Structural Decrees and Unintended Consequences: The Louisville Desegregation Decree

RUSSELL L. WEAVER*

Courts have expressed a reluctance to use structural decrees to bring an end to unconstitutional racial segregation, but in formulating remedies they have often been forced to formulate broad race-based remedies. This article examines the judicial decree entered in Louisville, Kentucky, in the 1970s. For twenty-five years, the Jefferson County Board of Education was ordered to emphasize race in making student assignment decisions, and explicitly ordered to try to achieve racial balance in its schools. When the decree was finally dissolved, Jefferson County Public Schools continued to use race as a determinative factor in student assignment decisions. This article considers whether there is an alternative to judicial involvement in desegregation.

Ravel's *Bolero* contains a serene melody that continues throughout the entire composition. However, the melody becomes more emphatic and louder at each successive level. A first-time listener soon recognizes the impossibility of the situation. At each stage of the composition, the music rises in volume and tone. But, how can this go on forever? How will Ravel break the pattern and bring the composition to an end? Of course, Ravel *does* break the pattern by creating an extremely discordant ending somewhat akin to a hunter bringing down a wild animal.

Structural decrees in the educational arena have brought Ravel's composition to life in a real world context. Although structural decrees are generally disfavored by the courts,[1] judicial intervention is sometimes needed to end unconstitutional segregation.[2] In formulating remedies, courts have often been forced to formulate broad race-based remedies. The risk is that, as courts encourage and force school

* Professor of Law & Distinguished University Scholar, University of Louisville, Louis D. Brandeis School of Law.

1 *See Grossman v. Wegman's Food Markets, Inc.*, 43 A.D.2d 813, 350 N.Y.S.2d 484 (Sup. Ct., App.Div.1973); *see also* William A. Fletcher, 'The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy' (1982); 91 *Yale L.J.* 635; Gerald E. Frug, 'The Judicial Power of the Purse' (1978) 126 *U. Pa. L. Rev*. 715; Robert F. Nagel, 'Separation of Powers and the Scope of Federal Equitable Remedies' (1978) 30 *Stan L. Rev.* 661; Abram Chayes, 'The Role of the Judge in Public Law Litigation,' (1976) 89 *Harv. L. Rev*. 1281.

2 *See, e.g., Missouri v. Jenkins*, 515 U.S. 70 (1995); *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992); *Hutto v. Finney*, 437 U.S. 456 (1978); *Milliken v. Bradley*, 433 U.S. 267 (1977); *Swann v. Charlotte–Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971).

districts to focus on race-based remedies over long periods of time, school district officials will have difficulty making decisions without race-based assumptions.[3] After being told for years, if not decades, that they simply *must* consider their students' race in making student assignments, how do school districts transition to a post-judicial world in which they might be prohibited from making decisions based on race?

This article examines the judicial decree entered in Louisville, Kentucky, in the 1970s. For twenty-five years, the Jefferson County Board of Education (JCBE)) was ordered to emphasize race in making student assignment decisions, and explicitly ordered to try to achieve racial balance in its schools. When the decree was finally dissolved, Jefferson County Public Schools (JCPS) continued to use race as a determinative factor in student assignment decisions. This practice only after JCBE was sued over the practice in *Parents Involved in Community Schools v. Seattle School District # 1*,[4] and ordered not to continue the practice. Like Ravel's *Bolero*, it is not surprising that the "riff" (of using race as a trump card in student assignments) continued following the end of the desegregation decree. Given the myriad of judicial orders, it would have been surprising if the school board had not continued to consider race in making student assignments. The end of the practice came to a discordant end when it was struck down by the U.S. Supreme Court in the *Parents Involved* case. This short article provides a short history of the Louisville litigation with an eye towards evaluating the wisdom of the structural decree entered in that case.

I. THE RISE AND DECLINE OF STRUCTURAL DECREES IN EDUCATIONAL CASES

Despite the judicial aversion to decrees that require judicial supervision, the use of structural decrees was both necessary and desirable during the Civil Rights Era. In the deep South, courts were confronted by segregated school districts and school boards that were deeply entrenched and resistant to change. Of course, *Brown v. Board of Education (hereinafter Brown I)* is the seminal case.[5] In *Brown*, the Court held that the Topeka, Kansas school district was illegally segregated. However, fearful of an adverse public reaction if they ordered an immediate end to desegregation,[6] the justices ultimately opted for a "go slow" approach to

3 *See Missouri v. Jenkins,* 515 U.S. 70, 99 (1995) ("local autonomy of school districts is a vital national tradition, [and] a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution."); *Freeman v. Pitts*, 503 U.S. 467 (1992) (in releasing a Georgia school district from judicial supervision, the Court stated that, once desegregation has been implemented, the impetus and need for structural decrees diminishes."); *Oklahoma City Board of Education v. Dowell*, 498 U.S. 237 (1991) (holding that the Oklahoma City school district should be partially released from a desegregation decree); *Green v. School Bd. of New Kent Cty.,* 391 U.S. 430, 435–436 (1968).

4 551 U.S. 701 (2007).

5 347 U.S. 483 (1954).

6 *See* Morton J. Horowitz, The Warren Court And The Pursuit Of Justice 290 (1998):

desegregation. In *Brown II*,[7] although the Court reaffirmed the idea that segregation must end, the Court ordered state officials to proceed with "all deliberate speed."[8] Of course, many segregated school districts interpreted *Brown's* go slow language as invitation to do nothing at all towards ending segregation. Even as late as the mid-1960s, many black children were still attending segregated schools.

The "all deliberate speed era" came to an end in *Swann v. Charlotte-Mecklenburg Board of Education*.[9] That decision ushered in a new era involving significant judicial intervention in the management of public school districts. In *Swann*, although school officials submitted three separate and distinct desegregation plans, the trial court rejected all three plans as constitutionally inadequate, and ultimately decided to desegregate the school system itself based on the advice of an outside consultant. In the decade that followed, a number of other federal courts followed suit, entering structural orders in a number of school desegregation cases.[10] In the process, federal judges began to dramatically reshape and remake U.S. school districts:

In order to achieve the objective of transforming the nation's segregated schools into unitary, nonracial school systems, courts ordered sweeping reforms related to the assignment of students, the construction or closure of schools, reassignment of faculty, revision of the transportation systems to accommodate new routes and new distances, reallocation of resources among schools and among new activities, curriculum modification, increased appropriations, revision of interscholastic sports schedules, and new information systems for monitoring the performance of the organization. In time it was understood that desegregation was a total transformational process in which the judge would completely restructure an existing educational system.

> The Supreme Court decision in *Brown* II reflected the justices understanding that they were initiating a social revolution. The Court feared that because deeply entrenched Southern attitudes and institutions were completely unprepared for immediate desegregation, anything more than a gradualist approach would inevitably lead to violence. As it turned out, [the Court approach] probably encouraged violence by allowing enough time for opposition to desegregation to build while holding out hope that the decision could be reversed. . . .
>
> [The decision] also encouraged Southern public officials to claim that they were performing their legal duties whenever they refused to integrate facilities because there was a threat of violence.

See also Lino A. Graglia, *The Brown Cases Revisited: Where Are They Now?*, (Mar. 1984) 1 *Benchmark* 23, 27 ("There can be little doubt that if the Court had ordered the end of segregation in 1954 or 1955 the result would have been the closing of public schools in much of the South, about which the Court could have done nothing. The principal impact would have been on poor blacks, and *Brown* could have come to be seen as a blunder and symbol of judicial impotence.").

7 *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (hereinafter *Brown II*).

8 *Id.* at 301.

9 402 U.S. 1 (1971).

10 See, e.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Keyes v. School Dist.*, 413 U.S. 189 (1973).

Perhaps the most sweeping desegregation order was issued in *Missouri v. Jenkins*,[11] a case that involved the Kansas City, Missouri school district. Since that school district was more than 68% black, the court could not reassign students in ways that would create meaningful integration, and the court feared that massive reassignments would drive away the remaining non-minority students. As a result, instead of reassigning students, the court decided to improve the school district's educational programs in an effort to make them more attractive to non-minority students and thereby create "desegregative attractiveness." In an effort to accomplish these objectives, the district court encouraged school officials to dream about how the district should be restructured, and then granted their dream by ordering the state to spend of vast sums to implement the plan, including $220 million for quality education programs, $448 million for magnet schools, $260 million for capital improvements, and nearly $448 million for magnet schools. The United States Supreme Court ultimately held that the trial court had exceeded its authority in focusing on the principle of desegregative attractiveness, as well as in requiring the state to finance the program. The Court noted:

> The purpose of desegregative attractiveness has been not only to remedy the system wide reduction in student achievement, but also to attract non-minority students not presently enrolled in the KCMSD....
> But this interdistrict goal is beyond the scope of the intradistrict violation identified by the District Court.... [T]he District Court has devised a remedy to accomplish indirectly what it admittedly lacks the remedial authority to mandate directly: the interdistrict transfer of students....
> The District Court pursuit of desegregative attractiveness cannot be reconciled with our cases placing limitations on a district court remedial authority.... [T]his rationale is not subject to any objective limitation....
> Nor are there limits to the duration of District Court involvement....[12]

Even though it was necessary for federal judges to supervise desegregation of many public school districts, it was inevitable that the era of judicial supervision would eventually come to an end. For example, in *Oklahoma City Board of Education v. Dowell*,[13] the Court held that the Oklahoma City school district should be released from a desegregation decree. *Dowell* was followed by the holding in *Freeman v. Pitts*,[14] in which the Court released a Georgia school district from judicial supervision. As the Court stated in *Missouri v. Jenkins,*[15] "local autonomy of school districts is a vital national tradition, [and] a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution."

---

11 515 U.S. 70 (1995).
12 *Id.* at 91.
13 498 U.S. 237 (1991).
14 503 U.S. 467 (1992).
15 515 U.S. 70, 99 (1995) .

II. THE LOUISVILLE LITIGATION

Segregation had, at one point in time, been *de jure* in Louisville. The litigation began following the decision in *Brown*, and resulted in a 1973 decree finding that the Jefferson County Public School system was segregated,[16] and a 1975 desegregation plan.[17]

Before the decrees were entered, the Louisville Board of Education (LBE) had made some efforts to comply with *Brown's* desegregation mandate. In 1956, the district enrolled approximately 45,800 students, of whom 12,000 (26%) were black and 33,800 were white,[18] and it had adopted an attendance zone plan, and a transfer plan, that cumulatively were designed to achieve some integration.[19] In 1959, LBE added a faculty desegregation plan.[20] Less than three thousand students applied for transfers.[21] In addition, LBE aggressively recruited black instructors, and more than 80% of new hires teachers were black over the period of a decade.[22] By 1972, 36% of the district's 2,200 faculty were black as were 40% of its administrative staff.[23] Every school had a biracial faculty, and LBE rules required that each school's principal and assistant principal be of different races.[24] Nevertheless, there were significant differences between schools in terms of their racial composition[25] although LBE had made progress towards achieving biracial populations in all but one of its seventy-five schools between 1956 and 1972.[26]

The Jefferson County Board of Education (JCBE) ran a system that was less integrated, partially because there were far fewer black students in the county

16 *Newburg Area Council, Inc. v. Board of Ed. of Jefferson Cty.,* 489 F.2d 925, 932 (6th Cir. 1973), vacated and remanded, 418 U.S. 918 (1974), reinstated with modifications, 510 F.2d 1358, 1359 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975).

17 *See Cunningham v. Board of Ed. of Jefferson Cty.*, 541 F.2d 538 (1976).

18 *See Hampton v. Jefferson County Bd. of Ed.*, 72 F. Supp.2d 753, 755 n.2 (W.D. KY 1999).

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.* at 755 n.3.

23 *Id.*

24 *Id.*

25 Id at 755, n.4:

> By 1972, though the City's six non-vocational high schools had each attained some level of integration, a number appeared to remain racially-identifiable. Central (95% black; formerly all-black), Male (97% black, although in 1956 the school was 5% black; formerly all-white), and Manual (37% black; formerly all-white) had overlapping attendance zones. The other schools reflected their geographic zones: Atherton (3% black; a formerly all-white school located outside the district lines, although it served the City), Iroquois (3% black; a new school), and Shawnee (95% black, although in 1956 the school was 5% black; formerly all-white).

26 *See generally Haycraft v. Board of Educ. of Louisville,* No. 7291, Memorandum Opinion and Judgment (W.D.Ky. 1973), *rev'd,* 489 F.2d 925 (6th Cir.1973) & 521 F.2d 578 (6th Cir.1975)

system (only 3% of the total number of stu dents were black).[27] Prior to 1956, the JCBE paid to send black high school students to the LBE's Central High School.[28] At that time, JCBE sent its black elementary students to Newburg Elementary, a modern twenty-room school building, as well as to seven other one- to four-room buildings throughout the county.[29] Between 1956 and 1963, the County eliminated its all-black schools and assigned black pupils by geographic district, but decided not to allow transfers.[30] By 1972, the black student population of the district had increased slightly,[31] and the JCBE's integration efforts had achieved limited success at the elementary level, with 56% of the black students attending three (of seventy-four) elementary schools, all of which were located close to black neighborhoods.[32] Faculty integration did not begin until 1963.[33]

Based on these facts, Judge Gordon (the federal judge assigned to hear the case) found no evidence that the vestiges of a discriminatory system continued to exist.[34] Indeed, Judge Gordon concluded that JCBE had made "vigorous" efforts to desegregate its faculty, but that it had encountered resistance because of the "reluctance of black teachers to teach in a predominantly all white school system."[35] Regarding student assignments, Judge Gordon concluded that only "drastic remedial action, such as busing," would have improved the level of integration,[36] but he concluded that it would be "totally unrealistic" to bus white children into the Newburg area and black children to white schools.[37]

The Sixth Circuit, U.S. Court of Appeals, disagreed, holding that both LBE and JCBE had failed to take effective action to end discrimination because of the existence of racial imbalances in their districts. In doing so, the appellate court concluded that, if there was evidence of racial imbalances in a previously segregated school district, the court would assume that the district had failed to eliminate "the vestiges of state-imposed segregation," and require the districts to prove that the assignment plans were "genuinely nondiscriminatory."[38] In

27 *Hampton*, 72 F. Supp.2d, at 757.
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.* at 757, n.14 ("In 1972 the County's student population was 95,900, of whom 92,200 were white and 3700, or 4.0%, were black. ").
32 *Id.* at 757.
33 *Id.* at 757, n.9 ("In 1955, the County employed 1066 teachers, of whom 36 were black. By 1972, the district employed 4000 teachers, with approximately 140 blacks (which was up from around 80 in 1971). In 1971, 35 schools contained integrated faculties, but by 1972 that number increased to 81 schools.").
34 *Id.* at 758. Indeed, compared to other deep South states, Louisville had made considerable progress towards desegregation. *See* Jack Bass, *Unlikely Heroes: The Dramatic Story of the Southern Judges of the Fifth Circuit Who Translated the Supreme Court's* Brown *Decision Into a Revolution for Equality* (1981); J.W. Peltason, *Fifty–Eight Lonely Men, Southern Federal Judges and School Desegregation* (1961).
35 *Hampton*, 72 F. Supp.2d, at 760.
36 *Id.*
37 *Id.*
38 *Id.* at 758.

addition, the court expressed concern that school siting and closure decisions, coupled with a bias in favor of neighborhood schools, created a significant risk of locking the school system into a pattern of "separation of the races," thereby "promot[ing] segregated residential patterns."[39] Indeed, the court suggested that even race neutral assignment plans might be objectionable if they "fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation."[40] In other words, if there were "racially identifiable schools" in a district, the existence of those schools could be treated as "evidence of the vestiges of [a] discriminatory system."[41] Finding that racially identifiable schools still existed,[42] in large part because of a neighborhood assignment policy,[43] the court decided to order desegregation.

On remand, Judge Gordon took control of the educational system in Louisville, and imposed a sweeping desegregation decree. About that same time, the Commonwealth of Kentucky decided to order that the LBE be merged into the JCBE.[44] When the LBE and JCBE submitted conflicting plans for integration (LBE was allowed to continue to exist for purposes of the litigation), Judge Gordon decided to impose his own desegregation plan.[45] That plan imposed restrictions governing student assignment, school closures, procedures relating to hardship, method of transportation, assignment of school employees (including teachers, administrators and other certified personnel), human relations programs, transportation schedules, procedures for enforcement and implementation, and monitoring and reporting procedures."[46] In particular, Judge Gordon ordered the JCBE to employ goals regarding the racial composition of schools, including requiring elementary schools to keep their black student populations between 12% and 40% of the student population, and secondary schools between 12.5% and 40%.[47] JCBE was required to keep black enrollment in elementary schools between 12 and 40 per cent, and in secondary schools between 12.5 and 35 per cent, and to readjust its data as the demographics of the population changed.[48] In addition, Judge Gordon ordered that the remedy of busing be used to achieve the necessary racial balance (although he exempted students from busing that were participating in certain programs such as Headstart, alternative schools, teenage parents, and rehabilitation schools), and ordered the Commonwealth of

39 *Id.* at 760.
40 *Id.*
41 *Id.*
42 *Id.* ("over 80% of the schools in Louisville are racially identifiable. Five of six academic high schools, nine of thirteen junior highs, and forty of forty-six elementary schools remained racially identifiable. Of the fifty-six pre-*Brown* schools still operating, thirty-five retained the same racial identity. That statistic alone was enough to decide the case.").
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.* at 761.
47 *Id.* at 763.
48 *Id.* at 761.

Kentucky to pay for the busing.[49] Finally, Judge Gordon ordered JCBE to ensure that the staff and teacher ratios at the individual schools conformed to the racial composition of the school district as a whole.[50] The decree was initially met with hostility by the citizenry.[51]

Three years later, in 1978, Judge Gordon reviewed the evidence and concluded that the JCBE had achieved unitary status, and proposed to release the district from federal court supervision of most aspects of the decree.[52] It seems that he intended to retain some judicial control.[53] Afterwards, JCPS continued to make student assignments on the basis of race.[54] Although JCPS moved to a student assignment plan that focused on "resides" districts, and student choice, a student could be denied admission to his/her preferred school if that choice would create a racial imbalance in the chosen school.[55] Because JCPS remained under judicial supervision, it was required to ensure that "racially identifiable schools" did not reemerge.[56] In addition, as late as 1999, JCBE was free to utilize racial guidelines to help achieve that objective.[57]

JCPS was completely released from judicial supervision in the year 2000, some fifteen years after the entry of the original desegregation decree.[58] Judge Heyburn, who had succeeded Judge Gordon on the case, concluded that JCPS had "succeeded admirably in meeting the original objectives of the 1975 desegregation decree."[59] Interestingly, the termination was precipitated by a lawsuit brought by African-American students who had been denied admission to Central High School because their matriculation would have placed Central out of compliance with the racial quotas imposed on Louisville schools. In his decree, Judge Heyburn held that

49 Id.

50 Id. at 763-764.

51 Id. at 754 ("[The] confusion and outrage at Judge Gordon's busing order [seemed] to tear this community apart as it sent children from their own neighborhoods to places that many of both races had never before seen.").

52 See *Haycraft v. Board of Education of Jefferson County*, Nos. 7045 & 7291, Memorandum Opinion & Final Judgment (W.D.Ky. June 15, 1978)

53 Hampton, 72 F.Supp.2d, at 772-773.

54 Id. at 766-767 ("with the assistance and advice of a representative citizens committee and other interested persons and organizations, the school board developed a plan by which students are assigned based on locations of their residence. In order to achieve an appropriate racial balance in each school, the perimeters of each school's attendance zone are, of necessity, somewhat arbitrary, even to the point of gerrymandering.").

55 Id. at 768 ("When the racial guidelines do come into play in the application process, they work to deny admission based on the student's race. If the school lies near the 15% minimum black enrollment, it could accept black applicants but it would deny admission to a disproportionate number of non-black students. Conversely, if the school approaches the 50% maximum black enrollment, it would deny admission to a disproportionate number of black students. These actions maintain each school within the Board's established racial guidelines and, thus, serve to advance the Board's overall objectives.").

56 Id. at 774-775.

57 Id. at 777-778.

58 See *Hampton v. Jefferson Cty. Bd. Ed*., 102 F.Supp.2d 358 (W.D. Ky. 2000).

59 Id.

JCPS could not exclude students from Central High School on racial grounds.[60] He went on to terminate judicial supervision because the JCBE had eliminated the "vestiges" of segregation, "root and branch," and appeared to be committed to maintaining an integrated system.[61] As a result, Judge Heyburn terminated the desegregation decree, returned JCBE to local control, and expressed confidence that JCBE would act constitutionally with the "same determination, good faith, and drive for excellence which the Board and its employees have shown for the past twenty-five years."[62] Although Judge Heyburn did not suggest that JCBE was absolutely prohibited from considering race in making student assignments, he did make clear that "any uses of race in student assignment must be 'narrowly tailored measures that further compelling governmental interests.' "[63] He went on to state that there might be situations in which JCBE might be allowed to consider race in its student assignment plan.[64]

The termination of the desegregation decree was eventually followed by the litigation in *Parents Involved in Community Schools v. Seattle School District # 1*.[65] After the desegregation decree was terminated, JCPS adopted a voluntary student assignment plan. At that time, JCPS' student body included 97,000 black students, but 66 percent of its students were white.[66] The plan required all nonmagnet schools to maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent.[67] For elementary school, each student was assigned to a "resides" school within a specific geographic area that was drawn to facilitate integration.[68] Under the plan, a student could be denied admission to a school, even if the school had room for the student, if the student's admission would contribute to creating a racial imbalance.[69] Transfers between schools could also be denied if the transfer would result in a violation of the racial guidelines.[70] The lawsuit began when plaintiff tried to enroll her son in schools near her home (one of the schools was in her resides cluster, and one was not), but was denied admission because of a racial imbalance at the schools. Her son was

60 Id. at 360 ("the Court concludes that the Board's use of racial quotas in the Central High Magnet Career Academy would violate the Equal Protection Clause. The Board must admit to Central any students who applied for this coming school year and were denied enrollment due to race. The Board must do this for the 2000–2001 school year.").

61 *Id.* at 369.

62 *Id.* at 376.

63 *Id.* at 377.

64 *Id.* at 379 ("JCPS could devise a method of student assignment to promote the arguably compelling interest of diversity, which could include a racial component. Indeed, particularly in its magnet schools and programs, JCPS might use race, alongside other important non-ethnic measures of diversity, as the kind of 'plus-factor' envisioned in *Bakke*.").

65 551 U.S. 701 (2007).

66 *See McFarland v. Jefferson Cty. Public Schools,* 330 F.Supp.2d 834, 839–840, and n. 6 (W.D.Ky.2004) (*McFarland I*).

67 *Parents Involved*, al.551 U.S. at 716.

68 *Id.*

69 *Id.*

70 *Id.*

assigned to a school some ten miles away.

In defending the action, JCPS argued that it had a "compelling interest in maintaining racially diverse schools," and that the assignment plan was "narrowly tailored to serve that compelling interest."[71] The U.S. Supreme Court disagreed, striking down JCBE's student assignment plan, and emphasizing that strict scrutiny applies when "government distributes burdens or benefits on the basis of individual racial classifications.[72] " '[R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.' "[73] In order to sustain the restriction, JCPS was required to show that the use of racial criteria was "narrowly tailored" to achieve a "compelling" government interest,[74] but the Court indicated that only two interests could be regarded as "compelling": the use of racial classifications to remedy the effects of prior intentional segregation, and the interest in promoting diversity.[75] The Court concluded that neither of these interests supported the JCPS' student assignment plans. For one thing, JCPS was not trying to remedy the effects of prior intentional segregation because it had already "eliminated the vestiges associated with the former policy of segregation and its pernicious effects," and thus had achieved "unitary" status.[76] In regard to the interest in "diversity," the Court noted that diversity does not encompass race alone, but rather includes "all factors that may contribute to student body diversity,"[77] and must focus "on each applicant as an individual, and not simply as a member of a particular racial group."[78] The Court concluded that JCPS was not promoting diversity because race was not "considered as part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints,' " but instead was a determinative factor under the student assignment plan.[79] The Court believed that the JCPS had employed "only a limited notion of diversity, viewing race exclusively in white/nonwhite terms."[80] The Court also rejected JCBE' assertion that it had a compelling interest in ensuring that students are educated "in a racially integrated environment."[81] Following the decision, JCPS moved to a new student assignment plan that focused on students' socio-economic status, but gave some consideration to race.

---

71 *Id.* at 717-718.

72 *Id.* at 720.

73 *Id.* (quoting *Gratz v. Bollinger,* 539 U.S. 244, 270 (2003) (quoting *Fullilove v. Klutznick,* 448 U.S. 448, 537 (1980) (Stevens, J. dissenting)).

74 *Id.* at 720.

75 *Id.* at 720-721.

76 *Id.* at 721.

77 *Id.* at 722 (referring to a law school's admissions policy, the Court noted that it includes, not only race, but also those "who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields.").

78 *Id.* at 722

79 *Id.* at 723.

80 *Id.*

81 *Id.* at 724.

CONCLUSIONS: REFLECTIONS ON STRUCTURALISM AND THE LOUISVILLE LITIGATION

The Louisville litigation reflects the difficulties that arise when courts grant sweeping structural remedies. Historically, courts have been reluctant to grant those decrees for a variety of reasons. Among of things, they worry about intruding on areas that lie within the jurisdiction of other branches of government, as well as about unduly inserting themselves into the administration of schools (or, in some cases, prisons or other governmental institutions). All of these concerns are quite legitimate. Nevertheless, in some instances, judicial intervention is necessary to ensure that individual rights are protected.

The difficulty is that, as courts assume supervisory authority over local officials, there is a distinct risk that the judicial direction will create perverse incentives. In the Louisville litigation, the evidence suggested that both LBE and JCBE were moving to end segregation well before the judicial decree, and there was ample evidence that they were acting in good faith. When the federal courts intervened, they directed the JCBE to specifically focus on race in making student assignments. Under the circumstances, it is not at all surprising that JCBE continued to use race-based criteria after the judicial supervision ended. JCBE simply assumed that it was supposed to make race-based decisions. As JCBE noted before the U.S. Supreme Court, "it would be incongruous to hold that what was constitutionally required of it one day—race-based assignments pursuant to the desegregation decree—can be constitutionally prohibited the next."[82] Nevertheless, in the Court's view, the post-decree authority of the Board was quite different than it's authority during the period of the decree. Prior to termination, it was acting to eliminate "the vestiges of prior segregation," and could consider race in doing so.[83] Once the decree was lifted, JCBE "was on the same footing as any other school district, and its use of race must be justified on other grounds."[84] How was JCBE to know? Like Ravel's *Bolero*, the years of judicial supervision might have ensured that the JCBE's use of race-based criteria would have come to a discordant end.

Was there an alternative to judicial involvement? In many segregated districts, there may have been no alternative. As distasteful as judicial involvement might be – because it involves judges in performing non judicial functions beyond the scope of their expertise and, sometimes, beyond their assigned role – sometimes judicial involvement is both necessary and inevitable. Without judicial involvement, school board officials might not ever have taken action to eliminate segregation. In Louisville, the situation may have been more debatable. Even in the 1950s, both the LBE and JCBE were taking steps to desegregate. Had LBE and JCBE been able to continue along that path, they might have achieved desegregation without judicial intervention, and without the need for the follow-up litigation involved in *Parents Involved*.

82 *Id.* at 726.
83 *Id.*
84 *Id.*