THE CONSTITUTIONAL AMENDMENT BY MISSOURI v. JENKINS

Laura S. Fitzgerald

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/crsj

Part of the Civil Rights and Discrimination Commons, and the Education Law Commons

Recommended Citation
Laura S. Fitzgerald, THE CONSTITUTIONAL AMENDMENT BY MISSOURI v. JENKINS, 2 Race & Ethnic Anc. L. Dig. 39 (1996). Available at: https://scholarlycommons.law.wlu.edu/crsj/vol2/iss1/7

This Article is brought to you for free and open access by the Washington and Lee Journal of Civil Rights and Social Justice at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Journal of Civil Rights and Social Justice by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.
THE CONSTITUTIONAL AMENDMENT BY MISSOURI v. JENKINS

Laura S. Fitzgerald

When I first read the Supreme Court’s decision in Missouri v. Jenkins, my immediate and visceral reaction was that the five-Justice majority had radically altered — indeed, virtually amended — the equal protection guarantee in the United States Constitution. This reaction was not unique to me. For example, on the day after Jenkins was handed down, the New York Times ran an editorial in response headlined “A Sad Day for Racial Justice.” Denouncing the Jenkins majority as a “constitutional wrecking crew,” the editorial announced that the “Supreme Court, a place where minorities once looked for racial justice, did what it could yesterday to halt the progress its own decisions once sparked.”

But on reading Jenkins for the second time and more, I began not to understand my initial reaction to it as a radical amendment of equal protection under the United States Constitution. Why did this decision feel so monumental? Why, indeed, has it, along with its Civil Rights siblings from last Term, brought us all together today to ponder whether “the Dream of the 1960s [has] Turned Into the Nightmare of the 1990s?”

As an initial matter, the facts of Jenkins are so unusual, the magnet school program ordered by the federal court there so extravagant, so unusually expensive — at a capital cost of over $1.5 billion, and yearly operating demands of $200 million or more — that the facts themselves may make Jenkins a poor case on which to puzzle over more abstract principles of constitutional law. The district court in Kansas City admitted and, in federal court order until Kansas City students began to realize that the State of Missouri continue to fund the quality education programs established under the Supreme Court’s order. The Jenkins’s majority articulates and applies to decide the two narrow questions, the majority holds that the facts, the legal rules that the majority articulates and applies to decide the two narrow questions, the major constitutional shift. Nonetheless, quite apart from its arguably unique facts, Jenkins still suggests a major constitutional shift. Yet this is not because of the majority’s two specific legal holdings in the case. That is, the legal rules that the majority articulates and applies to decide the two narrow issues before the Court do not, I believe, wholly explain the constitutional impact of the decision itself. It bears emphasizing how narrow those two legal issues were. First, could the federal district court order the State of Missouri to fund across-the-board salary increases for teachers and staff in the Kansas City School District as part of the ongoing desegregation program proceeding under federal court order? Second, could the district court insist that the State of Missouri continue to fund the quality education programs established under the federal court order until Kansas City students began to demonstrate consistent achievement levels at or above national norms?

In answering these two narrow questions, the majority articulates and applies legal rules that do not break radically new constitutional ground. Let’s consider the second question first. The Court in Jenkins decided that a State may be entitled to have its once-segregated school districts pronounced constitutionally cured, and accordingly released from further federal court control, even though student achievement in once-segregated school districts continues to fall below or not to exceed national averages. This legal holding represents little more than a straightforward application of two Court deci-

1 Assistant Professor of Law, Washington and Lee University School of Law. This essay is the text of the author’s remarks during a panel discussion of Missouri v. Jenkins conducted as part of a symposium entitled Civil Rights: Has the Dream of the 1960s Turned Into the Nightmare of the 1990s? held February 16, 1995, at Washington and Lee University.


4 Id.

5 Id.

6 Id.

7 Jenkins, 115 S. Ct. at 2045.


10 Jenkins, 115 S. Ct. at 2055.

11 Id.

12 Id. at 2055-56.
sions earlier this decade that establish the standards for deciding when a once-segregated school system should be deemed to have achieved "unitary" status — that is, should be held to have accomplished compliance with federal equal protection standards so that federal court oversight under a desegregation decree must end, and the decree itself be dissolved.\textsuperscript{13} These pre-\textit{Jenkins} decisions had already established that a school district’s unitary status — that is, its compliance with the Constitution — must be determined on the basis of two pragmatic factors: first, whether the constitutional “violator” (the segregating State or local government) had complied in "good faith" with the desegregation decree all along; second, an even more hard-nosed inquiry asks whether the "vestiges of past discrimination have been eliminated to the extent practicable."\textsuperscript{14} Thus, the Supreme Court had already determined before it decided \textit{Jenkins} that a federal court could not extend the life of a desegregation decree based solely, or even primarily, on the school district’s failure yet to achieve an ideal of \textit{quality education}, that is, a substantive ideal of education that produces students who can compete and achieve at or above national academic standards.\textsuperscript{15} So much for one of \textit{Jenkins}’s radical holdings.

As for the other question presented, whether the district court could order the State to fund salary increases for teachers and staff, the question is closer but again it appears that the \textit{Jenkins} majority breaks no radically new constitutional ground in holding that federal courts exceed their equitable authority when they craft desegregation remedies, like higher teacher salaries (and, indeed, like Kansas City’s entire magnet school program) with the principal goal of enticing non-minority students from other school districts voluntarily to seek an education in the desegregating district.\textsuperscript{16} That is, a federal district court faced with the job of desegregating a school district where people of color make up 68.3% of the school-age population (as in Kansas City) cannot, after \textit{Jenkins}, attempt, through the court-ordered creation and funding of dazzling magnet school programs, to engineer a reverse white flight from other school districts, like the Kansas City suburbs, in order to even out the racial mix in the desegregating school district.\textsuperscript{17}

To be sure, this holding in \textit{Jenkins} requires a leap of logic from the Court’s 1974 decision in \textit{Milliken v. Bradley (Milliken I)},\textsuperscript{18} on which the \textit{Jenkins} majority relied almost exclusively in deciding this issue.\textsuperscript{19} The Court in \textit{Milliken I} prohibited federal courts from remedying intentional racial segregation in one school district by crafting a desegregation decree that affected other school districts as well unless those other school districts themselves had been adjudged guilty of racial segregation, for example, by collaborating with the first school district to ensure segregation across district lines.\textsuperscript{20} \textit{Milliken I} recognized that interdistrict remedies might also be appropriate where one district’s intentional segregation had caused “a significant segregative effect” to be felt across those boundaries and into other districts.\textsuperscript{21}

As a practical matter, \textit{Milliken I} prohibited federal courts from desegregating a school district by entering an interdistrict decree to bus white students from the suburbs into predominately nonwhite urban schools, and vice versa, if those other school districts had not themselves been adjudged guilty of intentional segregation on the basis of race.\textsuperscript{22}

There is, of course, a logical synapse between this ruling in \textit{Milliken I}, concerned with federal courts imposing \textit{voluntary} busing obligations on parents and children residing in school districts not found to have violated the equal protection clause, and the ruling in \textit{Jenkins}, concerned with a federal court attempting only to create incentives to induce \textit{voluntary} behavior by suburban parents and children. Yet even though the Kansas City decree sought, unlike \textit{Milliken I}, to achieve an interdistrict effect through voluntary action by suburban parents and children, the Kansas City court nonetheless placed an \textit{involuntary} obligation on the State itself to fund that interdistrict remedy. That was, after all, the particular question presented to the Court by the State of Missouri: whether the district court could order it to fund pay raises to “improve the desegregative attractiveness” of the Kansas City School District.\textsuperscript{23} From this perspective, \textit{Jenkins} looks more like \textit{Milliken I}: both cases deny federal courts the power to impose an involuntary obligation on a State or local government to fund and otherwise comply with multidistrict segregation remedies absent a finding of multidistrict segregation in violation of the equal protection guarantee.

So why then the powerful, the persistent reaction that \textit{Jenkins} represents a radical reformation of the Constitution’s equal protection guarantee?

The answer, or at least a working hypothesis, came to me during President Clinton’s State of the Union Message this past January.\textsuperscript{24} This yearly event is no ordi-\textsuperscript{13} Freeman v. Pitts, 503 U.S. 467 (1992); Board of Educ. v. Dowell, 498 U.S. 237 (1991).
\textsuperscript{14} Jenkins, 115 S. Ct. at 2050 (citing Freeman v. Pitts, 503 U.S. 467 (1992), and Board of Educ. v. Dowell, 498 U.S. 237 (1991)).
\textsuperscript{15} Particularly where, as here, the district court had never made a factual finding measuring the incremental effect that Missouri’s past \textit{de jure} racial segregation continues to have on student achievement in the Kansas City schools. \textit{Id.} at 2055.
\textsuperscript{16} \textit{Id.} at 2052, 2055.
\textsuperscript{17} Id. at 2050.
\textsuperscript{18} Milliken v. Bradley, 418 U.S. 717 (1974)[hereinafter \textit{Milliken I}].
\textsuperscript{19} See Jenkins, 115 S. Ct. at 2048.
\textsuperscript{20} Milliken I, 418 U.S. at 746-47.
\textsuperscript{21} \textit{Id.}.
\textsuperscript{22} \textit{Id.}.
\textsuperscript{23} Jenkins, 115 S. Ct. at 2055-56.
nary ritual of communication between the President and the Congress; no mere practice or tradition honored for honor's sake; no mere negotiated ceasefire between the two federal political branches in a season otherwise remarkable for its relentless, vicious partisan wrangling. No. The Constitution itself requires the President "from time to time, [to] give to the Congress Information of the State of the Union, and to recommend to their Consideration such Measures as he shall judge necessary and expedient."23

The Constitution requires this formal ritual of communication, I believe, because it assumes that the President — in theory the chosen representative of the entire nation — can perhaps offer a perspective on the common, national good; a perspective that may contribute meaningfully to the Congress' effort to pursue the national good in its own legislative work. Indeed, that Article II imposes this specific communicative duty on the President (a duty which Alexander Hamilton, interestingly, referred to as a "power")28 reinforces the President's constitutional role in the federal legislative process quite apart from the President's qualified veto power.27 It reinforces the President's constitutional role in the process in which we all decide as a national political community what our shared priorities and goals are or should be.

Given these views about the Constitution's policymaking role for the State of the Union message, I was astonished to hear the President of the United States propose, as a national policy priority, that public schools be permitted to require students to wear school uniforms.28

School uniforms. This was extraordinary. Here was the President of the United States — appearing before the full national legislature (not to mention the full Supreme Court) to carry out his Article II communication duty — and the President was elevating to the level of national political debate the issue of what public school children in Lexington, Virginia, or Houston, Texas, or Miami, or New York, should wear to school every day. This was nationalizing public school management, the quality of public school education, to a breathtaking degree.

By contrast to Missouri v. Jenkins.

My strong visceral reaction to Jenkins began to make more sense. The majority's decision, I believe, is monumental not primarily because of its legal holdings on the technical legal questions presented. It is monumental, in my view, because it suggests powerfully this majority's inclination to delink issues of racial justice in this country from issues of public education in this country. The Jenkins Court shows itself willing, even eager, to dissolve the tight constitutional link between public education and the substantive ideal of racial equality embodied in the Constitution's equal protection guarantee, a link that has been recognized at least from the Court's decision in Brown v. Board of Education until June 12, 1995, when Jenkins was handed down.

In Brown, and in cases like Green v. New Kent County School Board and Swann v. Charlotte-Mecklenburg Board of Education, one can discern an underlying commitment by the Court to the principle that achieving racial equality and racial justice in the Nation's public school system was a necessary precondition to achieving that racial equality, that racial justice, in the national community at large; just as the most dedicated segregationists resisted public school desegregation as the key to full social and civil desegregation. That is to say, in these early desegregation cases, one can discern an undercurrent belief that the equal protection guarantee establishes — as a substantive constitutional norm — the principle that racial justice in public education is necessary to maximize every student's chance to achieve a flourishing life within a national community undistorted by racial division. That equal protection and public education are inextricably and substantively linked.

In Brown, the Court expressly recognized this substantive link between the Constitution's ideal of equality and public education, and not only in its famous observation, so roundly criticized by Justice Thomas in Jenkins, that educating Black children only with other Black children will "generate a feeling of inferiority as to their status in the community that may affect their hearts and minds in ways unlikely ever to be undone."92 Indeed, quite apart from that famous observation, the Brown Court recognized a tight substantive link between the equal protection guarantee, public education, and the goal of a thriving national community. The Court observed:

Education is perhaps the most important function of state and local governments. ... [Public education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional education, and in helping him to adjust normally to his environment.33

23 U.S. CONST. art. II, § 3.
32 Brown, 347 U.S. at 494. See Jenkins, 115 S. Ct. at 2062, 2065 (Thomas, J., concurring) (criticizing Brown's reliance on sociological or psychological effects of de jure school segregation on Black children).
33 Brown, 347 U.S. at 493.
It was in part because the Brown Court recognized this tight link, between public education and the goal of a just and flourishing national community, that the Court concluded that school segregation implicated the Constitution’s equal protection guarantee at all.

Recognizing this unifying principle in Supreme Court cases decided between Brown and Jenkins — namely, that race and public education are inextricably linked at the core of the Constitution’s equal protection guarantee — makes it possible to identify two aspects of that constitutional jurisprudence that Jenkins eradicates. First, Brown’s approach meant that issues of race in public education were deemed national. That is, so long as race and education shared such a foundational place in the interpreted ideal of racial equality guaranteed by the federal Constitution, it made sense that issues of race and education were decided by a federal decisionmaking body on the basis of national, and nationally applicable, standards derived principally from the Constitution. While local influence over desegregation by States or by school boards was never eliminated altogether by the Court, the cases in the first two-and-a-half decades after Brown suggest that desegregation itself was deemed a predominately federal issue. Accordingly, particularized local concerns, including local autonomy for its own sake, appeared to carry little decisional weight.

Brown’s tight linkage between race and public education at the core of the federal equal protection ideal had a second discernible consequence. Not only did it make public school desegregation a federal issue, but it squarely placed desegregation within the traditional province of the federal court. So linked at the core of equal protection doctrine, school desegregation controversies, including remediation, immediately and naturally invoked the judiciary’s special role as the protector of the individual’s constitutional right to racial equality as against an infringing political majority. A job tailor-made for the nonmajoritarian, some say countermajoritarian federal judiciary. 34 A judicial job straight out of Marbury 35 and Carolene Products. 36

But Jenkins offers a radically different view. No longer is the goal of racial equality inextricably linked to public education at the core of the Constitution’s equal protection guarantee. Jenkins, indeed, can be read to stand for the proposition that racial equality in public education is no longer specially a federal equal protection issue, for the majority directs federal trial courts to terminate desegregation decrees based entirely on pragmatic concerns about the “practicability” of additional desegregating efforts, no matter how poor the education available to minority students left in a desegregating school district like Kansas City’s, and no matter how poorly that education will serve any student in the effort to achieve a flourishing life within a national community unfrustrated by racial division.

Once race in education is demoted from its special status at the core of the federal equal protection guarantee, two consequences follow. First, demoting race in education from its special status in Brown means that public school desegregation is no longer a uniquely federal issue. Indeed, once race in education is demoted from its special equal protection position, there is no reason to invest in a federal institution the authority to make decisions that will determine how race issues are addressed — if at all — in a locality’s public schools. So school uniforms may now raise an issue more appropriately national in scope, more appropriately to be resolved by national political discourse, than issues of race and education.

Second, demoting race in education from its special equal protection status means that public school desegregation is no longer an issue best decided by a nonmajoritarian institution like a federal court. Instead, issues of race in education are deemed best decided through the ordinary operations of the majoritarian political process, just as the State or locality addresses other concerns that demand the allocation of scarce community resources. Thus, the Jenkins majority hints that, on remand, the district court in Kansas City should divest itself of whatever special federal constitutional authority it has been invoking to federalize what are, to this Supreme Court, simply local political questions about how to allocate local resources.

34 ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16, 24-26 (1962). Bickel argued that the unelected federal judiciary confronted a problem of legitimacy whenever it undertook constitutional judicial review of the decisions of a majoritarian legislature; he labeled this problem the “countermajoritarian difficulty.” Id. at 16. Bickel suggested that federal courts could avoid this difficulty, and preserve the legitimacy of their constitutional decisions, if they “served a function that was necessary to a democratic society, that no other [majoritarian] institution could fill adequately, and that was peculiarly suited to the competencies of the courts.” H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM 170 (1993) (summarizing Bickel’s theory, and quoting BICKEL, supra, at 24). In Democracy and Distrust, John Hart Ely returned to Bickel’s theory of judicial legitimacy, asserting that the appropriate special function of the countermajoritarian courts was to protect the democratic process from capture or abuse; thus, federal judges “are entitled to overturn specific political outcomes if those outcomes stem from a defect in the process, such as the systematic exclusion of a racial minority from participation.” ID. at 187 (summarizing thesis of JOHN HART ELy, DEMOCRACY AND DISTRUST 105-34 (1980)).

35 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
36 United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938) (Stone, J.) (suggesting that judicial non-deference to majoritarian decisions is appropriate either where those decisions restrict the political process available for their repeal or where they reflect “prejudice against discrete and insular minorities” identified by religion, national origin, or race”).
Read in this way, *Jenkins* becomes a case where desegregation issues do not raise a question of the Constitution's substantive commitment to an ideal of racial equality. Instead desegregation issues raise a pure and straightforward question of power: what kind of decisionmaker, majoritarian or not, gets to make decisions about race and education; and at what level of government should that power be lodged?

So why is *Jenkins* monumental? Because it may signal once and for all the Court's abandonment of what since *Brown* had become a profound and familiar link between public education and the ideal of racial justice at the core of the federal equal protection guarantee. *Jenkins* contradicts this assumption by delinking racial justice from education and so the Court demotes race and education issues from their status as a core federal constitutional concern to the position of being a largely local concern to be evaluated and addressed like any other resource allocation problem for local majoritarian bodies. Having the same constitutional status as zoning and road construction; and, after President Clinton's State of the Union Message, less national status than the issue of public school uniforms.

To state this observation, this working hypothesis, is not necessarily to declare that the constitutional alteration that *Jenkins* reflects is itself bad or good; just or unjust; accurate or not as an interpretation of federal constitutional law, or civil rights more particularly. I wish here simply to recognize that equal protection, race, and public education appear profoundly alienated from each other after *Jenkins* in a way, and to a degree, not palpable before. This is *Jenkins'*s constitutional amendment.