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Missouri v. Jenkins: Yet Another Complicated Chapter in the Desegregation Saga

James Anthony Ben

CASENOTES

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I. INTRODUCTION

1954 was a watershed year for racial equality. The Supreme Court, in *Brown v. Board of Education*,[1] belatedly rejected the "separate but equal doctrine" of *Plessy v. Ferguson*,[2] as it pertained to public education.[3] The *Brown* Court held, "[w]e conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[4] In so doing, the Warren Court attacked a system of apartheid that had its origins in the pre-civil war south and was stamped with the approval of the Supreme Court in *Plessy*.

Brown I, established a straightforward doctrine: *de jure* segregation on the basis of race is, *per se*, a deprivation of the "equal protection of the laws guaranteed by the Fourteenth Amendment."[5] Yet, the Court recognized that dismantling dual systems of education would not be simple and, consequently, did not immediately announce a remedy.[6]

Because of the variety of conditions affecting each school district,

1. 347 U.S. 483 (1954) (*Brown I*).
2. 163 U.S. 537 (1896).
3. *See* Brown v. Board of Education, 347 U.S. 483, 494 (1954).
4. *Id.*
5. *Id.*
6. The Court observed: "Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity." Specifically, the Court requested the

the Court remanded the cases to the courts of first instance,[7] assigning the federal district courts the task of desegregating the nation's entrenched dual school systems.[8] *Brown II* instructed the federal courts to undertake this monumental task "guided by equitable principles," emphasizing "flexibility in shaping [their] remedies," and with a "facility for adjusting and reconciling public and private needs."[9] Further, the lower courts were to ensure that the defendants complied "with all deliberate speed."[10]

Certainly, the Court's trepidation in fashioning a satisfactory remedy is understandable. It is also understandable that local district courts were viewed as better able to deal with the divergent situations that affected minority students across the country.[11] However, in retrospect, the intense criticism spawned by the *Brown II* decision is equally understandable[12]—forty-three years after *Brown* the effects of segregated schools still confound communities and courts alike.

Regardless of one's view of the *Brown II* rationale, reality demands that its deficiencies be acknowledged. Despite decades of doctrine

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parties to present further argument on the two questions, numbered four and five, earlier propounded by the Court:

> 4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
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> (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, negro children should forthwith be admitted to schools of their choice, or
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> (b) May this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated school systems to a system not based on color distinctions?
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> 5. On the assumption which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),
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> (a) should this Court formulate detailed decrees in these cases;
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> (b) if so, what specific issues should the decrees reach;
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> (c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;
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> (d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees.

Id. at 494 n.13.

7. *See* Brown v. Board of Education, 349 U.S. 294, 299 (1955) (*Brown II*).

8. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1489 (2d ed. 1988).

9. 349 U.S. at 301.

10. *Id.*

11. *See id.* at 300-01.

12. *See* RICHARD H. SAYLER & BARRY B. BOYER, THE WARREN COURT: A CRITICAL ANALYSIS 46, 52-57 (1969); HARRY R. RODGERS & CHARLES S. BULLOCK, III., LAW AND SOCIAL CHANGE: CIVIL RIGHTS LAWS AND THEIR CONSEQUENCES, Ch. 4 (1972); Alexander Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193 (1964).

attempting to chart the boundaries of district courts' remedial authority to grant desegregation remedies, those boundaries remain far from clear. The Rehnquist Court has inherited the desegregation dilemma from the Burger and Warren Courts before it, and it too has struggled to find a solution.

In 1995, the Supreme Court decided *Missouri v. Jenkins,*[13] which involved an effort begun in 1977 to desegregate the Kansas City, Missouri schools.[14] After eighteen years, numerous appeals, and millions of dollars spent on educational improvements, the Supreme Court was asked to pass judgment on the propriety of two recent remedial orders of the district court. The Supreme Court accepted certiorari[15] to review two questions:

> 1. Whether a remedial education desegregation program providing greater educational opportunities to victims of past de jure segregation than provided anywhere else in the country nonetheless fails to satisfy the Fourteenth Amendment (thus precluding a finding of partial unitary status) solely because student achievement in the district, as measured by standardized test scores, has not risen to some unspecified level?
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> 2. Whether a federal court order granting salary increases to virtually every employee of a school district—including non-instructional personnel—as part of a school desegregation remedy conflicts with applicable decisions of this court which require that remedial components must directly address and relate to the constitutional violation and be tailored to cure the condition that offends the Constitution?[16]

A majority of the Court reversed and ruled that the district court had exceeded its remedial authority in ordering salary increases for virtually all instructional and non-instructional staff.[17] Further, the Court held it was error to "requir[e] the State to continue to fund the quality education programs because student achievement levels were still 'at or below national norms at many grade levels.'"[18]

This Note will examine in detail the Court's decision in *Jenkins* and analyze the current status of desegregation. Part II is a historical survey of desegregation jurisprudence; Part III details the procedural history and factual background of *Jenkins*; Part IV analyzes the majority opinion in *Jenkins,* and Part V will analyze the merits of the decision. Part

13. 115 S. Ct. 2038 (1995).
14. *See id.* at 2042.
15. *See id.* at 2041.
16. *See id.* at 2076.
17. *See id.* at 2055.
18. *Id.*

VI will conclude by arguing that the Court's decision unnecessarily constrained the ability of district courts to redress the present effects of past segregation.

II. Desegregation Jurisprudence: A Historical Survey

"In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black—but it is a course I predict, our people will ultimately regret."[19]

Justice Marshall's somber observation was made in *Milliken v. Bradley*,[20] the first case in which the Supreme Court overruled a desegregation decree.[21] More disturbingly, *Milliken* was also the first case in which the Court "rationalized a segregated result in a case where a constitutional violation had been found to exist."[22] Therefore, *Milliken* will serve as a line of demarcation for our analysis: remedial authority was expanded before it and has been contracted ever since.

A. *Desegregation 1954-1973*

Following *Brown II*, desegregation efforts faced strong opposition. Desegregation faced two foes: the vague mandate of *Brown II*, and fanatical racism.

Judicial confusion and resistance is best illustrated by Judge Parker's reading of *Brown II*, after remand of *Brown*'s companion case, *Briggs v. Elliot*.[23] In *Briggs*, Parker held that *Brown* did not require integration, but "merely forbid the use of government power to enforce segregation."[24]

Considering the social climate of the South following *Brown*, the delay in integration cannot be explained by the vagueness of *Brown II*, alone. Evidence of the South's blatant defiance of *Brown I* is contained in the Southern Manifesto.[25] The Manifesto was a Congressional pledge by Southern congressmen attacking the Court's decision in *Brown I* and vowing to "use all lawful means to bring about a reversal of this decision which is contrary to the Constitution."[26] The document was signed by 101 Congressmen representing the states of the old Confederacy, and was evidence that the gradual change anticipated by the "all deliberate

19. Milliken v. Bradley, 418 U.S. 717, 814 (1974) (*Milliken I*) (Marshall, J., dissenting).
20. *See id.*
21. *See* Tribe, *supra* note 8, at 1495.
22. *Id.*
23. 132 F. Supp. 776 (E.D.S.C. 1955).
24. *Id.* at 777.
25. 102 Cong. Rec. H3948, 4004 (daily ed. Mar. 12, 1956).
26. *Id.*

speed" standard would not translate into increased acceptability.[27]

Faced with open hostility to integration and abuse of the "all deliberate speed" standard, the Court eventually was forced to demand results. In *Cooper v. Aaron,*[28] the Supreme Court asserted its supremacy as the expositor of the Constitution, and demanded that offending school districts comply with *Brown I.*[29] Following *Aaron*, the notion of "all deliberate speed" became a demand for immediate results.[30] The Court next moved to invalidate desegregation plans that, although facially neutral, did not produce significant desegregation.[31]

Taking the offensive, the Court later approved sweeping remedial power for the district courts. In *Swann v. Charlotte-Mecklenburg,*[32] district courts were encouraged to take "affirmative action in the form of remedial altering of attendance zones . . . to achieve truly nondiscriminatory [student] assignments," and were authorized to use mathematical ratios and busing to achieve desegregation.[33] Thus, by 1971, the Court had greatly bolstered the arsenal of the district courts in the fight to desegregate. This trend, however, did not last.

B. *Desegregation 1974-1994*

In 1974, the Burger Court decided *Milliken v. Bradley*[34] which marked the first decision of the Court to constrain efforts toward desegregation. *Milliken* involved a district court's attempt to desegregate the Detroit public school system. Although the suburban school districts were found innocent of any constitutional violation, the district court

27. *See* RICHARD KLUGER, SIMPLE JUSTICE 752 (1975).

28. 358 U.S. 1 (1958).

29. *Cooper* involved a district court order granting a two and one-half year suspension of a school board's desegregation program. The district court's decision was granted amidst an atmosphere of "extreme public hostility, which had been engendered largely by the official attitudes and actions of the Governor and legislature. . . ." The district court and the school board contended that following Governor Orville Faubus' blockade of desegregation, peace and order in the schools could only be restored and maintained by delaying desegregation. Although the situation was severe, the Supreme Court would not bow to public pressure admonishing the district court that "law and order are not here to be preserved by depriving the Negro children of their constitutional rights." *Id.* at 16, 19-21.

30. *See, e.g.*, Watson v. Memphis, 373 U.S. 526 (1963)(holding the "all deliberate speed" standard inapplicable to recreational facilities and questioning its validity in the context of school desegregation).

31. *See, e.g.*, Goss v. Board of Education, 373 U.S. 683 (1963)(invalidating a plan that allowed students to transfer to schools where their race was a majority); Griffin v. County School Board, 377 U.S. 218 (1964) (invalidating school closures as a means of avoiding desegregation); Green v. County School Board, 391 U.S. 430 (1968) (invalidating "freedom-of-choice" plan because it had produced only token desegregation in its three years of operation).

32. 402 U.S. 1 (1971).

33. *Id.* at 25, 28, 30-31.

34. 418 U.S. 717 (1974).

ordered the fifty-three suburban districts surrounding metropolitan Detroit to consolidate with the Detroit school system and mandated busing throughout the new district irrespective of former district lines.[35] The Sixth Circuit Court of Appeals affirmed, rationalizing that "any less comprehensive a solution than a metropolitan area plan would result in an all-black system immediately surrounded by practically all-white suburban school systems."[36]

The Supreme Court reversed, holding that because evidence of *de jure* segregation was shown only with respect to the Detroit School system "[t]o approve the remedy ordered . . . would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy."[37] Professor Tribe has noted that the *Milliken* Court divided sharply over the proper reading of *Swann.* While the majority confined the holding of *Swann* as seeking only to "restore the victims of discriminatory conduct to the position they would have occupied *in the absence of such conduct,*"[38] the minority, Justices Marshall, Douglas, Brennan, and White, read *Swann* to require "that school authorities must, to the extent possible, take all practicable steps to ensure that Negro and white children in fact go to school together."[39] Thus, the *Milliken* majority granted the victims of unconstitutional segregation a hollow remedy: admission to a unitary school system that was in fact still segregated.

A later decision of the Court granted district courts a partial reprieve from the constraints of *Milliken.* In *Milliken v. Bradley II,*[40] the Supreme Court allowed the district court to order educational enrichment programs for the purpose of addressing the reduction in student performance in the Detroit schools as a result of segregation.[41]

In 1976, the Court decided *Washington v. Davis,*[42] which announced that "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[43] Thereafter, racial imbal-

35. *See* Bradley v. Milliken, 484 F.2d 215, 245 (6th Cir. 1973).

36. *Id.*

37. 418 U.S. at 745.

38. TRIBE, *supra* note 8, at 1494 n.9.

39. 418 U.S. at 802.

40. 433 U.S. 267 (1977).

41. *Id.* at 282. In the context of housing discrimination the Court did relax the demands of *Milliken* allowing a metropolitan area remedy following a violation that was limited to the Chicago city limits. *See* Hills v. Gautreaux, 425 U.S. 284 (1976).

42. 426 U.S. 229 (1976).

43. *Id.* at 240. *Davis* involved a challenge to a verbal skills test used in hiring by the District of Columbia police force. Blacks failed at a rate four times greater than whites. Black applicant's challenged the tests claiming that its impact established an equal protection violation. *See* TRIBE, *supra* note 8, at 1503.

ance alone, without racial animus (as in *de jure* cases), would not constitute an equal protection violation.[44] Unsurprisingly, the doctrine of *Washington v. Davis* also impacted the Court's desegregation Jurisprudence.[45]

Nor were desegregation efforts confined to the South. In *Keyes v. School District No. 1*,[46] decided before *Davis*, the Court held that because the Denver school board had deliberately segregated one section of the school district, there was the presumption that other segregated portions of the school district were the product of racial animus. Consequently, unless the school board was able to prove that *de facto* segregation in the remainder of the district was not the product of discriminatory intent, the court was free to order a system-wide remedy.[47]

Northern *de facto* segregation was addressed in *Columbus Board of Education v. Penick*.[48] There, the City of Columbus had had no statutorily-mandated segregation in the Twentieth Century. Nevertheless, systemwide relief was affirmed because "the Board's conduct at the time of trial and before not only was animated by an unconstitutional, segregative purpose, but also had current, segregative impact that was sufficiently systemwide to warrant the remedy ordered by the District Court."[49] Thus, after *Keyes*, *Dayton II*, and *Penick*, the intent element demanded by *Davis* was partially ameliorated by the use of the "taint" concept and inferences of intent, such as "actions having foreseeable and anticipated disparate impact [which] are relevant evidence to prove the ultimate fact, forbidden purposes were acceptable."[50] Despite the posi-

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44. Racial animus as a necessary element of an equal protection violation is facially unexceptional. However, this requirement is troubling when one considers that *Brown* sought to end educational apartheid and gave no deference to the possibility of benign purposes. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954); *cf.* Plessy v. Ferguson, 163 U.S. 537 (1896). Further, asking plaintiffs to prove racial animus is divisive, because it requires a charge that entire school boards acted with racism. *Cf.* Thornburg v. Gingles, 478 U.S. 30, 52-74 (1986) (discussing the rationale behind the amended Voting Rights Act's refusal to require racial animus as an element of minority vote dilution). Moreover, from an evidentiary perspective, racial animus is potentially difficult to prove.

45. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) (*Dayton I*) (Court vacated systemwide remedy ordered by district court in absence of intent to segregate despite racial imbalance and a "cumulative violation" of the equal protection clause).

46. 413 U.S. 189 (1973).

47. 413 U.S. at 208. Chief Justice, then Justice, Rehnquist dissented and took the majority to task for reading the Equal Protection Clause as "embody[ing] a principle of 'taint[.]'" *Id.* at 257. *See also* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (*Dayton II*) (holding isolated discriminatory acts shifted presumption to schoolboard to prove systemwide racial imbalance not the product of racial animus). *Dayton II* was a companion case to *Columbus Bd. of Educ. v. Penwick*, 443 U.S. 449 (1979).

48. 443 U.S. 449 (1979).

49. 443 U.S. at 455.

50. *Id.* at 464.

tive results for the respective claimants in *Keyes, Dayton II*, and *Penick*, students enrolled in segregated school systems were required to prove that their segregation was the result of *racial animus* to gain relief. Moreover, the future of desegregation was tenuous and dependent on the shifting majorities of the Court.[51]

Recent decisions of the Supreme Court have addressed the test for dissolving a desegregation decree. In *Board of Education v. Dowell*,[52] the Court determined that whether unitary status had been reached depended upon whether the district had complied with the desegregation decree and whether the vestiges of past *de jure* segregation had been eliminated to the extent practicable.[53] The next year, in *Freeman v. Pitts*,[54] the Court enunciated factors that a district court should address in determining whether it should withdraw its supervision over a district. These factors include the district's record of compliance, whether further control is necessary to gain compliance in other areas, and whether the district has shown a good faith commitment to the decree.[55] Moreover, both *Dowell* and *Pitts* allowed districts to adopt neutral policies after achieving unitary status even though those policies may have a resegregative effect.[56] Arguably, these decisions, while true to the laudable ideal of returning school districts to local control, may contribute to a return to significant racial imbalance.[57]

The Supreme Court has considered sound reasons for limiting the reach of desegregation remedies—the neighborhood school policy, the respect for district lines, the return of schools to local control—however, it is difficult to elevate any of these factors above the right to be free of segregation.[58] Undeniably, the attenuated causal chain linking *de jure* segregation to present day effects is becoming more difficult to establish, and courts' patience and ability to rectify desegregation is waning. Unfortunately, just as the courts seem to be losing the ability to deal with racial imbalance in education, the spectre of racial segregation in America's public schools still looms.[59]

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51. *See*, TRIBE, *supra* note 8, at 1499.

52. 498 U.S. 237 (1990).

53. *Id.* at 249.

54. 503 U.S. 467 (1992).

55. *Id.* at 488-89.

56. *See Pitts*, 503 U.S. at 485-92; *Dowell*, 498 U.S. at 250.

57. *See* Note, Bradley W. Joondeph, *Killing Brown Softly: The Subtle Undermining of Desegregation in Freeman v. Pitts*, 46 STAN. L. REV. 147, 160-65 (1993).

58. *See* TRIBE, *supra* note 8, at 1500.

59. *See* Gary Orfield et al., Deepening Segregation in American Public Schools (Apr. 5, 1997) (unpublished report, Harvard Project on School Desegregation) (on file with author).

III. *MISSOURI V. JENKINS*: THE PROCEDURAL HISTORY AND FACTS DETAILED

The origins of this case lie in a 1977 complaint brought by the Kansas City, Missouri school district (KCMSD), the school board, and two children of school board members alleging that the State of Missouri, surrounding suburban school districts (SSD), and federal agencies were responsible for racial segregation within the Kansas City schools.[60] After the complaint was filed, the district court realigned the KCMSD as a defendant along with the State, and dismissed the SSDs finding that the plaintiffs "simply failed to show that those defendants had acted in a racially discriminatory manner that substantially caused racial segregation in another district."[61]

At trial, the State of Missouri admitted that it had "mandated segregated schools for black and white children."[62] Moreover, the court found that the KCMSD and the State had failed in their affirmative duties to dismantle the dual system of education "still lingering in the KCMSD."[63] This finding was predicated upon the fact that in 1977, "25 one-race schools under the pre-1954 system remained 90% or more of the same race,"[64] and that by 1984, twenty-four schools within the KCMSD remained "racially isolated with 90% plus black enrollment."[65]

In light of these findings, the district court recognized that improvements had been made, including the elimination of the sixteen entirely white schools, the reduction of the ninety percent-plus black schools to twenty-eight, and that, by 1984, no school had less than thirty percent black enrollment.[66] However, these improvements were not enough to overcome the district court's finding that the vestiges of segregation still existed within the KCMSD, and therefore, the State of Missouri and the KCMSD had failed to meet their affirmative duty to effect a transition to a unitary school system.[67]

Having entered a judgment of liability against the State of Missouri

60. *See* Jenkins v. Missouri, 593 F. Supp. 1485, 1488 (N.D. Mo. 1984).

61. *Id.*

62. *Id.* at 1490. Segregation in Missouri was mandated by statute and by a provision of the Missouri Constitution. *See* MO. CONST. art. IX, § 1(a) (1945) (rescinded 1976); MO. REV. STAT. §§ 163.130, 165.117 (repealed 1957). Missouri did not immediately abrogate its segregation statutes following *Brown I*. Instead, the statutes were repealed in 1957 and the constitutional provision was rescinded in 1976. *See* Adams v. United States, 620 F.2d 1277 (8th Cir. 1980), *cert. denied*, 449 U.S. 826 (1980); United States v. Missouri, 363 F. Supp 739 (E.D. Mo. 1973), *aff'd*, 515 F.2d 1365 (8th Cir. 1975), *cert. denied*, 423 U.S. 951 (1975).

63. *Id.* at 1504.

64. *Id.* at 1492.

65. *Id.* at 1493.

66. *Id.*

67. *See id.* at 1504.

and the KCMSD, the district court delayed deciding upon a remedy. Instead, it required the defendants to submit a plan that would have "the effect of removing the vestiges of the dual system as it presently exists in the KCMSD."[68]

Nine months later, the district court entered its first remedial order seeking to eradicate "all vestiges of state imposed segregation" through the use of "its broad equitable powers."[69] Recognizing the complexity of the situation the district court stated:

> implementation of this plan will be difficult. 'The pain of transition is an unfortunate, but inevitable result of deliberate policies which have isolated black Americans from the schools. . . of white Americans.' Since the minority students in the KCMSD are the victims of racial discrimination which was mandated by the Constitution and statutes of the State of Missouri, it is only equitable to place the greatest burden of removing the vestiges of such discrimination and the continuing effects of the same on the State rather than on those who are the victims.[70]

Fully aware of the complexity of enforcing a desegregation remedy, the district court began its task. Initially, the district court found that student achievement within the schools of the KCMSD had been detrimentally affected by segregation, and consequently, the students in the KCMSD were performing below national levels.[71] This conclusion was supported by the expert testimony of Dr. Daniel Levine and Dr. Eugene Eubanks, and by the results of the Iowa Test of Basic Skills.[72] Further, educational experts testified that the KCMSD schools could "attain educational achievement results more in keeping with national norms," provided that the KCMSD schools had adequate resources, sufficient staff development, and proper teaching methods.[73]

As a result, the district court ordered quality education programs for all students within the district to improve educational achievement levels in the district. The district court's plan to improve education included:

> 1. Returning the KCMSD to a AAA rating, as determined by the Missouri State Department of Elementary and Secondary Education. In order that AAA rating be attained the KCMSD must:
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> (a) Improve its library facilities, and hire 13 certified elementary

68. *Id.* at 1506.

69. Jenkins v. Missouri, 639 F. Supp. 19, 23 (W.D. Mo. 1985).

70. *Id.* at 23-24 (quoting United States v. School District of Omaha, 521 F.2d 530, 546 (8th Cir. 1975)) (citations omitted).

71. *See id.* at 24.

72. *See id.*

73. *Id.*

school librarians and 9 senior high librarians. The total cost of library improvements was estimated at $950,000.

(b) Improve the teaching load and curriculum of teachers within the KCMSD. This requirement was to be met by the hiring of 62 additional teachers including teachers in the specialty areas of art, music, and physical education.

(c) Hire counselors to meet the requirement of 1 counselor for every 1,500 students at the elementary school level, and 1 counselor for every 390 students at the secondary level.[74]

2. Reduction in class size: limiting class size in kindergarten through third grade to 22 students; and class size in grades four and above to 27 students. These limitations required the hiring of 183 additional teachers. The costs allocated to achieving this goal were to be $2,000,000 in the first year, $4,000,000 in the second year, and $6,000,000 in the third year, totaling $12,000,000.[75]

3. Implementation of programs which will expand educational opportunities including: summer school; full day kindergarten; before and after school tutoring; and an early childhood development program.[76]

Further, the State was ordered to fund programs at the schools in the KCMSD.[77] Funding was mandated at both racially isolated schools and the other schools within the district. The parameters for the funding were:

1. For each of the 25 schools with enrollments of 90% or more black:

a. 1985/86 school year $75,000 each school
b. 1986/87 school year $100,000 each school
c. 1987/88 school year $125,000 each school

2. For each of the remaining forty-three schools:

a. 1985/86 school year $50,000 each school
b. 1986/87 school year $75,000 each school
c. 1987/88 school year $100,000 each school.[78]

In addition to redressing the reduced achievement levels in the KCMSD, the district court sought to desegregate the racially isolated schools within the district.[79] The court realized that the demographics of the Kansas City metropolitan area would still make desegregation difficult: "[t]o accomplish desegregation within the boundary lines of a school district whose enrollment remains 68.3% black is a difficult

74. *Id.* at 26-27.
75. *Id.* at 28-30.
76. *Id.* at 30-33.
77. *Id.* at 33-34.
78. *Id.* at 33.
79. *See id.* at 37.

task."[80] Moreover, the district court recognized the limitations of its remedial power. It could not order the restructuring of operations of local and state government entities beyond the boundary lines of the KCMSD because it had found only an intradistrict violation.[81] Thus, the court recognized that *Milliken I* imposed an obstacle to a desegregation remedy affecting any school district beyond the KCMSD.

Consequently, the district court was relegated to attempting to desegregate a school district where the majority of students were black. Realizing that mandatory student reassignments within the district would likely lead to white-flight, exacerbating segregation, the court abandoned this option.[82] Instead, the court sought to attract voluntary transfers into the KCMSD through improving the quality of education within the district by achieving AAA status, establishing quality education programs, reducing class size, and creating magnet schools within the district.[83] Ultimately, the court attempted to influence racial patterns within the KCMSD by promoting the attractiveness of the schools, thereby increasing the desire of students, and their parents, to enroll in the enhanced KCMSD schools. The district court also targeted capital improvements as part of its desegregation remedy. The court concluded:

> [the] deteriorating conditions of the facilities include safety and health hazards, educational environmental impairments, functional impairments, and appearance impairments. The problems include extremes of heat and cold due to faulty heating systems, peeling paint, broken windows, odors resulting from inadequate and deteriorating ventilation systems, improper lighting, wiring problems, inadequate storage, lack of appropriate space for library and resource rooms, crumbling playground equipment installed over hard surfaces, water damage due to roof leakage, and deterioration of steps in school access areas.[84]

Stating the obvious, the court asserted that "a school facility which presents safety and health hazards to its students and faculty members serves both as an obstacle to education as well as to maintaining and

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80. *Id.* at 38. In its initial decision, finding the State of Missouri liable for the segregation within the KCMSD, the district court also found that the State had undertaken positive acts which discriminated against blacks including: segregating schools, segregating institutions of higher education, allowing communities to establish separate libraries, parks, and playgrounds for blacks and whites, proscribing marriages between persons 1/8 negro and a white person, and enforcing racially restrictive covenants. Further, the district court reasoned that these acts, having placed the State's imprimatur upon racial discrimination, encouraged private discrimination against blacks in the real estate, banking, and insurance industries. Thus, the State may incur liability for the racially segregated residential patterns within metropolitan Kansas City. 593 F. Supp. at 1503.

81. *Id.* at 38.

82. *See id.*

83. *See id.* at 38.

84. *Id.* at 39-40 (citations omitted).

attracting non-minority enrollment."[85] Hence, the district court's initial order focused on removing the vestiges of past unlawful segregation. Specifically, it focused on improving the educational environment within the district by improving educational programs and capital resources, thereby, promoting the desegregation of the KCMSD by enhancing its viability as an educational alternative in the Kansas City, Missouri area.

Since 1985, the district court has continued to order enhancements to the district aimed at achieving its original goal of the "elimination of all vestiges of state imposed segregation."[86] Consequently, in 1986, the district court approved a comprehensive magnet school program whereby all senior high schools, all middle schools, and half of all elementary schools would be converted to magnet schools.[87] The district court stated two goals for the magnet school program. First, it would improve the educational opportunities for students within the district, and, second, it would attract students into the district.[88] Ultimately, the district court's orders have resulted in:

> high schools in which every classroom will have air conditioning, an alarm system, and 15 microcomputers; a 2,000 square-foot planetarium; green houses and vivariums; a twenty-five acre farm with an air-conditioned meeting room for 104 people; a Model United Nations wired for language translation; broadcast capable radio and television studios with an editing and animation lab; a temperature controlled art gallery; movie editing and screening rooms; a 3,500 square-foot dust-free diesel mechanics room; 1,875 square-foot elementary school animal rooms for use in a zoo project; swimming pools and numerous other facilities.[89]

The costs of implementing the district court's orders have largely been borne by the State.[90]

In 1992, the district court ordered that the State fund additional salary increases for KCMSD instructional and noninstructional staff,[91] and that it continue funding the remedial quality education programs for the 1992/93 school year.[92] The State challenged these orders contending

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85. *Id.* at 40. The total cost of capital improvements ordered by the district court exceeds $540,000,000. *See* Missouri v. Jenkins, 115 S. Ct. 2038, 2044 (1995).

86. *Id.* at 23.

87. *Jenkins*, 115 S. Ct. at 2043.

88. *See id.*

89. *Id.* at 2044-45 (quoting Missouri v. Jenkins, 495 U.S. 33, 77 (1990) (Kennedy, J., concurring in part and concurring in judgment)).

90. *See* Missouri v. Jenkins, 495 U.S. 77 (1990) for treatment of the district court's order compelling the local government to impose taxes to fund the improvements.

91. *See* District Court's Order of June 15, 1992.

92. *See* District Court's Order of June 17, 1992.

that the order requiring the salary increases was beyond the district court's remedial authority, and that it had achieved partial unitary status regarding the quality education programs.[93]

The district court denied the State's assertion that the salary increases were beyond its remedial authority and found that the increases were appropriate because "high quality personnel are necessary not only to implement specialized desegregation programs intended to 'improve educational opportunities and reduce racial isolation' . . . but also to 'ensure that there is no diminution in the quality of its regular academic program.'"[94] Further, the court ordered the State to continue to fund the quality education programs for the 1992/93 school year without specifically addressing the State's contention that it had reached partial unitary status.[95]

The Eighth Circuit Court of Appeals affirmed the decision of the district court.[96] Regarding the salary increases, the court of appeals rejected the State's argument that the salary increases were not directly related to the State's constitutional violation, and that "low teachers salaries did not flow from any earlier constitutional violations by the State."[97] In affirming the salary increases, the court of appeals also recognized that the remedy granted by the district court had the additional goal of "reversing white flight by offering superior educational opportunities."[98]

Moreover, although the district court did not address this issue, the court of appeals determined that the district court had implicitly rejected the State's contention that it had achieved partial unitary status.[99] Relying on comments made by the district court during a May 28, 1992 hearing, the court of appeals determined that the district court had considered and rejected the partial unitary status argument. The comments were:

> The court's goal was to integrate the Kansas City, Missouri school district to the maximum degree possible, and all these other matters were elements to be used to try to integrate the Kansas City, Missouri schools, so the goal is integration. That's the goal. And a high standard of quality education. The magnet schools, the summer school program and all these programs are tied to that goal, and until such time as that goal has been reached, then we have not reached the goal. . . . The goal is to integrate the Kansas City, Missouri school

93. *See Jenkins*, 115 S. Ct. at 2045.
94. *Id.* at 2038.
95. *Id.*
96. Missouri v. Jenkins, 11 F.3d 755 (8th Cir. 1993).
97. *Id.* at 767.
98. *Id.*
99. *See id.* at 765.

district. So I think we are wasting our time.[100]

Thus, the Eighth Circuit rejected the argument that the State had achieved partial unitary status and announced the relevant inquiry for determining unitary status, stating that the significant factor was not "implementation" of the programs, but rather "whether the vestiges of segregation, here the system-wide reduction in student achievement, have been eliminated to the greatest extent possible."[101] Subsequently, the Supreme Court granted the State's petition for certiorari to review the order requiring the State to continue funding the quality education programs and to fund salary increases.[102]

IV. *MISSOURI V. JENKINS:* THE COURT'S DECISION

In *Jenkins*, a majority of the Court[103] held that the district court exceeded its discretion in ordering the State to fund salary increases.[104] Initially, the Court canvassed the limitations of the district court's remedial authority, namely, that "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation,"[105] and that "[the remedy] must directly address and relate to the constitutional violation itself."[106] Thus, the propriety of the salary orders depended on whether they "rested upon . . . [a] proper means to the end of restoring the victims of discriminatory conduct to the position they would have occupied in the absence of that conduct."[107]

In determining whether the salary orders were proper, the Court returned to its holding in *Milliken v. Bradley* (*Milliken I*),[108] that "without an interdistrict violation and interdistrict effect, their is no constitutional wrong calling for an interdistrict remedy."[109] The Court then proceeded to characterize the salary order as an illicit interdistrict remedy that went beyond the district court's remedial authority "to eliminate to the extent practicable the vestiges of prior *de jure* segregation within the KCMSD: a systemwide reduction in student achievement and the existence of twenty-five racially identifiable schools with a population of over 90% black students."[110]

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100. *Id.* at 761.
101. *Id.* at 766.
102. *See supra* note 16 and accompanying text.
103. Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas comprised the majority.
104. *See Jenkins*, 115 S. Ct. at 2055.
105. *Id.* at 2049 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)).
106. *Id.* at 2049 (quoting *Milliken v. Bradley*, 433 U.S. 267, 282 (1977)).
107. *Id.*
108. *See id.* at 2051; *see also supra* notes 32-37 and accompanying text.
109. Milliken v. Bradley, 418 U.S. 717, 745 (1974).
110. *Jenkins*, 115 S. Ct. at 2050 (citations omitted).

The Court based this conclusion on the purpose behind the salary orders: enhancing the desegregative attractiveness of the KCMSD.[111] Justice Rehnquist reasoned that by seeking to entice non-minority students into the KCMSD through improved education, the district court had "devised a remedy to accomplish indirectly what it admittedly lacks the authority to mandate directly: the interdistrict transfer of students."[112] The Court concluded that the voluntary interdistrict transfers expected to follow from the enhanced "desegregative attractiveness," were comparable to the mandatory busing of Detroit area students in *Milliken I.* Once satisfied that the remedy was interdistrict, the Court's decision that it was invalid followed logically from the lower court's decision that only an intradistrict violation had occurred.[113]

Consideration then turned to the district court's mandate that the State continue to fund quality education programs. The district court order required continued State funding of quality education programs because "student achievement levels were still 'at or below national norms at many grade levels.'"[114] The State's specific challenge to this portion of the district court's order was that "while a mandate for specific educational improvement, both in teaching and in facilities, may have been justified originally, its indefinite extension is not."[115]

There were two justifications for the institution of quality education programs in the KCMSD: First, to remedy low student achievement due to unlawful segregation; and second, to promote the desegregative attractiveness of the schools. Unsurprisingly, following the Court's rejection of desegregative attractiveness as a valid predicate for increasing salaries, it rejected desegregative attractiveness as a justification for requiring continued State funding of quality education programs.[116]

No factfindings were contained in the district court's order mandating continued funding of the quality education programs.[117] Troubled by this, the Court concluded that detailed factfinding, and clear articulation of these findings, was necessary to the determination of whether a school district operating under a school desegregation order has reached partial unitary status.[118] Although this deficiency was recognized by the court of appeals, it nevertheless had affirmed the district court's order, relying on the general assertion that the KCMSD had not achieved its

111. *See id.* at 2051.
112. *Id.*
113. *See supra* note 80 and accompanying text.
114. *Id.* at 2055.
115. *Id.*
116. *See id.*
117. *See id.*
118. *See id.*

"maximum potential because the [school] district was still at or below national norms at many grade levels."[119]

The Court, however, rejected both the generalized reasoning of the district court and the "maximum potential" test.[120] Instead, the Court enunciated that the relevant question the district court must consider on remand is whether "the reduction in achievement by minority students attributable to prior *de jure* segregation has been remedied to the extent practicable."[121] Further, the Court emphasized the necessity for findings that demonstrate the incremental effect of segregation upon minority student achievement.[122]

Finally, the Court advised the district court to utilize the three-part *Freeman* test in determining whether control of the district should be returned to the local authorities.[123] Moreover, the Court recommended that the district court consider that the State's responsibility for the quality education programs was limited to funding, rather than implementation, thus decreasing the State's responsibility for the current status of student achievement levels.[124] Ultimately, the use of student achievement levels as a factor in determining whether unitary status had been achieved was explicitly disfavored because "numerous external factors beyond the control of the KCMSD and the State affect minority achievement."[125] In concluding its opinion, the majority cautioned the district court that "its end purpose is not only to remedy the violation to the extent practicable, but also to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution."[126]

V. ANALYSIS

This analysis will center on three aspects of the Court's opinion: first, the decision to reach the underlying goal of desegregative attractiveness, second, the Court's view that desegregative attractiveness was

119. Missouri v. Jenkins, 11 F.3d 733 (8th Cir. 1993).

120. *See Jenkins*, 115 S. Ct. at 2055.

121. *Id.* (quoting Board of Education v. Dowell, 498 U.S. 237 (1991)).

122. *See Jenkins*, 115 S. Ct. at 2055.

123. The test enunciated in *Freeman* is: (1) whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; (2) whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and (3) whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the Court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance. Freeman v. Pitts, 503 U.S. 467, 491 (1992).

124. *See Jenkins*, 115 S. Ct. at 2055.

125. *Id.* at 2056.

126. *Id.*

the sole goal for the salary increases, and, third, the Court's extension of the *Milliken I* doctrine to the facts of this case.

A. *The Majority's Decision to Reach the Merits of the Underlying Goal of Desegregative Attractiveness*

Initially, the majority and dissent disagreed regarding whether the district court's goal of achieving desegregative attractiveness should be reached. The majority concluded that it must reach this issue, the dissent disagreed. The significance of this discord is that the majority addressed the lower court's entire remedial scheme which spanned decades, while the dissent, authored by Justice Souter, limited its analysis to the two orders specifically challenged.

The majority concluded that the district court's "basis for its salary order was grounded in improving the desegregative attractiveness of the KCMSD."[127] Therefore, the Court decided that it must address the propriety of the goal of attaining desegregative attractiveness, and, ultimately, whether the district court's focus on this goal was permissible.[128] However, the dissent disagreed, and stated that the questions presented could be answered without reaching the underlying goal of desegregative attractiveness.[129]

Rule 14.1(a) of the Supreme Court governs what issues may be considered by the Court, and states that: "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court."[130] The Court has held that an issue is fairly comprised in a question presented if "the determination of the question is essential to the correct disposition of the other issues in the case. . . ."[131]

Obviously, this rule, as well as the cases cited by the Court construing it, is malleable. Ultimately, the Court's view of the case will determine whether it believes an issue is "essential to the correct disposition"

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127. *Id.* at 2047.

128. *See id.*

129. *Id.* at 2076.

130. SUP. CT. R. 14.1. The text of the rule reads:

> 1. A petition for a writ of certiorari shall contain, in the order indicated:
> (a) The questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive . . . . The questions shall be set out on the first page following the cover, and no other information may appear on that page. The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only questions set out in the petition, or fairly included therein, will be considered by the Court.

SUP. CT. R. 14.1(a).

131. United States v. Mendenhall, 446 U.S. 544, 551 n.5 (1980); *see also* Procunier v. Navarette, 434 U.S. 555, 561 n.6 (1977) (holding that the issue was included in the question presented because it was "essential to analysis of the Court of Appeals [decision]").

of the controversy. Here, the majority and dissent had divergent viewpoints; this ultimately determined the issues that the majority and dissent were willing to reach.

Justice Souter read the two questions accepted for certiorari as requiring analysis of only two discreet issues:

> [1] the extent to which a district court may look at students' test scores in determining whether a school district has attained partial unitary status as to its *Milliken II* educational programs, and [2] whether the particular salary increases ordered by the District Court constitute a permissible component of its remedy.[132]

Souter resolved that both issues could be answered without examining the magnet school concept, and that the Court, by deciding this ancillary issue, had run afoul of Rule 14.1.[133] Further, Justice Souter stated that if, arguendo, the Court was correct that this issue could be reached without offending Rule 14.1, "the critical inquiry is whether that issue may fairly be decided without clear warning."[134]

Justice Souter then demonstrated that both questions presented could be answered without reaching the foundational issue. Addressing the role of test scores in determining whether the district had achieved partial unitary status, Souter read the findings of the district and appellate courts differently than the majority. He concluded that the test scores were not dispositive in denying unitary status for the district.[135] Justice Souter cited the concurring opinion of the Eighth Circuit, denying rehearing *en banc*, in support of his argument: "[n]othing in this court's opinion, the district court's opinion, or the testimony of KCMSD's witnesses indicates that test results were the only criteria used in denying the State's claim that its obligation for the quality education programs should be ended by a declaration that they are unitary."[136]

Instead, Justice Souter reasoned that unitary status was denied because the State did not attempt to show that they met the standards of *Freeman*, and would not have satisfied the test had they attempted to do so.[137] Indeed, Justice Souter stated that the State failed to allege compli-

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132. *Jenkins*, 115 S. Ct. at 2077.

133. *Id.* at 2076. *See also* Procunier v. Navaratte, 434 U.S. 555, 560 n.6 (1978) (construing the requirements of Supreme Court Rule 14.1).

134. *Jenkins*, 115 S. Ct. at 2077. Souter argued that because a challenge to the validity of the entire remedial scheme had earlier been denied certiorari, the plaintiffs were without warning that the entire remedial scheme was threatened. *See id.*

135. *See id.* at 2078.

136. *Id.* at 2078 (quoting Missouri v. Jenkins, 19 F.3d 393, 395 (8th Cir. 1994) (Gibson, J., concurring in denial of rehearing en banc)).

137. *See Jenkins*, 115 S. Ct. at 2078. Again, the *Freeman* test is:
(1) whether there has been full and satisfactory compliance with the decree in those aspects of the

ance with two prongs of the *Freeman* test.[138] Further, Souter determined that had the State attempted to satisfy the *Freeman* test, it would have failed, because no evidence was presented on the effects of the quality education programs as demanded by *Freeman*.[139]

Souter declared that under both *Freeman* and *Dowell,* the initial requirement in determining unitary status is that "to the extent reasonably possible, a constitutional violator must remedy the ills caused by its actions before it can be freed of the court-ordered obligations it has brought upon itself."[140] Therefore, Justice Souter demanded that a proper record be established to determine whether improvement in education programs had cured the deficiency in the district to the extent practicable.[141]

Consequently, Justice Souter decided that the first question presented could be decided without reaching the merits of the "magnet school concept." Similarly, Souter determined that the second question, challenging the order requiring salary increases, could have been resolved without reaching the permissibility of desegregative attractiveness as an underlying goal for the increases.

Although the majority viewed desegregative attractiveness as the sole goal of the salary increases, Souter found that the district court viewed the salary increases as vital to the goal of improving student achievement.[142] Souter noted that the district court justified its salary increases because of their potential to improve education within the district: "[i]t is essential that the KCMSD have sufficient revenues to fund an operating budget which can provide quality education, including a high quality faculty."[143]

Moreover, Souter argued that the 1992 salary order was beyond question because the State agreed to further fund the salary increases in 1990, and because the 1992 order merely maintained existing salary levels.[144] Thus, Souter was satisfied that the district court had ordered

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system where supervision is to be withdrawn; (2) whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and (3) whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the Court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.

138. *See Jenkins*, 115 S. Ct. at 2079.

139. *See id.* at 2080.

140. *Id.*

141. *Id.* Justice Souter conceded that the significance of test scores is a matter of judgment, but stated that they must play a role in the analysis. *Id.* at 2081.

142. *See id.*

143. Missouri v. Jenkins, 672 F. Supp. 400, 410 (W.D. Mo. 1987).

144. *See Jenkins*, 115 S. Ct. at 2081. Further, Justice Souter observed that failing to maintain

continued funding of salaries with periodic increases because it was essential to remedy reduced achievement levels.[145] Therefore, Justice Souter claimed that the majority was in error because it looked only to "desegregative attractiveness" as the goal of the salary increases and ignored the effort to promote student achievement.[146]

It is difficult to understand the Court's apparent rush to decide a foundational issue, that arguably may not have been included in the questions presented, without allowing the parties an opportunity to fully brief and argue the broad issue.[147] Moreover, because the Court's decision significantly expanded the reach of *Milliken I,* thereby limiting the ability of courts to effect meaningful desegregation through the use of *Milliken II* remedies, it is troubling that the Court would decide this issue without allowing the parties the fullest opportunity to litigate.[148]

B. *The Court's Refusal to Recognize Salary Increases as Germane to the District Court's Milliken II Remedial Scheme*

The Court focused its analysis entirely on the lower court's purported goal of achieving "desegregative attractiveness."[149] However, in so doing the majority ignored the district court's reasoning that the salary orders were necessary to effectuate its remedial scheme. The district court ordered salary increases beginning in 1977 to benefit the KCMSD's academic program, stating: "it is essential that the KCMSD have sufficient revenues to fund an operating budget which can provide quality education, including a high quality faculty."[150] Thus, the salary increases were justified as essential to the district court's remedial program imposed to improve the quality of education within the KCMSD.

In *Milliken II,* the Court affirmatively approved of remedial education programs "designed to wipe out continuing conditions of inequality produced by the inherently unequal dual school system long maintained by [the district]."[151] Similarly, here, the district court unequivocally determined that "[s]egregation has caused a systemwide *reduction* in student achievement in the schools of the KCMSD,"[152] and ordered a remedial program to improve student achievement.[153] Further, the dis-

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the salary orders in 1992 would have caused salary levels to fall to their 1986-1987 levels, resulting in salaries in the KCMSD being forty to fifty percent below the nationwide level. *Id.*

145. *See id.* at 2082.

146. *See id.* at 2082-83.

147. Justice Souter made this argument. *Id.* at 2078.

148. *See id.*

149. *See id.* at 2055.

150. Jenkins v. Missouri, 672 F. Supp. 400, 410 (W.D. Mo. 1987).

151. Milliken v. Bradley, 434 U.S. 267, 290 (1977) (*Milliken II*).

152. Jenkins v. Missouri, 639 F. Supp. 19, 24 (W.D. Mo. 1985).

153. *See id.*

trict court explicitly recognized the need for an operating budget sufficient to ensure the KCMSD with a "high quality faculty."[154]

Justice Souter recognized that *Milliken II* approved the remedial goal of addressing reduced student achievement in a previously segregated district, and therefore, concluded that the relevant inquiry was whether the salary increases were reasonably related to improving student achievement. That argument has merit. However, the Court recognized only the goal of desegregative attractiveness, stating "we conclude that the District Court's order of salary increases, which was 'grounded in remedying the vestiges of segregation by improving the desegregative attractiveness of the KCMSD' is simply too far removed from an acceptable implementation of a permissible means to remedy previous legally mandated segregation."[155] Thus, the majority's narrow focus ignored the permissible rationale for the salary increases and instead, focused solely on "desegregative attractiveness" as an impermissible interdistrict remedy. This narrow focus, when combined with the expansion of the doctrine of *Milliken I*, potentially threatens all *Milliken II* remedies designed to eradicate vestiges of prior segregation—most importantly, low student achievement levels.

C. *The Court's Expansion of the Definition of "Interdistrict Remedy"*

The majority opinion makes its most glaring error in its characterization of the district court's remedial scheme as an interdistrict remedy. The Court held that the district court's order approving salary increases was "an interdistrict goal . . . beyond the scope of the intradistrict violation identified by the District Court"[156] because the order was not predicated solely on redistributing students within the KCMSD, but instead hoped to attract non-minority students from beyond the KCMSD's boundaries.

Clearly, the district court hoped to achieve desegregation by enticing the voluntary transfer of students into the KCMSD.[157] However, a hoped for voluntary transfer of students into the district is not an interdistrict remedy as contemplated by the *Milliken I* Court.[158]

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154. Jenkins v. Missouri, 672 F. Supp. 400, 410 (W.D. Mo. 1987).

155. *Jenkins*, 115 S. Ct. at 2055 (quoting Appendix to Petition for Certiorari, at A-90) (citations omitted).

156. *Id.* at 2051.

157. *See* Jenkins v. Missouri, 639 F. Supp. 19, 38 (W.D. Mo. 1985).

158. The validity of the holding of *Milliken I* is certainly open to debate; it eviscerated *Brown* in precisely the areas where segregation was most pervasive. As a result, district courts have few choices in attempting desegregate a district which is racially isolated. However, the *Milliken I* decision is over twenty years old, therefore, questioning its validity today is of doubtful value.

In *Milliken I*, the Court invalidated a district court's remedy that attempted to redress segregation in the Detroit school system by mandating fifty-three suburban school districts to participate in the desegregation order, although none of the fifty-three suburban districts had committed a constitutional violation.[159] The Supreme Court held that the district court's remedy was impermissible because "approv[al] of the remedy ordered . . . would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy."[160]

The interdistrict remedy imposed in *Milliken I*, however, is easily distinguished from the remedy imposed by the district court in *Missouri v. Jenkins*. In *Milliken I*, the district court ordered sovereign districts, innocent of constitutional wrong, to bus students into the Detroit school system and to accept students bused out of Detroit.[161] Thus, the Court recognized that the remedy, if approved, would have resulted in the district court becoming the "school superintendent for the entire area" and a "de facto legislative authority."[162] Professor Tribe has accurately attributed the decision to the Court's "emphasis on the significance of local control over the operation of schools."[163] Furthermore, in his *Milliken I* dissent, Justice White commented on the majority opinion's "talismanic invocation of the desirability of local control over education."[164]

It, therefore, becomes clear that the *Milliken I* Court found the "interdistrict" remedy objectionable because it commanded local government entities to relinquish control of their school districts to the district courts, although they, themselves, had committed no wrong. Yet, the district court, in attempting to remedy the past segregation within the KCMSD, has imposed no affirmative burdens on any district except the KCMSD. Neither the use of a magnet school concept, nor the goal of "desegregative attractiveness," threaten the sovereignty of any other school district. Thus, it is implausible to equate the affirmative command of a district court to bus students across district lines with the goal of hoping to attract non-minority students into the KCMSD. As one commentator has observed:

By holding that the salary assistance order in *Jenkins* was an interdis-

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However, the Court's expansive reading of *Milliken I* is troubling because it has the potential of severely reducing a court's ability to address problems resulting from segregation through means other than student transfers.

159. *See supra,* notes 34-39 and accompanying text.

160. Milliken v. Bradley, 418 U.S. 717, 745 (1973) (*Milliken I*).

161. *See* Bradley v. Milliken, 484 F.2d 215, 245 (6th Cir. 1973).

162. *Milliken*, 418 U.S. at 725.

163. TRIBE, *supra* note 8, at 1495.

164. *Milliken*, 418 U.S. at 778 (White, J., dissenting).

> trict remedy, the Court misapplied the principles of *Milliken I.* As *Gautreaux* confirmed, the remedy in *Milliken I* was 'interdistrict' because it placed significant affirmative obligations on 'innocent' suburban school systems, usurping much of their legally conferred authority; it essentially abolished the boundaries of fifty-four school districts. By contrast, the salary assistance order in *Jenkins* imposed no affirmative obligations on any other school district other than the one in which the violation occurred, and it did not encroach on any other school systems' autonomy. The only sense in which the salary relief order was interdistrict was that it was partly designed to induce some purely voluntary interdistrict effects. The court's conceptualization of the term 'interdistrict remedy' in *Jenkins* ignored this distinction. It simply equated any contemplated interdistrict effects with an interdistrict remedy.[165]

Despite the patent factual distinction between the instant case and *Milliken I*, the majority applied the holding and declared that "the District Court has devised a remedy to accomplish indirectly what it admittedly lacks the remedial authority to mandate directly: the interdistrict transfer of students."[166] However, this is precisely the reason that the district court did not exceed its authority; it did not directly compel the interdistrict transfer of students.

> The best understanding of the salary relief order is not as an interdistrict remedy but as an intradistrict remedy with potential interdistrict effects. As such, it was virtually indistinguishable from any other compensatory education remedy in a desegregation case. As the Court acknowledged in the majority opinion in *Jenkins*, any remedial program that improves the quality of education in a formerly segregated district will enhance that school district's attractiveness in relation to surrounding schools.[167]

Clearly, the *Jenkins* Court has significantly expanded the definition of "interdistrict remedy" beyond the vision of *Milliken I*, which proscribed remedies that placed affirmative obligations on independent and innocent government bodies. Now any remedy potentially impacting an independent government entity is vulnerable. Undoubtedly, a district court attempting to eradicate the effects of desegregation is likely to recognize, if not explicitly hope for, potential impacts beyond district lines. However, the rationale of *Jenkins* will potentially expose any *Milliken II* remedial scheme, designed to improve the quality of education within a district, to a challenge predicated on *Jenkins*.

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165. Bradley W. Joondeph, *Missouri v. Jenkins And The De Facto Abandonment of Court-Enforced Desegregation*, 71 WASH. L. REV. 597, 634-35 (1996) (footnotes omitted).

166. *Jenkins*, 115 S. Ct. at 2051.

167. Joondeph, *supra* note 165, at 631 (footnotes omitted).

VI. CONCLUSION

Today, forty-three years after *Brown I,* racial segregation is pervasive at a level not seen since *Brown I* was decided.[168] Moreover, racial tension continues to be among America's most pressing concerns.[169] Clearly, much work remains before the malingering effects of slavery and segregation can be eradicated. Yet at the same time, society[170] and our courts[171] seem to be losing the patience and commitment necessary to redress the consequences of America's history of apartheid. A superficial reading of *Missouri v. Jenkins* will likely cause little alarm for the average American. Missouri has not practiced *de jure* segregation since 1957. This litigation, itself, is twenty years old and millions have been spent transforming the KCMSD into a quality district. Most would likely conclude that "[w]e've done all we can." However, one fact remains: the district court found that the students in the KCMSD were functioning below national norms because of the past segregation practiced in the KCMSD. As Justice Ginsberg observed in her dissent:

> The Court stresses that the present remedial programs have been in place for seven years. But compared to more than two centuries of firmly entrenched official discrimination, the experience with the desegregation remedies ordered by the District Court has been evanescent.
>
> In 1724, Louis XV of France issued the Code Noir, the first slave code for the Colony of Louisiana, an area that included Missouri. When Missouri entered the Union in 1821, it entered as a slave State.
>
> Before the Civil War, Missouri law prohibited the creation or maintenance of schools for educating blacks: 'No person shall keep or teach any school for the instruction of negroes or mulattos, in reading or writing, in this State.
>
> Beginning in 1865, Missouri passed a series of laws requiring separate public schools for blacks. After this Court announced its decision in *Brown,* Missouri's Attorney General declared these provisions mandating segregated schools unenforceable. The statutes were repealed in 1957 and the constitutional provision was rescinded in 1976. Nonetheless, thirty years after *Brown,* the District Court found

168. *See* Orfield, *supra* note 59.

169. *See* Cedric Merlin Powell, *Blinded By Color: The New Equal Protection, The Second Deconstruction, And Affirmative Inaction,* 51 U. MIAMI L. REV. 191, 192-94 (1997) (cataloging recent newspaper quotations bemoaning the state of race relations in America).

170. *See, e.g.,* Cal. Prop. 209. This affirmative action initiative amended the California Constitution, prohibiting the state, municipalities, and public schools and colleges from discriminating on the basis of race, sex, color, ethnicity, or national origin in the areas of employment, public education, or public contracting. *See* CAL. CONST. art. I, § 31(a) (amended 1996).

171. *See, e.g.,* Adarand Constructors v. Pena, 115 S. Ct. 2097 (1995).

> that the 'inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District.'[172]

In essence, the students of the KCMSD are left with no remedy to combat the lingering effects of Missouri's history of segregation. Even more disturbing, the Court's decision has constrained the ability of district courts to impose *Milliken II* remedies in an era where such remedies may be the only means of equalizing the education received in America's schools.

JAMES ANTHONY BEN

172. *Jenkins*, 115 S. Ct. at 2091 (Ginsburg, J., dissenting).