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Declare Victory and Go Home: The Practical Ramifications of the Seventh Circuit's Interpretation of Missouri v. Jenkins in School Desegregation Cases

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Declare Victory and Go Home: The Practical Ramifications of the Seventh Circuit's Interpretation of *Missouri v. Jenkins* in School Desegregation Cases

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The Fourteenth Amendment commands, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws[.]"[1] After the Civil War, in 1868, the Fourteenth Amendment became part of the Constitution, the purpose of which was to bar state laws that could discriminate or disadvantage African Americans.

I. BACKGROUND

It took the Supreme Court over eighty-five years to decide that African-American school children should not be discriminated against because of the color of their skin.[2] Once that decision was made, the Court

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1. U.S. CONST. amend. XIV.

2. *See* Brown v. Bd. of Educ., 347 U.S. 483, 496 (1954) [hereinafter *Brown I*]. Prior to *Brown I*, the Supreme Court did not view state-imposed school desegregation as a violation of the Fourteenth Amendment. This view was made clear in *Plessy v. Ferguson*, 163 U.S. 537 (1896), whereby the Court articulated the "separate but equal" doctrine upholding a Louisiana law requiring separate railway cars for black and white passengers. While the Court in *Plessy* stated the Fourteenth Amendment was designed to create equality under the law, the Court stated the Fourteenth Amendment was not implemented to "abolish

assumed the decision would be followed.[3]

The Court left it up to the school districts to develop remedial plans which would correct the imbalance. This is the "with all deliberate speed" phase of desegregation law suits.[4] Courts found that it took more than a signed order to change 200 years of institutional discrimination.[5] Particularly, democratic institutions run by elected officials refused to change.[6]

Intentional discrimination desegregation lawsuits, because of this resistance, evolved into three phases. Phase One was liability. In Phase One, it had to be demonstrated that there was intentional discrimination which separated the children by race. Phase Two was the remedial phase. If liability is established, in the remedial phase, the court was to supply a remedy if the school district would not. This remedy was to compensate the victims of discrimination and place them in the same position they would have been if the discrimination had not occurred. Phase Three was unitary status.[7]

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distinctions based upon color, or to enforce social, as distinguished from political, equality" or to abolish "separate schools for children of different ages, sexes, and colors." 163 U.S. at 544-45.

3. It should be noted that the *Brown I* Court did not discuss remedial methods. Rather, "because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity." 347 U.S. at 495.

4. A year after *Brown I*, the Court, in *Brown v. Board of Education*, 349 U.S. 294 (1955) [hereinafter *Brown II*], addressed for the first time the question of remedial methods in school desegregation cases. The Court, in a surprisingly short opinion, supplied general guidelines for remedial methods. The often quoted section from the *Brown II* opinion states that District Courts are to enter decree orders and return schools to a racially non-discriminate basis "with all deliberate speed." 349 U.S. at 301.

5. *See* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1602-03 (2003)

> After *Brown* [I], southern states used every imaginable technique to obstruct desegregation. Some school systems attempted to close public schools rather than desegregate. Some school boards adopted so-called 'freedom of choice' plans which allowed students to choose where they would enroll and resulted in continued segregation. In some places, school systems outright disobeyed desegregation orders.

Id.

6. *See* Cooper v. Aaron, 358 U.S. 1, 18-20 (1958) (demanding that the states' elected officials follow judicial orders of the Supreme Court).

7. One of the more complex problems that lower courts face after dismantling a "dual" segregated school system is how a former "dual" system attains "unitary" status and obtains release from judicial supervision. *See* DAVID J. ARMOR, FORCED JUSTICE 48 (1995). This is even more evident by the Supreme Court's discussion in *Board of Education v. Dowell*, 498 U.S. 237 (1991), where the Court discussed what is meant by the term "unitary." Some courts, according to the *Dowell* Court, interpret "unitary" to mean a "school district that has completely remedied all vestiges of past discrimination," see United

Once the remedial programs were in place and the "vestiges" of intentional discrimination had been removed to the extent possible,[8] the district was to be returned to local control. This process was usually brought about by a petition filed by the school district requesting unitary status.[9] Historically, the ultimate inquiry at a unitary status hearing was whether the constitutional violator had complied in good faith with the desegregation remedial order since it was entered and whether the "vestiges" of past discrimination had been eliminated. The concentration was on the vestiges being eliminated completely.[10] Later, the Supreme Court began to emphasize a return to local control.[11] The de-emphasis of the elimination of vestiges and emphasis on local control culminated in *Missouri v. Jenkins*.[12]

States v. Overton, 834 F.2d 1171, 1175 (5th Cir. 1987), while other courts have "used 'unitary' to describe any school district that has currently desegregated student assignments, whether or not the status is solely the result of a court-imposed desegregation plan." Dowell v. Bd. of Educ., 890 F.2d 1483, 1490 (10th Cir. 1989).

8. Initially, the Supreme Court's focus at the unitary status phase of the case was to determine if the vestiges of state-imposed discrimination had been removed. *See* Swann v. Bd. of Educ., 402 U.S. 1, 15 (1971) ("The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."). That focus appears to have changed with recent Supreme Court rulings. *See* Missouri v. Jenkins, 515 U.S. 70, 103 (1995).

9. Generally, to be granted unitary status, courts would look to the six *Green* factors set forth in *Green v. New Kent County School Board*, 391 U.S. 430, 435 (1968). Those factors are: 1) student assignments; 2) transportation; 3) physical facilities; 4) extracurricular activities; 5) faculty assignments; and 6) resource allocation.

10. *See* Missouri v. Jenkins, 515 U.S. at 103.

11. This movement away from concentrating on whether vestiges of past discrimination had been removed and towards an emphasis of local control was first seen in *Dowell*. 498 U.S. at 237. Specifically, the *Dowell* Court stated early on in the opinion that "From the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination." 498 U.S. at 247. Later, the Court discussed how "[l]ocal control over the education of children allows citizens to participate in decision making, and allows innovation so that school programs can fit local needs." *Id.* at 248. Again, such direction can be seen in the Court's statement that "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination." *Id.* at 248 (quoting Milliken v. Bradley, 433 U.S. 267, 280-82 (1977)). One wonders who the Court thought would be locally controlling the school system after court release. Hopefully, not the very people who segregated the school system in the first place.

12. "On remand, the District Court must bear in mind that its end purpose is not only 'to remedy the violation' to the extent practicable, but also to 'restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.'" 515 U.S. at 102.

II. PEOPLE WHO CARE AND THE SEVENTH CIRCUIT ANALYSIS

Rockford, Illinois has had its own parallel to the nation's struggle with desegregation lawsuits.[13] In 1973, in *Quality Education for All Children v. School Board*, District Court Judge William J. Bauer found the Rockford School District in violation of the United States Constitution.[14] He wanted the district to come up with ways to correct the results of the discrimination. Shortly thereafter, Judge Bauer was elevated to the Seventh Circuit Court of Appeals.[15] No fewer than five district court judges were assigned the case between 1971-1981.[16] Most required the district to file reports but did little else. I began to help monitor *Quality Education for All Children* in 1976. No remedial order was ever entered. No student assignment order was ever entered. The court's only requirement was that the district periodically file reports – which showed no improvement on the conditions Judge Bauer found to have violated the Equal Protection Clause.[17] Finally, in 1981, Judge Roszkowski granted a motion to dismiss the case with prejudice. There was no unitary hearing. Nothing had been accomplished. This was Rockford's "with all deliberate speed" phase.

In 1989, the Rockford school system was back in federal court,[18] again accused of segregating children by race and intentionally discriminating

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13. *See* People Who Care v. Rockford Bd. of Educ., 851 F. Supp. 905 (N.D. Ill. 1994); Quality Educ. for All Children, Inc. v. Sch. Bd., 362 F. Supp. 985 (N.D. Ill. 1973).

14. *See* Quality Educ. for All Children, Inc., 362 F. Supp. at 1001 ("[M]uch of the evidence which has been presented to this Court to date strongly suggests a problem of minority isolation in the Rockford School District.").

15. Judge Bauer was elevated to the Seventh Circuit on December 20, 1974 and served on the panel that decided the majority of the *People Who Care* appeals.

16. Those judges were: Judge Bauer, Judge Prentice H. Marshall, Chief Judge Joel Flaum, Judge Alfred Kirkland, Sr., and Judge Stanley J. Roszkowski.

17. Some of those conditions included district officials proving that there were no educationally sound and administratively feasible alternatives to overcome the existence of segregated schools; seeking means of eradicating the results of the school board's discriminatory acts; and not discriminating in the hiring, assigning, dismissing, or demoting teachers because of their race or color.

18. While Judge Posner likes to write that the Rockford school desegregation case was some thirty-years-old in 2001, there were actually two cases, not one, of school desegregation. Judge Posner did acknowledge this in one opinion, but then returned to the thirty year litigation language. *See* People Who Care v. Rockford Bd. of Educ., 246 F.3d 1073, 1074 (7th Cir. 2001)

> Twelve years ago the plaintiffs filed this suit against the board of education of Rockford, Illinois, charging that the board had intentionally discriminated against black and Hispanic students. Though nominally a new suit, it was actually a continuation of school desegregation

against African-American and Hispanic children.[19] In 1994, the Rockford School District was found to have engaged in massive discrimination and segregation of its minority students.[20] The district did not appeal Judge Roszkowski's order. Phase One was complete. Phase Two was assigned to this Magistrate Judge with the consent of the parties.[21]

Soon after the finding of liability, the court began the remedial phase.[22] A comprehensive remedial order, entered in three phases, was completed on June 7, 1996, close to the time *Jenkins v. Missouri* was decided by the Supreme Court. Most of the order was accepted by the district, but parts were appealed to the Seventh Circuit. The Seventh Circuit emphatically sustained the district's objections.[23]

Enter Erwin Chemerinsky.[24] Mr. Chemerinsky is kind of a court guru for the Federal Judicial Center. By that I mean he is the paramount speaker on Supreme Court issues. He is the guy that tells federal judges what the Supreme Court is doing. He is bright, engaging and a very nice man. In 1995 all the magistrate judges in the country gathered in Salt Lake City, Utah. I was there and so was Mr. Chemerinsky. The *Jenkins* opinion had just come out. Now *Jenkins*, as we point out, dealt with the remedial phase of the Kansas City, Missouri school system, not unitary status, but it did substantially boost the idea of local control as an important factor in desegregation cases.[25] I asked Mr. Chemerinsky what his view was on the impact of the *Jenkins* decision on pending desegregation lawsuits. His answer startled me. He said it is like what Senator George Aiken said

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> litigation that had started long before and had resulted in the entry of a remedial decree as early as 1973. Realistically, we are dealing with a lawsuit that is almost 30 years old.

Id. (internal citation omitted).

19. *See People Who Care*, 851 F. Supp. 905 (N.D. Ill. 1994).

20. *Id.* at 933 ("The plaintiffs have prevailed on the merits of their claim and have established that the defendant has violated the constitutional rights of the plaintiffs.").

21. If anyone calls you up and suggests you supervise a discrimination lawsuit, my suggestion is that you tell them they have the wrong number. I am sure there are people in Rockford who wish my number had been disconnected.

22. This was a very time consuming and difficult process.

23. *See* People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 534 (7th Cir. 1997) (finding that the provisions in the remedial order, such as racial quotas for cheerleaders, super-seniority for minority teachers, goals of closing the white-minority gap in test scores, and desegregation of remedial classes were "ambitious schemes of social engineering.").

24. Erwin Chemerinsky is the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science at the University of Southern California. *See* Mr. Chermerinsky's very impressive nineteen page curriculum vitae at http://sdshh.com/attorneys/chemerinsky_resume.pdf (last visited January 13, 2004).

25. *See* Green v. New Kent County Sch. Bd., 391 U.S. at 435.

about Vietnam.[26] Federal courts are to declare victory and leave. He later made the same statement in print (twice).[27]

It was not long before I saw the impact of *Jenkins* on the Rockford case. In 1999, the district had disagreed with many of my orders and appealed them. Most of my decisions were affirmed,[28] but there was an interesting development. Judge Posner asked the attorney for the district at oral argument when he thought the district would obtain unitary status.[29] That issue was not before the court. No petition had been filed for unitary status or even partial unitary status. The Rockford School District attorney picked a date out of the air—2002.[30] The date made the opinion and became a target for unitary status.[31] Over and over, Judge Posner in court opinions insisted the district apply for unitary status.[32] Nowhere in those opinions was the issue of "vestiges" discussed.[33]

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26. *See* Chemerinsky, *supra* note 5 at 1622 ("During the Vietnam War, Senator George Aiken said that the United States should declare victory and withdraw from Vietnam.") (citing Albin Krebs, *George Aiken, Longtime Senator and G.O.P. Maverick, Dies at 92*, N.Y. TIMES, Nov. 20, 1984, at B10); Erwin Chemerinsky, *The Rehnquist Revolution*, 1-SPG NEXUS 21, 32 (1996) ("During the Vietnam War, a senator said that the United States should declare victory and withdraw. These [recent] cases show that the Supreme Court is impatient with continuing federal court desegregation efforts and wants to declare victory over the problem of segregation and have the federal courts withdraw.").

27. *See* Cherminsky, *supra* note 26.

28. *See* People Who Care v. Rockford Bd. of Educ., 171 F.3d 1083, 1091 (7th Cir. 1999) ("[W]e are being inundated by groundless appeals challenging peripheral and for the most part unexceptionable facets of the magistrate judge's administration of the remedial decree.").

29. *Id.* at 1091 ("The board told us at argument that it thinks full compliance with the decree is achievable by 2002; and when full compliance is achieved, the decree must be dissolved.").

30. While Judge Posner did state that the board should "propose to the magistrate judge, after consultation with the plaintiffs and the master, a modification of the decree that will include an appropriate termination date (perhaps a series of different dates, for different programs) ... ." *People Who Care*, 171 F.3d at 1091. 2002 was the end date, some three years after the Seventh Circuit's opinion. *Id.*

31. *Id.* at 1090 ("We hoped that our 1997 decision, in cutting back the scope of the comprehensive remedial decree, would set the stage for an early termination. We had thought it would be followed by the school board's submitting a plan for winding up the litigation within a definite and short period of time.").

32. *See* People Who Care v. Rockford Bd. of Educ., 246 F.3d 1073, 1075 (7th Cir. 2001) (wondering "[w]hy the board asked for deferred rather than immediate dissolution . . . ."); *People Who Care*, 171 F.3d at 1091 (recommending the board submit a plan for winding up the litigation).

33. In fact, nowhere in the Seventh Circuit's *People Who Care* decision does the court discuss whether the vestiges of past discrimination have been removed. Rather, in response to the *Jenkins* decision, the Seventh Circuit, in almost every single one of its *People Who Care* opinions subsequent to *Jenkins*, continued to "heed the admonition of the

Jenkins had, as a practical matter, changed the landscape of school desegregation cases. Return to local control was dominant and removal of vestiges of discrimination was secondary. The Seventh Circuit was ready to declare victory and leave. It did so on April 18, 2001.[34]

III. PRACTICAL RAMIFICATIONS

Rather than selecting arbitrary dates and declaring victory, this author would suggest combining Steps Two (remedial) and Three (unitary status). The Majority in *Jenkins*, and the panel of the Seventh Circuit that oversaw *People Who Care*, both seemed to believe desegregation cases to be historic aberrations that, when ended, will never reappear. I am not so sure. There may be other cases out there. Those cases will be in cities about the size of Rockford, Illinois, with somewhere between 75,000 and 250,000 people. For those future desegregation cases possibly on the horizon, heed the word of *Jenkins* and the direction of the Seventh Circuit and combine Steps Two and Three.

A school district can be compared to a big ship. Ordering a district to change direction is like asking an oil tanker to make a U-turn in Illinois' Rock River. Changes in a school district can only be made during certain times of the year and, often, only once a year. Staffing, finance and student assignment can only be done once every twelve months. Further, when a federal court leaves, it takes the desegregation money with it. This can cause a financial crisis for a district.[35] Wherever a remedial program is ordered, a new source of funding has to be created to support the programs. No school district has excess funds laying around which can be applied to correct the vestiges of intentional discrimination. When unitary status is declared, that funding source dries up. In order to have a positive impact on a district, a court should at the time of the remedial hearing and as part of the Comprehensive Remedial Order, set out a reasonable time frame for

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Supreme Court . . . to bend every effort to winding up school litigation and returning the operation of the schools to the local school authorities." *People Who Care*, 246 F.3d at 1074 (internal citations omitted). Mysteriously, the language used by the Seventh Circuit, "to bend every effort to winding up school litigation," is absent from any Supreme Court case. *Id.*

34. *See People Who Care*, 246 F.3d at 1076 (stating that the "Rockford public schools have been desegregated.").

35. Mark Bonne, Schools' Future in Community's Hands, ROCKFORD REG. STAR, Jan. 7, 2004, available at http://www.rrstar.com/localnews/your_community/rockford/20031221-3721.shtml (stating that "by several measures – next year's anticipated $30 million deficit, test scores well below average – the public schools remain broken."). The article further indicates that the State of Illinois may take over the Rockford School District.

the return to local control. This will allow for multi-year planning and funding.

Combining Steps Two and Three will also allow minority parents and children to have reasonable expectations as to the duration and the results of the remedial order. Having a time frame will make the remedial phase more of a positive experience for the community. It will allow the school district to prepare for the time when local control is returned. It will decrease litigation costs. It also makes sense. The time of creating the remedy is also an appropriate time to establish the life span of the remedies. The only remaining issue would be whether the district is complying in good faith with implementation of the remedies. If a remedial order is drawn up at the time of conception with an end date, the district then knows the length of the plan, which will result in a more productive plan. The parties could develop a plan that will meet the needs of both and bring about a better result for the students.[36] Remember also that unitary status can be achieved by incremental steps. It is not an all or nothing event. This means that an area that will need more time, such as student assignment, may be given a longer life span.

IV. CONCLUSION

The landscape of school desegregation cases has changed. While all indications from the Seventh Circuit seem to point to an end to school desegregation, such a presumption is unrealistic. Rather, from a practical standpoint, what should be taken from the Seventh Circuit's interpretation of *Jenkins* is not that school desegregation cases are a thing of the past, but that the manner in which they are approached has changed. What used to be a three step process has now, for all intents and purposes, become a two step process with steps two and three combined. Pick a date at the remedial stage of the litigation before some court arbitrarily declares victory.

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36. This is ultimately the goal of school desegregation cases. However, some do not find it a realistic goal for the courts given external factors. *See People Who Care*, 246 F.3d at 1076 ("Yet it is obvious that other factors besides discrimination contribute to unequal educational attainment, such as poverty, parents' education and employment, family size, parental attitudes and behavior, prenatal, neonatal, and child health care, peer-group pressures, and ethnic culture.").