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# Suspended Over the Abyss: A City's Quest for Local Autonomy in Institutional Reform Litigation

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# SUSPENDED OVER THE ABYSS: A CITY'S QUEST FOR LOCAL AUTONOMY IN INSTITUTIONAL REFORM LITIGATION

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## Introduction

*If you choose to believe me, good. Now I will tell how Octavia, the spider-web city, is made. There is a precipice between two steep mountains: the city is over the void, bound to the two crests with ropes and chains and catwalks. You walk on the little wooden ties, careful not to set your foot in the open spaces, or you cling to the hempen strands. Below there is nothing for hundreds and hundreds of feet: a few clouds glide past; farther down you can glimpse the chasm's bed.*

*This is the foundation of the city: a net which serves as passage and as support. All the rest, instead of rising up, is hung below: rope, ladders, hammocks, houses made like sacks, clothes hangers, terraces like gondolas, skins of water, gas jets, spits, baskets on strings, dumbwaiters, showers, trapezes and rings for children's games, cable cars, chandeliers, pots with trailing plants.*

*Suspended over the abyss, the life of Octavia's inhabitants is less uncertain than in other cities. They know the net will last only so long.*[1]

The city sways, suspended between two peaks: one peak represents constitutional rights guaranteed by the Fourteenth Amendment; the other the city's quest for autonomy.[2] When a city violates a constitutional right, courts must address the violation and create an effective remedy while respecting local autonomy. The tension between these two goals causes the city to swing precariously between the mountains.

The city is a mere political subdivision of the state, "created as [a] convenient agen[t] for exercising such of the governmental

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1. ITALO CALVINO, INVISIBLE CITIES 75 (1974).

2. Issues involving local autonomy have primarily arisen in the context of the relationship between the state and local governments, and not between the federal and local governments. *See infra* notes 36-42 and accompanying text.

powers as may be entrusted to [it]."[3] Despite its limited powers, the city plays an integral role in our daily lives. It is the primary protector of our homes and schools, as well as the provider of essential services such as garbage collection, police and fire protection, utilities, and transportation. Moreover, the city provides for an additional layer of democratic protection by allowing its constituents to participate more directly in the political process. Democracy, however, is always accompanied by the fear that the majority will subject the minority to its will. A viable democratic system will ensure that minority interests are protected by regulating the direct participation process.[4] In the American system, the Constitution protects the minority from the tyranny of the majority by providing certain rights which cannot be taken away by a simple democratic process.

Constitutional rights are abstract; the Framers prescribed them without a detailed view of how they would apply to individual cases.[5] When a right has been violated, however, creating and enforcing a remedy is anything but abstract. When a city violates a constitutional right, the court's authority to create a remedy clashes with the city's autonomy and its ability to fashion policies to further its objectives. If the court places too much importance on the interests of the local government, many constitutional violations will go unremedied.[6] A fair remedy is crucial to the well be-

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3. Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907).

4. Debates focusing on the pros and cons of decentralization of power have taken place throughout American history. For cases discussing the debates, see National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). For additional information on these debates, see Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339 (1993); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993); Michael Libonati, *Home Rule: An Essay on Pluralism*, 64 WASH. L. REV. 51 (1989); James W. Lowe, *Examination of Governmental Decentralization in New York City and a New Model For Implementation*, 27 HARV. J. ON LEGIS. 173 (1990); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-511 (1987); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837 (1983); *see also* Joseph M. Lynch, *Garcia v. San Antonio Metropolitan Transit Authority: An Alternate Opinion*, 16 SETON HALL L. REV. 74 (1986); D. Grier Stephenson, Jr. & Barry M. Levine, *Vicarious Federalism: The Modern Supreme Court and the Tenth Amendment*, 19 URB. LAW. 683 (1987).

5. Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 738 (1992) (arguing that today's court system, faced with a strong popular will, selectively enforces rights that have remedies that can be implemented without great offense to majoritarian values and beliefs).

6. Any attempt to reform major institutions or programs will lead to controversy as those who are used to the status quo must readjust to a new method. If the change is judicially ordered, it suggests that the change is already in opposition to the popular

ing of a society because it is likely to affect important interests such as families, homes, schools, and financial security. On the other hand, remedies are costly, and local governments may not be able to bear the financial or social costs without imposing a heavy burden on its constituents. For that reason, courts must depend on the cooperation and participation of the municipality and its inhabitants for success in the remedial process.

The difficulty involved in protecting constitutional rights while respecting the autonomy of the municipal government and the legitimacy of majoritarian rule suspends the city over the abyss. In an attempt to stabilize the foundation of the city, the Supreme Court has held that district courts must consider the nature and scope of the violation, and "the interest of state and local authorities in managing their own affairs[,]"[7] when addressing the constitutional violations of municipalities. Unfortunately, this statement offers little guidance on how district courts are to balance the competing interests of preserving local autonomy and remedying constitutional violations.

As a result, district courts are able to fashion any remedy they feel is appropriate. The Court has consistently limited its role by denying certiorari or affirming particular remedies,[8] unless the remedy is intrusive or causes a severe backlash.[9] Meanwhile, the lower federal courts have been extremely active, issuing sweeping

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will, which can enhance opposition. For an illustration of this point, *see infra* notes 92-109 and accompanying text.

7. Millikin v. Bradley, 433 U.S. 267, 281 (1977) [hereinafter *Millikin II*]; *see also* Missouri v. Jenkins, 115 S. Ct. 2038, 2054 (1995) ("[O]ur cases recognize that local autonomy of school districts is a vital national tradition . . . and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution.") [hereinafter *Jenkins II*]. The case history for *Missouri v. Jenkins* is both extensive and confusing. Several issues related to the initial facts were litigated separately using the same case name. For the purposes of this article, and this article only, Missouri v. Jenkins, 495 U.S. 33 (1990), will be referred to as *Jenkins I* and Missouri v. Jenkins, 115 S. Ct. 2038 (1995), will be referred to as *Jenkins II*.

8. *See* Friedman, *supra* note 5 at 747-48; *see also* Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 716 (1978) ("The Supreme Court has not yet reviewed any of the orders that significantly increase government expenditures for prisons or mental institutions."); Robert F. Nagel, *Controlling the Structural Injunction*, 7 HARV. J.L. & PUB. POL'Y 395, 396-97 (1984) ("At present the Supreme Court is either unwilling or unable to provide any effective restraint on the intrusions of the federal judiciary into state and local government.").

9. The lower court opinions in both *Jenkins II*, 115 S.Ct. 2038 (1995), and Spallone v. United States, 493 U.S. 265 (1990), had a strong impact on the specific communities and on the nation in general.

remedial orders.[10] Some scholars have criticized this active participation as judicial intermingling in legislative and executive affairs,[11] while others have argued that the district courts are overstepping constitutional boundaries.[12] Yet, because of the serious constitutional rights that are at stake, courts continue to zealously participate in the remedial process.

Over the last several years, the Supreme Court has addressed the relationship between the district court and the local government in the creation, enforcement, and termination stages of remedial orders in desegregation cases. In *Missouri v. Jenkins I*,[13] the Court held that a remedial order requiring the locality to raise its property tax was not an unconstitutional limitation on local taxing authority.[14] Yet, in *Missouri v. Jenkins II*,[15] the Court held that the district court exceeded its remedial power when it ordered salary increases to improve the "desegregative attractiveness" of the Kansas City schools.[16] Furthermore, the Court, in *Spallone v. United States*,[17] held that the district court violated traditional equitable principles when it punished local legislators with contempt sanctions for failing to enforce the court's remedial order.[18]

In *Board of Education of Oklahoma City v. Dowell*,[19] *Freeman v. Pitts*,[20] and *Missouri v. Jenkins II*,[21] the Court outlined the steps that a district court must follow before it can relinquish its supervision of its remedial measures in school desegregation cases. In *Dowell*, the Court emphasized the importance of local control over education, and held that a district court may terminate a remedial order upon a finding that the school board acted in good faith and that the vestiges of past discrimination have been eliminated to the greatest extent practicable.[22] In *Freeman*, the Court observed that

10. *See* Spallone v. United States, 493 U.S. 265 (1990); *Milliken II*, 433 U.S. 267 (1977); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971); Missouri v. Jenkins, 639 F. Supp. 19 (W.D. Mo. 1985).

11. Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 711 (1978).

12. Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH & LEE L. REV. 949 (1978).

13. 495 U.S. 33 (1990) [hereinafter *Jenkins I*]. *See supra*, note 7.

14. *Id.* at 57.

15. 115 S. Ct. 2038 (1995).

16. *Id.* at 2054.

17. 493 U.S. 265 (1990).

18. *Id.* at 274.

19. U.S. 237 (1991).

20. 503 U.S. 467 (1992).

21. 115 S. Ct. 2038 (1995).

22. *Dowell*, 498 U.S. at 237.

"local autonomy of school districts is a vital national tradition"[23] and held that a district court may relinquish supervision in incremental stages. Finally, in *Jenkins II*, the Court stated that termination only requires a finding that the victims of discrimination occupy the position they would have, had the discrimination never occurred.[24]

In all of these cases, the Court suggests that considerations of federalism guide the discretion of the district court, and that the court should respect the autonomy and integrity of the local government in remedying the violation.[25] Yet, by permitting the district court to use broad, autocratic strokes to fashion a remedial order while curtailing the court's power to enforce the order, the Supreme Court, under the guise of supporting local autonomy, is placing the city in an even more precarious position.

This Article examines the conflict between preserving local autonomy and remedying constitutional violations in the context of school desegregation. Part I articulates the problem by exploring the role of the city and its part in institutional reform. The first section explains what is meant by local autonomy. The second section examines what constitutes institutional reform. The third section discusses an example of the clash between local autonomy and institutional reform in the context of the ongoing struggle in Kansas City, Missouri. Part II examines how the Supreme Court has viewed the relationship between the remedial powers of district courts and municipal autonomy of local governments.

Finally, Part III argues for a more coherent system of balancing judicial involvement and local government autonomy in fashioning remedial orders. The Article concludes that consideration of local autonomy only belongs in the formulation stage of the remedial process. A local government's cooperation and participation in the formulation phase will lead to a remedial plan that can be more successfully implemented than one that is court-imposed.

Local autonomy, however, should not be a consideration in either the enforcement or the dissolution stage of the remedial order. District courts must be given broad discretion to enforce the order and to determine whether the violation has been remedied. The Court's recent decisions, which emphasize the importance of returning school districts to local control, prevents the violations

23. *Freeman*, 503 U.S. at 489 (quoting Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406, 410 (1977)).

24. *Jenkins II*, 115 S. Ct. at 2041.

25. *Jenkins II*, 115 S. Ct. at 2054; *Freeman*, 503 U.S. at 489; *Dowell*, 498 U.S. at 248.

from being adequately remedied. A method which stresses considerations of local autonomy in the remedy formulation stage and allows district court discretion in the enforcement and termination stages will minimize the intrusions into the affairs of local government and ensure a successful remedy.

## I. The Relationship Between Local Autonomy and Institutional Reform: The Problem

Over the last forty years,[26] institutional reform litigation has become commonplace.[27] In these lawsuits, plaintiffs, usually using the class action device, seek to reform government-operated institutions through equitable judicial decrees.[28] Because many of these institutions are operated by the city, the city is frequently a defendant in these lawsuits.

The modern city plays many roles in institutional reform litigation mainly because it is home to over seventy percent of the

26. The counting begins with the decision in Brown v. Board of Education, 347 U.S. 483 (1954).

27. For example, there are over 500 local school districts currently operating under court orders to desegregate, and prisons in over 40 states are under judicial supervision because of constitutional violations. David O. Stewart, *No Exit: Supreme Court Finds No Easy Path to Terminate Structural Injunctions*, 78-Jun A.B.A. J. 49 (1992).

28. There are many scholarly pieces on institutional reform litigation. *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978); DAVID SCHOENBROD ET AL., REMEDIES, PUBLIC AND PRIVATE (1990); Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725 (1986); Lloyd C. Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation*, 1983 U. ILL. L. REV. 679 (1983); Robert E. Buckholz, Jr. et al., *Special Project: The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978); Michael Finch, *Fairness and Finality in Institutional Litigation: The Lessons of School Desegregation*, 4 GEO. MASON U. C.R. L.J. 109 (1994); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); Barry Friedman, *supra* note 5; Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265 (1983); Karen Keeble, *Judicial Modification of Consent Judgments in Institutional Reform Litigation*, 50 BROOK. L. REV. 657 (1984); David I. Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C. DAVIS L. REV. 753 (1984); David I. Levine, *The Modification of Equitable Decrees in Institutional Reform Litigation: A Commentary of the Supreme Court's Adoption of the Second Circuit's Flexible Test*, 58 BROOK. L. REV. 1239 (1993); Maimon Schwartzschild, *Public Law By Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 897 (1984); Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639 (1993); Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981 (1993); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 888 NW. U. L. REV. 469 (1984).

American population.[29] The people who call the city home represent a wide variety of political, economic, and social views within one local unit.[30] Primarily due to its accessibility, the city government is the most responsive source of protection and opportunity for its constituents.

In addition to being home to a wide variety of individuals with disparate needs and values, the city is a governing body with powers and responsibilities. Cities differ considerably in their size, wealth, and functions.[31] The policies and programs of actual local governments are as varied as the cities themselves.

In 1984, a federal district court ruled that both the Kansas City School Board (KCMSD) and the State of Missouri had intentionally segregated the public schools within Kansas City.[32] Although ten years have passed since the district court ordered a desegregation plan, evidence of racial and ethnic segregation is still prevalent.[33] Kansas City has made national headlines with its continuing battle to provide a desegregated education to children who reside in the inner-city.[34] The State has contributed more than $800 million to the program since 1986.[35] Kansas City is the perfect example of a municipality torn between the need to retain local autonomy and the need to remedy years of intentional segregation.

## A. Local Autonomy: A Triple-Edged Sword

Local autonomy involves three relationships: federal/state, federal/local, and state/local. In institutional reform, the litigation dwells where the federal/state, federal/local, and state/local relationships intersect.[36] Because the city is only a political subdivision

29. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, NATIONAL DATA BOOK AND GUIDE TO SOURCES, STATISTICAL ABSTRACT OF THE UNITED STATES (114th ed. 1994). In 1992, 79.7% of the United States population inhabited metropolitan areas. *Id.* at table 39. This is an increase of over 11% from 1970. *Id.* For a definition of metropolitan areas, see *id.* at App. 2.

30. *See* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 4 (1990); D. Bruce La Pierre, *Enforcement of Judgments Against States and Local Governments: Judicial Control Over the Power to Tax*, 61 GEO. WASH. L. REV. 299 (1993).

31. Briffault, *supra* note 30, at 2.

32. Jenkins v. Missouri, 593 F. Supp. 1485 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 807 F.2d 657 (8th Cir. 1986) (en banc), *cert. denied*, 484 U.S. 816 (1987).

33. *See* William H. Freivogel, *School Desegregation Comes to a Crossroads*, ST. LOUIS POST, June 18, 1995, at 1B.

34. *See id.*

35. *See id.*

36. *See generally* Briffault, *supra* note 30 (discussing the powers of local government and the social and political ramifications of those powers); Richard Briffault,

of the state, the federal/state relationship establishes the parameters for the interaction between the federal government and the city. Additionally, because the local government receives its power from the state, it must frequently rely on the state to finance the remedy.

Local autonomy is initially defined by the relationship between the state and its cities. Historically, most governance functions were exercised by the state, not by the local government. Cities were more concerned with managing their properties than with exercising taxing or regulatory power.[37] Local political subdivisions were corporations that owed their existence to a charter granted by the state. Thus, unlike states, local governments were beholden and accountable to a higher governmental power.[38] This view was embodied in Dillon's Rule, which stated that municipalities only possessed those powers that were expressly delegated to them by the state.[39]

Dillon's Rule no longer represents the relationship between a state and its cities.[40] Most states have conferred some type of

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*Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990) (discussing the relationship of local government power to federal power) [hereinafter *Part II*]. *See also* Frug, *supra* note 8, at 718-32 (discussing the expansion of federal courts' powers and how that affects the local government).

37. See HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870 192-204 (1983).

38. *See* Briffault, *supra* note 30; Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1128-48 (1980) (describing and attacking the public/private distinction).

39. JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 89 145 (Boston, Little, Brown) (4th ed. 1880). In his treatise, Dillon stated that "the power of the legislature over municipal corporations is supreme and transcendent: it may . . . erect, change, divide, and even abolish them, at pleasure, as it deems the public good to require." *Id.* at 93.

40. As a result of political struggles between cities and states during the nineteenth century, however, home rule developed, whereby a state could transfer some of its governmental powers to the local government. *See* Judith A. Stoll, *Home Rule and the Sherman Act After Boulder: Cities Between a Rock and a Hard Place*, 49 BROOK. L. REV. 259 (1983). The object of this transfer of authority is "a more equitable and efficient allocation of duties and rights between the state and its cities." Sidney H. Asch, *Municipal Home Rule in New York*, 20 BROOK. L. REV. 201, 202 (1954). As the cities grew and the need for services grew, however, state legislatures began to assert a greater influence on the governing of the city. *See* Terrence Sandalow, *The Limits of Municipal Power Under Home Rule: A Role For the Courts*, 48 MINN. L. REV. 643, 647 (1964). Although the cities have developed the political power to acquire some sort of local autonomy, the struggle involving the allocation of duties and rights between the states and their cities continues to rage. *See* James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule,"* 59 ST. JOHN'S L. REV. 713 (1985). This struggle becomes especially important when local governments are ready, willing, and, but for state law curtailing their powers, able to remedy the consti-

"home rule" authority on its cities.[41] Under home rule authority, the city is granted the power to initiate legislation in matters of local concern without first seeking authority from the state legislature.[42] The ability of the local governments to promulgate policy without having to account to the state is similar to the autonomy that the states enjoy from the federal government. Although the state legislature has the power to preempt local legislative decisions, preemption is not lightly granted. Thus, most states empower the local government with decisional authority with respect to local matters.

The city, however, does not enjoy complete autonomy. Even under home rule authority, a local government may not enact "private law."[43] The areas of property law, contract law, and tort law are not considered matters of local concern.[44] Secondly, unlike the federal/state system which allows state fiscal autonomy,[45] home rule provisions leave the state in control of local financing.[46] Under some home rule provisions, local governments must seek state legislative approval before imposing a tax on their citizens.[47] Jurisdictions that allow local governments to initiate fiscal policies are very liberal in permitting state preemption of local taxing deci-

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tutional violation. *See* Association of Surrogates v. New York, 772 F. Supp. 1412 (S.D.N.Y. 1990). There is also statutory home rule, where the constitution authorizes state legislatures to pass laws on home rule and the power is therefore conferred through state statutes to the local governments.

41. The state, either by statute or through a constitutional provision, confers powers upon a local government. *See* Briffault, *supra* note 30 at 9-18 (advocating the effectiveness of home rule provisions). When substantial authority is granted to a locality in a state constitution, that constitutional provision is called a "home rule" provision. *Id.*

42. The two basic components of home rule are an affirmative grant of power to the municipalities to manage their own affairs and a restriction on the state legislature from intruding upon matters of local concern. Local autonomy is defined by these two aspects of home rule. Determining the relationship between the powers of the city under home rule and the ability of the state to legislate has been a recurring role for the courts. *See, e.g.*, City of Seattle v. Williams, 128 Wash. 2d 341 (Wash. 1995); Sip & Save Liquors, Inc. v. Daley, 657 N.E.2d 1 (Ill. App. Ct. 1995).

43. Sandalow, *supra* note 40, at 674-79.

44. *Id.* at 678-79.

45. *See generally* George D. Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363 (1985); Lawrence Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

46. *See* Frug, *supra* note 38, at 1064.

47. FRANK I. MICHELMAN & TERRANCE SANDALOW, MATERIALS ON GOVERNMENT IN URBAN AREAS, 422-47 (1970); OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW 40, at 110-112 (1982); Frug, *supra* note 38, at 1064.

sions.[48] Because desegregation remedies are often so expensive, and must rely on state approved financing, the fiscal limitation on local governments becomes very important.[49]

In many areas, local governments have displaced the state as the primary governing and service-providing unit.[50] Cities legislate on matters affecting their citizens' economic and social activities, have their own police forces, and enforce their laws in their own courts.[51] Cities own and manage hospitals, provide low-income housing, and provide educational services.[52]

In some areas, the city enjoys complete autonomy from the state, while in others it does not.[53] Cities are partially created by state law, but are also created by the people who live within them, making the nature of the city difficult to categorize.[54] Thus, the relationship between the state and its cities is complicated. Local autonomy is further complicated by the relationship between the federal government and the city.

Cities are not mentioned at all in the United States Constitution. There are few cases where the Supreme Court addresses local autonomy.[55] In these cases, the Court has used federalism principals to protect local governments from federal intrusion. For example, in *San Antonio School District v. Rodriguez*,[56] the Court upheld a local property tax scheme for financing public schools under Equal Protection scrutiny.[57] Similarly, in *National League of Cities v.*

48. *See* Frug, *supra* note 38, at 1062; *see also* Sandalow, *supra* note 40, at 647.

49. *See Jenkins II*, 115 S.Ct. 2038, 2044 (1995) ("The District Court's Desegregation plan has been described as the most ambitious and expensive remedial program in the history of school desegregation. The annual cost per pupil at the KSMSD far exceeds that of the neighboring SSB'd or of any school district in Missouri.").

50. *See* Briffault, *Part II*, *supra* note 36, at 354, 382; *see also* JON C. TEAFORD, THE MUNICIPAL REVOLUTION IN AMERICA 16, 35 (1975); Frug, *supra* note 38, at 1096.

51. *See* Melvyn R. Durchslag, *Should Political Subdivisions Be Accorded Eleventh Amendment Immunity?*, 43 DEPAUL L. REV. 577, 603 (1994) (discussing how it is difficult to distinguish the function performed by the state from the functions performed by local entities). City governments had to request authorization from the state government to perform and finance these operations. Teaford, *supra* note 50, at 108. Many municipalities received this authorization under new charters. Others, such as New York City, retained their colonial charters and had to get specific authorization from their state legislatures. *Id.*

52. Most state constitutions require the state to perform educational functions, but most states have delegated this function to the city or school boards. E.g., N.Y. CONST. art XI.

53. *See generally* Sandalow, *supra* note 40.

54. *See* Frug, *supra* note 38, at 1062-63.

55. *See infra* notes 58-62 and accompanying text.

56. 411 U.S. 1 (1973).

57. 411 U.S. at 6.

*Usery*,[58] the Court suggested that because local governments derive their power from the states, their decisions regarding local matters are protected from federal interference by the Tenth Amendment.[59] Municipalities are treated as states for purposes of "state action" under the Fourteenth Amendment[60] and double jeopardy.[61] Yet, the Court views local governments as independent from states under the Eleventh Amendment because they function as independent corporate bodies even though they are "territorially a part of the state."[62]

The Court does not specifically recognize local autonomy as having a "distinct constitutional value."[63] In order to take advantage of notions of federalism, proponents of local autonomy have endeavored to identify cities with states.[64] Proponents argue that be-

58. 426 U.S. 833 (1976).

59. *Id.* at 844 n.20 (1976); *see also* Nollan v. California Coastal Comm'n, 483 U.S. 825, 866-67 (1987) (Stevens, J., dissenting) (arguing that the Takings Clause should not be interpreted so as to disable local governments from performing their regulatory functions); First English Lutheran Evangelical Church v. Los Angeles Co., 482 U.S. 304, 340-41 (1987) (Stevens, J., dissenting) (contending that the Court's Takings Clause will inhibit local regulatory actions beneficial to the public welfare). *But see* Community Communications Co. v. City of Boulder, 455 U.S. 40, 60-71 (1982) (Rehnquist, J., dissenting) (arguing that local governments should have the same immunity from federal antitrust liability that states enjoy).

60. Avery v. Midland County, 390 U.S. 474, 480 (1968).

61. Waller v. Florida, 397 U.S. 387, 393 (1970).

62. Lincoln County v. Luning, 133. U.S. 529, 530 (1890). The 11th Amendment divests the federal courts of a piece of Article III power by depriving them of the ability to hear "any suit in law or equity" initiated against "one of the United States by Citizens of another state or subjects of any foreign state. U.S. CONST. amend. XI. The Amendment was ratified in 1789, and overturned Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), which held that a citizen of South Carolina was entitled to recover an outstanding debt that arose from the sale of Revolutionary War Supplies from the State of Georgia. The provision affords immunity to the states and the Supreme Court has extended immunity to state offspring that it defines as arms of the state. This does not include local governments, which are considered to be political subdivisions. *See* Alex E. Rogers, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-Of-The-State Doctrine*, 92 COLUM. L. REV. 1243 (1992) (discussing the difficulty in differentiating between arms of the state and municipal corporation).

63. In Briffault, *supra* note 30, at 86-115, Professor Briffault argues that cases such as Avery v. Midland County, 390 U.S. 474 (1968), Millikin v. Bradley, 418 U.S. 717 (1974) [hereinafter *Millikin I*], San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), and Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985), establish the Court's willingness to find Constitutional support for the autonomy of local government units. *But see* Durchslag, *supra* note 51, at 609 (arguing that all of these cases focus on protecting the autonomy of the state and not the local government).

64. *See* Gerald E. Frug, *Empowering Cities in a Federal System*, 19 URB. LAW. 553, 553 (1987).

cause cities are mere political subdivisions of the states, principles of federalism protect cities from federal control.[65] This argument is contradictory because cities must be separate from the state for local autonomy to exist. The dichotomy becomes pronounced in the area of federal court remedial orders because they necessarily involve competing state, city, and national interests.[66]

## B. Institutional Reform: Across the Ravine

The remedial process in institutional reform litigation involves four different phases. First, the court must determine that a constitutional right has been violated.[67] Section 1983 creates a cause of action for any person injured by the deprivation of a constitutional right (including the right to a desegregated education) at the hands of the state.[68] Although section 1983 authorizes both legal and equitable relief, it does not define a specific remedy.[69] Once the institution has been found to be liable, the court must fashion an appropriate remedy.[70] After the remedy has been created, the court must ensure that it is enforced.[71] Finally, the court must determine when to terminate the remedy.[72]

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65. *Id.* at 554.

66. *Id.* at 556.

67. This aspect of the remedial process is beyond the scope of this article.

68. "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in any action of law, suit in equity, or other proper proceedings for redress." 42 U.S.C. § 1983 (1994). Federal jurisdiction is predicated on 28 U.S.C. § 1343(3) & (4) (1994). A lawsuit can also be brought under Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000(d) et. seq. (1994) A third basis for bringing a lawsuit is 20 U.S.C. § 1703 (1994).

69. Congress has considered legislation that would define desegregation remedies. *See, e.g.*, H.R. 14553, 94th Cong., 2d Sess. (1976) ("establish[ing] standards for the framing of relief in suits to desegregate the Nation's elementary and secondary public schools . . . .").

70. Section 1983 creates a cause of action for any person injured by the deprivation of constitutional rights, including the right to a desegregated education. Although section 1983 authorizes both legal and equitable relief, it does not define the remedy. In addition, section 1983 does not address questions of enforcement or execution of judgments against state or local governments or officers. See 42 U.S.C. § 1983 (1994).

71. *See* Friedman, *supra* note 5, at 735-36 ("Without an available and enforceable remedy, a right may be nothing more than a nice idea.").

72. *See* Friedman, *supra* note 5, at 743 (arguing that the remedial process has three phases — definition of the right, determination of the remedy, and enforcement). For further information on the remedial phase of institutional reform litigation, see Curtis J. Berger, *Away from the Courthouse and Into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978); Abram Chayes, *Foreward: Public Law Litiga-*

Because most civil rights lawsuits seek structural injunctive relief, the court is faced with the task of eliminating the constitutional violation by restructuring an offending organization.[73] The process of formulating a remedy to accomplish this task poses problems distinct from the initial finding of a constitutional violation. The nature of relief in institutional reform litigation places the courts in an unfamiliar role; they must implement reforms without having expertise about the institution in question.[74] The formulation of a remedy often involves broad policy decisions as the courts attempt to ensure that the violation is eliminated.[75]

Generally, the remedy comes in the form of a consent decree or a judicial decree. A consent decree is a hybrid of a contract and an injunction.[76] The parties fashion a remedy and then request that

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*tion and the Burger Court*, 96 HARV. L. REV. 4 (1982); Abram Chayes, *The Role of a Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fletcher, *supra* note 28; Mishkin, *supra* note 12; Nagel, *supra* note 8; Nagel, *supra* note 11; Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665 (1987).

An additional phase may involve the need to restore the court's supervision once it has been released due to circumstances that change the unitary status. *See* David I. Levine, *The Latter Stages of Enforcement of Equitable Decrees: The Course of Institutional Reform After Dowell, Rufo, and Freeman*, 20 HASTINGS CONST. L.Q. 579, 629 (1993) (discussing the restoration of court supervision after jurisdiction has ended).

73. "The structural suit is one in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements. The injunction is the means by which these reconstructive directives are transmitted". Owen M. Fiss, *The Supreme Court 1978 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 5 (1979).

74. Ordinarily the court avoids this kind of judicial second-guessing. *See, e.g.*, Lloyd C. Anderson, *Release and Resumption of Jurisdiction Over Consent Decrees in Structural Reform Litigation*, 42 U. MIAMI L. REV. 401, 403 (1987) (indicating that the judge's decision to end supervision in a case involves many factors creating conflicts between idealism and moral dictates).

75. The remedial phase "is concerned not with the enforcement of a remedy already given, but with the giving or shaping of the remedy itself. . . . The task is to remove the condition that threatens the constitutional values." Fiss, *supra* note 73 at 27-28. But Professor Fiss also argues that an effective enforcement of constitutional rights comes from complex, ongoing involvement of the trial court in shaping the relief. *Id.*

76. A consent decree is a court order that approves and embodies a negotiated agreement between the parties. Once the court approves an agreement, it either signs the settlement agreement or enters a separate order that requires the parties to comply with the settlement agreement. Because a consent decree grants injunctive relief and has the same binding effect as an adjudicated decree, the court, by approving the consent decree, commits the full power of the judiciary to enforce its obligations under the decree. A consent decree is the equivalent of a judgment. Since a structural injunction involves changes over time in the operation of an institution, they can be considered judicial acts in the nature of injunctions. *See generally* Levine, *supra*

the court enter judgment based on their agreement.[77] The court monitors the agreement to ensure that the parties comply with its terms. The consent decree is enforced through the court's power to enforce any equitable decree or order.[78] A judicial decree consists of a structural injunction, which is a judicial command that prohibits or proscribes some discrete act of the defendant.[79] If the parties have difficulty negotiating a consent decree, the court will impose a structural injunction through a judicial decree.[80]

Whether an injunction is issued or the parties reach an agreement, court involvement does not end with the entering of a judgment. A remedy for institutional change is complex and is often accompanied by disputes over the interpretation of the order, resistance by the institution, and crises over funding.[81] When a defendant has violated the requirements of a decree, a court may impose an injunction, ordering the defendant to comply or directing the defendant to take specific steps to redress its violation.[82]

There are some limitations on injunctive relief. One limitation is comity, the idea that a federal court should not impermissibly intrude on the discretion of state executive officials.[83] Yet, courts

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note 72; Schwarzschild, *supra* note 28; Symposium, *Consent Decrees: Practical Problems and Legal Dilemmas*, 1987 U. CHI. LEGAL F. 1.

77. "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs." FED. R. CIV. P. 23(e).

78. *See* Anderson, *supra* note 28, at 746 ("[C]ourts have inherent equitable power to enter supplemental orders to enforce, implement, and effectuate their judgements and decrees.").

79. *Id.* at 726 ("A consent decree is a hybrid in the law containing elements of both contract and injunction.").

80. *Id.*

81. *Id.* at 727.

82. *Id.* at 737-752 (describing the court's role in implementing the decree).

83. The idea of comity first appeared in Younger v. Harris, 401 U.S. 37 (1971). The Court held that the federal court could not enjoin state criminal prosecutions unless the defendant is threatened with irreparable injury to his constitutional rights. The Court recognized that the reason to restrain the federal court is reinforced by:

> the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways.

*Id.* at 44.

The Defendant may also raise the Eleventh Amendment as a limitation on the injunctive power of the federal courts. *See* Spallone v. United States, 493 U.S. 265 (1990) (deciding that the immunity doctrine must come into play in the District Court's exercise of discretion). Under the 11th Amendment, a federal court is prohibited from awarding retrospective monetary relief that is payable out of the state treasury. Edelman v. Jordan, 415 U.S. 651, 664-69 (1974). A structural consent de-

have ordered the implementation of injunctions when a defendant has demonstrated substantial noncompliance, disregarded the consent decree, or continued to violate the plaintiff's constitutional rights.[84] In addition, the court may also order contempt sanctions.[85] A finding of contempt explicitly recognizes that the spirit of consent and cooperation has died. The court must hold a hearing on a motion for contempt which has the semblance of a full trial.[86] Once the court has held a defendant in contempt, it has the authority to impose sanctions, such as monetary fines, to ensure future compliance.[87]

Finally, a defendant will seek release from the district court's jurisdiction usually by showing that it has substantially complied with the provisions of the decree.[88] When a defendant is a school board in a desegregation case, the district court must release the board from its jurisdiction within a reasonable time if the system has achieved unitary status.[89] The Supreme Court has recently held

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cree, however, is a form of injunctive relief that is prospective in nature, requiring the defendants to implement policy changes in the future. *Id.* The 11th Amendment does not bar prospective injunctive relief that has the practical effect of requiring the state to spend money. *Id.*

84. Anderson, *supra* note 28, at 739.

85. If the court must decide a contempt motion, it must first determine whether to impose civil or criminal contempt. Civil contempt is remedial in nature, and either ensures compliance with the decree or compensates the plaintiff for the defendant's failure to comply with the order. Criminal contempt is punitive, and exists to vindicate the court's authority. Fines or imprisonment characterize criminal contempt. *See Spallone*, 493 U.S. at 265.

86. Before a court can find civil contempt, a defendant must violate the consent decree. While no intent to violate the decree is necessary, the plaintiffs carry a heavy burden of proving substantial noncompliance with clear and convincing evidence. *See* Anderson, *supra* note 28, at 737-752. Although a good faith attempt to comply with a decree is not a defense, the defendants can demonstrate impossibility of compliance as a defense. *Id.* It is not enough to show that they tried and failed; they must show that they have exhausted every possibility. *Id.*

87. *See Spallone*, 493 U.S. at 265.

88. *See* Levine, *supra* note 72, at 579. Courts must often modify the consent decree as a result of changes during the life of the litigation. *Id.* A motion to modify is based on the premise that the order has to be changed because it is not equitable to require compliance with one of its directives. *Id.* This is contrasted with a request to be released from the active supervision of the district court, which is based on the premise that the order needs to be modified because the defendant has complied with some of its provisions. *Id.*

89. Board of Educ. of Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237 (1991). For a further discussion, see *infra* notes 202-12 and accompanying text. The Supreme Court is continuing to grapple with the issue of what constitutes a "unitary" status. *See infra* notes 202-03, 234-36 and accompanying text. *See* Anderson, *supra* note 74; Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L.

that a school district can be released from an order in incremental stages before all of the vestiges of segregation are gone.[90] The Court stated that the goal of the district court is not only to remedy the violation, but to restore state and local control as quickly as possible.[91]

### C. The Clash: Kansas City, Missouri

In 1977, the Kansas City Missouri School District (KCMSD) and students from the district filed a complaint against the State of Missouri and the school districts surrounding Kansas City, alleging that the defendants operated a dual school system.[92] In 1978, the school board was realigned as a defendant, but the plaintiff and the school board maintained a relationship of "friendly adversaries."[93] After a long trial, the district court held that KCMSD and the State of Missouri operated an intradistrict segregated school system.[94]

The State of Missouri had mandated segregated schools for black and white children sometime before 1954.[95] Each school district participated in this dual school system before it was declared unconstitutional in *Brown I*.[96] In holding the state liable for intentionally segregating the schools, the district court pointed out that the state established and maintained a separate university for black students, allowed school boards to establish separate libraries, public parks and playgrounds for blacks and whites, and allowed its courts to enforce racially restrictive covenants.[97] This "created an atmosphere in which private white individuals could justify their

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REV. 1105 (1990); Dennis G. Terez, *Protecting the Remedy of Unitary Schools*, 37 CASE W. RES. L. REV. 41 (1987).

90. *See infra* notes 234-36 and accompanying text.

91. *See infra* note 236 and accompanying text.

92. School Dist. of Kansas City v. Missouri, 460 F. Supp. 421, 427 (W.D. Mo. 1978), *appeal dismissed*, 592 F.2d 493 (8th Cir. 1979) (realigning KCMSD as a party defendant and dismissing other defendants for lack of jurisdiction).

93. *School District of Kansas City*, 460 F. Supp. at 442.

94. Jenkins v. Missouri, 593 F. Supp. 1485, 1505 (W.D. Mo. 1984). The court did not find evidence of interdistrict segregation and dismissed the claims against the surrounding school districts. *Id.* at 1488.

95. *See* MO. CONST. art. X, § 1(a) (1945) (rescinded 1976) and §§ 163.130, 165.117 R.S. Mo. (repealed 1957). These provisions were not formally abrogated after the *Brown* decision was announced. However, the United States Attorney General issued an opinion in 1954 declaring them unenforceable. *Jenkins*, 593 F. Supp. at 1490. The statutes were repealed in 1957 and the constitutional provision was rescinded in 1976. Adams v. United States, 620 F.2d 1277, 1280-81 (8th Cir.), *cert. denied*, 449 U.S. 826 (1980). *See also* United States v. Missouri, 363 F. Supp. 739, 746-47 (E.D. Mo. 1973), *aff'd*, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975).

96. 347 U.S. at 483.

97. *Jenkins*, 593 F. Supp. at 1503.

bias and prejudice against blacks."[98] Thus, the State of Missouri and the school board were found liable for failing to eliminate the vestiges of a racially segregated school system.[99]

The district court issued a remedial order and estimated the financing necessary to implement the order.[100] The court apportioned seventy-five per cent of the costs to the state and twenty-five per cent to KCMSD.[101] Because a provision in the Missouri Constitution limited property taxes, the district court was concerned that KCMSD would be unable to pay its share.[102] Consequently, the court enjoined a property tax rollback, thereby allowing the school district to raise additional funds.[103] Furthermore, the court ordered the school district to submit to the voters a proposal to increase taxes so that it may pay for its share of the desegregation costs.[104] The school district's efforts to persuade the voters to approve the tax increase failed, as did efforts to receive funding from the Kansas City Council or the legislature.[105] After approving additional remedial measures,[106] the court concluded that the school district had exhausted all means of raising revenue,

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98. *Id.*

99. *Id.* at 1505.

100. *Id.* at 1506.

101. The Eighth Circuit later ruled that the district court had not given adequate justification for apportioning the costs and ordered the court to divide the costs equally. Jenkins v. Missouri, 807 F.2d 657, 685 (8th Cir. 1986) (en banc), *cert. denied*, 490 U.S. 1034 (1989). On remand, the district court held that the doctrine of comparative negligence supported its original ruling and held the tortfeasors jointly and severably liable to ensure funding for the remedy. *Jenkins I*, 495 U.S. 33, 41 (1990).

102. The constitutional provision limited property taxes to $1.25 per $100 of assessed valuation unless a majority of voters approved an increase of up to $3.75 per $100. Any further increase required the approval of two thirds of the voting constituency. MO. CONST. art. X, §§ 11(b), (c). Another obstacle to raising money was the "Hancock Amendment," which required property tax rates to be decreased to match any increase in revenue resulting from a decreased property value reassessment, and thus precluded increasing tax revenues by increasing property taxes. MO. CONST. art. X, § 22(a); MO. REV. STAT. § 137.073 (Supp. 1990). Finally, Proposition C established a common trust fund for state education, but had the effect of channeling almost half of the sales tax collected in Kansas City to other parts of Missouri. MO. REV. STAT. § 164.013.1 (Supp. 1990).

103. Jenkins v. Missouri, 639 F. Supp. 19 (W.D. Mo. 1985). The court estimated that the total cost of desegregation would be $88,000,000 over a period of three years. *Id.* at 44.

104. *Id.*

105. *Jenkins I*, 495 U.S. at 40.

106. One of the criticisms of the court's involvement in the scope of the remedial order is that it continued to approve remedial measures in the same proceedings where it was trying to determine how to finance KCMSD's share. Jenkins v. Missouri, 672 F. Supp. 400, 408 (W.D. Mo. 1987). The new improvements eventually totaled an additional $187,450,334. *Id.*

and ordered a raise in the school district property tax levy which clearly exceeded the state limits.[107] The U.S. Court of Appeals for the Eighth Circuit affirmed the order, rejecting the state's comity argument that a federal court lacks the judicial power to order a tax increase.[108] The Eighth Circuit held that any state law limitations must fall to the supremacy of the United States Constitution.[109]

The United States Supreme Court in *Missouri v. Jenkins I*,[110] held that the district court had abused its discretion by directly imposing the tax.[111] The Court found that the district court had violated the principle of comity and that it should have used a less intrusive method.[112]

Recently, in *Missouri v. Jenkins II*,[113] the State of Missouri argued that the federal judiciary had gone too far in overseeing the Kansas City School District's desegregation program and that it resulted in "the most expensive remedial program in the history of school desegregation."[114] When the district court ordered the Kansas City schools desegregated in 1985, it found that "segregation had caused a system-wide reduction in student achievement."[115] The state argued eight years later that it had fully implemented the programs required under the remedial order, and asked for an order of partial unitariness.[116] The district court held that the state had to show some evidence of improved student achievement before that determination could be made.[117] In addition, the district court ordered the state to pay for wage increases of district personnel in order to attract highly skilled workers.[118] In arguing for a reversal, the state of Missouri contended that these actions far outweighed the scope of the initial violation.[119]

The Eighth Circuit rejected the State's request for partial unitary status and held that the salary increases were directly related to

107. *Id.* at 412.
108. Jenkins v. Missouri, 855 F.2d 1295, 1313 (8th Cir. 1988).
109. *Id.*
110. 495 U.S. 33 (1990).
111. *Id.* at 37.
112. *Id.*
113. 115 S. Ct. 2038 (1995).
114. *Id.* at 2044.
115. Jenkins v. Missouri, 639 F. Supp. 19, 24 (W.D. Mo. 1985).
116. *Jenkins II*, 115 S. Ct. at 2045.
117. Jenkins v. Missouri, 11 F.3d 755, 766 (8th Cir. 1993).
118. *Jenkins II*, 115 S. Ct. at 2045.
119. *Id.* at 2047.

remedying the constitutional violation.[120] Reversing the Eighth Circuit, the Supreme Court held that the district court exceeded its remedial authority in ordering the funding of salary increases for district personnel.[121] The Court further held that the district court erred in using student achievement levels to determine unitariness.[122] Instead, the Court determined that the test for unitariness should be based on the following three factors: (i) whether there has been full compliance with the decree in the area where supervision is to be withdrawn; (ii) whether retention of judicial control is necessary to achieve compliance with the decree in other facets of the school system; and (iii) whether the school system has demonstrated its good-faith commitment to the decree.[123]

The *Missouri* litigation showcased the turmoil surrounding the effort to remedy the racial discrimination that has existed in Kansas City for over 40 years. It involves the nation's largest and most expensive desegregation effort, with nearly $1.5 billion spent to remove racial isolation in poor quality schools.[124] It is also an example of the district courts' need for direction about federal, local and state entities and their responsibilities in the remedial process.

## III. The Supreme Court's Role in Defining the Parameters of Local Autonomy in School Desegregation Cases: A Study in Contrast

Over the last forty years, the Supreme Court has examined the tension between local autonomy and institutional reform in several school desegregation cases. The cases can be divided into four different categories of conflicts: between local autonomy and the court's initial involvement in the lawsuit; between local autonomy and the scope of the remedy; between local autonomy and enforcement; and between local autonomy and termination. In each of these different categories, the Court has sent conflicting messages to the district courts about the importance of local autonomy in institutional reform.

120. *Jenkins*, 11 F.3d at 765, 768.
121. *Jenkins II*, 115 S. Ct. at 2051.
122. *Id.* at 2065.
123. *Id.* at 2041.
124. *Id.* at 2044.

### A. Initial Involvement and Scope of Remedy

The origin of institutional reform can be traced to *Brown v. Board of Education (Brown II)*.[125] In that secondary litigation, the Supreme Court directed the district court to implement the right to non-segregated education established in *Brown v. Board of Education (Brown I)*.[126] Although the Court did not specifically address the issue of local autonomy in *Brown II*, it acknowledged the need for federal courts to reconcile public needs with public interest when dealing with desegregation remedies.[127] The Court did not establish any limitation on the courts' powers to remedy discrimination, but stated that equity has traditionally been characterized by "practical flexibility."[128]

In *Swann v. Charlotte-Mecklenburg Board of Education*,[129] the Court truncated the district court's involvement by stressing that judicial authority may only be invoked after school authorities have failed in their affirmative obligations to eliminate segregation.[130] The Court emphasized that although "breadth and flexibility" are necessary in equitable remedies, the scope of the remedy must be limited by the nature of the constitutional violation.[131] In *Dayton Board of Education v. Brinkman*,[132] the Court reaffirmed its prior view that the remedy must be narrowly tailored to the violation. It also explicitly recognized that "the local autonomy of school districts is a vital national tradition."[133]

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125. 349 U.S. 294 (1955) [hereinafter *Brown II*].

126. 347 U.S. 483 (1954) [hereinafter *Brown I*].

127. *Brown II*, 349 U.S. at 300.

128. *Id.*

129. 402 U.S. 1 (1971).

130. *Id.* at 15.

131. *Id.*

132. 433 U.S. 406 (1977).

133. *Id.* at 410. In Griffin v. County Sch. Bd., 377 U.S. 218 (1964), the Supreme Court approved an application of the principles it laid out in *Brown II*. 349 U.S. at 300. The Court in *Griffin* upheld the district court's injunction disallowing state tax credits to parents who sent their children to segregated private schools while the county kept the public schools closed. *Griffin*, 377 U.S. at 225. The Court approved the remedy, but emphasized that the district court's power to affect state taxing plans was not plenary because a federal court can only require the local governments "to exercise the power that is theirs to levy taxes to raise funds adequate to . . . maintain without racial discrimination a public school system." *Id.* at 233.

In *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971), the Supreme Court upheld the enjoining of North Carolina's anti-busing law, which had prevented the local school board from complying with the district court's remedial order. *Id.* at 46. The Court held that if a state-imposed limitation on a school authority's discretion hinders desegregation, the state policy must fall. *Id.* at 45.

The Court again examined the scope of remedial authority in *Milliken II*.[134] In affirming the district court's desegregation plan, the Court formulated a three-part test for the propriety of an institutional remedy. First, the desegregation remedy must be determined in relation to the nature and scope of the constitutional violation.[135] Second, the decree must be remedial in nature and thus restore the victims to the position they would have occupied but for the discriminatory conduct.[136] Third, the federal courts "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."[137] In sum, district courts must balance the autonomy interests of local governments against the nature and scope of the offensive conduct when creating a remedy.

In *Missouri v. Jenkins I*,[138] the Court outlined the parameters of a remedial order that can be imposed by a district court. In that case, the Supreme Court unanimously held that the district court abused its discretion when it imposed a property tax increase on the municipality.[139] The Court found that this was a drastic step that not only intruded on local authority but circumvented it completely.[140] It determined that before taking such a drastic step, there must be a positive determination that other alternatives are not available.[141] But, on the issue of whether the district court may order the local government to exercise its own taxing authority, the Court split 5-4, with the majority holding in favor of district court

134. 433 U.S. 267 (1977). In *Milliken I*, 418 U.S. 717 (1974), the Supreme Court determined that the district court could not impose a multi-district remedy absent a finding that the other school districts committed acts that affected segregation, and remanded the case for further proceedings. *Id.* at 752-753.

135. *Milliken II*, 433 U.S. 267, 280 (1977).

136. *Id.*

137. *Id.*

138. 495 U.S. 33 (1990). For a further discussion of the case, see Robert T. Abramson, *Minimally Obtrusive Means Required in Imposing Desegregation Remedies Upon Local School Districts - Missouri v. Jenkins*, 21 SETON HALL L. REV. 387 (1991); Stanley J. Anderson, *Judicially Imposed Taxation and Desegregation*, 24 CREIGHTON L. REV. 289 (1990); Scott Carleton Brenner, *Judicial Taxation as a Means of Remedying Public School Segregation Under Missouri v. Jenkins: Boldly Going Where No Federal Court Has Gone Before*, 12 WHITTIER L. REV. 551 (1991); Douglas J. Brocker, *Taxation Without Representation: The Judicial Usurpation of the Power to Tax in Missouri v. Jenkins*, 69 N.C. L. REV. 741 (1991); Linwood Gunn, *Missouri v. Jenkins, The Expansion of Federal Judicial Power*, 7 GA. ST. U. L. REV. 495 (1991); Margaret D. Stock, *Federal Judicial Authority to Increase Local Taxes: Missouri v. Jenkins*, 14 HARV. J.L. & PUB. POL'Y 270 (1991).

139. *Jenkins I*, 495 U.S. at 50.

140. *Id.* at 51.

141. *Id.*

discretion. The majority went further to hold that the district court may enjoin any inhibitory state laws.[142] Avoiding the "difficult constitutional questions" of whether the district court's order violated Article III or the Tenth Amendment,[143] the majority concluded that the court ordered tax increase "contravened the principles of comity that must govern the District Court's equitable discretion."[144] Allowing the district court to enjoin inhibitory state laws did not circumvent local authority because it placed responsibility of school desegregation on the culpable local governments.[145] Writing for the majority, Justice White maintained that the difference between the two approaches is far more than a matter of form:

> Authorizing and directing local government institutions to devise and implement remedies not only protects the functions of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems.[146]

Justice Kennedy, joined by Justices Rehnquist, O'Connor and Scalia, filed a separate opinion concurring in part and concurring in the judgment.[147] Justice Kennedy vehemently argued that the federal judiciary does not possess the power to tax.[148] He added that such an intrusion by the federal court into state and local financing would be a "perversion of the normal legislative process."[149] Justice Kennedy maintained that although the district court's remedial powers are broad, the district court may not impede the locality's ability to function.[150] Instead, the district court must minimize the intrusiveness of its remedial measures as a matter of judicial discretion.[151] Justice Kennedy concluded that even if a federal court has the power to tax in "an extreme case," this situation did not fit such a mold.[152]

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142. *Id.* at 57.
143. *Id.* at 50.
144. *Jenkins I*, 495 U.S. at 50.
145. *Id.* at 57.
146. *Id.* at 51.
147. *Id.* at 58.
148. *Id.*
149. *Jenkins I*, 495 U.S. at 75. Justice Kennedy asserted that the taxing power is a legislative, not judicial function and that judicial taxation circumvents the legislative process designed to give taxpayers representation in taxing decisions. *Id.* at 69-70.
150. *Id.* at 74.
151. *Id.* at 67.
152. *Id.* at 75. The reaction to the decision in *Jenkins I* was severe. A few days after the decision was announced, a constitutional amendment was introduced in the

In June of 1995, the Court examined the permissible scope of a district court's remedial authority in *Jenkins II*.[153] The majority opinion written by Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy, and Thomas, concluded that a district court's remedial authority only extends to orders that restore "the victims of discriminatory conduct to the position they would have occupied absent that conduct . . . and their eventual restoration of state and local authorities to the control of a school system that is operating in compliance with the Constitution."[154] The Court found that the district court's plan to attract non-minority students to KCMSD schools was an interdistrict remedy that is beyond the court's authority.[155]

The Court stated that each additional program ordered by the district court to increase the "desegregative attractiveness" of the school district makes KCMSD more and more dependent on additional funding from the state.[156] The greater the school district's reliance on the state treasury, the greater its reliance on supervision by the district court.[157] Thus, in order to preserve the vital national tradition of local autonomy, the Court concluded that the district court's order of salary increases could not be sustained.[158]

The opinion is a reflection of a new conservative Court, signaling a movement towards limiting judicial involvement in the creation of the remedy. Justice Souter argued in his dissent that the district court must be able to enrich the city school to attract suburban white students.[159] The majority determined, however, that it is outside the court's purview if suburban growth and white flight results in black students remaining racially isolated in poor quality schools.[160]

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Senate that would prevent the judiciary from ordering a state or municipality to increase its taxes. S.J. Res. 295, 101st Cong., 2d Sess. 136 (1990). The bill did not get out of the subcommittee. *See also* Ron Combs, *Schoolbooks in the Missouri River? A Possible Response to Missouri v. Jenkins*, 56 MO. L. REV. 389 (1991).

153. 115 S. Ct. 2038 (1995). The Court also examined the relationship of local autonomy to the termination of the remedy. *See infra* notes 220-23 and accompanying text.

154. *Jenkins II*, 115 S. Ct. at 2041.

155. *Id.* at 2045.

156. *Id.* at 2054.

157. *Id.* at 2054-55.

158. *Id.* at 2055.

159. *Jenkins II*, 115 S. Ct. at 2074 (Souter, J., dissenting).

160. *Id.* at 2075 (Souter, J., dissenting).

## B. Enforcement

The Court looked at the issue of enforcement in *Spallone v. United States*,[161] The Court found that the district court had abused its discretion when it held city council members in contempt for refusing to vote in favor of legislation implementing a consent decree.[162] The decision followed a long series of lawsuits that found the city of Yonkers and the Yonkers School Board liable for intentionally enhancing racial segregation.[163] In 1987 the Second Circuit affirmed the district court's ruling that the city was liable for racial discrimination,[164] but the issue of compliance with the district court's remedial orders had not yet been resolved.[165] In its remedial decree, the district court had directed the city to designate sites for public housing by November, 1986.[166] While the ap-

161. 493 U.S. 265 (1990). For a further discussion of the case, see Lynn Samuels, *Spallone v. United States: When Constitutional Principles Collide*, 7 GA. ST. U. L. REV. 527 (1991).

162. *Spallone*, 493 U.S. at 280.

163. *See, e.g.*, United States v. City of Yonkers, 856 F.2d 444 (2d Cir. 1988); United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985). In a unique decision, the district court found that the city of Yonkers and the Board of Education had jointly engaged in a pattern of housing discrimination that was intentionally designed to segregate Yonkers public schools. *Id.* at 1373. Statistically, 19 out of 25 elementary schools were at least 80% white or 80% minority. *Id.* at 1385. The two East Yonkers middle schools had only 62 minorities in a student population of 1312. *Id.* The three Southwest Yonkers middle schools, by contrast, enrolled 79% of the district's minority middle school students. *Id.* at 1385-86. The court determined that the city's consistent pattern of locating public housing in Southwest Yonkers contributed to school segregation. *Id.* at 1527. For further discussion, see Docia L. Rudley, *School Desegregation: Whose Responsibility?*, 12 T. MARSHALL L. REV. 109 (1986); *United States v. Starrett City Associates and United States v. Yonkers Board of Education: Can More Be Done to Remedy Housing Discrimination?*, 4 J. OF LEGAL COMMENTARY 1 (1988).

164. United States v. Yonkers Bd. of Educ., 837 F.2d 1181 (2d Cir. 1987). In 1980, the Justice Department brought an action against the city of Yonkers and the Yonkers Community Development Agency, alleging that they had intentionally engaged in a pattern of housing discrimination in violation of Title VIII and the equal protection clause. The plaintiffs maintained that the city had, over a period of thirty years, disproportionately restricted new subsidized housing projects to areas of the city that were already predominantly populated by minorities. In addition, the government alleged that the Mayor of the city of Yonkers and the city council exerted influence over the board of education by manipulating funding, and that the board of education itself engaged in discriminatory conduct by opening and closing schools based on racial considerations. After 89 days of trial, the district court found that due to the combined actions of the city of Yonkers and the Yonkers School Board, public housing and public schools in the city of Yonkers had been intentionally segregated by race. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276.

165. United States v. City of Yonkers, 856 F.2d 444 (2d Cir. 1988).

166. United States v. Yonkers Bd. of Educ., 635 F. Supp. 1577 (S.D.N.Y. 1986). The order enjoined Yonkers from intentionally promoting racial segregation and re-

peal was pending, the city refused to comply with the remedial order.[167] Finally, in January of 1988, after the Second Circuit had affirmed the judgment of racial discrimination, and the Supreme Court had denied certiorari, the parties agreed to a consent decree that established the framework for a long-term plan for the creation of housing.[168] The decree was approved by the city council in a five to two vote and was entered by the district court as a consent judgment in January of 1988.[169] The decree specifically stated that the city agreed to adopt, within 90 days, legislation outlining the construction of housing.[170]

The city remained idle, and as a result, the NAACP and the United States were forced to submit to the court a proposed Long Term Plan Order based on a draft that had been prepared by the city's lawyers during negotiations.[171] After a hearing on July 26, 1988, the court entered an order requiring the city of Yonkers to enact this "legislative package," known as the Affordable Housing Ordinance, by August 1, 1988. A failure to do so would result in the city and the council members being held in contempt.[172] The court order mandated escalating fines, and provided that if the legislation was not enacted before August 10, 1988, any council member who remained in contempt would be imprisoned.[173]

Notwithstanding these threats, on August 1, 1988, the city council defeated the resolution of intent to adopt the legislative package by a vote of four to three.[174] On August 2, the district court held

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quired that the city take affirmative steps to disperse public housing throughout Yonkers. *Id.* The city was required to designate sites for 200 units of public housing in east and northwest Yonkers and develop by November, 1986 a long-term plan for the creation of additional subsidized housing in east or northwest Yonkers. *Id.* at 1582. The court did not mandate the details of the plan, such as how many units should be built, where they should be constructed, or how the city should pay for the units. *City of Yonkers*, 856 F.2d at 448.

167. *City of Yonkers*, 856 F.2d at 448. The city first defaulted and then refused to comply. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* Under the Charter of the city of Yonkers in effect at the time, all legislative powers were vested in the city council, which consisted of an elected mayor and six council members. Thus, the city had to act through the city council when passing legislation. *Spallone*, 493 U.S. at 269.

171. *City of Yonkers*, 856 F.2d at 449. The city council not only failed to implement the required legislation, but voted against a resolution indicating commitment to the implementation of the consent decree. *Id.*

172. *Id.* at 450.

173. *Id.*

174. *Id.*

both the city and the council members in contempt.[175] The Second Circuit affirmed the contempt orders.[176]

The city and the council members requested a stay of sanctions pending the filing of a petition of certiorari to the United States Supreme Court.[177] The Supreme Court granted a stay to the council members but not to the city.[178] With the city's contempt sanction approaching $1 million per day, the city council finally enacted the Affordable Housing Ordinance on September 9, 1988, by a vote of five to two.[179]

The Supreme Court subsequently determined that it was not an abuse of discretion for the district court to have entered contempt sanctions against the city.[180] The city had entered into a consent decree and thereby committed itself to enact legislation implementing a plan for the creation of subsidized housing, and then refused to do so.[181] The city was a party to the action from the beginning, was liable for both statutory and constitutional violations, and was directly subjected to remedial orders that had been upheld on appeal.[182]

As to the sanctions imposed on the council members, the Court emphasized that they were not parties to the action and therefore, they had never been found individually liable.[183] Moreover, although the injunctive portion of the remedial order was directed to the city and to its "officers, agents [and] employees[,]" the affirmative steps to disperse public housing were directed only at the city.[184] Although the Court declined to address whether the council members were entitled to legislative immunity, it noted that the district court must look at similar considerations when determining whether and how to exercise its discretion.[185] Any restriction on a legislator's freedom undermines the public good by interfering with the right of people to be represented in the democratic pro-

175. *City of Yonkers*, 856 F.2d at 451. The court found the city in contempt and fined it $100 a day, doubling the amount for each day of non-compliance. *Id.* The court found four council members in contempt and fined each of them $500 for each day the legislation remained unadopted. *Id.* at 452.

176. *Id.* at 460.

177. *Spallone*, 493 U.S. at 273.

178. *Id.*

179. *Id.*

180. *Id.* at 276.

181. *City of Yonkers*, 856 F.2d at 448-50.

182. *Spallone*, 493 U.S. at 276.

183. *Id.*

184. *Id.* at 274.

185. *Id.* at 274, 278.

cess.[186] Applying this principle, the Court determined that imposing fines on council members would cause them to vote "not with a view to the interests of their constituents or of the city, but with a view solely to their own personal interests."[187] The Court concluded that the imposition of sanctions on the city alone would probably have brought about the desired result.[188] Only if that approach failed to produce compliance should the district court have considered imposing fines against the council members.[189]

In his dissent, Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, acknowledged the majority's concerns regarding the district court's decision to invoke contempt sanctions against local officials.[190] The dissent urged, however, that contempt powers be available for use in extreme circumstances.[191] Arguing that the Court should have deferred to the district court's familiarity and special insight into the case, the dissent maintained that the personal sanctions were appropriate.[192] Accusing the majority of playing "district-court-for-a-day,"[193] the dissent pointed out that the Constitution itself defined the public good, and the legislators were duty bound to uphold it.[194] Once a federal court has issued a valid order to remedy a specific constitutional violation, the remedial decrees may not be frustrated merely because the constituents prefer to remain segregated.[195]

Although both *Spallone* and *Jenkins I* address the limits of a district court's involvement in local government affairs,[196] the two decisions are inconsistent with one another and provide little guidance to district courts. The view enunciated in *Spallone* and restated in the *Jenkins I* concurrence emphasizes local autonomy, and confers a duty upon the federal courts to determine the least intrusive remedy.[197] In holding that a district court may not impose fines against legislators,[198] and in arguing that district courts can

186. *Id.* at 279.
187. *Spallone*, 493 U.S. at 279.
188. *Id.* at 280.
189. *Id.*
190. *Id.* at 281.
191. *Id.*
192. *Spallone*, 493 U.S. at 297, 305.
193. *Id.* at 297.
194. *Id.* at 300-01.
195. *Id.* at 301.
196. *Spallone*, 493 U.S. at 274; *Jenkins I*, 495 U.S. at 37.
197. For an in-depth discussion of this point, see *The Supreme Court, 1989 Term - Leading Cases,* 104 HARV. L. REV. 296, 303 (1990).
198. *Spallone*, 493 U.S. at 280.

not compel local governments to tax,[199] the conservative justices are advocating that local autonomy be respected over ensuring compliance with a remedial order. The other view, adopted by the *Jenkins I* majority and the *Spallone* dissent, allows a district court to choose the remedy that it believes will vindicate the wrong even if that remedy crosses traditional boundaries involving separation of powers.[200] Finally, in *Jenkins II*, the Court was willing to severely curtail the scope of the remedy, even in the face of "the deep, inglorious history of segregation in Missouri."[201] Under all three approaches, the local government must attempt to preserve its autonomy while changing its structure to remedy the constitutional violation.

### C. Termination

The Supreme Court has recently begun to define the standards to be applied by the district court in determining when and whether a desegregation remedy can be terminated. In *Board of Education of Oklahoma v. Dowell*,[202] the Court examined a remedial decree imposing a school desegregation plan that was implemented in 1972.[203] In 1977, finding that the school district had achieved "unitary" status, the district court issued an order terminating the case.[204] In 1984, as a result of demographic changes that caused busing to be burdensome, the school board adopted a student reassignment plan that would allow a student to transfer from a school where he was in the majority to a school where he was in the minority.[205] The plaintiffs moved to reopen the case, contending that the school had not achieved unitary status, and that the new plan was a return to segregation.[206] The district court refused to reopen the case.[207] The U.S. Court of Appeals for the Tenth Circuit reversed the decision, holding that the 1977 order merely ended the district court's active participation in the case, and remanded the case to determine whether the desegregation decree

199. *Jenkins I*, 495 U.S. at 65.
200. *Id.* at 55.
201. 115 S. Ct. at 2091 (Ginsburg, J., dissenting).
202. 498 U.S. 237 (1991).
203. Dowell v. Bd. of Educ. of Oklahoma City, 338 F. Supp. 1256, *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972). *See also* Joe Hannel, *The Future of Desegregation After Dowell: Returning to Pre-Brown Days?*, 56 MO. L. REV. 1141 (1991).
204. No. Civ-9452 (W.D. Okla., Jan. 18, 1977).
205. *Dowell*, 498 U.S. at 242.
206. *Id.*
207. 606 F. Supp. 1548 (W.D. Okla. 1985).

should be lifted.[208] On remand, the district court found the following: (i) that the school board had bussed students for over ten years in compliance with the court's order;[209] (ii) that the district had maintained its unitary status;[210] and (iii) that the neighborhood assignment plan was not designed with discriminatory intent.[211] As a result of these findings, the court vacated the desegregation decree and concluded that the school district should be returned to local control.[212]

The Tenth Circuit again reversed the district court's decision, holding that a desegregation decree must remain in effect unless a school district can show that dramatic changes in conditions led to "extreme and unexpectedly oppressive hardships on the obligor."[213] The court held that the board had an affirmative duty not to take any action that would impede the process of destroying the dual system.[214] The Supreme Court granted certiorari so that it may determine the standard by which a desegregation decree can be modified or terminated.[215]

The Court found that the district court's 1977 order did not precisely describe when and how the desegregation plan terminated. The Court went on to state that there was no need for the school board to show a "grievous wrong evoked by new and unforeseen conditions."[216] Instead, a finding by the district court that the school was being operated in compliance with the Equal Protection Clause and that the board most probably would not return to its former ways, was sufficient to terminate an existing remedial order.[217] The district court must determine whether the board has complied with the decree and whether the vestiges of past discrimi-

208. 795 F.2d 1516 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986).
209. 677 F. Supp. 1503, 1512 (W.D. Okla. 1987).
210. *Id.* at 1519.
211. *Id.* at 1516.
212. *Id.* at 1526.
213. 890 F.2d 1483, 1490 (10th Cir. 1989). The court relied on *United States v. Swift & Co.*, 286 U.S. 106 (1932), for the proposition that a desegregation decree could not be lifted absent a showing of grievous wrong evoked by new or unforeseen conditions. *Swift* involved several meat-packing companies that entered into a consent decree where they agreed, in perpetuity, to refrain from entering the grocery business. The Supreme Court held that the circuit court's reliance on *Swift* was misplaced because the language must be read in the context of the continuing danger of unlawful restraints on trade. 498 U.S. at 247 (citing United States v. United Shoe Machinery Corp., 391 U.S. 244, 248 (1968).
214. 890 F.2d at 1504.
215. 494 U.S. 1055 (1990).
216. *Dowell*, 498 U.S. at 246.
217. *Id.* at 247.

nation have been eliminated to the extent practicable.[218] In making this determination, the court must look not only at student assignments, but also to every aspect of school operations, including faculty, staff, transportation, extra-curricular activities, and facilities.[219]

As to the issue of local autonomy, the Court emphasized that federal supervision of local school systems was intended as a temporary measure to remedy past discrimination and should not operate in perpetuity.[220] Local control over education allows citizens to participate in decision making and allows innovation so that school programs can fit local needs.[221] Dissolving a desegregation decree after the local authorities have acted in compliance with it recognizes the "necessary concern for the important values of local control of public school systems . . . . [A] federal court's regulatory control of such systems [should] not extend beyond the time required to remedy the effects of past intentional discrimination."[222] The Court reversed the Tenth Circuit's decision and remanded the case to the district court to make its findings consistent with the specific guidelines.[223]

Justice Marshall, joined by Justices Blackmun and Stevens, dissented.[224] Finding the standard enunciated by the majority "vague" and "mild," the dissent maintained that the standard must take into account the unique harm associated with a system of racially identifiable schools.[225] In regard to local autonomy, Justice Marshall stated that in its concern to spare local school boards the "draconian" fate of "indefinite judicial tutelage,"[226] the majority risked subordinating the constitutional rights of children to the school board's autonomy interests.[227] The dissent emphasized that local control considerations relate only to the feasibility of the remedial measure, not to whether the constitutional violation had been remedied.[228] The dissent concluded by stressing that the

218. *Id.* at 249-50.
219. *Id.* at 250.
220. *Id.*
221. *Dowell*, 498 U.S. at 248.
222. *Id.*
223. *Id.* at 251.
224. *Id.*
225. *Id.*
226. *Dowell*, 498 U.S. at 267.
227. *Id.*
228. *Id.*

school districts have an unconditional duty to eliminate any condition that perpetuates racial dichotomy.[229]

In *Freeman v. Pitts*,[230] the Court once again examined the supervision withdrawal procedures of a district court.[231] In 1969, the DeKalb County school system was ordered to dismantle its dual school system.[232] In 1986, the school district petitioned for a final dismissal.[233] The district court relinquished remedial control as to those aspects of the system which had achieved unitary status, but retained supervisory authority over the areas in which the district was not in full compliance.[234] The U.S. Court of Appeals for the Eleventh Circuit reversed the district court's decision, holding that a district court should retain full authority until the school board has achieved unitary status in all categories.[235] The Supreme Court reversed the Eleventh Circuit decision, holding that a district court may withdraw supervision in discrete categories and need not retain complete control over a school district just because it has not achieved full unitary status.[236]

In coming to this conclusion, the Court stated that the duty of a school district, once it has been found to have intentionally discriminated against racial minorities, is to take all steps necessary to eliminate the vestiges of the unconstitutional de jure system.[237] The district court's purpose in intervening and formulating a decree is to remedy the violation. Once a school system is operating in compliance with the Constitution, a district court must restore control to local authorities.[238] Citing *Dowell*, the Court reiterated that federal judicial supervision of local school systems was intended as a temporary measure.[239] Partial relinquishment of judicial control, when justified by the facts of the case, is a significant step in fulfilling the district court's duty.[240] As long as the district court applies the standard enunciated in *Dowell*, it has the power to relinquish supervision of school districts in incremental stages.[241]

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229. *Id.* at 268.
230. 503 U.S. 467 (1992).
231. *Id.*
232. *Id.* at 471.
233. *Id.*
234. *Id.*
235. 887 F.2d 1438 (11th Cir. 1989).
236. *Freeman*, 503 U.S. at 471.
237. *Id.* at 485.
238. *Id.* at 489.
239. *Id.*
240. *Id.*
241. *Freeman*, 503 U.S. at 490.

In emphasizing the importance of local autonomy, the Court stated:

> Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course.[242]

The Court emphasized that it is the duty of the state and its subdivisions to ensure that the potential for discrimination does not shape the policies of its school systems.[243] "Where control lies, so too does responsibility."[244]

In *Jenkins II*, the Supreme Court reviewed the district court's determination of KCMSD's unitary status. In short, the Court held that the district court should not consider academic goals in determining whether a school district had achieved unitary status because this examination could postpone the restoration of control to the local government.[245] Emphasizing that the goal of the district court is not only to remedy the violation, but to restore control to the state and local authorities as quickly as possible, the Court tipped the balance against judicial activism in the remedial pro-

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242. *Id.*

243. *Id.*

244. *Id.* Justice Scalia concurred, arguing that the presumption that any current racial imbalance is the product of the past constitutional violation is legal theory that has served its usefulness, and should be abolished. Instead, there should be a reversion to the ordinary principles of law: plaintiffs alleging an equal protection violation must prove intent and causation, and not just racial disparity. Only that way can courts begin to relinquish supervision and reinstate the democratic processes. *Id.* at 505-06.

Justice Souter also wrote a concurring opinion, as did Justice Blackmun, who was joined by Justices Stevens and O'Connor. Justice Souter elaborated on his understanding of the inquiry that is required by the district court in its assessment of whether the decree can be vacated. *Freeman*, 503 U.S. at 507-08. Justice Blackmun, concerned about the relationship between demographic changes and intentional segregation, specified that a district court should retain jurisdiction of the school board, even if it relinquishes supervision and control over a subpart. Further, Justice Blackmun argued that the district court must explore the school district's influence on residential segregation, and examine whether the school board might have contributed to it. *Id.* at 514.

245. 115 S. Ct. at 2056.

cess.[246] The Court pointed out that the Constitution only requires equal opportunity, not equal results.[247]

The Supreme Court initially endorsed a "hands off" approach when it articulated that "the court [should not] substitute its discretion for that of a board of education but [should] adopt a plan proposed by the board if it fulfills the board's duty to eliminate the effects of past illegal conduct."[248] By 1968, however, the Court began to instruct the district courts to consider school board plans "in light of any alternatives which may be shown as feasible and more promising in their effectiveness."[249] After the *Green* and *Swann* decisions, most commentators agreed that the Court was adopting a more active judicial posture.[250] In *Jenkins I*,[251] the Court rearticulated a test first announced in *Milliken*[252] — a test which balanced local interests against the vindication of constitutional rights.[253] Yet, the Court endorsed a remedial plan that included

246. Justice O'Connor concurred in the opinion, concluding that the Court had the power to look at the scope of the remedy. *Id.* at 2057 (O'Connor, J., concurring).

247. *Id.* at 2055.

248. 349 U.S. at 483. The Court in *Brown II* specifically stated that school authorities have the primary responsibility for assessing the problem and creating the remedy. *Id.* at 299.

249. Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 439 (1968).

250. Although the Court in *Swann* stated that "[r]emedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary," 402 U.S. 1, 16 (1971), it observed an increasing need for activist judiciary as a consequence of changing constitutional standards. *Id.* at 17-18. This active judicial posture often takes the form of judicial selection of a remedy after receipt of suggestions from all the parties. *See* Evans v. Buchanan, 416 F. Supp. 328 (D. Del. 1976), *modified*, 555 F.2d 373 (3rd Cir. 1977), *cert. denied*, 434 U.S. 880 (1977); Boston Chapter NAACP v. Beecher, 371 F. Supp. 507 (D. Mass.), *aff'd*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). Typically, the court solicits ideas and plans from all parties involved and then either accepts one plan or creates its own out of the various proposals. The additional plans usually come from the plaintiff. *See* Saville v. Treadway, 404 F. Supp. 430 (M.D. Tenn. 1974). Others, however, may become involved. *See* Williams v. Edward, 547 F.2d 1206 (5th Cir. 1977) (federal government offered alternative remedies).

Another common method of judicial involvement is the reference of formulation issues to an expert special master. These masters are often responsible for devising the remedy that is decreed by the court. *See* Connor v. Finch, 419 F. Supp. 1072 (S.D. Miss. 1976), *rev'd and remanded*, 431 U.S. 407 (1977); Costello v. Wainwright, 397 F. Supp. 20 (M.D. Fla. 1975), *vacated and remanded*, 539 F.2d 547 (5th Cir. 1976), *rev'd and remanded*, 430 U.S. 325 (1977). For further discussion, see *Special Project: The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 804 (1978).

251. 495 U.S. 33, 51-52 (1990).

252. 433 U.S. 267 (1977).

253. Since *Spallone* and *Jenkins I*, various courts have attempted to use the guidelines set out by the Supreme Court. In *Langton v. Johnston*, 928 F.2d 1206 (1st Cir. 1991), the inmates at a mental health facility sought to have the State held in con-

extensive capital improvements and the creation of a network of magnet schools.[254] In *Jenkins II*,[255] the Court took a step away from judicial activism, holding that a district court must restore control of a school system to the local authorities if it is operating in compliance with the Constitution.

The Court has also restricted the district court's power to enforce its remedial orders even in the face of a clearly recalcitrant defendant.[256] In recent cases concerning the dissolution of remedial orders, the Court strongly emphasized the importance of local autonomy, holding in *Freeman v. Pitts* that judicial supervision can be relinquished even when full unitary status has not been achieved.[257] The Court noted that the district court may terminate its oversight when it finds that the school district is operating in compliance with the Constitution, and that it is unlikely to return to its former ways.[258] The Court continued this trend in *Jenkins II*, when it held that the district court's end purpose is to restore con-

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tempt for violating a consent decree that governed conditions at the facility. The district court denied the relief, and the First Circuit affirmed. The court cited *Jenkins I* and *Spallone* to emphasize that intervention into the affairs of state and local governments must be conducted with the understanding that the autonomy of these governments should be safeguarded to the maximum extent possible. *Id.* at 1221. The court used *Spallone* as an example where the district court had overstepped its power. *Id.* at 1222. Because the district court's record was "dotted with examples of judicial restraint cast in precisely the mold configured by the *Spallone* Court," *id.*, its determination not to find contempt was treated with deference and affirmed. *See also* United States v. Yonkers Bd. of Educ., 902 F.2d 213 (2d Cir. 1990) (citing *Jenkins I* for the proposition that a federal district court may order almost anything it wants in order to remedy past discrimination); United States v. Metro. Dist. Comm., 930 F.2d 132, 136 (1st Cir. 1991) (citing *Spallone* for the limits of comity and federalism).

254. The argument that the *Jenkins I* decision infringed on local autonomy is without merit. The Missouri State Constitution specifically provided that taxes could not be increased by the local government without direct voter approval. *Jenkins I*, 495 U.S. at 64. In *Jenkins I*, the Missouri Constitution provided that the taxing power may be exercised . . . by counties and other political subdivisions under power granted to them by the general assembly. *Id.* The only state constitutional provision that granted the locality authority to levy property taxes also limited this power to $1.25 per $100 of assessed value unless an increase was approved by the local constituents. *Id.* Thus, under existing state law, KCMSD had no authority to raise the property tax over $1.25 without voter approval. *Id.* By enjoining this provision, the district court enjoined the provision that granted the locality the power to tax. *Id.* at 64-65. Eliminating state law limitations on a school district's taxing authority did not create a "perversion of the normal legislative process." *Id.* at 71. Although this may infringe on state autonomy, the Court is allowing the local government the power to raise the revenue needed to finance the remedy.

255. 115 S. Ct. 2038 (1995).

256. 493 U.S. 265 (1990).

257. 503 U.S. 467, 471 (1992).

258. *Id.* at 489-90.

trol of the school system to the state and local school authorities even if academic achievement is clearly not compatible with other schools in the district.[259]

Although the Court mentions local autonomy in all its recent desegregation opinions,[260] it has consistently failed to assert the importance of local autonomy in fashioning remedial orders. The city continues to sway, pulled on one side by the need for change in deeply entrenched patterns of behavior, and on the other by the need for local autonomy and control. In order to achieve the dual goals of desegregation, the Court must articulate what it means by local autonomy and where it belongs in the remedial process.

## IV. Local Governmental Autonomy at Crossroads: The Need for a Definition of What It Means and Where It Applies

The Court's view that local autonomy is equally important in each phase of the remedial process only hinders the overall process. To achieve the dual goal of redressing the constitutional infirmity as quickly as possible while maintaining the integrity of the local government, the Court should stress local autonomy only in the creation of the remedy. By emphasizing local autonomy in the formulation phase, the Court ensures a successful and feasible remedy. Once a city has failed to comply with a remedial order, local autonomy should no longer be a factor. Similarly, the determination of whether a school district has achieved unitary status is a question of law in which local autonomy should not play a part. This approach prevents a scenario where a city is forced to institute sweeping changes when it does not have the ability to finance those changes. It also ensures that the district court has the power to enforce compliance until the vestiges of discrimination have been eliminated.

Once liability has been determined, the duty of the district court is to guarantee that school districts "eliminate the discriminatory effects of the past as well as [to] bar like discrimination in the future."[261] The obligation of segregated school districts is to come forward with a plan that "promises realistically to work, and

259. 115 S. Ct. at 2055.

260. *See Freeman*, 503 U.S. at 490 ("As we have long observed, 'local autonomy of school districts is a vital national tradition.' " (quoting Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977))); *Jenkins II*, 115 S. Ct. at 2054 ("[O]ur cases recognize that local autonomy of school districts is a vital national tradition.").

261. *Green*, 391 U.S. at 438 n.4.

promises realistically to work *now*."[262] This is an affirmative obligation, born out of the realization that "the time for mere 'deliberate speed' has run out."[263] Thus, a desegregation remedy must attain two distinct goals. First, the formulation process must produce a viable plan that specifically addresses the constitutional violation.[264] Second, the plan must be implemented as quickly as possible.[265] An emphasis on the importance of local autonomy in the formulation phase would foster these dual goals.

### A. Formation of Remedy

The nature of relief in institutional reform litigation places the courts in a new role.[266] During the formulation phase, the court becomes responsible for implementing broad reforms in situations where the disputes are often accompanied by political ambivalence and social dissension.[267] In many instances, the court learns of the problems involved in the dispute from information gathered in an adversarial setting.[268] Regardless of the court's involvement, the local government must ultimately destroy the vestiges of discrimination. Because of the complexity surrounding institutional reform litigation, the best way to successfully maintain local autonomy while curing the constitutional violation is to impose a court-overseen Alternative Dispute Resolution.[269]

This approach has many advantages. First, a remedy developed and proposed by the local government has the greatest chance of success.[270] The local government has the resources to develop the

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262. *Id.* at 439.

263. *Id.* at 438 (quoting Griffin v. Prince Edward County Sch. Bd., 377 U.S. 218, 234 (1964)).

264. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) ("The nature of the violation determines the scope of the remedy.").

265. *See* Davis v. Bd. of School Comm. of Mobile Co., 402 U.S. 33, 37 (1971) ("The measure of any desegregation plan is its effectiveness.").

266. *See* Chayes, *supra* note 72.

267. For a good discussion of these problems in the area of mental health reform, *see* Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977).

268. In formulating a remedy, the court derives its knowledge of the institution from information presented during the adversarial process. Because this information may not be completely accurate, the court may not be aware of the political or organizational realities of the institution.

269. The policy in federal court favoring the voluntary resolution of litigation through settlement is particularly strong in the class action context. *See, e.g.*, White v. National Football League, 822 F. Supp. 1389, 1416 (D. Minn. 1993).

270. *See, e.g.*, Hart v. Community Sch. Bd., 383 F. Supp. 699 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975); Johnson v. San Francisco Unified Sch. Dist., 339 F. Supp. 1315, 1321 (N.D. Cal. 1971), *vacated and remanded*, 500 F.2d 349 (9th Cir. 1974);

plan and can deal with the intricacies of school operation by including educational components in the plan that are beyond the competence of the court.[271] Second, this method minimizes intrusions into the affairs of local governments.[272] Third, allowing a municipality to create the plan greatly aids in the enforcement of such a plan by reducing the risk of non-compliance. Finally, active participation by the local government at the outset ensures a smoother restoration of control to the school board following the judicial supervision.[273] Under this approach, the district court would invite broad participation of all parties with an interest in the remedy. In addition to the parties involved in the litigation, neighborhood associations, parent groups, and other civic organizations would be encouraged to participate in the process.[274] The local government would be given every opportunity to create a viable plan. If the court rejects a plan submitted by the local government, the rejection should be accompanied by specific reasons. The court's role should be limited to deciding whether the result achieved by the plan satisfies constitutional criteria.

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Hawkins v. Town of Shaw, 461 F.2d 1171, 1174 (5th Cir. 1972). One school board attorney has suggested that if plaintiffs "adopt a less confrontational attitude towards school boards . . . in many cases effective compromises would be reached which in the long run would be more effective than they would have been had the plaintiffs succeeded in implementing their own plan." Alfred A. Lindseth, *A Different Perspective: A Local School Board Attorney's Viewpoint*, 42 EMORY L.J. 879, 887 (1993).

271. *See* Lindseth, *supra* note 270, at 887.

272. *See, e.g.*, Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987, 1026 (E.D. Pa. 1976), *aff'd in part, modified, and vacated in part*, 564 F.2d 126 (3rd Cir. 1977), *cert. denied*, 435 U.S. 908 (1978) ("[The court] does [not] intend to appropriate the role of the legislative bodies whose proper function it is to . . . establish local policy"); Bradley v. Sch. Bd., 325 F. Supp. 828, 832-33 (E.D. Va. 1971) (noting that it is the "[s]chool board's duty to run the schools"); Connor v. Johnson, 256 F. Supp. 962, 967 (S.D. Miss. 1966) ("[We] trust that such a vital legislative function will never have to be performed by the judiciary, state or federal."), *aff'd*, 386 U.S. 483 (1967); *see generally*, *Hawkins*, 437 F.2d at 1294 (Bell, J., concurring).

273. One of the prerequisites to relinquishment of court control over schools is that a school district has demonstrated its commitment to a cause of action that gives full respect to the equal protection guarantees of the Constitution. *Freeman*, 503 U.S. at 490.

274. Extensive participation can diminish the adversarial nature and enhance the likelihood of compliance. Organizations are prone to respond negatively to change imposed from the outside. Increased participation in decree formulation can make the change appear to be self-generated rather than externally imposed. *See* Mills v. Bd. of Educ. of Dist. of Columbia, 348 F. Supp. 866 (D.D.C. 1972).

Participation may also raise policy and implementation factors that were overlooked by the plaintiff and defendant and can help shape the decree. *See* Chayes, *supra* note 72, at 440.

The success of a plan which emphasizes local government involvement depends on the good faith of the municipality.[275] The court's focus, however, should not be on whether the local government can be trusted, but rather whether the judiciary could create a more successful plan. In the event that the local government is unable to create a viable plan, the district court should take a more active part in the formulation of the remedy.[276] In creating the remedy, however, the district court should explore all alternatives, and articulate why those rejected remedies were not chosen. Areas of inquiry by the district court should include: (i) whether the remedial decree intrudes on the legislative function of the locality; (ii) whether the remedial order exceeds the statutory authority allocated to the locality by the state; and (iii) whether the locality has the resources available to implement the decree.[277]

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275. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) ("Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

276. Indeed, when the school authorities default in their obligations to offer an acceptable remedy, the district court has broad power to fashion a remedy that will assure a unitary school system. In Swann v. Charlotte-Mecklenburg Bd. of Educ., 300 F. Supp. 1381, 1382-83 (W.D.N.C. 1969), for example, the district court gave the defendants ample opportunity to produce a plan but had not obtained an acceptable plan after six years of litigation. Although the school board directed the superintendent to prepare a plan, the superintendent prepared a "minimal" plan, that was further pared down by the board before submission to the court. Finally, the district court ordered a plan developed by a court-appointed consultant which finally pushed the defendants into creating an acceptable plan. Swann v. Charlotte-Mecklenburg Bd. of Educ., 311 F. Supp. 265, 266 (W.D.N.C.), *vacated and remanded*, 431 F.2d 138 (4th Cir. 1970) (hearings in response to defendant's fourth opportunity to present plans); *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 379 F. Supp. 1102, 1103 (W.D.N.C. 1974), *aff'd*, 501 F.2d 383 (4th Cir. 1974).

Similarly, in the *Yonkers* litigation the court initially ordered relief in 1986, but the city balked at the housing remedy order resulting in the contempt sanctions ordered by the district court in 1988. In both of these instances the court's remedial powers were necessary to ensure and effectuate constitutional rights. If local authorities are stagnant, the courts become the only avenue where those discriminated against can obtain a remedy.

277. The dispute in *Jenkins I* arose because the locality did not have enough resources to fund the elaborate plan approved by the district court. With greater participation by the locality, the people have the opportunity to modify the desegregation plan to reflect the collective will of the taxpayers. It would be better to reduce the plan to a level that can accomplish the goals at a more reasonable price. As the Supreme Court has held, desegregation decrees must be reasonable, feasible, workable, effective and realistic. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31 (1970).

### B. Enforcement of Remedy

Local autonomy should not be a consideration in the enforcement phase of the remedial process. A remedial order is useless if the institution fails to comply. Therefore, district courts must be given broad enforcement power. Without the power to guarantee compliance, a negotiated settlement is meaningless. It is essential for the court to be able to impose sanctions for disobedience.[278]

The *Spallone* decision, where the Court held that the district court's order of contempt against the council members was an abuse of discretion under traditional equitable principles, raises serious doubts regarding the utility of negotiated settlements. The district courts' intimate contact with civil rights cases equips them with special insights into various methods of coercing compliance when all cooperative measures have failed. District courts are better able to determine which sanctions are most likely to work quickly and effectively.

The *Spallone* dissent, written by Justice Brennan and joined by Justices Marshall, Blackmun, and Stevens, recognized that the district court had "weathered a whirlwind of evasive maneuvers and misrepresentations, . . . considered and rejected alternative means of securing compliance other than contempt sanctions; and carefully considered the ramifications of personal fines."[279] In arguing that the district court did not abuse its discretion, the dissent emphasized that the decision sends a message to district courts that despite their close contact with the parties and issues, their choices are subject to being second-guessed by a higher court. Justice Brennan astutely observed in the last paragraph of his opinion, "[I] worry that the Court's message will have the unintended effect of emboldening recalcitrant officials continually to test the ultimate reach of the remedial authority of the federal courts . . . ."[280]

For desegregation remedies to be effective, the Supreme Court must furnish the district courts with broad enforcement powers so that it may ensure compliance. This power does not infringe on the autonomy of the local government; instead it prohibits the local government from defying court orders merely because the inhabitants prefer to remain segregated. Local autonomy is preserved by the active role the local government plays in designing the scope and content of the underlying order. Once that order has been

278. Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).
279. 493 U.S. 265, 292 (1990).
280. *Id.* at 306.

designed, the defendants must implement it or face the consequences.

### C. Modification or Termination of Remedy

Finally, the Court's recent emphasis on the importance of local autonomy in the dissolution phase of the remedial process is misplaced. The Court's concern that judicial supervision of school systems be intended as a temporary measure is laudable;[281] however, a court should terminate its remedial jurisdiction only when it finds that the violation no longer exists. A local government is not in the position to determine whether a school is being operated in compliance with the equal protection clause. More importantly, the goal of returning school systems to local control should not supersede the constitutional rights of children. As cautioned by Justice Marshall in his dissent in *Dowell*:

> [D]issolving a desegregation plan when it is unlikely that a school board will return to its former ways fails to recognize the unique harm associated with a system of racially identifiable schools, and the ability of the vestiges of segregation to survive for a long, long time.[282]

## V. Applying the New Standard to Kansas City

While many school systems in the United States have desegregation plans that are under the supervision of the federal courts, the plan established in *Missouri v. Jenkins* is one of the most controversial and expensive in the nation. Issues involving the scope, enforcement, and termination of the remedial order have been in front of the Supreme Court in two separate lawsuits.[283] Thus, this ongoing dispute provides a good setting for the application of the principles set forth in the preceding section.

The remedy formulation phase in Kansas City was unique in a variety of aspects. First, unlike in most desegregation lawsuits, the school district—the Kansas City School Board—was originally a

281. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977). *See* Board of Educ. of Oklahoma City Public Sch. v. Dowell, 498 U.S. 237, 247 (1991) ("[F]rom the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination."); Millikin v. Bradley, 418 U.S. 717, 741 (1974)("No single tradition in public education is more deeply rooted than local control over the operation of schools."); *Dowell*, 498 U.S. at 249 ("No one's interest is furthered by subjecting the nation's educational system to judicial tutelage for the indefinite future.").

282. 498 U.S. at 257.

283. 495 U.S. 33 (1990); 115 S. Ct. 2038 (1995).

plaintiff in the action. Although it was realigned as a defendant, it continued to be a "friendly adversary" in the proceedings.[284] Rather than being a recalcitrant defendant, it was an active participant in the remedy formulation. Although the school board was a willing and active participant, the State of Missouri was not.[285]

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284. *Jenkins II*, 115 S. Ct. at 2044.

285. Throughout the remedial phase of the litigation, the KCMSD proposed ever more expensive improvements with the agreement of the plaintiffs, and the State objected. The district court rejected various proposals by the State to make capital improvements because the "patch and repair" approach proposed by the State would not achieve suburban comparability. Instead, the district court approved new construction and a large scale magnet school program. *Jenkins I*, 495 U.S. at 59 (Kennedy, J., concurring).

In many cases, an additional problem in funding arises because the state is not a defendant in the action. For example, in 1993, the Yonkers Board of Education and the NAACP brought a new proceeding in district court, alleging that although the Yonkers public schools were no longer racially identifiable, the vestiges of segregation had not been eliminated. United States v. City of Yonkers, 833 F. Supp. 214 (S.D.N.Y. 1993). The board of education asserted that the failure to adequately address these vestiges of segregation did not result from a lack of commitment on the part of the school system, but rather from the lack of funds. *Id.* at 217. The board of education therefore instituted proceedings against the State of New York, seeking to impose a fiscal responsibility on the state. *Id.*

The court determined that two separate issues needed to be resolved: first, whether inadequately addressed vestiges remained in the Yonkers school system; second, whether the state should be fiscally responsible. *Id.* The court limited its discussion to whether vestiges of prior discrimination continued to exist in Yonkers, leaving open the question of what entities should share fiscal responsibility if vestiges remained. *Id.* at 218. After twelve days of testimony, the court concluded that vestiges of segregation remained in the Yonkers public school system, and although steps were being taken to address these vestiges, the steps were inadequate. *Id.* at 225. The expansion and implementation of these steps would necessarily entail additional funds. The court emphasized that it did not address issues relating to the state's liability for the existence of these issues, or the relative fiscal responsibility of the city and state. *Id.*

In March, 1995, the court held that the State of New York was not liable for the segregated status of the Yonkers public schools and was therefore not responsible for supplying the additional funds to remedy the violation. United States v. City of Yonkers, 880 F. Supp. 212 (S.D.N.Y. 1995). The court reluctantly concluded that liability could not be imposed on the state because of a Second Circuit case holding that although the state has the power and duty to address segregation, if the state does not affirmatively participate in local pro-segregative conduct, liability cannot be imposed under § 1983. Mere knowledge of a wrongdoing is insufficient for § 1983 liability; there needs to be evidence that local and state officials conspired to thwart desegregation policies, or that the state supported the conduct of the local officials. *Id.* at 236. Even though there was evidence that the state was aware of the segregation in the Yonkers public schools and that the state had the power and authority to deal with the problem and chose not to do so because of political pressures, liability cannot be imposed. *Id.* Thus, the state is insulated from liability and the city of Yonkers must bear the financial burden.

Second, the remedy itself was extravagant.[286] Because the Court did not find interdistrict liability,[287] there could be no interdistrict relief.[288] The district court, however, ordered the school district to make the school system so attractive that suburban children would voluntarily transfer to its schools.[289] To satisfy this goal, the remedy included air conditioning in all the classrooms;

> an alarm system, and 15 microcomputers; a 2,000-square-foot planetarium; greenhouses and vivariums; a 25-acre farm with an air-conditioned meeting room for 104 people; a Model United Nations wired for language translation; broadcast capable radio and television studios with an editing and animation lab; a temperature controlled art gallery; . . . swimming pools; and numerous other facilities.[290]

When this lavish plan reached the Supreme Court, it concluded that the district court had allowed the school board to dream, and "provided the mechanism for those dreams to be realized."[291]

An approach emphasizing court-overseen Alternative Dispute Resolution would have yielded a better result. Had the district court been more cognizant of the various interests of the parties during the formulation phase, the unnecessary expense could have been avoided. Additional discussion by the state and community members would have either yielded less opposition to the final expensive plan, or perhaps resulted in the formulation of a different

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286. As the Eighth Circuit judges dissenting from denial of rehearing en banc put it: "The remedies ordered go far beyond anything previously seen in a school desegregation case. The sheer immensity of the programs encompassed by the district court's order—the large number of magnet schools and the quantity of capital renovations and new construction—are concededly without parallel in any other school district in the country." 855 F.2d at 1318-19.

287. *Jenkins II*, 115 S. Ct. at 2051.

288. *Id.*

289. *Id.* at 2041.

290. 495 U.S. 33, 76 (1990) (Kennedy, J., concurring).

291. *Jenkins II*, 115 S. Ct. at 2045 (quoting App. to Pet. for Cert. A-133). The opinion itself has led to conflicting appraisals from the community. As one commentator stated: "The decision to restrain Judge Clark is one more sign that the nation is escaping from the intellectual dead end of solving social problems—including the most intractable ones, regarding race—by allowing judges to bend the Constitution to the service of their political agendas." George F. Will, *The Last Word: From Topeka to Kansas*, NEWSWEEK, June 26, 1995, at 66. Another commentator espoused a different view: "As a nation we are going to have to face the tragedy of those schools in the cities that don't function . . . . The problems can't be solved by the cities themselves, and the state and federal government and now the courts are saying they have no stomach for solving it either." Juan Williams, *The Court's Other Bombshell; Schools, Not Voting Rights, Was the Key Racial Ruling*, WASH. POST, July 2, 1995, Outlook, at C1.

plan that respected the wishes of the community instead of the district court.[292]

Once a plan has been approved by the court, local autonomy interests should not infringe on the need to enforce the remedial order. In *Jenkins*, a problem arose with funding the plan. Total

292. The district court in the *Yonkers* decision had the formidable task of creating two remedies: one for the discrimination in housing and one for the discrimination in schools. United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1288 (S.D.N.Y. 1985). Although there were strong efforts at resolving the "schools" portion of the lawsuit, the efforts eventually failed. After the court found intentional segregation in November, 1985, it requested the city officials to propose remedies to move towards integration. United States v. Yonkers Bd. of Educ., 635 F. Supp. at 1540 (S.D.N.Y. 1986). The plaintiffs, the Justice Department and the NAACP, found the plans inadequate and proposed further modifications. *Id.* The district court's final remedial order represented the thoughts of both parties. It included extensive redistricting, closing some schools, and developing "magnet schools" that would offer enriched academic programs. *Id.* at 1540-41. The plan went into effect in September, 1986, and was successful, largely because of voluntary compliance by the parents and the community. As a result of good faith and zealous implementation of the remedial order by the board of education, the racial separation of students in the Yonkers public schools has nearly ended. The transition took place peacefully, without disturbances and disruption.

Although the racial segregation of students in the Yonkers public schools has nearly ended, Yonkers continues to be engaged in a bitter and divisive effort to thwart the court's orders to remedy racial discrimination with respect to housing. Creating an effective remedy for housing discrimination is both similar and different from creating school discrimination remedies. Housing remedies are frequently met with even a higher level of resistance than school desegregation remedies. As one resident stated, "there are questions on the mixing of people of disparate economic classes." Residents are concerned about decreasing property values, graffiti in their neighborhoods, crowds, and traffic. Once the housing is built, there is little true mingling among adults, although there is some evidence of children playing with each other. Unlike busing programs or the creation of magnet schools, that once initiated can carry out the desired goal, housing requires a commitment to implementation that must be ongoing. Non-minority residents, who have traditionally controlled political mechanisms, successfully avoid placing public housing in their own neighborhoods. Because the eradication of residential segregation requires such a long-term commitment, and goes to the heart of the needs of city dwellers, emphasizing a consensual agreement becomes even more important.

The success of the school integration as compared with the continued problems with housing integration demonstrates the importance of emphasizing a consensual agreement between the parties. The school desegregation order, although not a consent decree, reflected ideas from both the defendant board of education and the plaintiffs. The community members felt as if they had input into the decision-making process, and were not being forced to change their lifestyle. The housing order, on the other hand, was met with virulent opposition. The refusal of the council members to go along with the court order was based on their perception of the opposition of their constituents. A consent decree allows open discussion early on in the process. It gives the local authorities input and control over the programs.

desegregation costs approached $200 million per year.[293] The school district lacked the funds to comply, and the electorate was neither willing to remove state law restrictions on the school district's power to tax, nor approve the school district's proposals for tax increases or bond issues.[294] The district court chose to enforce its remedial order by circumventing the Missouri State Constitution and imposed taxes on the city's constituents.[295] Once the plan was created, the district court needed to devise a solution to the funding problem. The resulting order imposed a substantial financial burden on the taxpayers. Although the enforcement mechanism arguably infringed on local autonomy, the court must be given the flexibility to impose whatever sanctions it deems necessary to ensure compliance.

Finally, contrary to the Supreme Court's current view, consideration of local autonomy has no place in the dissolution phase of institutional reform. Although education may be a vital local tradition, it remains the gateway to opportunity, self-sufficiency, economic success, and political participation. A school desegregation decree should not be dissolved until the purposes of the decree have been fully achieved. Local control relates to the feasibility of a remedial measure, not to whether the constitutional violation has been remedied.[296]

In its haste to return school districts to local control, the *Jenkins* Court ignored the need to fully integrate every aspect of the school system. Although there has been some progress in desegregating the Kansas City schools, academic achievement at those schools is still below national norms.[297] The percentage of minority students in the schools has increased, not decreased, since the plan was implemented.[298] "The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about."[299] As Justice Marshall stated in the *Dowell* dissent, a vestige of segregation "extends to any condition that is likely to con-

293. 115 S. Ct. at 2044. Given the cost, it is not surprising that the district court thought it was advisable to order the hiring of a "public-information specialist" to sell the plan to the community. 639 F. Supp. at 41.

294. La Pierre, *supra* note 30, at 303.

295. *Id.* at 334-35.

296. Board of Educ. of Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237, 267 (1991) (Marshall, J., dissenting).

297. Missouri v. Jenkins, 11 F.3d 755, 761-62 (8th Cir. 1993).

298. Laura Scott, *Better KCK Schools*, KAN. CITY STAR, Feb. 12, 1996, Opinion, at C6.

299. Green v. Country Sch. Bd. of New Kent County, 391 U.S. 430, 436 (1968).

vey the message of inferiority implicit in a policy of segregation."[300] The effects of discrimination remain chargeable to the school district, and a remedial decree is required until those effects are completely eliminated.[301] These considerations have nothing to do with local autonomy.

## VI. Conclusion

Segregation in our schools remains prevalent. Municipalities are often the source of constitutional violations; yet, without the cooperation of the municipality and its constituents, a remedy cannot be successful. The United States Supreme Court in addressing this dilemma recently concluded that the courts must respect the integrity of the municipality while correcting any constitutional violations. The cases, however, provide little guidance to the district courts on how this balance is to be maintained. In fact, the decisions themselves are inconsistent due to the differing views of the judges on the role of the municipality in our government.

These cases challenge the courts to reexamine the importance of local autonomy in the context of institutional reform. It is critical that the law provide a clear guideline on what part local autonomy is to play in the different phases of institutional reform. Local autonomy should be an integral consideration in formulating a proper remedy. To protect the local government's integrity, greater deference must be given to the municipality in creating the order. Even though the municipality is often responsible for the constitutional violation, its knowledge of school operations and needs of its inhabitants puts it in a better position than a court in formulating a remedy. Once the specific remedy is ordered, the district court must be given the power to enforce its remedial orders. Allowing a municipality to participate in the beginning stages of the remedial process protects local autonomy, while broad enforcement powers guarantee compliance with the order. Finally, local autonomy should not play a role in the decision to terminate the remedial order. Although it is important to return control of education to the locality as quickly as possible, this should not outweigh the importance of eradicating the violation.

The city continues to sway, unsure of its role in institutional reform litigation. The Court must not blindly protect the power of the federal government or the autonomy of the local government

300. 498 U.S. at 260-61 (Marshall, J., dissenting).
301. *Id.*

at the expense providing an effective resolution. When the Court accomplishes this feat, the city will cease to sway and the lingering effects of segregation will be eliminated. Life over the abyss will be a bit more stable than before.