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The Little Rock School District's Quest for Unitary Status

Cover Page Footnote
The following is one of three articles solicited by the University of Arkansas at Little Rock Law Review specifically to complement the Symposium essays that commemorate the 50th Anniversary of the Central High Crisis appearing also in this issue.
THE LITTLE ROCK SCHOOL DISTRICT'S QUEST FOR UNITARY STATUS

Honorable Robert L. Brown*

I. INTRODUCTION

"50 Years Later, Little Rock Can't Escape Race" read the May 8, 2007 New York Times front-page headline.1 And our community's heart sank. The Times article depicted the struggle and dissension between whites and blacks on the Little Rock School Board (the "School Board") and in the community at large over the retention of Roy Brooks, who is black, as superintendent of the Little Rock School District.2 The irony of it all was that the three whites on the seven-person School Board supported Brooks.3 The second irony was that the Brooks debate was raging just weeks after the Federal District Court declared that the Little Rock School District (the "School District") had fulfilled its desegregation obligations and was unitary.4

But had nothing changed in the past fifty years? Was integration, or even desegregation, something that could only be imposed by fixed bayonets or by court order, as opposed to a community’s mutual will and commitment? Surely not.

This essay will discuss the major judicial benchmarks affecting the Little Rock School District since the Brown decisions,5 but it will additionally touch on attitudinal stumbling blocks between the races where problems continue to arise and where suspicions run deep.

II. JUDICIAL BENCHMARKS SINCE BROWN

First, there are the judicial benchmarks. Three cases bear mentioning. After some forty years of litigation, the Little Rock School District has been

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* Robert L. Brown, Associate Justice of the Arkansas Supreme Court. I am indebted to my law clerk, Sarah Keith-Bolden, who did considerable research for this paper.
2. Id.
3. Id.
declared unitary in all respects by the Federal District Court for the Eastern District of Arkansas. In its 1968 decision of *Green v. County School Board*, the United States Supreme Court defined unitary status to mean that all vestiges of racial discrimination have been removed for student assignments, faculty and staff, transportation, extracurricular activities, and facilities.

The most recent decision of the Federal District Court involving the School District is at this writing on appeal to the Eighth Circuit Court of Appeals. The second set of opinions to discuss are the *Lake View* opinions, which concerned public school funding in Arkansas and whether that funding was substantially equal for all students and provided an adequate education.

And, finally, there is the new kid on the block, which is the United States Supreme Court's decision relating to racial preferences in the Seattle and Louisville public schools.

A. Unitary Status

My initial focus then is on the unitary-status decisions handed down by the Federal District Court, and specifically by Judge Bill Wilson, in 2002, in 2004, and on February 23, 2007. If this final decision stands, it will terminate federal court supervision over the Little Rock public schools, which dates back to 1966.

1. **Historical Context of Unitary Status in Little Rock**

A brief history of our litigation is required, which really is a history of desegregation experiments in the Little Rock schools for the last forty years. Following the United States Supreme Court's decision in *Green* in 1968, the whole notion of freedom of choice for patrons in school districts that had had de jure segregation, whereby students were allowed to choose which school to attend, was struck down. This decision affected the School District because it had employed freedom of choice for school enrollment based

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on attendance zones, thereby allowing de facto segregation to continue.\textsuperscript{11} As a result, litigation began in the Federal District Court in the 1960s to enforce the \textit{Brown} decisions, using the \textit{Green} guidelines.

The plaintiffs in the \textit{Clark} cases, as they were known, were black parents who met racial discrimination head on and sought remedies to correct racial imbalances.\textsuperscript{12} Most of these remedies centered around cross-town busing. Experiments began, such as busing black students to elementary schools in predominantly white areas for grades one through three and busing white students to schools in predominantly black areas for grades four through six.\textsuperscript{13} Other experiments included having a certain number of all-black elementary schools that would expand the pool of white students for the remaining elementary schools,\textsuperscript{14} magnet schools with heightened funding,\textsuperscript{15} and majority-to-minority transfers.\textsuperscript{16}

In 1981, when faced with a 76\% black enrollment in the elementary grades, the School District began to focus on the declining number of white students enrolled in Little Rock's public schools.\textsuperscript{17} In 1982, the School District, hoping to tap into the large number of white students in the other two Pulaski County School Districts, sued to consolidate the three school districts. In 1984, Judge Henry Woods of the Federal District Court consolidated those three school districts, in part to address the dwindling number of white students in the School District.\textsuperscript{18} The Eighth Circuit Court of Appeals

\begin{footnotesize}
\begin{enumerate}
\item[11.] Clark v. Bd. of Educ. of Little Rock Sch. Dist., 426 F.2d 1035, 1043-44 (8th Cir. 1970) ("\textit{Clark IV}").
\item[14.] \textit{See, e.g.}, \textit{Clark VIII}, 705 F.2d at 269 (describing the problem of decreasing white enrollment and approving a plan creating certain "essentially all-black" schools).
\item[15.] \textit{See, e.g.}, \textit{id}. (describing the creation of Williams as a magnet school which was to "achieve a 50\% white/50\% nonwhite racial composition, allowing for a 10\% deviation" and receive "10\% over the average per pupil expenditure for other schools in the Little Rock School District").
\item[16.] \textit{See, e.g.}, Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F.2d 404, 436 (8th Cir. 1985) ("\textit{Little Rock Sch. Dist. II}") (setting forth a desegregation plan in which majority-to-minority transfers were to be encouraged).
\item[17.] \textit{Clark VIII}, 705 F.2d at 267.
\end{enumerate}
\end{footnotesize}
reversed the consolidation decision but allowed expansion of the School District’s boundaries so that they were contiguous with Little Rock’s city limits, thereby bringing a large number of white students who were previously part of the Pulaski County Special School District into the School District.  

There was also the debacle implemented by the School District in 1987 and approved by the Federal District Court known as the “Controlled Choice Plan.” In reality, it was not strictly controlled choice, in which parents chose a school for their children on the front end, but more of a hybrid. Under this plan, mandatory assignments of students were made by the School District for the elementary grades without regard to residences and neighborhoods. Choices by school patrons, which were transfer requests that would only be granted if a transfer did not disrupt racial balance at each school, could, ironically, only be made after the assignments were put in place. The Little Rock School Board found the plan unworkable and soon jettisoned it, after which a “stabilizing year” was agreed to by all parties to allow for future planning. This allowed everyone to take a deep breath.

In the late 1980s, another phenomenon was taking place. A debate was raging in the black community regarding assimilation. Did black elementary school children truly benefit from being bused to predominantly white areas of the city where white teachers predominated? Or did these black students fare better, academically and socially, in predominantly black settings? The result of this debate was a gradual shift back to neighborhood schools in the elementary school grades.

In the late 1980s and 1990s, there were several major developments. First, the Office of Desegregation Monitoring was established as an arm of the Federal District Court to monitor progress toward unitary status. The second major development was the 1990 Settlement Agreement in which the state agreed to pay nearly $130 million to the three Pulaski County School Districts as a remedy for the state’s role in fostering past segregation.
represented by John Walker as counsel, assumed the role of monitoring desegregation in the School District.\textsuperscript{29}

Eventually, some of the provisions of the 1990 Settlement Agreement were recognized as untenable, and in 1998 a Revised Desegregation Plan (the "Revised Plan") was agreed to by the parties in which the School District assumed numerous contractual obligations to eliminate racial discrimination.\textsuperscript{30} The Joshua Intervenors would also monitor the Revised Plan.\textsuperscript{31}

2. \textit{The Little Rock School District's Recent Moves Toward Unitary Status}

Professor Charles Ogletree wrote in his seminal book, \textit{All Deliberate Speed}, about the attitude of the Supreme Court in directing the march to become unitary:

In the years following \textit{Brown}, the Supreme Court moved from simply prohibiting segregation to stating that school districts bear an "affirmative duty to take whatever steps might be necessary to [achieve an integrated system] in which racial discrimination would be eliminated root and branch." Put differently, the Court recognized that providing the opportunity for integration was not enough: some positive, remedial steps needed to be taken to ensure that black citizens and students were not denied equal benefit of the laws. President Johnson's "Great Society" was but the political expression of this goal.\textsuperscript{32}

But was elimination of discrimination by "root and branch" a reasonable and attainable goal? Apparently it was not reasonable or attainable in the mind of the United States Supreme Court. In 1991, the Court expanded the factors set out in its \textit{Green} decision in 1968 to include good faith efforts by the school districts.\textsuperscript{33} The Court moved, in addition, from a test of total elimination of racial discrimination "root and branch" to elimination "to the extent practicable."\textsuperscript{34}

On March 15, 2001, the School District applied for unitary status and asserted that it had substantially complied with the Revised Plan that it en-

\begin{itemize}
\item \textsuperscript{29} See \textit{id.} at 1010–11 (noting that the School District agreed to pay Joshua's counsel for monitoring activities to be performed under the 1990 Settlement Agreement).
\item \textsuperscript{30} \textit{id.} at 1017.
\item \textsuperscript{31} \textit{id.} at 1014 (describing agreement in which the School District agreed to pay Joshua's counsel for monitoring activities).
\item \textsuperscript{32} \textit{Charles J. Ogletree, Jr., All Deliberate Speed: Reflections on the First Half Century of \textit{Brown v. Board of Education} 147 (2004)} (quoting \textit{Green v. County School Board of New Kent County, Va.}, 391 U.S. 430, 437–38 (1968)).
\item \textsuperscript{34} \textit{id.} at 238.
\end{itemize}
tered into in 1998, which again set out multiple desegregation obligations.\textsuperscript{35} Those areas of alleged compliance with the Revised Plan included the \textit{Green} factors of desegregation relating to student assignments, faculty and staff, transportation, extracurricular activities, and facilities.\textsuperscript{36} The Revised Plan had also called for compliance with double funding of incentive schools, magnet school orders, remediation of black students, early childhood education, programs to promote parental involvement and support, other obligations related to student discipline, advanced placement courses, and guidance counseling.\textsuperscript{37}

So for the School District to achieve unitary status, it had to substantially comply with the obligations it assumed in the Revised Plan. Because the School District had not been adjudged a violator under the United States Constitution, the Joshua Intervenors had the burden of proving no substantial compliance with these contractual obligations and, thus, no designation as unitary.\textsuperscript{38}

Judge Wilson ultimately agreed in 2002 that the School District had operated in good faith and that partial unitary status had been achieved in most areas with the exception of assessing and evaluating the effectiveness of programs for remediating the academic achievement of black students.\textsuperscript{39} In ruling as he did, Judge Wilson made the point that elimination of the achievement gap between white and black students is not required.\textsuperscript{40} Rather, a good faith effort to do so is what is mandatory.\textsuperscript{41}

The Eighth Circuit Court of Appeals affirmed that decision for partial unitary status in March 2004.\textsuperscript{42} The School District again petitioned for a declaration of full unitary status, but Judge Wilson denied the petition a second time on grounds that substantial compliance with the required assessment and evaluation for remediating academic achievement for black students was still lacking.\textsuperscript{43}

In 2006, the School District applied for full unitary status a third time.\textsuperscript{44} Following a hearing on this application, Judge Wilson found that the School District had substantially complied with the Revised Plan, including the requirement for assessing and evaluating the remediation of academic

\textsuperscript{35} \textit{Little Rock Sch. Dist. IV}, 237 F. Supp. 2d at 1031–32.

\textsuperscript{36} \textit{Id}.

\textsuperscript{37} See \textit{id}. at 1032.

\textsuperscript{38} See \textit{id}. at 1033–34.

\textsuperscript{39} See \textit{id}. at 1082–86.

\textsuperscript{40} \textit{Id}. at 1073.

\textsuperscript{41} \textit{Little Rock Sch. Dist. IV}, 237 F. Supp. 2d at 1046, 1073.

\textsuperscript{42} \textit{Little Rock Sch. Dist. v. Armstrong}, 359 F.3d 957, 969–70 (8th Cir. 2004).


achievement for black students.\textsuperscript{45} He then terminated court supervision and monitoring of the School District in February of this year.\textsuperscript{46} In doing so, the court used the standard of a good faith effort to comply and held that the School District had met that standard.\textsuperscript{47}

Not surprisingly, one pivotal aspect of the \textit{Little Rock School District} case and the unitary decision is money. Pursuant to the 1990 Settlement Agreement, about $24 million in desegregation funds flows each year from the State of Arkansas to the School District based on the state’s liability for past racial discrimination.\textsuperscript{48} These funds have been used to pay for majority-to-minority transfers, magnet-school funding, and transportation costs.\textsuperscript{49} The question this raises is, should the state still be liable for these funds even though the School District has now been declared unitary and racial discrimination has been eliminated to the extent practicable? Stated another way, does the School District’s new unitary status have any impact on the state’s liability for payment of desegregation funds?

Because the desegregation funds have helped the School District pay for magnet-school expenses, transportation costs, and majority-to-minority transfers over the past seventeen years, if those funds are limited or cut off, will the School District regress? Act 395 of 2007 states that the desegregation funds will continue to some extent for seven years following a unitary declaration,\textsuperscript{50} but in what amount and for how long? And is the seven-year limitation written in stone or will that time limit be contested?

Settlement negotiations are said to be underway between the Joshua Intervenors, who have appealed the unitary decision, and the School District. The negotiations appear to center around the School District’s assumption of additional contractual obligations regarding desegregation in exchange for dropping the appeal. This raises another question in the minds of some. If the School District is now unitary, why should the School District assume additional contractual obligations at the behest of the Joshua Intervenors? Clearly, the questions raised in this essay are impossible to answer with any certainty without a crystal ball.

\textsuperscript{45} \textit{Id.} at *23–25.
\textsuperscript{46} \textit{Id} at *25.
\textsuperscript{47} \textit{Id}. at *8.
\textsuperscript{49} \textit{Id}.
\textsuperscript{50} 2007 Ark. Acts 395 (codified at \textit{ARK CODE ANN.} § 6-20-416 (b) (1) (A) (Repl. 2007)).
B. Public School Funding

What is more certain is that state litigation regarding the equality and adequacy of the funding of public education, known as the Lake View case, has now come to an end. In 2002, the Arkansas Supreme Court held that the system for funding public education violated the Arkansas Constitution’s equal protection clauses and its requirement that education be public, suitable, and efficient.\(^{51}\) Five years later, after multiple regular and special legislative sessions, three reports by the court’s specially appointed masters, and several decisions by the court itself, the court held that the state’s public school funding system was now constitutional.\(^{52}\) The state breathed a collective sigh of relief.

On September 6, Juan Williams, the renowned commentator for National Public Radio, spoke to the Clinton School in Little Rock and stated powerfully: “to my mind there is no greater struggle to be had than the struggle to deliver on the promise of equal education and opportunity for every child in this new 21st Century.”\(^{53}\)

The changes to state education fomented by the general assembly and executive branch in this state over the past five years in the wake of the Lake View decisions were of epic proportions and meet Mr. Williams’s challenge. The ensuing legislation resulted in state control over local school districts, uniform accounting and accountability requirements, and a tremendous infusion of funding for education resulting, in part, from a sales tax increase and significant revenue surpluses. The legislative measures included:

(1) increases in per-pupil expenditures and incentives and special funding to assure equality and adequacy in high risk and economically distressed areas,
(2) enhanced teacher salaries and benefits,
(3) state supervision of public education in local school districts,
(4) uniform accounting by the local school districts,
(5) accountability measures for the school districts for spending education funds,
(6) ongoing legislative oversight with public-school funding set as the number-one priority for the state,
(7) increased categorical aid in areas like English language learners, and
(8) wholesale renovation and overhaul of school facilities and equipment.\(^{54}\) And, finally,

\(^{51}\) Lake View I, 351 Ark. at 72, 91 S.W.3d at 495.
\(^{53}\) Juan Williams, Senior Correspondent, National Public Radio, Speech at the Central High Symposium: Little Rock Desegregation Crisis: 50 Years Later (Sept. 6, 2007).
\(^{54}\) Lake View IV, 2007 WL 1560547. The precursor of the Lake View decision was a 1983 decision by the Arkansas Supreme Court, Dupree v. Alma Sch. District, 279 Ark. 340, 651 S.W.2d 90 (1983). In Dupree, this court held that sharp disparities in per-pupil expenditures among the various school districts violated the Equal Protection Clause of the state constitution. Moreover, the Court held that local control by local school districts was not a rational basis for the disparate funding. Dupree, 279 Ark. at 345–46, 651 S.W.2d at 93. In the subsequent Lake View I decision, the court held that funding for public education was still not
though not required by the Arkansas Constitution, significantly greater revenues were appropriated for early childhood education.\textsuperscript{55}

One national commentator has described the kinship between desegregation litigation and decisions relating to equality in public school funding. Molly McUsic wrote, following a symposium at Harvard University in 2004: "As desegregation stalled, school finance litigation became the primary legal tool for creating equal educational opportunities."\textsuperscript{56} She went on to say that this litigation, of course, had to be accomplished under the education clauses of state constitutions because in 1973, the United States Supreme Court rejected the notion that discriminatory unequal educational funding violated the Equal Protection Clause of the Federal Constitution.\textsuperscript{57} Arkansas is a prime example of what Ms. McUsic describes. Stated simply, Arkansas has been a model for reform in the arena of public-finance litigation and one of the leaders in this country for the equal education opportunity that Juan Williams espouses.

C. Seattle Case

Yet, almost as a counterbalance to the School District’s unitary status and the \textit{Lake View} rulings, the United States Supreme Court handed down a decision last June involving the Seattle and Louisville School Districts that could have far-reaching consequences.\textsuperscript{58} In the Seattle case, the Court, in a five-four plurality decision, struck down a student assignment plan that provided preferences based on race for school slots in oversubscribed high schools.\textsuperscript{59} The Court’s decision was based on a racial classification and violation of the Equal Protection Clause.\textsuperscript{60} Specifically, nonwhites had received priority for those coveted spots under a plan or formula developed by the School District.\textsuperscript{61} This resulted, according to the Court, in discrimination against white patrons.\textsuperscript{62}

In ruling as it did, five justices reviewed the racial classification under a strict scrutiny standard and found that racial balancing in the schools was substantially equal for children in different school districts, nor was it adequate. \textit{Lake View I}, 351 Ark. at 72, 91 S.W.3d at 495.

\textsuperscript{55} See, e.g., \textit{Lake View III}, 364 Ark. 398, 220 S.W.3d 645.


\textsuperscript{57} \textit{Id.} at 1342–43 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 15–16 (1973)).

\textsuperscript{58} Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 127 S. Ct. 2738 (2007).

\textsuperscript{59} \textit{Id.} at 2746–47, 2749, 2759–61.

\textsuperscript{60} \textit{Id.} at 2753–54.

\textsuperscript{61} \textit{Id.} at 2746–47, 2749.

\textsuperscript{62} \textit{Id.} at 2753–54.
not narrowly tailored to accomplish its goal of achieving racial balance in the high schools.\textsuperscript{63}

Does the Seattle case sound a retreat from the clarion call that \textit{Brown} represents? Certainly, doubt may have been cast on certain strategies used by school districts and implemented by contract to accomplish desegregation.

\section*{III. ATTITUINAL PROBLEMS}

Before I get too global in my ruminations, let me return to Little Rock and a final comment I would like to make about race relations in my city. Nineteen years ago, I wrote about professional gains by blacks in the workplace in the Rockefeller Report, but I had this to say about social interaction among the races in this community:

A torpor seems to have settled over social integration in Little Rock. While it could be said in the seventies that social contacts between the races as opposed to business contacts were increasing, the same does not hold true today. In fact, just the opposite appears to be the case among business and professional people. The fault belongs to both whites and blacks. They operate in two separate communities and have ceased to work at social integration.\textsuperscript{64}

The Rockefeller Report also pointed out that misunderstanding and distrust manifested themselves among whites in believing that some blacks did not oppose an all-black school district, because the School District is a major business enterprise with job and managerial opportunities.\textsuperscript{65} The blacks, on the other hand, believed the whites were only interested in special elite schools and advanced placement classes and did not really understand or care about the social and educational needs of black patrons and students.\textsuperscript{66} I further took the then existing confrontational School Board to task for staking out absolute positions from which no compromise was attainable.\textsuperscript{67}

Today, as was the case in 1988, better dialogue and communication between the races built on social relationships and generated by mutual concern for the betterment of our educational system and our community at large is our greatest challenge. At times, we all seem to fall into the trap that former School District Superintendent Ed Kelly described in the 1980s when he said that the Little Rock community seems to look to the public

\begin{itemize}
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} Rockefeller Report, \textit{supra} note 13, at 24.
\item \textsuperscript{65} \textit{Id.} at 10.
\item \textsuperscript{66} \textit{Id.} at 24.
\item \textsuperscript{67} \textit{Id.} at 27.
\end{itemize}
schools as the means to solve all of our social problems. Little Rock is hardly unique in that regard.

IV. CONCLUSION

The School District is now unitary, though that decision is on appeal, and the state’s public school funding is now in constitutional compliance. I harken back to the New York Times headline—has Little Rock “escaped race?” Without question, tremendous gains have been made. The ongoing challenge for our city’s leaders, both white and black, is to work to foster better communication, understanding, and trust between the races. Without this, we shall never hope to overcome.

68. See Nossiter, supra note 1.