Washington and Lee Journal of Civil Rights and Social Justice

Volume 2 | Issue 1 Article 6

4-1-1996

AT LOGGERHEADS: THE SUPREME COURT AND RACIAL EQUALITY INPUBLIC SCHOOL EDUCATION AFTER MISSOURI V. JENKINS

Roberta M. Harding

AT LOGGERHEADS: THE SUPREME COURT AND RACIAL EQUALITY IN PUBLIC SCHOOL EDUCATION AFTER *MISSOURI V. JENKINS*

Roberta M. Harding[1]

I. INTRODUCTION

June 12th of 1995 marked a somber occasion in the annals of school desegregation litigation. On that day, the United States Supreme Court sent disturbing messages in its opinion in *Missouri v. Jenkins*.[2] The Court's decision hinders achievement of the objective of school desegregation litigation—providing equal educational opportunities for African-American public school children—and detrimentally impacts other substantive areas of civil rights litigation.

This article examines what I believe are several important general consequences of *Jenkins's* the impairment of a trial judge's discretionary equitable remedial powers; the Court's establishment of a new agenda that sacrifices the interests of African-American school children, the plaintiffs in equal education litigation; and how defendants in such cases are now rewarded for their failure to rectify constitutional wrongs. The Article begins by briefly reviewing relevant portions of desegregation jurisprudence. This review is followed by a summation of the action brought by the plaintiffs in *Jenkins*, and a discussion of the remedies selected by the district court. Finally, this article analyzes the general ramifications of the Court's decision.

II. THE LEGAL FOUNDATIONS OF THE CONSTITUTIONAL RIGHT TO EQUALITY IN PUBLIC SCHOOL EDUCATION

A. Brown v. Board of Education

In 1954, the Supreme Court decided the landmark case of *Brown v. Board of Education*.[3] *Brown I* decided the issue of whether African-American public school children must have educational opportunities equivalent to those available to other public school children.[4] The Court held that equal educational opportunities must be made available to all public school children.[5] In making this decision, the Court rejected the application of the infamous "separate but equal" doctrine[6] to public schools by concluding that "in the field of public education the doctrine of 'separate but equal' has no place."[7] Consequently, defendants' institutionalized racial discriminatory practices violated the equal protection clause of the Fourteenth Amendment.[8]

A critical aspect of the Court's pronouncement in *Brown I* was its acknowledgment of the dual nature of the harm or injury sustained by the plaintiffs through unconstitutional racial discrimination in educational practices. The Court noted that the scope of the harm encompassed not only tangible, but also intangible factors.[9] This acknowledgment was not unprecedented. If anything, recognition of the "intangible" harm caused by this type of constitutional violation was consistent with the Court's earlier decisions in *Sweatt v. Painter*[10] and *McLaurin v. Oklahoma State Regents*.[11]

In *Sweatt*, the Court found that the refusal of Texas to admit a black student to the University of Texas Law

---

[1] Roberta M. Harding is an Associate Professor of Law at the University of Kentucky College of Law. She graduated from the Harvard Law School in 1986 and received a B.S.B.A. from the University of San Francisco in 1981. She would like to thank Dean Barry Sullivan for recommending that she write this article. In addition, she would like to thank Sandy Emerson, her Administrative Assistant, for her assistance in completing this article.

[2] 115 S. Ct. 2038 (1995). The decision was 5-4, with Chief Justice Rehnquist writing the majority opinion. Justices O'Connor, Scalia, Kennedy, and Thomas joined Chief Justice Rehnquist's opinion which reversed the Eighth Circuit's affirmation of the District Court's remedial orders that were the subject of the controversy. *Id.* at 2042, 2056. Justices Souter, Stevens, Ginsburg, and Breyer dissented. *Id.* at 2042.

[3] 347 U.S. 483 (1954)[hereinafter "Brown I"]. Several companion cases were consolidated with *Brown I*. *See id.* at 486 n.1.

[4] *Id.* at 487-88. Previously the Court addressed the same issue but in the context of educational opportunities on the graduate and professional levels. *See* Sweatt v. Painter, 339 U.S. 629 (1950)(holding that a black student has the right to a "legal education equivalent to that offered by the State to students of other races")(emphasis added); McLaurin v. Oklahoma State Regents, 339 U.S. 637, 642 (1950)(holding that a black student has the right to graduate educational opportunities equal to those of other students). *See infra* pp. 26-27.

[5] Brown I, 347 U.S. at 493-95.

[6] This doctrine was originally adopted by the Court in Plessy v. Ferguson, 163 U.S. 537(1896). Plessy addressed the issue of the constitutionality of racially segregated railroad passenger cars. In order to uphold segregation, the Court "formally" recognized the "separate but equal" doctrine. *Id.*

[7] Brown I, 347 U.S. at 495.

[8] *Id.* The Court later relied upon the Fifth Amendment's due process clause to extend *Brown I's* holding to the maintenance of segregated public schools in the District of Columbia. Bolling v. Sharpe, 347 U.S. 497 (1954).

[9] Brown I, 347 U.S. at 492-94. The Court noted that its decision could not rest solely upon the enumeration and comparison of tangible factors, such as the physical plant and the curriculum, but must "look instead to the effect of segregation itself on public education." *Id.* at 492.

[10] 339 U.S. 629 (1950).

[11] 339 U.S. 637 (1950).

School violated the Fourteenth Amendment's equal protection clause.[12] The Court also found that simply providing an alternative law school for students of color did not adequately and effectively remedy the harm incurred from the constitutional violation.[13] In reaching this decision, and in its accompanying discussion about the nature of the harm stemming from the disparate education, the Court noted that disparity in educational opportunities included "those qualities which are incapable of objective measurement but which make for greatness in a law school."[14] *McLaurin* reveals a similar appreciation of the intangible harm done to individuals who are denied equal educational opportunities simply because their skin happens to be the wrong color. In *McLaurin*, the Court found that the restrictions placed upon the petitioner by the State "impair[ed] and inhibit[ed] his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."[15] The Court summed it up nicely by stating that "his training is unequal to that of his classmates."[16]

Following the lead of *Sweatt* and *McLaurin*, the *Brown I* Court expands on the pivotal role that intangible factors play in providing the requisite relief for the evils of segregation:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities .... 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 training, and in helping him to adjust normally to his environment. *In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.*[17]

Thus, the emphasis placed on intangibles in *Brown I* coupled with appreciation of their significance in *Sweatt* and *McLaurin* evidences the important role intangible factors occupy in providing a suitable and effective remedy to segregation. Specifically, a remedy that places the plaintiffs, the African-American public school aged children, in their rightful position—obtaining an equal education.[18] Accordingly, the *Brown I* Court recognized and anticipated that the remedial portion of *Brown I* would necessarily address both the tangible and intangible facets of the constitutional harm of segregation.

In *Brown I*, the Court did not attempt to tackle the complex task of identifying and enumerating the intangible and tangible factors that would have to be considered in formulating an effective remedy.[19] Instead, the Court restored the remedial issue to the docket and allowed argument on the issue.[20] The Court did, however, acknowledge that any remedy would be intricate because the nature of the violation required a significant restructuring of the existing racially segregated public school systems.[21] Implicit in this comment is the Court's acceptance of the substantial probability that it would be necessary for courts to resort to elaborate and novel equitable remedies in order to provide effective relief to the victims of segregation in public schools.

B. The Remedy

The focal point of *Brown II* was the determination of "the manner in which relief [was] to be accorded."[22] The Court's central concern was in ensuring that the plaintiffs received a remedy that would correct the wrong done to them.[23] Accordingly, it was the interests of the plaintiffs and not those of the defendants that were to be the focus in the formulation of a remedy. In addition to this underlying remedial principle, the Court provided specific directives pertaining to the creation of an effective remedy. These directives included: "fully" remedying the wrong;[24] tailoring the remedies to address the diverse local problems;[25] instituting complex remedies;[26] vesting the trial courts in the original cases with the re-

---

[12] Sweatt, 339 U.S. at 635-36.

[13] *Id.* at 635.

[14] *Id.* at 634. Such "intangible" factors included the inability to obtain the prestige gained from attending the University of Texas Law School and the lack of access to preeminent faculty members at the University of Texas facility. *Id.* at 632-35.

[15] McLaurin, 339 U.S. at 641.

[16] *Id.*

[17] Brown I, 347 U.S. at 493 (emphasis added).

[18] A remedy's purpose is to "make whole the victims of unlawful conduct." Milliken v. Bradley, 433 U.S. 267, 280 n.15 (1977).

[19] Although the Court did not attempt to list the intangible factors, it did note that intangible factors could include being able to engage in discussions and exchange views with other students of other races. Brown I, 347 U.S. at 493 (quoting McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641 (1950)).

[20] *Id.* at 495.

[21] *Id.*

[22] Brown v. Board of Education, 349 U.S. 294, 298 (1955)(hereinafter "Brown II").

[23] *Id.* at 300 (concluding that "[a]t stake is the personal interest of the plaintiffs").

[24] *Id.* at 299.

[25] *Id.*

[26] *Id.*

sponsibility for formulating a complete remedy;[27] and using equitable principles to guide the formation of the remedies.[28]

One of the most significant directives is the Court's decision to rely upon local trial courts to devise and carry out the remedy. It was decided that because "of their proximity to local conditions,"trial courts will be most familiar with the parties.[29] Thus, local courts are in the best position to evaluate the situation and construct the most suitable means for fully remedying the wrong done to the plaintiffs.

In *Brown I,* the Court noted that the harm stemming from denying African-American public school children possessed intangible components.[30] By expressly noting that traditional equitable principles should be used,[31] the Court reassures the courts responsible for overseeing the achievement of *Brown I's* mandate that they would be afforded all the flexibility and accommodation historically associated with using remedial tools grounded in equity in order to address these intangibles. Thus, it was envisioned that the specific terms of the remedial schemes would include the means of remedying the intangible harms associated with being denied the chance to receive equal educational opportunities. Of course, since one feature that contributed to the unequal educational situation was the existence of racially segregated schools sanctioned by state laws and constitutions, the Court's first task was to dismantle this tangible feature that thwarted black children's ability to receive an equal education.

C. *Post-Brown Jurisprudence in Equal Education Opportunities*

After its decision in *Brown I,* the Court has often revisited the issue of eliminating racial discrimination in public schools in order to provide equal educational opportunities to *all* students. The decision rendered in *Green v. County School Board*[32] confirmed several of the directives advanced in *Brown II.* First, the Court reaffirmed that the district courts were entrusted with the responsibility of developing and implementing effective remedies that provided plaintiffs with the relief to which they were entitled.[33] Evidence of the pivotal role played by district courts is the Court's continued observance that: "*Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and *multifaceted* problems would arise which would require time and *flexibility* for a successful resolution."[34]

In addition to defining the district court's role in the desegregation process, the *Green* Court reemphasized that the prevailing interest was that of securing the plaintiffs' relief.[35] The Court also admonished the defendants for not following the "deliberate speed" directive of *Brown II.*[36] The Court noted that fourteen years had passed since its decision in *Brown I* and the plaintiffs' situation remained unremedied.[37] Delays of this length were "no longer tolerable."[38] In reprimanding the defendant, the Court "strongly encouraged" the school board "to come forward with a plan that promises realistically to work, and promises realistically to work now."[39] Lastly, the Court identified educational faculty and staff as appropriate factors to be incorporated into remedial schemes.[40]

The Court's unanimous decision in *Swann v. Charlotte-Mecklenburg Board of Education*[41] clarified several important components of *Brown I's* edict. First, the Court reemphasized the dual nature of the constitutional harm: the tangible and the intangible.[42] This was accomplished by specifically noting that "[t]he objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."[43] These "vestiges of segregation" that perpetuate the disparity in educational opportunities are equivalent to the intangible harms acknowledged by the Court in *Sweatt,*[44] *McLaurin,*[45] and *Brown I.*[46] The *Swann* Court also stressed the need for flexible parameters if the trial courts were going to satisfy the general remedial objective set forth in *Brown II.*[47] For example, the Court noted that in formulating an appropriate remedy for the plaintiffs "[t]he remedy for such segregation may be administratively awkward, inconvenient, and

---

[27] *Id.*
[28] *Id.* at 300.
[29] *Id.* at 299.
[30] Brown I, 347 U.S. at 493-94.
[31] Brown II, 349 U.S. at 300.
[32] 391 U.S. 430 (1968).
[33] *Id.* at 439.
[34] *Id.* at 437 (emphasis added).
[35] *Id.* at 436-42.
[36] *Id.* at 438-39.
[37] *Id.* at 435, 438.
[38] *Id.* at 438.
[39] *Id.* at 439 (emphasis omitted).
[40] *Id.* at 435. The important role played by the teaching staff in providing an equal education was originally raised in *Sweatt.* Sweatt, 339 U.S. at 632-34. In addition, *Brown II* discusses the probability that the personnel at educational facilities would be addressed when considering remedial options. Brown II, 349 U.S. at 300.
[41] 402 U.S. 1 (1971). The Court acknowledged that one of its goals was to "try to amplify guidelines" for the implementation of the remedial portion of *Brown I. Id.* at 14.
[42] *Id.* at 15.
[43] *Id.* at 15.
[44] Sweatt, 339 U.S. at 632-34.
[45] McLaurin, 339 U.S. at 640-42.
[46] Brown I, 347 U.S. at 493-94.
[47] Swann, 402 U.S. at 28.

even *bizarre* in some situations and may impose burdens on some."[48] This passage illustrates the Court's anticipation that trial courts would be compelled to impose what some might consider novel remedial measures in order to fulfill the obligations conferred upon them in *Brown II*. The *Swann* Court also reiterated the *Green* Court's recognition of the vital connection between support personnel and the goal of achieving parity in education.[49] Thus, the Supreme Court accepted the conclusion that the proper staffing of public educational facilities is an integral feature of a multifaceted remedy designed to eliminate the disparity in education.

Perhaps most indicative of the *Swann* Court's encouragement that trial courts seek and adopt creative remedies, is the emphasis placed on the trial court's historically broad and flexible powers in equity to fashion the necessary relief. In fact, one of the issues before the Court was the scope of the lower courts' powers to fashion remedies to eliminate racially discriminatory public schools.[50] Although the *Brown II* Court unambiguously announced that trial courts responsible for attaining compliance with *Brown I* would have the benefit of broad and flexible equitable powers, the *Swann* Court evidently believed it necessary to reiterate this aspect of the remedial scheme. The Court pronounced that: "the scope of a district court's equitable powers to remedy past wrongs is *broad, for breadth and flexibility are inherent in equitable remedies*."[51] In a similar vein, the Court reaffirmed its decision in *Brown II* to rely upon district courts to accomplish the task at hand because "we must of necessity rely to a large extent . . . on the informed judgment of the district courts in the first instance and on courts of appeals."[52] This is essentially an admission by the Court that it is not the court in the best position to assess the situation and to decide which remedial tools work and which do not. A consequence of this admission is the willingness to defer to lower courts' findings and decisions.

One final, but equally significant, area considered by the *Swann* Court is the effect the defendants' actions or inactions should have on the formulation of the remedy and ultimately, the dissolution of the orders and decrees. The Court wholeheartedly agreed that the "objective is to dismantle the dual school system."[53] With this goal in mind, the Court envisioned that once the vestiges of public school segregation were eliminated, federal courts would no longer play a role in guaranteeing that plaintiffs obtain equal educational opportunities. The Court noted, however, that this day cannot arrive until defendants in these cases cease engaging in the "dilatory tactics" frequently encountered by the Court.[54] Additionally, the Court stated that "[t]he failure of local authorities to meet their constitutional obligations *aggravated* the massive problem of converting from the state-enforced discrimination of racially separate school systems."[55] The message sent by the Court was that defendants should be aware that adopting delay tactics or continuing to resist complying with *Brown I* would only result in the continued presence of the federal judiciary. Furthermore, the language adopted by the Court indicates that it does not want to reward any defendant engaging in activity that lengthens the process and frustrates the plaintiff's ability to be placed in their rightful position.

The journey undertaken by the Court to clarify *Brown I's* mandate includes an important stop reflected in its decision in *Milliken v. Bradley*.[56] Several important remedial features were addressed by the Court in this case. First, the Court endorsed the lower court's adoption of a variety of educational programs designed to address quality of education concerns that surfaced in the quest to achieve the remedy's objective—educational parity.[57] The Court had no objection to creating and using these diverse programs as part of the trial court's remedial package.[58] Indeed, the trial court's initiative embodies the *Swann* Court's pronouncement that the trial courts were free to create and devise a variety of programs and measures in order to remedy the harm done to the plaintiffs.[59] In endorsing the quality of education programs, the Court found that "[t]hese specific

---

[48] Swann, 402 U.S. at 28 (emphasis added). The *Swann* Court also cited Green v. County School Board, 391 U.S. 430(1968), in support of the proposition that trial courts should have, and probably require, a great deal of latitude in the formulation of tools to remedy the intangible and tangible educational harms derived from unequal educational opportunities created by racial discrimination. *Id.* at 27. The Court in *Green* noted: "[T]here is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance." Green, 391 U.S. at 439.

[49] Swann, 402 U.S. at 18-19 (citing Green, 391 U.S. at 435.

[50] *Id.* at 5.

[51] *Id.* at 15 (emphasis added).

[52] *Id.* at 28.

[53] *Id.*

[54] *Id.* at 13.

[55] *Id.* at 14 (emphasis added). This is precisely what the Court observed in *Green*: "This deliberate perpetuation of the unconstitutional dual system can only have *compounded the harm of such a system*." Green, 391 U.S. at 438 (emphasis added).

[56] 433 U.S. 267 (1977)[hereinafter "Milliken II"].

[57] *Id.* at 279-88.

[58] *Id.* at 291.

[59] See Swann, 402 U.S. at 28 (holding that "bizarre" remedies might be called for in order to provide the necessary relief). *See also* Green, 391 U.S. at 437 (finding that *Brown II* was a call for the dismantling of well-entrenched duel systems tempered by an awareness that complex and multifaceted problems could arise which would require time and flexibility for a successful resolution).

educational remedies . . . were deemed necessary to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education had these four components been provided in a nondiscriminatory manner in a school system free from pervasive de jure racial segregation."[60] Thus, the Court again emphasizes how critical it is that trial courts be allowed to employ their historically flexible equitable powers to ensure that defendants comply with *Brown I*.

The *Milliken II* Court was faced with the novel issue of whether equitable orders issued in connection with the *Brown I* mandate were tantamount to personal judgments and thus violative of the Eleventh Amendment.[61] It has been well established that an order issued by a court pursuant to its powers in equity is not a monetary judgment in disguise. This is true even when the court's order requires the defendant to spend money. This legal rule has been maintained by distinguishing between a court order requiring or enjoining a particular act, and a judgment requiring the payment of money. This principle applies even though the performance of the action mandated by the equitable order might require a state defendant to use state funds to comply with the order.[62] Applying this principle, the *Milliken II* Court rejected defendants' argument that this rule should not apply because the equitable orders were substantively monetary judgments barred by the Eleventh Amendment.[63] In doing so, the Court noted:

> The decree to share the future costs of educational components in this case fits squarely within the prospective-compliance exception reaffirmed by *Edelman*. That exception, which had its genesis in *Ex parte Young . . . permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury.*[64]

Besides invalidating the Eleventh Amendment challenge to the orders issued to secure the elimination of disparate educational opportunities, this decision reflects an important stance taken by the Court. While it acknowledged that the implementation of the remedies necessary for compliance with *Brown I*'s mandate could affect the state's purse, the Court ultimately decided that correcting the violation of the plaintiff's equal protection rights outweighed the State defendant's interests as embodied in the Eleventh Amendment. Thus, the Court struck a balance between these two competing principles. And given the gravity of the harm done to the plaintiffs, it came down in favor of continuing to champion the plaintiffs' interests.

Secondly, the defendant's federalism challenge of the trial court's order was examined.[65] The Court abruptly dismissed this argument.[66] One basis for this dismissal arguably hinged on the view that the defendants had waived any federalism claims by their actions. In *Milliken II*, many years had passed since *Brown I* and the Detroit public school system still had not eliminated the vestiges of racial segregation. This failure sustained the federal court's continuing duty to remedy the plaintiffs' situation. While this continued involvement potentially implicates federalism concerns,[67] the perceived infringements on a state's rights can be eliminated or minimized if the defendant acts in "good faith" in remedying the situation and does so with all "deliberate speed."[68] Unfortunately, typically the contrary is true.

Given the Court's admonishment in *Swann* about the dilatory tactics used by some defendants to frustrate efforts to formulate a remedy and to delay the implementation of the remedy,[69] the curtness evident in the *Milliken II* Court's response to the issue could be an attempt to "derail" future ploys to use federalism principles in support of objections to individual remedial schemes or to justify noncompliance with a trial court's orders. In sum, the Court is saying that it is the defendants' actions, or inaction, that causes any increases in the federal court's involvement in remedying this situation. Thus, defendants will not be permitted to resort to the Tenth Amendment and to cries of federalism as a

---

[60] Milliken II, 433 U.S. at 282 (emphasis omitted).

[61] *Id.* at 288-89. The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

[62] For example, if under the terms of an affirmative injunction a state is required to allow incarcerated inmates unlimited access to the law library, then in all likelihood the state is going to have to expend funds in some manner—by increasing taxes, reallocating existing resources, etc.—in order to comply with the order.

[63] Milliken II, 433 U.S. at 289 (citations omitted).

[64] *Id.* at 289 (citing Edelman v. Jordan, 415 U.S. 651, 667 (1974)(emphasis added)). *Edelman* reconfirmed *Ex parte Young's*, 209 U.S. 123 (1908), exception allowing the federal judiciary to issue equitable orders forcing states to perform tasks which might require the expenditure of state funds that would have to come from its treasury, require a reallocation of the state budget, or might even require the state to reconsider its taxing policies to generate the revenue needed to be in compliance with the court's orders. Edelman, 415 U.S. at 667-68.

[65] Milliken II, 433 U.S. at 291.

[66] *Id.*

[67] Federalism is implicated by the federal courts involvement in the creation of remedies, implementation of those remedies, monitoring of compliance with those remedies, and ultimately deciding whether defendants have complied to the extent reasonably practicable.

[68] Brown II, 349 U.S. at 301.

[69] Swann, 402 U.S. at 13-14.

last-ditch effort to stave off compliance. When examined holistically, the Court's message that defendant States can waive their Tenth Amendment rights by virtue of their actions is akin to use of the unclean hands doctrine.[70]

The position taken by the *Milliken II* Court on the federalism issue reinforces its earlier stance regarding its commitment to pursuing the goal of ensuring that plaintiffs in school desegregation cases are given an effective remedy. Hence, the Court's no nonsense statements that the principles of federalism "[are] not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment,"[71] and that as opposed to violating principles of federalism "[t]he district court has, rather, properly enforced the guarantees of the Fourteenth Amendment consistent with our prior holdings, and in a manner that does not jeopardize the integrity of the structure or functions of state and local governments."[72]

Prior to *Jenkins*,[73] *Freeman v. Pitts*[74] marked the final stop of the desegregation jurisprudential journey. In some ways, the decision in *Freeman* foreshadowed what happened in *Jenkins*. Probably the most significant aspect of the *Freeman* decision was how it marked a shift in the focal point of school desegregation litigation. Instead of the traditional focus on ensuring that the plaintiffs received a remedy providing them with equal educational opportunities, the Court paved the road to making the defendant's interests paramount in the remedial scheme.

The *Freeman* Court was concerned with the propriety of allowing partial or incremental compliance and, thus, permitting a district court to relinquish its jurisdiction over components of the remedial scheme without requiring the defendant to prove full compliance with achieving unitary status.[75] Ultimately, the Court agreed with the district court and held: "[I]n the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations."[76] One adverse consequence of this ruling is that it shifts the primary concern from providing a meaningful and effective remedy for victims of segregation to promoting the defendants' interest in eliminating federal judicial review that is meant to ensure the cessation of constitutional rights violations. With this result, the Court begins to reveal its new position toward the achievement and maintenance of equal educational opportunities.

III. *MISSOURI v. JENKINS*

After the preceding overview of the crucial jurisprudence in this area, one has to ask what happened in *Jenkins*. Or, more accurately, what went wrong? The overall thrust of the Court's decision shatters the core of *Brown v. Board of Education* and the essential remedial directives contained in *Brown II* and its progeny.

The Court's objective in *Jenkins*—impeding compliance with *Brown I*—can be analyzed by placing the opinion into three categories and examining them: (1) the limitations placed on the remedial powers a court exercises pursuant to its powers in equity; (2) the reconfiguration of the competing interests; and (3) the rewards given to defendants for resisting judicial orders. Each category will be discussed individually.

In order to grasp the gravity of the Court's decision, the best place to start is to examine the lower court's decision and the remedial tools it selected to fulfill its obligation to place plaintiffs' in their rightful positions.

A. The Case and the Remedy

Prior to the decision in *Brown I*, "Missouri mandated segregated schools for black and white children."[77] It was not until 1976 that Missouri's constitutional provision providing for racial segregation in schools was rescinded.[78] The Kansas City Missouri School District("KCMSD") admitted that prior to 1977 it was not in compliance with *Brown I*.[79] Thus, from 1954 until 1977 the Kansas City School District maintained a dual school system in direct violation of the mandate established in *Brown I*. In 1977, several African-American school children and the KCMSD brought an action against several federal and state agencies, the State of Missouri, and surrounding suburban school districts.[80] Subsequently, in 1978, the trial judge realigned the case making KCMSD a defendant.[81] KCMSD filed a cross-claim against the State of Missouri for "its failure to eliminate the vestiges of its prior dual school system."[82] During the trial, the district court dismissed all claims against the suburban school districts and the U.S. Department of Health Education and Welfare.[83] On September 17, 1984 the district court "found that there are still vestiges of the dual school

[70] The unclean hands doctrine is an affirmative defense which prohibits one from receiving a remedy in equity if "he goes into equity with unclean hands." *See* DAN B. DOBBS, LAW OF REMEDIES § 2.4(2) (2d. ed. 1993).

[71] Milliken II, 433 U.S. at 291 (citation omitted).

[72] *Id.*

[73] 115 S. Ct. 2038 (1995).

[74] 503 U.S. 467 (1992).

[75] *Id.* at 471.

[76] *Id.* at 490.

[77] Jenkins v. Missouri, 593 F. Supp. 1485, 1490 (W.D. Mo. 1984), *reh'g*, 639 F. Supp. 19 (W.D. Mo. 1985), *aff'd*, 807 F.2d 657 (8th Cir. 1986), *rev'd*, 115 S. Ct. 2038 (1995).

[78] *Id.* at 1490.

[79] *Id.* at 1489.

[80] *Id.* at 1487-88.

[81] *Id.* at 1487.

[82] *Id.* at 1488.

[83] *Id.*

system in the KCMSD," and held in favor of the plaintiffs against KCMSD and the State of Missouri and in favor of KCMSD against the State of Missouri.[84]

As for the issue of an appropriate remedy, the district court noted that it "not only has the power but the *duty* to enter a decree which will correct the continuing effects of past discrimination as well as bar discrimination against blacks in the future."[85] The court directed the KCMSD and the State to "prepare a plan which would establish a unitary school system within the KCMSD."[86] Eventually, the district court selected several remedial tools to implement the goal of the decree—to eliminate the vestiges of racial discrimination in order to provide the equal educational opportunities mandated in *Brown I*. The tools included: establishing magnet schools; developing and instituting quality of education programs; increasing the salaries of instructional and noninstructional educational personnel; and embarking on an aggressive capital improvements program. [87]

The State of Missouri appealed the decision and orders of the district court.[88] The Supreme Court granted certiorari to consider the State of Missouri's objections to two components of the district court's remedial scheme that had been affirmed by the Court of Appeals for the Eighth Circuit. [89] Two issues were considered by the Supreme Court: whether the trial court exceeded its remedial authority by mandating that funds be allocated to increase the salaries of instructional and noninstructional staff,[90] and whether the district court could order the State of Missouri to continue funding quality of education programs.[91] Finally, with the Court's 1995 decision to disallow the lower court's remedial measures,[92] the State of Missouri obtained the relief it wanted—the abrogation of its constitutional duty to comply with the dictates established in *Brown I* which allowed it to continue denying equal educational opportunities to African-American school children.

B. *The Impact of Missouri v. Jenkins*

In addition to aiding the State of Missouri, the Supreme Court's decision produces several disturbing consequences. First, the decision places limits upon a trial court's power to remedy a situation. This is particularly disturbing because the Court's precedent since *Brown I* has consistently stressed the integral and pivotal role that district courts play in the desegregation process. Second, the Court appears to place little or no importance upon the attainment of equal educational opportunities for African-American school children. Third, the court sends a message to defendants that they will ultimately be rewarded for employing dilatory tactics that delay the implementation of remedies that are needed to correct constitutionally infirmed situations. In addition to its effect on school desegregation litigation, the ideas embodied in the Court's opinion could have a detrimental impact on other areas of civil rights litigation.

1. *Impairment of The Judiciary's Power to Fashion an Effective and Adequate Equitable Remedy*

From a remedial perspective, the most devastating aspect of the Court's decision in *Jenkins* is how it impairs the district courts' ability to exercise their equitable remedial powers. After assessing the educational system in Kansas City, Missouri, the district court decided that continued funding of the quality of education programs,[93] and salary increases for instructional and noninstructional educational staff[94] were integral components of the remedial scheme adopted to dismantle the disparity in education.

In deciding to disallow the use of the lower court's remedial tools in *Jenkins*, the Supreme Court has made a disturbing change in the area of a trial court's ability to design adequate and meaningful equitable remedies. To begin with, courts have traditionally been bestowed with broad and flexible equitable powers.[95] The need for flexibility is understandable. When granting an equitable

---

[84] *Id.* at 1505.

[85] *Id.* (citation omitted)(emphasis added).

[86] *Id.* at 1506.

[87] Jenkins v. Missouri, 639 F. Supp. 19, 24-56 (W.D. Missouri 1985).

[88] Missouri v. Jenkins, 115 S. Ct. at 2042-46.

[89] *Id.* at 2041.

[90] *Id.* at 2046.

[91] *Id.* at 2055.

[92] *Id.*

[93] Programs designed to improve the quality of education were previously held to be an acceptable means of remedying the wrong in educational racial discrimination cases. Milliken II, 433 U.S. at 282-88.

[94] The Court previously mentioned that it was appropriate for district courts to consider issues relating to the staffing of educational facilities when fashioning an effective and meaningful remedy. Brown II, 349 U.S. at 300. In *Green*, the Court specifically noted that the staffing of public educational facilities was an appropriate item for inclusion in a remedy designed to eliminate the vestiges of racial discrimination in public school systems. Green, 391 U.S. at 435; *see also* Swann, 402 U.S. at 18-19 (commenting upon how it might be necessary for a court to consider issues pertaining to support personnel when formulating a remedial scheme). Presumably, this would include some consideration of the costs of employment. In order to implement and sustain equal educational opportunities, the necessary noninstructional personnel need to be compensated in accordance with their professional peers. To do otherwise, would not only severely hamper the implementation of the remedy, but, in essence, would require these individuals to bear the financial burden of being the only "good citizens" attempting to correct a constitutional wrong inflicted by the State of Missouri.

[95] *See* Hecht v. Bowles, 321 U.S. 321, 329 (1944)(noting that flexibility has been a tradition for "several hundred years"

remedy, it is imperative that a court be permitted to prepare a remedy that will place plaintiffs in their rightful position.

Given the broad social implications of *Brown I*, the *Brown II* Court envisioned that trial courts would need to rely upon equity's "practical flexibility" in order to formulate innovative remedial tools to "[solve] . . . varied local school problems," and to "eliminat[e] . . . a variety of obstacles.[96] In *Swann*, the Court forcefully reiterated its commitment to permitting trial courts to devise a proper remedy by stating: "There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance."[97] In other words, the trial courts vested with the authority and the responsibility to accomplish the task of desegregation often need to resort to innovative and creative means of effectuating the relief. The Court clearly anticipated the need for creativity when it stated that "[t]he remedy for such segregation may be administratively awkward, inconvenient, and *even bizarre* in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided . . . to eliminate the dual school systems.[98]

By failing to adhere to precedent, the *Jenkins* Court conveys a strong negative message to the judiciary that the historical flexibility in developing appropriate equitable remedies is subject to erosion. This is particularly true in the context of eliminating the vestiges of racial discrimination in the public school systems so that the plaintiffs can obtain an equal education.

The Court employs a variety of tools to support the outcome in *Jenkins* and to depart from the practice of relying upon trial courts to decide the appropriate form of relief. A dominant feature of the majority's opinion is the interjection of the "interdistrict" versus "intradistrict" argument as a means of invalidating the trial court's orders.[99] This distinction is merely a distraction and is more likely a "red herring."

The Court correctly noted that during the liability phase of the lower court's proceedings, the claims against the suburban school districts were dismissed "[a]fter hearing the presentation of plaintiff's evidence and before any defense."[100] Therefore, any remedies fashioned by the court would have to be intradistrict as opposed to interdistrict.[101] The *Jenkins* Court stated:

> The district court's remedial plan in this case, however, is not designed solely to redistribute the students within the KCMSD in order to eliminate racially identifiable schools within the KCMSD. Instead, its purpose is to attract nonminority students from outside the KCMSD schools. But this *interdistrict* goal is beyond the scope of the *intradistrict* violation identified by the district court.[102]

Nonetheless, it does not necessarily follow that the district court exceeded its equitable powers simply because its remedial scheme might have an "interdistrict" impact, i.e. an impact on the dismissed defendants. If anything, the district court's actions were consistent with the Court's constant acceptance of the fact that the remedies needed in this context would be broad[103] and could undoubtedly have an ancillary impact on areas adjacent to the city in which the school district is located.[104] Specifically, since the *Green* Court held that orders entered by district courts to remove the vestiges of racial discrimination in public school education "may impose burdens on some,"[105] it obviously contemplated that such a situation might occur and considered it an acceptable consequence of instituting the requisite relief. Thus, disallowing the remedy ordered by the district court because of the impact such relief might have on others not only disregards the Court's previous position on the issue, but also improperly impedes the trial court's ability to create a meaningful remedy as mandated by *Brown II*, and severely hinders the plaintiffs' ability to obtain relief.

The majority's objection to the use of the lower court's remedial powers is also based upon the provocative point that "the district court has set out on a program to create a school district that was *equal to* or superior to the surrounding [suburban school districts]."[106]

The Court's statement reveals its position that African-American school children who have historically been denied equal educational opportunities and have tried to obtain an education in a school system riddled with

---

and is an important feature of a court's equitable power). *See also* Brown II, 349 U.S. at 300 (citing Hecht v. Bowles, 321 U.S. 321 (1944)); Milliken II, 433 U.S. at 280 n.15, 281.

[96] Brown II, 349 U.S. at 300.

[97] Swann, 402 U.S. at 27 n.10 (quoting Green, 391 U.S. at 439).

[98] *Id.* at 28 (emphasis added).

[99] Missouri v. Jenkins, 115 S. Ct. at 2049-54.

[100] Jenkins v. Missouri, 593 F. Supp. at 1488.

[101] *See* Milliken v. Bradley, 418 U.S. 717, 744-45 (1974) (holding that to use a cross-district remedy it must be "shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district").

[102] Missouri v. Jenkins, 115 S. Ct. at 2051 (emphasis in original).

[103] The Court was "aware that complex and multifaceted problems would arise" which in turn would require the development of broad complex remedies. Green, 391 U.S. at 437; *see also* Brown II, 349 U.S. at 300.

[104] *See* Brown II, 349 U.S. at 298-99 (commenting on the need to consider "local condition" in formulating a remedy and "the elimination of a variety of obstacles").

[105] Swann, 402 U.S. at 28.

[106] Missouri v. Jenkins, 115 S. Ct. at 2050 (emphasis added).

the vestiges of racial discrimination do not have a right to an education that is equal to school children in adjacent, but predominately white school districts. This position seems absurd given that the objective of *Brown I* and its progeny was to ensure that these victimized children did indeed receive an *equal* education! Furthermore, the use of such an argument to support the Court's conclusion that the district court exceeded its remedial powers directly contravenes years of precedent.

Approximately 45 years ago, the *McLaurin* Court decided that a black graduate student's "training [was] *unequal* to that of his classmates"[107] and consequently held that he was entitled to "receive the same treatment at the hands of the state *as students of other races.*"[108] In *Sweatt*, the Court announced that the "petitioner may claim his *full* constitutional right: legal education *equivalent* to that offered by the State to students of other races."[109] The theme of parity in educational opportunities was again announced in *Swann* when the Court observed that the goal is for the defendants to "produce schools of *like quality.*"[110]

Nowhere has the Court objected to a remedy designed to achieve equal educational opportunities for the plaintiffs on the grounds that it was designed to achieve the desired educational parity. By resorting to this "definition" of equality,[111] the Court's decision sends a confusing message to the district courts regarding the proper exercise of their remedial powers in trying to develop the necessary complex and multifaceted remedies. More importantly, the decision reveals the Court's view on remedying the wrong suffered by African-American school children due to years of institutionalized racism in this country.

The Court's contention regarding the consequence of the lower court's actions ignores the fact that, even if the terms of the remedy did provide the plaintiffs with access to a "superior educational program," the district court might have had a viable reason for adopting a remedial scheme that might be considered prophylactic.[112] For example, an exorbitant amount of time has passed since the decision in *Brown I* and the KCMSD's public school system continues to have vestiges of racial discrimination.[113] The court's orders could very well reflect its view that guaranteeing that plaintiffs are eventually placed in their rightful position requires resorting to a remedy that grants more than what is needed to place them in their rightful position. The *Swann* Court's recognition that "[t]he failure of local authorities to meet their obligations [has] aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems,"[114]

In her concurring opinion, Justice O'Connor uses another means to undermine the district court's traditional flexible power to fashion an adequate remedy. Justice O'Connor advocates the invalidation of the court's power to provide these remedies through the development of a legal process argument. The core of her argument is that the judiciary should not be the decision making body addressing this issue.[115] Instead, legislatures should be making these decisions.[116] As a general matter, Justice O'Connor is probably correct. She seems to have forgotten, however, that a major impetus for the decision in *Brown I* was the states' refusal to provide equal educational opportunities for African-American school children. Since it was impossible for the school children to change the situation by resorting to the legislative process as they were ineligible to vote and since their parents did not have a meaningful vote, the federal courts were virtually the only decision making body that could correct the situation. Now, Justice O'Connor advocates denying the victims their remedy based upon the premise that the victimizers should be the ones to decide the remedy!

In addition to placing limits on lower courts' remedial powers, the majority's opinion threatens to derail the long standing deference given to the trial court's factual findings in cases seeking equitable remedies. In *Brown II*, the Court acknowledged that given the district courts' "proximity to local conditions" they would be in the best position to formulate the remedies and to "consider whether the action of school authorities constitute[d] good faith implementation of the govern-

---

[107] McLaurin, 339 U.S. at 641 (emphasis added).

[108] *Id.* at 642 (emphasis added).

[109] Sweatt, 339 U.S. at 635 (emphasis added).

[110] Swann, 402 U.S. at 19 (emphasis added).

[111] Maybe the Court is suggesting that the express text of the 14th Amendment which provides for "equal protection" really means something less than equal.

[112] A prophylactic injunction is one that might actually place the plaintiff in a position exceeding his or her rightful position. This result may be necessary for several reasons. First, it may be difficult to make a precise determination of the plaintiff's rightful position. Therefore, rather than not provide a remedy, it is permissible to grant more in order to be certain that the plaintiff will be placed in his or her rightful position. Second, there may be instances where the defendants behavior suggests that obtaining compliance could be difficult. As a means of staving off problems in getting the plaintiff his or her remedy, the court may order a prophylactic remedy. The underlying assumption is that even if the defendant "misbehaves," its more likely that the plaintiff will receive the remedy if more than what is actually necessary has been ordered. *See* DOBBS, *supra* note 70, at 645.

[113] Brown I was decided in 1954. Brown I, 347 U.S. at 483. This litigation commenced in 1977. Missouri v. Jenkins, 115 S. Ct. at 2042. It was not until 1985 that the State of Missouri was held to have violated the plaintiffs' constitutional rights. Jenkins v. Missouri, 593 F.Supp. at 1485. It is now 1996 and Missouri still has not satisfied the mandate issued in *Brown I.*

[114] Swann, 402 U.S. at 14.

[115] Missouri v. Jenkins, 115 S. Ct. at 2060-61.

[116] *Id.* at 2060.

ing constitutional principles."[117] Accordingly, the *Swann* Court later decided that "we must of necessity rely to a large extent . . . on the informed judgment of the district courts in the first instance and on courts of appeals."[118]

Given the tremendous duty entrusted to the district courts, along with the traditional deference given to their findings of facts in equitable cases, it seems that, at least prior to *Jenkins*, the Court wanted to ensure that an additional amount of deference would be provided to the district courts' desegregation decisions because of the uniqueness of their relationships to the situations and the importance of the issues.[119] Despite the existence of substantial precedent regarding the proper degree of deference that should be afforded to district courts formulating remedies in school desegregation cases, the current Supreme Court has opted to essentially supplant the district court's findings and understanding of the situation in the Kansas City public school system.[120] This approach is revealing because it is contrary to the approach taken in *Freeman* where the Court went to great lengths to uphold and support the district court's findings.[121] The Court's not so subtle vacillation on when to accept the findings of fact that flow from a district court's unique understanding of the case appears to reflect a policy of supporting those cases that coincide with the Court's agenda of subjugating the rights of African-American public school children to the local governmental interest of controlling school districts.

Besides its obvious impact on desegregation litigation, it warrants noting the dangerous repercussions *Jenkins* could have if it is used as precedent in other areas of civil rights litigation. Structural injunctions are frequently used in cases involving prisoners' conditions of confinement and the conditions of facilities for the mentally disabled.[122] Unfortunately, the opinion in *Jenkins* reveals the Court's willingness to erode the trial court's ability to fashion adequate remedies in cases involving violation of the rights of essentially powerless or disenfranchised individuals. Given this message, defendants embroiled in public law litigation might be "encouraged" to engage in certain tactics like "coercing" plaintiffs to enter consent decrees that do not provide plaintiffs with an adequate remedy and engaging in behavior designed to delay complying with the remedies imposed by the court because of the realization that the decision in this case sets a favorable precedent for arguing that the trial court exceeded its remedial powers in equity. Essentially, if the defendants can "hold out," they probably can use *Jenkins* to make the case go away. At a minimum, they could use it to obtain a more favorable decree that does not provide the relief to which the plaintiffs are truly entitled. Thus, the core of the message sent by the Supreme Court to defendants litigating public structural reform cases is clear: drag your feet, and don't comply. If the institution involved performs what is traditionally considered a local governmental function, such as administering a prison system, it will probably benefit from these tactics because the Supreme Court will eventually come to its rescue by declaring that the district court exceeded it's remedial powers.

Another consequence of the message sent by the Court is the potential unwarranted restraint it could place on the judiciary. Now when confronted with a public law litigation case, it would not be surprising to see the judiciary proceed hesitantly and with extreme caution because of the threat posed by the decision in *Jenkins* that the defendants' challenge to its remedy will ultimately be accepted by the Court. Perhaps even more damaging is that district courts might be deterred from finding liability if they know they could ultimately be hindered in their quest to develop and implement effective remedies. This could happen in situations where the defendants' attitude and comportment during the pretrial and trial proceedings make using a prophylactic injunction necessary. So, instead of encouraging court's to correct pervasive systemic constitutional wrongs, *Jenkins* serves to deter the judiciary from exercising its equitable remedial powers when confronted with such cases.

If the trial court is feeling the heat, then imagine the pressure placed on plaintiffs' counsel in public law cases. *Jenkins* sends the message that the Supreme Court is willing to interfere with the trial court's traditionally broad and flexible equitable remedial powers. This willingness to interfere will directly influence counsel's decision regarding whether to commence litigation. If it is likely that a complex and possibly "intrusive" decree is required and the Court is informing the trial judges that they should exercise restraint in doing so, then counsel are going to be just as hesitant about pursuing these cases. Ultimately, *Jenkins* sends a signal that the Court is not concerned about the following: the harm done to certain plaintiffs; the fact that these plaintiffs may not receive the relief to which they are entitled; that the judiciary may be deterred from doing its job; and that potential plaintiffs' counsel might be deterred from pursuing cases on behalf of certain classes of individuals who

[117] Brown II, 349 U.S. at 299.

[118] Swann, 402 U.S. at 28.

[119] *See* Swann, 402 U.S. at 16 (acknowledging that if "the school authorities [default on] their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system,").

[120] Missouri v. Jenkins, 115 S. Ct. at 2049-56.

[121] Freeman v. Pitts, 503 U.S. at 467, 492-99 (1992).

[122] *See generally* Toussaint v. McCarthy, 926 F.2d 800 (9th Cir. 1991)(conditions of confinement in the administrative segregation housing units at several California prisons); Madrid v. Gomez, 889 F. Supp. 1146 (N.D.Cal. 1995)(conditions of confinement at the security housing unit at Pelican Bay); Coleman v. Wilson, 912 F. Supp. 1282 (E.D.Cal. 1995)(psychiatric care at California penal facilities).

have the misfortune to be in situations where their rights are violated by states or other governmental entities.

2. *The Subjugation of the Plaintiffs' Interests in Equal Education Litigation*

The majority opinion in *Jenkins* contains another interesting twist. This is derived from the emphasis placed upon the costs associated with the implementation and maintenance of the district court's remedy.[123] This reveals a not too subtle attempt to reintroduce two issues previously decided in favor of plaintiffs in school desegregation cases: whether the prospective remedy violates the Eleventh Amendment; and whether judicial involvement in such matters violates the Tenth Amendment and the general principles of federalism. Both issues were considered and rejected by the Court in *Milliken II*.[124]

In addressing the Eleventh Amendment issue, the *Milliken II* Court held that although the prospective relief granted to achieve the goal of equal educational opportunities might require the defendant to expend state treasury funds, since the relief was not a monetary damage award "federal courts [can] enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a *direct and substantial impact on the state treasury*."[125] In the same case, the Court entertained a Tenth Amendment federalism challenge and perfunctorily rejected it.[126] Despite the prior resolution of these issues, the Court reintroduces them.[127]

The real impetus for the Court's discussion of the costs associated with the remedial scheme is not per se federalism and the propriety of using state treasury funds to comply with court orders. Instead, at the core of this discussion is the Court's decision to reconfigure the hierarchy of interests involved in cases of this nature. Previously, it had been accepted that the plaintiffs' interests were the focal point of the litigation and the ensuing remedy.[128] *Brown II* initially established the hierarchy of interests: "[a]t stake is the *personal interest of the plaintiffs*."[129] *Green* reaffirmed the Court's decision to balance the interests in this manner.[130] In *Milliken II*, the court again took the position previously taken by the Court by holding that the plaintiffs' interests in obtaining the equal education to which they were deemed entitled outweighed the defendants' concern with regaining total control of the school system.[131] The *Milliken II* Court's rejection of the Tenth and Eleventh Amendment challenges, which reflected the state's interest, reconfirmed the Court's decision to place the plaintiffs' interests before those of the defendants. Until its decision in *Jenkins*, the Supreme Court has never wavered from the steadfast position that litigation involving issues pertaining to equal educational opportunities should focus on the African-American school children's rights because "the ultimate objective of the remedy is to make whole the victims of unlawful conduct."[132] The Court's reference to the costs expended and to be expended by the State of Missouri and the emphasis placed on the school system's interests, however, supports the conclusion that the current Court has decided to alter the historical hierarchy of rights. Evidently, the Court is more concerned with how much it has and will cost the State of Missouri to remedy the situation than it is with the fact that Missouri was found to have violated the plaintiffs' rights by not providing equal educational opportunities for more than 40 years after the decision in *Brown I*. This can only have devastating effects on securing equal education opportunities for African-American children.

3. *Rewarding Improper Behavior*

Brown II required remedying the inequality in the public school systems with "all deliberate speed."[133] The defendants were also directed "[to] make a *prompt* . . . start towards full compliance" with the decision in *Brown I*.[134] Lastly, the Court said that "the vitality of [*Brown I's*] constitutional principles cannot be allowed to yield simply because of disagreement with them."[135] Despite these admonitions, the Court anticipated that the defendants' attitudes might cause some delay to occur before equal education was available to all students attend-

---

[123] Missouri v. Jenkins, 115 S. Ct. at 2043-44, 2054.

[124] Milliken II, 433 U.S. at 288-91.

[125] *Id.* at 289 (citation omitted)(emphasis added). *See also* discussion *supra* p. 30.

[126] *Id.* at 291.

[127] *See* Missouri v. Jenkins, 115 S. Ct. at 2054-56 (federalism issue); *id.* at 2043-45(Eleventh Amendment issue). Justice O'Connor's concurring opinion which uses a legal process rationale to invalidate the District Court's orders also relies upon principles of federalism. *Id.* at 2060-61.

[128] *See supra* at pp. 27-28.

[129] Brown II, 349 U.S. at 300 (emphasis added).

[130] Green, 391 U.S. at 436 (citing Brown II, 349 U.S. at 300).

[131] Milliken II, 433 U.S. at 274.

[132] *Id.* at 280. I do not suggest that the responsibility for public school systems does not belong with the states and with the local school boards. I only suggest that the Court has decided that they must comply with *Brown I's* mandate and that the federal judiciary is the body vested with this responsibility. Approximately ten years have passed since the District Court found the State of Missouri liable for violating the plaintiffs' rights. Various programs pursuant to the court's orders have been implemented, and the District Court has already considered timelines for the cessation of the supervision necessary to ensure that plaintiffs obtain their remedy. *See* Brief of Respondent, KCMSD, 1994 WL 690211, at *17, Missouri v. Jenkins, 115 S. Ct. 2038 (1995).

[133] Brown II, 349 U.S. at 301.

[134] *Id.* at 300 (emphasis added).

[135] *Id.*

ing public schools.[136] Although the Court was willing to allow some acceptable degree of delay, it advised defendants to exercise good faith in creating and performing the necessary corrective measures.[137] The question remained as to what the Court considered an acceptable delay.

The *Green* case sheds light on the issue of what constitutes acceptable delay. *Green* was decided in 1968,[138] fourteen years after the 1954 decision in *Brown I*. After the School Board's failed to dismantle the discriminatory school system during this extended period, the Court declared that "such delays are no longer tolerable."[139] Thus, it is logical to assume that fourteen years is an unacceptable delay in remedying the constitutional harm done to the plaintiffs. The decisions in *Green* and *Swann* also reinforce the message to defendants in school desegregation cases that delays in establishing equal educational opportunities for the plaintiffs were inexcusable and highly suggestive of "dilatory tactics"[140] and "may indicate a lack of good faith."[141]

Four decades have passed since *Brown v. Board of Education* was decided, and the Kansas City School District still does not provide equal educational opportunities to African-American school children. Further, more than ten years have elapsed since the district court found Missouri liable for violating the equal protection clause because it had denied an equal education to black children attending public school in Kansas City. The defendant might be able to proffer reasons for its delay, but it is highly unlikely that a "delay" of forty one years is acceptable. This seems a reasonable conclusion given that the Court in *Green* was incensed after only ten years had passed between the decision in *Brown II* and the defendant's first remedial plan.[142]

The defendant's delay in complying with *Brown I* "can only have compounded the harm"[143] suffered by the plaintiffs. This failure can only have "aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems."[144] It also brings into question the sincerity of the State of Missouri's "good faith" efforts to remedy the harm compounded by its failure to satisfy *Brown I*. Given what can undoubtedly be construed as an unacceptable delay by the State in complying with *Brown I* that compounded the harm sustained by the plaintiffs and the questions these considerations raise regarding the propriety of the State's motivation, it seems improper to have rejected the district court's remedial orders, even if they are prophylactic. The Court's ruling in *Jenkins*, however, not only deprived the plaintiffs of components of a remedial scheme designed to address the compounded harm caused by the defendant's refusal to adhere to *Brown I's* dictates, but it also condones, or rewards, such activity that flagrantly defies the Court's instructions to act with "good faith compliance,"[145] and to do so "with all deliberate speed."[146]

Why would the Court bestow such a benefit upon a defendant in a school desegregation case where the ultimate objective is to eliminate the vestiges of racial discrimination which make it impossible for the plaintiffs to obtain an education equivalent to that received by children in other school districts?[147] Rewarding activity that is tantamount to the continued violation of a constitutional right seems counterintuitive. However, the Court must have had a reason for proceeding with this course of action. Perhaps it is that identified earlier: its decision to realign the interests involved by placing those of the victims last and those of the victimizer first.

IV. CONCLUSION

Where does the Court's decision in *Jenkins* leave us? For one thing, the decision certainly hinders the district courts' ability to fashion the necessary schemes to remedy school inequality situations with which they are intimately familiar. The same can be said for remedying wrongs for other civil rights violations if this portion of the decision is applied to other contexts. Equally disturbing is the Court's decision to reconfigure the interests in equal educational opportunity litigation that had been entrenched for over 45 years. Now the victims' interests occupy the final position on the list! It is a shame that the Court decided to bestow numerous benefits upon defendants in this type of litigation. The decision provides defendants with a tool they can use to avoid the imposition of what they would perceive as burdensome orders in structural injunction cases. It can also aid defendants in avoiding any involvement in this specific

---

[136] The Court in *Brown II* noted that "the courts may find that additional time is necessary to carry out the [*Brown I*] ruling in an effective manner." Brown II, 349 U.S. at 300.

[137] *Id.*

[138] Green, 391 U.S. at 430.

[139] *Id.* at 438.

[140] Swann, 402 U.S. at 13.

[141] Green, 391 U.S. at 439.

[142] *Id.* at 438-39.

[143] *Id.* at 438.

[144] Swann, 402 U.S. at 14.

[145] Brown II, 349 U.S. at 300.

[146] *Id.*

[147] One might argue that the federalism concerns are at the forefront of the Court's decision. *See* Missouri v. Jenkins, 115 S. Ct. at 2043-47, 2054-56. However, any federalism concerns are exacerbated by the defendant's delay or resistance to act in accordance with a constitutional mandate issued by the United States Supreme Court. Now the Supreme Court is permitting the State of Missouri to latch onto its federalism concerns as a means of avoiding compliance with *Brown I*, or reducing what is actually necessary for it to comply with *Brown I's* mandate. It seems absurd to allow a party to benefit from a situation it is at least partially responsible for creating.

type of litigation and potentially in other types of civil rights cases. Perhaps what is most frightening is the tacit approval of behavior that delays or frustrates the deliverance of the remedy to which the plaintiffs were deemed entitled.

The Court seems to have forgotten that an adjudged wrong without a remedy does not accomplish much. Maybe what the Court actually wants is for plaintiffs in certain types of cases, such as equal educational opportunity cases, to realize that they are foreclosed from receiving "justice" from the "justice system." Fraught with frustration, the plaintiffs will throw their hands up and opt not to pursue their claims. The consequence is that the Court will no longer have to be bothered by these disfavored suits.