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School Desegregation -- Failure To Revamp Segregated School District Attenuates the Milliken v. Bradley Barrier to Federal Interdistrict Remedies United States v. Missouri, 515 F.2d 1365 (8th Cir.), Cert. Denied, 96 S. Ct. 374 (1975)

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child and the parent, the Borough should have to prove only that the curfew actually fosters the well-being of the child and the family.[54] The *Bykofsky* court, however, did not require any evidence to that effect, but instead deferred to the Borough's judgment. When an ordinance threatens important familial prerogatives, spontaneous deference to governmental interests becomes impermissible.

Until the Supreme Court establishes more helpful guidelines for analyzing the relationship between the constitutional rights of adults and juveniles, the lower courts should remain abreast of the trend favoring expansion of juvenile liberties. Courts should formulate their own thoughtful analytic criteria. When judges determine that juveniles have as great an interest in a particular right as adults have, they should not hestitate to demand that only the weightiest governmental interest would suffice to deprive juveniles of their freedom.

CONSTITUTIONAL LAW—SCHOOL DESEGREGATION—FAILURE TO REVAMP SEGREGATED SCHOOL DISTRICT ATTENUATES THE *Milliken v. Bradley* BARRIER TO FEDERAL INTERDISTRICT REMEDIES. *United States v. Missouri*, 515 F.2d 1365 (8th Cir.), *cert. denied*, 96 S. Ct. 374 (1975).

Kinloch School District, small and all-black, adjoins the predominantly white Berkeley and Ferguson-Florissant School Districts in St. Louis County, Missouri. Kinloch and Berkeley had comprised one district until 1937, when they split along racial lines.[1] In 1971 the United States, pursuant to Title IV of the Civil Rights Act of 1964[2] and the

ment's Religion Clauses, 75 W. VA. L. REV. 213, 232 (1973); Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383, 1392-94 (1974).

54. *See generally* Note, *supra* note 53, at 1394-1409.

[Note by Bruce A. Budner.]

1. The Missouri constitution had required the original Kinloch School District to operate segregated schools. MO. CONST. art. IX, § 3 (1875). A vote of the white residents to incorporate their portion of the district as the City of Berkeley, despite protests from the newly isolated black residents, induced the racial dissociation. The school district structure mandated by state law has thus inevitably reflected the county's dualistic residential pattern. United States v. Missouri, 363 F. Supp. 739, 742-43 (E.D. Mo. 1973) (findings of fact and conclusions of law), 388 F. Supp. 1058 (E.D. Mo.) (final order), *aff'd in pertinent part*, 515 F.2d 1365 (8th Cir.), *cert. denied*, 96 S. Ct. 374 (1975).

2. 42 U.S.C. § 2000(c)-6(a) (1970).

fourteenth amendment,[3] commenced a school desegregation action against the State of Missouri, the State and county boards of education, the three school districts, and several public officials. The district court concluded that all the defendants had unlawfully maintained Kinloch as a racially segregated school district.[4] After reviewing various proposed desegregation plans, the court ordered Ferguson to annex Kinloch and Berkeley.[5] *Affirmed in pertinent part.* A federal court can order the implementation of an interdistrict remedy where adjacent school districts and the state have maintained a de jure[6] segregated district for racially discriminatory reasons.[7]

Since *Brown v. Board of Education*,[8] the task of implementing desegregation has troubled the federal courts. Aware of the variegated

3. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1; *see* note 8 *infra*.

4. 363 F. Supp. at 746-50.

5. The district court approved the three-district plan submitted by the State and county defendants as "the least disruptive alternative which is educationally sound, administratively feasible, and which promises to achieve at least the minimum amount of desegregation that is constitutionally required." United States v. Missouri, 388 F. Supp. 1058, 1059 (E.D. Mo. 1975). The plan envisions a new composite district that would be 84% white (Berkeley and Ferguson are presently 59% and 95% white respectively). Approximately 2000 additional students will be bused throughout the districts. *See* Brief for Appellee at 21-23, United States v. Missouri, 515 F.2d 1365 (8th Cir. 1975). The trial court rejected a Kinloch-Berkeley merger as ineffective and discarded a proposed Ferguson-Kinloch annexation as financially unsound. United States v. Missouri, 515 F.2d 1365, 1371 (8th Cir.), *cert. denied*, 96 S. Ct. 374 (1975).

6. De jure segregation consists of both legislatively mandated segregation, which existed in some states prior to Brown v. Board of Educ., 347 U.S. 483 (1954), and segregation intentionally bred by public school officials. De facto segregation, on the other hand, embraces all other racial imbalances arising from unintended, nonofficial sources. For an excellent explication of the distinction between the two terms, see Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972). *See also* Oliver v. Michigan State Bd. of Educ., 508 F.2d 178, 180-82 (6th Cir. 1974); Note, *De Facto School Segregation and the "State Action" Requirement: A Suggested New Approach*, 48 IND. L.J. 304 (1973).

7. The Eighth Circuit also approved the lower court's directive for tax funding of the new school district, despite the State constitutional requirement that the electorate authorize increased tax assessments. 515 F.2d at 1372-73; *see* MO. CONST. art. X, § 11(c). Chief Justice Burger and Justice Powell voted to grant certiorari on this issue. 96 S. Ct. at 374. The court of appeals did overturn the prescribed maximum tax rate on the ground that the district judge should have deferred to the State and county officials' recommendations. 515 F.2d at 1373.

On remand the district court has delayed implementation of its desegregation plan until the beginning of the 1976-1977 school year because of complications inherent in the consolidation. The Eighth Circuit abided this ruling. United States v. Missouri, 523 F.2d 885 (8th Cir. 1975).

8. 347 U.S. 483 (1954). *Brown*, the progenitor of school desegregation law, furnishes the touchstone for determining fourteenth amendment violations. Basically, the *Brown* Court decided that state-mandated segregation of public schools denies black students equal protection of the laws. Subsequently, the Court expanded the duty of

problems of school administration, educational policy, economics, and politics, the Supreme Court has attempted to define generally the limits of federal remedial power in desegregation cases. *Brown v. Board of Education (Brown II)*[9] prescribed traditional equitable remedies, the flexibility of which would accommodate a variety of public and private interests.[10] The Court charged district courts to evaluate the relevant social, administrative, and legal obstacles in determining whether school authorities had advanced good faith efforts to eradicate segregation. Defendants, however, needed only to proceed "with all deliberate speed,"[11] a formula that in practice licensed postponement of relief.[12]

Not until *Green v. County School Board*[13] did the Supreme Court impose upon school officials an affirmative duty to dismantle de jure segregated school systems. To effectuate *Green*, federal courts transcended their evaluative posture and actively compelled school boards to adopt structural modifications that promised to maximize integration.[14] Later, *Swann v. Charlotte-Mecklenburg Board of Education*[15] endorsed specific equitable remedies, including mandatory busing, the alteration of attendance zones, and the utilization of racial quotas as guides in shaping decrees. The fundamental principle governing remedies *within* singular school districts emerged from *Swann*—confined only by the bounds of feasibility, federal courts possess plenary authority to redress

school officials to desegregate dual school systems. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (failure to fulfill that duty may require exercise of the broad remedial authority of federal courts); Mouroe v. Board of Comm'rs, 391 U.S. 450 (1968) (the fear of "white flight" does not justify a transfer provision that perpetuates segregation); Green v. County School Bd., 391 U.S. 430 (1968) (school officials shoulder an affirmative dnty to pursue whatever means necessary to convert a dual school system into a unitary one free of racial discrimination); Cooper v. Aaron, 358 U.S. 1 (1958) (public hostility, if encouraged by state action, does not excuse delay in desegregating).

9. 349 U.S. 294 (1955) (the implementation decision).

10. *Id.* at 300. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971), in which Chief Justice Burger observed that desegregation decrees should vindicate constitutional rights by balancing the relevant individual and collective interests.

11. 349 U.S. at 301.

12. *See* Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193, 203-12 (1964), & cases cited therein.

13. 391 U.S. 430 (1968).

14. *See, e.g.*, Monroe v. Board of Comm'rs, 391 U.S. 450 (1968) ("free transfer" provisions of desegregation plan invalidated because some schools remained segregated; the Court instead recommended a "feeder system" through which junior high schools would draw students from specified elementary schools); Coppedge v. Franklin County Bd. of Educ., 394 F.2d 410 (4th Cir. 1968) ("freedom of choice" plan for pupil assignment overthrown in favor of either a unitary system of geographic attendance zones or consolidation of grades or schools).

15. 402 U.S. 1 (1971).

de jure segregation.[16] While stressing the inherent breadth of equitable power, the *Swann* Court delimited the judiciary's remedial faculties—judicial authority "may be exercised only on the basis of a constitutional violation" *(i.e.,* de jure segregation), and "the nature of the violation determines the scope of the remedy."[17] Within these bounds federal courts enjoy broad discretionary power to fashion appropriate remedies.[18]

Interdistrict relief represents the next and perhaps final step in the expansion of federal courts' equitable powers to combat school segregation. Until recently litigation has focused on the singular district, within which courts could readily design effective remedies.[19] Increased racial polarization of America's major metropolitan areas into black urban cores and white suburbs, however, has rendered unsatisfactory the solitary integration of city schools. Forced integration of majority-black school systems on a single district level merely perpetuates racial imbalance in inner city schools by inducing "white flight" to the suburbs or private schools.[20] Consequently, in the absence of legislative solutions, desegregation decrees must traverse district boundaries if urban schools are ever to reflect more closely the racial composition of the metroplitan community.[21]

16. The *Swann* Court adjudged a 1.5% budget hike and a thirty-five minute bus ride for students to be reasonable. *Id.* at 30. *See* Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971). *See generally* Comment, *Milliken v. Bradley in Historical Perspective: The Supreme Court Comes Full Circle,* 69 NW. U.L. REV. 799, 804-05 (1974).

17. 402 U.S. at 16. Although the Court acknowledged the limits to judicial remedial powers, it perceived "no fixed or even substantially fixed guidelines" for ascertaining those limits. *Id.* at 28. Apparently, courts must determine the substantive bounds to their authority on a case-by-case basis. Its reticent tone notwithstanding, the *Swann* decision notably vitalized the federal judiciary's desegregative role by means of its emphasis on achieving actual integration rather than the merely nonracial grouping of students. *See* Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation,* 38 U. CHI. L. REV. 697, 704-05 (1971).

18. Before courts may intervene, they must discern a constitutional wrong attributable to educational authorities. In every case, however, judicial control will fall short of the plenary powers enjoyed by the defaulting officials. *See* 402 U.S. at 15-16.

19. *See* Note, *Merging Urban and Suburban School Systems,* 60 GEO. L.J. 1279, 1293 (1972); text accompanying note 16 *supra.*

20. *See* Milliken v. Bradley, 418 U.S. 717, 800-02 (1974) (Marshall, J., dissenting); Comment, *Interdistrict Segregation: Finding a Violation of the Equal Protection Clause,* 23 AM. U.L. REV. 785 (1974); Note, *supra* note 19, at 1279. *See also* Bradley v. School Bd., 462 F.2d 1058, 1061-66 (4th Cir. 1972), *aff'd by an equally divided Court,* 412 U.S. 92 (1973).

21. Residentially segregated metropolitan areas must either educate their suburban white and urban minority children together, or abandon the concept of racially mixed urban schools in favor of upgrading the learning process in predominantly minority schools. Decisionmakers must remember that integration, no matter how socially and morally desirable it might be, remains a means to the paramount end of providing equal

Courts attempting to remedy interdistrict segregation may select from several options.[22] First, absolute merger of the governing bodies of two or more districts, the most drastic solution, might require a minimum of continuing judicial supervision. Second, a pupil exchange program between districts would provide an alternative to unduly complicated consolidation, but might necessitate long-term court involvement. Third, a partial merger could consolidate some but not all educational services of several districts.[23] Other available techniques include ordering state officials to control directly the desegregation of several districts and splicing segments of a predominantly black district onto surrounding districts. Ultimately, a court also might defer to the state legislature,[24] which commands greater resources to rectify interdistrict racial imbalances.

The Supreme Court has recently attempted to establish criteria for determining when courts may fashion interdistrict remedies. In *Milliken v. Bradley*,[25] a narrow five-to-four decision, the Court decided that to invoke interdistrict remedies plaintiffs must first establish that (1) the racially discriminatory acts of one district substantially caused segregated schools in another district,[26] or (2) school officials deliberately drew district lines on the basis of race.[27] While clearly barring interdistrict relief to desegregate schools outside these two narrow exceptions, *Milli-*

and maximum educational opportunities for all students. *See generally* N. ST. JOHN, SCHOOL DESEGREGATION: OUTCOMES FOR CHILDREN 124-37 (1975).

22. *See Symposium—Milliken v. Bradley and the Future of Urban School Desegregation*, 21 WAYNE L. REV. 751, 782-90 (1975).

23. These compromise "umbrella districts," *id.* at 785, which stand between the usual school district and the state board of education in the educational hierarchy, commonly provide services too expensive for individual districts to furnish.

24. *See, e.g.*, United States v. Board of School Comm'rs, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 95 S. Ct. 1655 (1975); Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd per curiam*, 96 S. Ct. 381 (1975).

25. 418 U.S. 717 (1974). *Milliken*'s implications for interdistrict remedies have reeeived intensive analysis. *See, e.g.*, Kushner & Werner, *Metropolitan Desegregation After* Milliken v. Bradley*: The Case for Land Use Litigation Strategies*, 24 CATHOLIC U.L. REV. 187 (1975); *Symposium, supra* note 22; Comment, *supra* note 16.

26. The substantial cause ground for interdistrict relief apparently requires a specific and substantial causal connection between a constitutional transgression in one district and a segregative ramification in another. *See* 418 U.S. at 745-48.

27. Justice Stewart's concurrence, which represented the crucial swing vote against the lower court's interdistrict plan, *see* Bradley v. Milliken, 345 F. Supp. 914, 916 (E.D. Mich. 1972), recognized a third ground for permitting such relief: namely, a finding that state officials had purposefully contributed to discrimination through housing or zoning legislation. 418 U.S. at 755. Concluding that official activity had not precipitated the racial composition of Detroit's outlying school districts, Justice Stewart joined the plurality in disapproving a multidistrict remedy for constitutional violations that had occurred solely within the city. *Id.* at 756.

ken's two-pronged test comprehends rather than repudiates earlier decisions that under the fourteenth amendment condemned racially based tampering with school district lines.[28] Thus, despite *Milliken*'s restrictive result, the Court might favor interdistrict relief[29] when the facts differ significantly from *Milliken*[30] or when plaintiffs present different evidence.[31]

Bradley v. School Board of the City of Richmond[32] also illustrates the rationale for limiting the power of courts to cast interdistrict relief. While school district lines are not sacrosanct, especially when drawn contrary to constitutional principles,[33] neither are they inconsequential demarcations subject to improvident judicial tinkering. In *Richmond* the Fourth Circuit withheld interdistrict relief because it believed all

28. For example, in United States v. Texas, 321 F. Supp. 1043 (E.D. Tex. 1970), *aff'd and modified*, 447 F.2d 441 (5th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972), State and local officials had perpetuated nine small, all-black school districts by tampering with certain student transfer and transportation regulations and by redrawing district lines. Application of the first prong of the *Milliken* test, ascertaining the segregative effect of one district upon another, would comport with the *Texas* court's consolidation of the black districts with their neighboring districts. Morcover, *Milliken*'s second prong, which prohibits the redrawing of district boundaries to create or maintain segregation, would also have compelled the interdistrict order. *See also* Haney v. County Bd. of Educ., 410 F.2d 920 (8th Cir. 1969), which determined that the Arkansas legislature's drawing of district lines to create an all-black district (at that time State law required segregated schools) established de jure segregation as a matter of law, and thus prompted a consolidation with other districts. The second *Milliken* test would also reach the carving out of new school districts from existing ones where such a division impedes integration of a segregated system. *See, e.g.*, United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972); Wright v. Council of City of Emporia, 407 U.S. 451 (1972).

29. In fact, *Milliken*'s majority opinion, authored by Chief Justice Burger, specifically reaffirmed the validity of several prior rulings. *See* 418 U.S. at 744.

30. Plaintiffs could seek less inclusive remedies, which, in subsuming fewer districts, would arguably produce less educational upheaval. The burden of proving purposeful isolationist treatment of a neighboring district, however, would remain formidable. *See* Amaker, Milliken v. Bradley: *The Meaning of the Constitution in School Desegregation Cases*, in CONFERENCE BEFORE THE UNITED STATES COMM'N ON CIVIL RIGHTS, MILLIKEN V. BRADLEY: THE IMPLICATIONS FOR METROPOLITAN DESEGREGATION 12-13 & n.61 (1974).

31. The *Milliken* plaintiffs fatally omitted to allege specific interdistrict violations. *See* 418 U.S. at 745. In the lower courts plaintiffs successfully argued that State-encouraged segregation rendered Detroit schools de jure segregated. Bradley v. Milliken, 338 F. Supp. 582, 587 (E.D. Mich. 1971). Before the Supreme Court, however, they abandoned this promising approach, *see* note 27 *supra*, because of its novelty and instead attempted to justify interdistrict relief under a more traditional de jure segregation analysis. *See Symposium*, *supra* note 22, at 908.

32. 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 92 (1973) (Justice Powell not participating). The Fourth Circuit abrogated the district court order that had consolidated a Richmond school district and two other districts in an effort to achieve a greater degree of racial balance in the three systems.

33. *See* Milliken v. Bradley, 418 U.S. 717, 744 (1974).

three districts involved were operating unitary school systems, and that no constitutional violations had occurred in the creation and maintenance of those districts.[34] Both *Milliken* and *Richmond* re-emphasized *Swann*'s equitable maxim that "the nature of the violation determines the scope of the remedy."[35] The substantial, if poorly articulated, limitation on equitable power apparently derives from principles of federalism; both *Milliken* and *Richmond* stress the state's strong interest in preserving local control of education against diminution by interdistrict remedies.[36]

Current *Milliken* offspring, although significant, have embraced or refused interdistrict remedies on the narrower basis of statutory interpretation. In *United States v. Board of School Commissioners of Indianapolis*,[37] the Seventh Circuit overturned a district court consolidation order purportedly in harmony with State legislation that had merged several municipalities into one metropolitan government. Because evidence showed de jure segregation in only one district, the appellate court ordered the lower court to determine on remand whether under *Milliken* legislative creation of the metropolitan government without readjustment of school district boundaries would warrant an interdistrict remedy.[38] Predictably, the Supreme Court declined to review *Indianapolis*; on the other hand it chose to hear and in four words affirm *Evans v. Buchanan*,[39] a three-judge district court's ruling that the exclusion of one school district from a reorganization and consolidation statute constitutes an interdistrict violation under *Milliken*.[40]

By liberalizing rather than merely discussing and applying the *Milliken* tests,[41] *United States v. Missouri*[42] augments the power of federal courts to ordain interdistrict remedies. The Eighth Circuit

34. 462 F.2d at 1070.

35. 418 U.S. at 738; Bradley v. School Bd., 462 F.2d 1058, 1061 (4th Cir. 1972).

36. The Fourth Circuit in *Richmond* asserted that the tenth amendment limits federal equity power and that the state has near-plenary power over school districts and other political subdivisions. 462 F.2d at 1068-69.

37. 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 95 S. Ct. 1655 (1975).

38. *See id.* at 85-86.

39. 393 F. Supp. 428 (D. Del.), *aff'd per curiam*, 96 S. Ct. 381 (1975).

40. The statute empowered the Delaware Board of Education to consolidate districts, but expressly omitted Wilmington, a majority-black city surrounded by majority-white suburbs, from the Board's reorganization domain. The court emphasized Justice Stewart's third requirement for interdistrict violations, *see* note 27 *supra*, and determined that the Educational Advancement Act fostered a separation of races by authorizing school redistricting. *See* 393 F. Supp. at 445-46.

41. *See* text accompanying notes 25-27 *supra*.

42. 515 F.2d 1365 (8th Cir.), *cert. denied*, 96 S. Ct. 374 (1975).

readily accepted the trial court's conclusion that State and local officials, through the establishment of the Berkeley district, discriminatorily created the segregated Kinloch district.[43] Under *Milliken*, this determination clearly justified judicially ordered consolidation of Berkeley and Kinloch,[44] but the inclusion of Ferguson in the remedy erected a potential roadblock. Ferguson's boundary lines had no racial foundation, and Ferguson did not actively participate in segregating Kinloch. Nonetheless, the circuit court affirmed as not clearly erroneous the district court's finding that Ferguson "unlawfully maintained" Kinloch as a segregated district.[45] Apparently Ferguson's constitutional violation sprang from either its admitted inaction[46] or a 1949 referendum that rejected a reorganization plan that had included Kinloch.[47]

The Eighth Circuit sanctioned the lower court's reading of *Milliken*—federal courts can and must implement interdistrict remedies

43. *Id.* at 1369. Kinloch has continually provided educational opportunities substantially inferior to those offered in Berkeley, Ferguson, and most other school districts in the county. *Id.* at 1367. Kinloch's boundary lines have remained frozen, although its small size, educational deficiencies, and low assessed valuation have made it a conspicuous candidate for reorganization with other districts. Studies commissioned by the State and county uniformly recommended consolidation, and in 1967 the Kinloch board asked the county to apportion it and any other district. United States v. Missouri, 363 F. Supp. 739, 745 (E.D. Mo. 1973). Nevertheless, with one exception in 1949, *see* note 47 *infra* & accompanying text, State and county officials excluded Kinloch from their numerous reorganization plans, ostensibly because they believed the surrounding districts would reject consolidation with an all-black district.

44. Both the district court and court of appeals summarily dismissed Berkeley's several protests, among them that it presently operates a unitary school system and that including it in the annexation would both financially burden its own black residents and contribute nothing toward desegregating Kinloch. *See* 515 F.2d at 1368.

45. *Id.* at 1370.

46. The Eighth Circuit rubber-stamped the district court's conclusion that "[t]his is an instance where the failure to act or resistance for discriminatory reasons to actions tending to correct segregation amounted to a constitutional wrong." *Id.* Observing that county and State officials had improperly excluded Kinloch from reorganization, the *Missouri* court reasoned that past intentional segregation may justify condemning present inaction that has effectively maintained segregation. *Id.*, *citing* Oliver v. Michigan State Bd. of Educ., 508 F.2d 178, 182 (6th Cir. 1974). The opinion referred to Keyes v. School Dist. No. 1, 413 U.S. 189, 211-12 (1973), for the presumption that intentional segregative acts within the system constitute de jure segregation, even if those transgressions antedate the construction of the offending schools. School authorities must rebut this prima facie incrimination by proving that the past acts did not contribute to the present situation. The de jure presumption, however, should not apply to Ferguson, which, unlike the officials and the Berkeley district, did not actively commit past segregative wrongdoings.

47. Several districts voted; the vote in Ferguson was tied. *See* 515 F.2d at 1370. Since 1948 virtually every district near Kinloch has grown through reorganization or annexation, perhaps in the belief that larger districts can operate more efficiently and can provide greater educational opportunities. Kinloch, however, has remained the same size. *See* note 43 *supra*.

if district lines obstruct the exercise of constitutional rights. Including Ferguson in the consolidation order, whether under the inaction or referendum theory, arguably relies upon the "interdistrict effect" test. In addition, the court distinguished *Milliken* on its facts, observing that, unlike the metropolitan desegregation plan urged for Detroit, the St. Louis County three-district scheme substantially assimilated Missouri law and would not foster extensive educational disruption.[48] If Ferguson's indifference toward its neighboring segregated school district constitutes an interdistrict violation, then *Milliken* does not merit the constrictive view of interdistrict relief attributed to it.[49]

The court's interpretation of *Milliken* parallels the Seventh Circuit's in *Gautreaux v. Chicago Housing Authority*,[50] which characterized *Milliken* not as an absolute prohibition on interdistrict remedies in the absence of interdistrict violations but as a command to implement practical remedies where needed.[51] Having concluded that the defendants' discriminatory site selection and tenant assignment policies rendered public housing throughout Chicago de jure segregated, the *Gautreaux* court ordered the building of public housing units in predominantly white, suburban neighborhoods. *Gautreaux* focused on residential segregation at the metropolitan level and condemned discriminatory abuses in public housing programs. *Missouri*, in essence, channels *Gautreaux*'s pragmatic interpretation of *Milliken* into the school desegregation arena.

Missouri thus understands *Milliken* as a restraint only on interdistrict remedies that pose functional problems similar to those inherent in the metropolitan Detroit plan.[52] The Eighth Circuit's opinion furnishes flexible guidelines for revamping segregated school districts that have not engaged in traditional de jure misconduct. *Missouri* itself illustrates the advantages of its more elastic approach—its three-district plan offers

48. *See* 515 F.2d at 1370; note 5 *supra* & accompanying text.

49. *See, e.g., The Supreme Court, 1973 Term*, 88 HARV. L. REV. 13, 61 (1974); Comment, *supra* note 16.

50. 503 F.2d 930 (7th Cir. 1974), *aff'd sub nom.* Hills v. Gautreaux, 44 U.S.L.W. 4480 (U.S. Apr. 20, 1976). For a detailed analysis of *Gautreaux*'s handling of *Milliken*, see Note, 43 GEO. WASH. L. REV. 633 (1975); Note, 1975 U. ILL. L.F. 135; Note, 21 VILL. L. REV. 115 (1975). *See generally* Kushner & Werner, *supra* note 25.

51. Justice Tom Clark, sitting by designation and writing for the *Gautreaux* court, understood *Milliken* to indicate that the proposed Detroit multidistrict plan overreacted to a single district violation. *See* 503 F.2d at 935-36.

52. The Supreme Court determined that the Detroit desegregation plan would disrupt the State educational structure by diminishing local control over education and would create massive problems of administration, transportation, and finance. 418 U.S. at 742-43.

meaningful integration without imposing extreme administrative or financial burdens. Because of its limited scale, the St. Louis County plan arguably neither significantly increases busing needs nor diminishes local control of education.

Missouri's limitation of *Milliken* meshes with the results in two other recent interdistrict cases,[53] reinforcing the notion that the appropriateness of court-ordered interdistrict relief turns on practical considerations unique to the particular school systems under review. The consolidation plan rejected in *Richmond*[54] envisioned an unwieldy super district, which would have created financial and tax problems, as well as significantly diluting community control over education.[55] On the other hand, the Sixth Circuit in *Newburg Area Council v. Board of Education*[56] accepted a three-district metropolitan plan that neither presented major administrative problems nor altered the structure of public education envisioned under Kentucky law.

Missouri's facts present *Milliken* in microcosm, yet tension arises between the two decisions[57] as the result of their divergent standards for identifying de jure segregation. *Milliken* requires that racially discriminatory acts have produced an interdistrict segregative effect before a

53. *See* notes 54-56 *infra* & accompanying text.

54. *See* notes 32-36 *supra* & accompanying text.

55. *See* 462 F.2d at 1066-67. The Fourth Circuit also observed that consolidation would ignore Virginia's structuring of "free school systems." *Id.*

56. 489 F.2d 925 (6th Cir. 1973), *vacated and remanded,* 418 U.S. 918, *reaff'd per curiam,* 510 F.2d 1358 (6th Cir. 1974), *cert. denied,* 421 U.S. 931 (1975) (school district lines traversable when necessary to remove the vestiges of state-imposed segregation). The *Newburg* court's distinguishing of *Milliken* on its facts paralleled the techniques utilized in *Missouri* and *Gautreaux.* The Sixth Circuit perceived six material differences: (1) unlike *Milliken,* all the school districts included in the remedy had unlawfully operated de jure segregated systems; (2) the remedy encompassed only two or three districts in a single county, necessitating nominal changes, whereas *Milliken* involved fifty-four districts; (3) under Kentucky law the county, not the school district, forges the basic educational unit; (4) consolidation under the metropolitan remedy could proceed under express provisions of a Kentucky statute, obviating *Milliken*'s attendant administrative difficulties; (5) all the implicated school authorities had ignored school district lines in maintaining school segregation, while only two of the fifty-four Detroit districts were suspect; and (6) the Louisville School District had not expanded with the city's political boundaries, thereby intensifying segregation. 510 F.2d at 1359-61. *Newburg* questioned whether a federal court could consolidate de jure segregated districts; the issue, however, did not reach the Supreme Court because the districts in question voluntarily consolidated. NEWSWEEK, Sept. 8, 1975, at 79.

57. The Chief Justice's majority opinion in *Milliken* implicitly recognized a substantive barrier to interdistrict relief, impregnable even where consolidation appears reasonable—constitutional principles "cannot vary in accordance with the size or population dispersal of the particular city, county, or school district." 418 U.S. at 747 n.22. Obviously, the *Missouri* court conceived the Supreme Court's observation as less than dispositive.

court may order interdistrict relief.[58] In *Missouri*, however, Ferguson's failure to consolidate with Kinloch might not qualify as an interdistrict violation under that formula. Clearly, Ferguson's inaction[59] precipitated the requisite *effect*, for consolidation would have terminated Kinloch's social isolation. On the other hand, the Eighth Circuit may have improperly supplied the missing variable—the *acts*—by characterizing the failure to merge as "racially discriminatory," *i.e.*, intentional.

Milliken does not address the issue of segregative intent. The Supreme Court in *Keyes v. School District Number 1*[60] stated "that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate."[61] The *Keyes* test does not, however, evaluate the subjective intention that motivated action resulting in segregation; rather courts commonly infer intent from the results of those actions.[62] While the segregative intent

58. *See id.* at 744-45.

59. As used in this note and by the Eighth Circuit, the term "inaction" refers to Ferguson's lack of involvement in creating or maintaining the obviously unconstitutional structure of the neighboring school districts. The only evidence of positive action taken by Ferguson was the referendum vote not to annex Kinloch. *See* 515 F.2d at 1370; note 47 *supra* & accompanying text. The *Missouri* court made little mention of this vote, which, although representing a choice by the district's residents, would not support a finding of segregative action under *Milliken*. The private exercise of the ballot does not in itself constitute action by the state or its officials, dispensing with a necessary ingredient of a fourteenth amendment violation. Furthermore, the county board of education's decision to submit the reorganization to the electorate in accordance with state law apparently does not violate the equal protection clause. *Compare* Hunter v. Erickson, 393 U.S. 385 (1969) (ordinance requiring referendums for racial housing matters denies equal protection), *with* James v. Valtierra, 402 U.S. 137 (1971) (mandatory referendums for low-rent housing comport with the Constitution). Even if the board's use of the referendum procedure represents wrongdoing on its part, the infraction does not reflect on Ferguson.

60. 413 U.S. 189 (1973).

61. *Id.* at 208 (emphasis in original).

62. "[A] presumption of segregative intent arises once it is established that school authorities have engaged in acts or omissions, the natural, probable and foreseeable consequence of which is to bring about or maintain segregation." United States v. School Dist., 521 F.2d 530, 535-36 (8th Cir.), *cert. denied*, 96 S. Ct. 361 (1975). *See generally* Note, 55 NEB. L. REV. 144, 148-50, 153-59 (1975).

With respect to interdistrict violations, one court has inferred segregative intent when a district consolidation plan proposed by school officials would foreseeably perpetuate segregated schools. Hoots v. Pennsylvania, 359 F. Supp. 807 (W.D. Pa. 1973), *cert. denied*, 419 U.S. 884 (1975). The State had no affirmative duty to desegregate because it had never operated a dual system; still the court mandated that any restructuring reverse rather than promote existing racial polarity. In northern states where school segregation never received legal sanction, courts nevertheless discern de jure segregation through an "effects" theory analysis. *See* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971), *aff'd in part, vacated in part*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974). *See also* Wright v. Council of City of Emporia, 407 U.S. 451, 462 (1972). The *Gautreaux* court determined that the extensive placement of public housing projects in black residential areas evidenced segregative intent. *See* 503 F.2d at 933.

test has various formulations,[63] courts invariably focus on positive actions in determining whether the requisite intent exists. Inferring intent from inaction, as in *Missouri*, appears more tenuous. Severe difficulties inhere in any bona fide attempt to determine why an action was not taken.[64] In *Missouri* the Eighth Circuit simply assumed that Ferguson intended the segregative effect of its inaction; consequently the court easily clothed Ferguson's inaction in discriminatory garb.

Missouri breaks new ground in treating inaction as interdistrict de jure segregation. Although courts have determined that inaction may constitute discriminatory conduct within a single district,[65] inaction has never itself generated a finding of *interdistrict* violation. Prior cases suggest that official inaction offends the Constitution only when the officials owe an affirmative duty to desegregate.[66] Clearly, in *Milliken* and *Richmond* the suburban districts had refused to aid the segregated urban schools, but lacking a duty to desegregate, they successfully parried accusations of unconstitutional misconduct. Ferguson's position warrants similar immunity. Having committed no positive segregative acts, Ferguson need not have heeded the directive to desegregate Kinloch. The Eighth Circuit misconstrued the fourteenth amendment implications of Ferguson's inaction and, in so doing, significantly relaxed the standard for finding de jure segregation. *Missouri*'s inaction concept extends an affirmative duty to desegregate to virtually every school district adjacent to a segregated district.[67]

63. *See* Comment, Keyes v. School District No. 1: *Unlocking the Northern Schoolhouse Doors*, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 124, 149 (1974).

64. *See* Wright v. Council of City of Emporia, 407 U.S. 451, 462 (1972).

65. *See, e.g.*, Oliver v. Michigan State Bd. of Educ., 508 F.2d 178 (6th Cir. 1974); Johnson v. San Francisco Unified School Dist., 339 F. Supp. 1315 (N.D. Cal. 1971); People v. San Diego Unified School Dist., 19 Cal. App. 3d 252, 96 Cal. Rptr. 658 (4th Dist. 1971), *cert. denied*, 405 U.S. 1016 (1972).

66. An affirmative duty attaches to school authorities who commit positive acts of discrimination and, consequently, operate de jure segregated schools. *See* Green v. County School Bd., 391 U.S. 430 (1968). The Supreme Court in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), and Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), implied that inaction for racial reasons may constitute de jure segregation, but in both cases the defendant school officials already managed de jure segregated school systems and thereby triggered an affirmative duty to integrate. While under the *Missouri* facts Berkeley owed the same duty toward Kinloch, Ferguson did not. Other lower court cases finding inaction unconstitutional also concentrate on the de jure context. *See, e.g.*, Oliver v. Michigan State Bd. of Educ., 508 F.2d 178 (6th Cir. 1974); Johnson v. San Francisco Unified School Dist., 339 F. Supp. 1315 (N.D. Cal. 1971); Keyes v. School Dist. No. 1, 303 F. Supp. 279 (D. Colo. 1969), *rev'd on other grounds*, 413 U.S. 189 (1973). *But cf.* Branche v. Board of Educ., 204 F. Supp. 150 (E.D.N.Y. 1962); People v. San Diego Unified School Dist., 19 Cal. App. 3d 252, 96 Cal. Rptr. 658 (4th Dist. 1971) (dictum), *cert. denied*, 405 U.S. 1016 (1972).

67. Practicality as well as theoretical consistency dictate that interdistrict remedies

No workable narrowing of the *Missouri* inaction concept appears feasible. The Eighth Circuit implied that inaction warrants condemnation only in the absence of nonracial justification, an imprecise and unwieldy theory in light of the multifarious potential justifications available to defendants: for example, failure to consider action, lack of authority, increased tax burdens, costs of planning and administering reorganization, and dilution of local control over schools. Moreover, to sanction the federal courts' emergence as educational planners presupposes their adroitness as school superintendents, a function far beyond traditional judicial competence.

The *Missouri* decision, although unique in its determination that discriminatory acts within one school district substantially implicate interdistrict effects, does stand on another, more solid ground. Other interdistrict rulings have used violations at the state agency level to justify correctives that cross district lines.[68] The trial court in *Missouri* concluded that the State and county boards of education had acted unlawfully by failing to desegregate Kinloch.[69] The school boards not only must fulfill their statutory duty to reorganize school districts[70] but also must comply with the fourteenth amendment's prohibition against state-supported segregation. Consequently, failure to reorganize districts to eliminate de jure segregation constitutes unlawful inaction, a violation interdistrict in scope. Proper relief could require the reorganization of all districts that the boards of education, had they acted properly, might have reorganized with the segregated district. This theory, by dispensing with the need to detect constitutional violations on the part of districts included within the remedy, justifies Ferguson's reorganization with Kinloch and Berkeley without an artificial finding that Ferguson had acted unconstitutionally.[71] Basing the interdistrict

should not ensue from the mere inaction of neighboring school districts. Forcing one school district to integrate with another offends practical sensibilities because one district has no authority to reorganize another and can merely make proposals. For social and economic reasons the segregated district may reject the overtures of a district charged with the affirmative duty. The facts of *Missouri* illustrate the anomaly; Kinloch opposed a plan calling for its annexation with Ferguson. 515 F.2d at 1368.

68. *See, e.g.*, Haney v. County Bd. of Educ., 410 F.2d 920, 923-24 (8th Cir. 1969); United States v. Texas, 321 F. Supp. 1043, 1057 (E.D. Tex. 1970), *aff'd and modified*, 447 F.2d 441 (5th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972).

69. *See* note 43 *supra* & accompanying text.

70. The St. Louis County Board of Education and the State Board of Education share responsibility for developing school district reorganization plans for St. Louis County. MO. REV. STAT. §§ 161.152, 162.161, 162.181 (1959).

71. In some circumstances courts must either compel consolidation of districts that have not committed violations or deny any relief. Suppose county officials discriminatorily refuse to include a de facto segregated district in reorganization plans. The only appropriate solution requires some form of interdistrict consolidation. Because the

remedy on violations at the state and county level greatly reduces the friction between *Missouri* and *Milliken* by eliminating the restrictions conceivably placed on *Milliken's* standard by the Eighth Circuit. Moreover, the strategy of prosecuting state agencies that supervise local districts promises success in other settings because the educational system under siege in *Missouri* sufficiently resembles that found in various other states.[72]

The Supreme Court's denial of certiorari, while suggesting that the *Missouri* decision melds with *Milliken*,[73] leaves the basic inconsistency of the two cases unresolved. If the facts of *Missouri* justify its different result, *Milliken* enjoys narrower applicability than has been supposed; it might only prohibit administratively unreasonable remedies, or even constitute a procedural rule simply requiring that neighboring districts receive a meaningful opportunity to present evidence on the question of constitutional violations or the propriety of a multidistrict remedy.[74] Alternatively, courts can reconcile *Missouri* with *Milliken* by broadening the requisites to invoke interdistrict relief.[75] Hopefully, future cases will either articulate the scope of the affirmative duty to integrate or establish a workable rule for determining when state or district inaction constitutes unlawful racial discrimination.

Missouri court adopted the desegregation plan proposed by the State and county boards, its action arguably ratifies the authorities' proposal rather than evinces its own initiative. In fact, the United States contended that by ordering the three-district plan the district court did not intervene but merely enabled State and county officials to meet their responsibilities. Brief for Appellee at 41-42, United States v. Missouri, 515 F.2d 1365 (8th Cir. 1975). "School authorities have the primary responsibility for elucidating, assessing, and solving . . . [desegregation] problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles." Brown v. Board of Educ., 349 U.S. 294, 299 (1955).

72. *See* Comment, *supra* note 20, at 790-92, 805; Note, *supra* note 19, at 1304.

73. After *Milliken*, Supreme Court observers predicted an era of retrenchment in the school desegregation area. *See* note 25 *supra*. The more conservative Court, however, has continued rather than arrested the judicial activism exemplified by its decisions from *Green* through *Keyes*.

74. *See* Milliken v. Bradley, 418 U.S. at 717.

75. Due to demographic trends, school segregation is developing an increasingly interdistrict character. *See generally* N.Y. Times, Jan. 7, 1975, at 25, col. 4. Interdistrict remedies will necessarily play a larger part in any viable desegregation policy. The educational system sorely needs a coherent interdistrict standard. Whatever the ultimate standard, school district lines should not suffer casual crossing or discarding, because they protect the vital social interest in community control of public education; neither should they supply an invulnerable defense for de jure segregation.

[Note by James Charles Smith.]