Toward the Elimination of De Facto Segregation in Public Schools

Glenn Backer
TOWARD THE ELIMINATION OF DE FACTO SEGREGATION IN PUBLIC SCHOOLS*

Our nation's public school systems have the primary responsibility for enabling American youth to function in contemporary society. If we are committed to the goals of social, economic, and scientific progress, equal educational quality for our school children must be provided irrespective of race. Yet, despite the Supreme Court's frequent emphasis on education and the fourteenth amendment's obvious intent to establish racial equality, seemingly sincere efforts to desegregate public schools have progressed slowly.

Since the 1954 Supreme Court decision in Brown v. Board of Education, state-enforced segregation in public schools has been repugnant to the Constitution. Undoubtedly, many believed that Brown presaged an end to all segregated education in the public sector, but subsequent caselaw has done much to dispel such optimism. Brown has been

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1 See Hobsen v. Hansen, 269 F. Supp. 401, 505 (D.D.C. 1967), appeal dismissed, 393 U.S. 801 (1968), where the court states:

   For [Horace] Mann believed that public schools were at the source of the democratic enterprise; his faith, like that of his fellow reformers, was that the public school, by drawing into the close association of the classroom students from every social, economic and cultural background, would serve as an object lesson in equality and brotherhood and undermine the social class divisions which he and his colleagues felt were inimical to democracy.


3 Strauder v. West Virginia, 100 U.S. 303, 306-07 (1879); Ex parte Virginia, 100 U.S. 339, 344-47 (1879).

4 347 U.S. 483 (1954). In Brown, the Court faced the problem of determining the constitutionality of four de jure segregated school systems. In each case, the pertinent state law either "require[d] or permit[t] separation." Petitioners, therefore, sought a court order to enable themselves to attend the school in their locality. The Court held that state mandated public school segregation was unconstitutional and noted "that in the field of public education the doctrine of 'separate but equal' has no place." Id. at 495.
DE FACTO SEGREGATION

limited to de jure segregation, i.e., segregation produced by state action. Consequently, segregation has been allowed to flourish in public school systems so long as there is no demonstrable state involvement. If the resulting de facto segregation is permitted to continue, the hopes aroused by Brown will remain largely unfulfilled.

THE GENERATING FORCES BEHIND DE FACTO SEGREGATION

Nationally, desegregation has progressed at varying rates. Brown held the statutorily mandated dual school systems of the South violative of the equal protection clause of the fourteenth amendment. Consequently, local school boards were required "to effectuate a transition to a racially nondiscriminatory school system." The Court further ordered that the desegregation proceed "with all deliberate speed." In the North, by contrast, segregated educational facilities arose in the absence of statutory compulsion and thus have been unaffected by Brown.

Currently, school segregation in the industrial northern cities continues. Accounting for its existence are several interrelated factors: (1) the absence of overt state action; (2) judicial interpretation of the fourteenth amendment; (3) residential patterns; (4) the neighborhood school policy; and (5) the selection of construction sites for new schools.

Although racial classifications are "constitutionally suspect" and consequently must be "scrutinized with particular care," courts have upheld de facto segregation by examining racial separation from the vantage point of its cause rather than its effect. If neither invidious racial classifications

5 Id. In Green v. County School Bd., 391 U.S. 430, 435 (1967), the Court held unconstitutional a de jure segregated school system in Virginia noting that:
[racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations — faculty, staff, transportation, extracurricular activities and facilities. In short, the State, acting through the local board and school officials, organized and operated a dual system, part "white" and part "Negro."


7 Id.


9 Bolling v. Sharpe, 347 U.S. 497, 499 (1954). See Kiyoshi Hirabayashi v. United States, 322 U.S. 81, 100 (1943) wherein Mr. Chief Justice Stone elaborated on the unconstitutionality of racial classifications by stating:

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.

For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.

10 Cf. Comment, De Facto Segregation — The Northern Problem, 40 CONN. B.J. 493, 501
nor other state action causes schools to be racially separated, the resulting de facto segregation is constitutional. In *Deal v. Cincinnati Board of Education*,\(^{11}\) for example, the constitutionality of the de facto segregated Cincinnati Public School System was upheld since no state action had been alleged. The court distinguished between the psychological harm of segregated education, *viz.*, the impact, and the state's participation, *viz.*, the cause. Chief Judge Weick found the causation concept to be controlling:

[A] showing of harm alone is not enough to invoke the remedial powers of the law. If the *state* or any of its agencies has not adopted *impermissible* racial criteria in its treatment of individuals, then there is no violation of the Constitution . . . \(^{12}\)

By so holding, the courts remain insensitive to the inferior quality of, and the resultant psychological harm generated by segregated education.

Additionally, a conservative construction of the fourteenth amendment, while perhaps not creating de facto segregation, certainly has fostered it. The fourteenth amendment has been construed to prohibit discrimination without mandating integration, even where state action exists.\(^{13}\) Consequently, judicial nonintervention in cases of racial imbalance in de facto segregated public schools has become the rule. Both the Fifth and Tenth Circuits have advanced this interpretation by stating that "Negro children have no constitutional right to the attendance of white children with them in the public schools."\(^{14}\) If this view is generally accepted, no constitutional attack on de facto segregation via the fourteenth amendment is maintainable.

While judicial conservatism arguably contributes to continued segregation, there is no question that residential patterns are tied to the creation of racially segregated school systems. Such patterns develop due to "a combination of sociological events including non-white migration to the North, the white exodus to suburban communities and the low economic status of non-whites . . . \(^{15}\)" However, residential segregation, de facto in

\(^{12}\) *Id.* at 59 (emphasis added).
\(^{13}\) *See* Borders v. Rippy, 247 F.2d 268, 271 (5th Cir. 1957).
\(^{14}\) Boson v. Rippy, 285 F.2d 43, 45-46 (5th Cir. 1960). In *Downs v. Board of Educ.*, 336 F.2d 988, 998 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965), the court upheld a de facto segregated school system in Kansas City by noting: Although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend with them.

\(^{15}\) *The Northern Problem*, supra note 10, at 493. For an analysis of "the white exodus" see *After Swann*, supra note 5, at 446.
nature, is not confined to the North but is mirrored in both northern and southern public schools. Invariably, if children attend the school closest to their home, a city with de facto segregated residential patterns produces a de facto segregated school system. Faced with the problem of voluntary residential segregation, the courts, to date, have viewed their position as powerless:

It is apparent to all that the difficulty here arises out of residential racial patterns. That such residential segregation actually produces educational segregation and renders the task of school integration extremely difficult is obvious. However, it is impossible for the court to abolish the housing problem by judicial order as desirable as such might be in the final solution of the school problem.

The evils of residential segregation are intensified when the neighborhood school policy is implemented by the local school boards. Such policy—the assignment of a child to the school nearest his home—is widely adopted throughout the nation. Its avowed purposes are to improve the educational experience for the child, to increase safety by reducing travelling time, to enhance community participation in the school program, and to facilitate pupil placement. In the absence of gerrymandered district lines, school construction intentionally perpetuating racial segregation, or other acts tantamount to de jure segregation, the neighborhood school policy, until recently, has withstood judicial scrutiny.

Several circuit courts have agreed that the imposition of a neighborhood school policy on a residentially segregated community does not, of itself, create a constitutional violation. Chief Judge Lewis, speaking for the Tenth Circuit, has explicitly sanctioned the neighborhood school as a valid educational concept by noting:

The law of this circuit has been consistently stated to be that neighbor-
hood school plans, when impartially maintained and administered, do not violate constitutional rights even though the result of such plan is racial imbalance.\(^2\)

Furthermore, in *Bell v. School City*,\(^31\) the Seventh Circuit sustained the constitutionality of a de facto segregated school system in Gary, Indiana. By so doing, the court approved the city’s “honestly and conscientiously constructed” neighborhood school plan.\(^2\)

Difficulties arising from the implementation of a neighborhood school policy, notwithstanding existing patterns of residential segregation, are compounded when one considers the issue of new school site location. Mr. Chief Justice Burger has acknowledged the critical interrelationship between school construction and residential patterns by stating:

> People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.\(^2\)

The choice of location for new schools in Pontiac, Michigan was challenged in *Henry v. Godsell*,\(^2\) but the school board was deemed not to have violated the Constitution by constructing a school in a predominantly black area. The district court held that “[t]he choice of a school site based on density of population and geographic considerations such as distance, accessibility, ease of transportation . . . is a permissible exercise of administrative discretion.”\(^2\) Subsequently, *Griggs v. Cook*\(^2\) added further authority to the proposition that school zoning, neutrally administered yet producing pockets of segregation, could not supply the basis for judicially mandated desegregation:

> What is decided is that the establishment of a school on non-racially motivated standards is not unconstitutional because it fortuitously results in all negro or all-white enrollment. The need for education under reasonable conditions supercedes the need for absolute integrated education under unreasonable conditions . . . .\(^2\)

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\(^3\) 324 F.2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964).


\(^7\) Id. at 90.

\(^8\) 272 F. Supp. 163 (N.D. Ga.), aff'd, 384 F.2d 705 (5th Cir. 1967).


The Sixth Circuit, in Northcross v. Board of Educ., 302 F.2d 818, 823 (6th Cir.), cert. denied, 370 U.S. 944 (1962), also refused to order desegregation where the only state action
Deeming de facto segregation constitutional, therefore, has resulted in the sanctioning of one race schools and a refusal to alter racial imbalances. Mr. Chief Justice Burger, for example, has indirectly indicated that one race schools are constitutionally acceptable. Additionally, the one race or racially disproportionate school is justified by Justice Harlan's concept of a "color-blind" Constitution. Under the "color-blind" test, courts are precluded from taking any affirmative action based on racial considerations. The court in Deal v. Cincinnati Board of Education, for example, adhered to this position and refused to correct the racial imbalance which was found to exist in a public school. Strictly construed, the "color-blind" concept is antithetical to the notion of racial balancing and has caused warnings that society must choose "between the mutually exclusive goals of color-blindness and color-consciousness."

Although lower federal courts have upheld the constitutionality of de facto segregated public schools, the Supreme Court has avoided facing the issue. In Swann v. Board of Education, the Court approached, but did
not reach, the de facto question by holding, \textit{inter alia}, that once discriminatory state action ceases, further district court involvement is unwarranted.\textsuperscript{36} Mr. Chief Justice Burger did add the caveat, however, that “[t]his does not mean that federal courts are without power to deal with future problems . . . .”\textsuperscript{37}

\textbf{KEYES v. DENVER SCHOOL DISTRICT NO. ONE: A TOOL FOR DESEGREGATION}

Mr. Justice Brennan, writing for the majority in \textit{Keyes v. Denver School District No. One},\textsuperscript{38} continued to avoid the issue of the constitutionality of pure de facto public school segregation, \textit{i.e.}, segregation without any link to prior de jure segregation.\textsuperscript{39} Nonetheless, \textit{Keyes} is significant in that its outer limits have been used subsequently to challenge both de facto segregation and the neighborhood school concept.\textsuperscript{40} While this sweeping result may be suggested by \textit{Keyes}, it is in direct contrast with the majority opinion’s conservative approach.

\textit{Background}

In \textit{Keyes}, parents of children attending school in the Park Hill area of Denver sought a court order compelling desegregation not only of the Park Hill schools, but of all Denver schools. The Denver school system, unlike the traditional dual systems in the South, operated without a statutorily mandated policy of educational segregation. Nevertheless, since 1960, a sizeable portion of Denver’s black population migrated to the Park Hill area producing heavily concentrated black neighborhoods. Consequently, racial imbalances in the area’s schools developed.\textsuperscript{41}

The racially segregated schools in Park Hill, however, did not result exclusively from the population shift. Policy decisions by the school authorities contributed to the concentration of black and Hispanic students. The Barrett Elementary School, for instance, which opened in 1960 was

\begin{footnotes}
\item[36] Id. at 32.
\item[37] Id.
\item[38] 413 U.S. 189 (1973).
\item[39] Mr. Justice Brennan clearly delineated the scope of the decision by noting:
\begin{quote}
We have no occasion to consider in this case whether a ‘neighborhood policy’ of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting \textit{de jure} segregation.
\end{quote}
\item[40] See text accompanying notes 108-12 \textit{infra}.
\end{footnotes}
immediately classified as a desegregated school although such a classification was factually unrealistic. In an endeavor to end the racial concentration, the school board, pursuant to the superintendent's report adopted resolutions mandating boundary changes and student busing. However, subsequent to a board election in which integration was a primary issue, the new board by a four-to-three vote rescinded the resolutions. The newly elected board then adopted a resolution which required the implementation of a voluntary student transfer plan. Dissatisfied with the voluntary plan, the petitioners brought an action to enjoin the rescission of the prior resolutions and to obtain a court order directing desegregation of the city's schools.

The district court, in upholding petitioners' contentions, found that the Park Hill schools were segregated as a result of affirmative state action. As to the remaining Denver schools, termed "the core city schools," no de jure segregation was noted. Despite the absence of state action, the court determined that "a denial of equal opportunity in these schools" existed. Consequently, Judge Doyle included both the Park Hill and "core city schools" within the ambit of the desegregation order. On appeal, however, the Tenth Circuit found no justification for the district court's view pertaining to the "core city schools." Thus, while affirming the desegregation of the Park Hill schools, the court of appeals set aside the remainder of the lower court's holding.

The Majority — A Search for De Jure Segregation

The Supreme Court, reacting favorably to the district court's rationale, modified and remanded the decision of the Tenth Circuit. Mr. Justice Brennan stated that where intentional segregation is found in a "meaningful portion of the school system," a presumption arises that "other segregated schooling within the system is not adventitious." The burden of
proving that district policies toward other segregated schools within the system contain no elements of intentional segregation then shifts to the school board. Significantly, a mere showing of de facto segregation resulting from the implementation of a neutral neighborhood school policy will be insufficient to meet this burden.

The use of a presumption by the Supreme Court in school desegregation cases is not unprecedented. In *Swann v. Board of Education*, for example, the Court established two presumptions. First, if a school may be labelled black or white "by reference to racial composition of teachers and staff, the equality of the buildings and equipment, or the organization of sports activities," a prima facie violation of the fourteenth amendment is established. The school board must then assume the burden of ending all "invidious racial distinctions." The weight of this presumption, however, is somewhat vitiated by the Court's seemingly contradictory reasoning that "the existence of some small number of one-race, or virtually one-race schools . . . is not in and of itself the mark of a system that still practices discrimination by law." Secondly, the Court in *Swann* noted

The Court stated that the burden of proof shifts. However, it is widely recognized that the burden of proof never shifts although the burden of coming forward with an explanation may. *See* Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104, 110-11 (1941); Polizzi v. Commissioner, 265 F.2d 498, 501-02 (6th Cir. 1959). Inadvertently, courts equate the defendant's burden to come forward with evidence with the burden of proof. Therefore, in *Keyes*, the Court is probably referring to the school board's burden of coming forward with sufficient evidence to rebut the petitioner's presumption. *See* Farmer's Loan & Trust Co. v. Siefke, 144 N.Y. 354 (1895).

It is enough that we hold that the mere assertion of such a policy is not dispositive where, as in this case, the school authorities have been found to have practiced *de jure* segregation in a meaningful portion of the school system by techniques that indicate that the "neighborhood school" concept has not been maintained free of manipulation.

The presumption is a procedural device not unknown to racial discrimination cases. In an action challenging the constitutionality of a statute prohibiting blacks from participation as jurors, a longstanding exclusion was held presumptively to deny equal protection. *See* Norris v. Alabama, 294 U.S. 587, 591 (1935); Kuhn, *Jury Discrimination: The Next Phase*, 41 So. CALIF. L. REV. 235, 252 (1968).

Furthermore, segregation in public housing, where the housing authority acts as agent for the state, creates a "presumption of discrimination." *See* Comment, City Housing Authority Intentionally Discriminating in Selection of Public Housing Sites Directed to Select Future Sites in Accordance with Specific Plan for Integration, 44 N.Y.U. L. REV. 1172, 1176 (1968).


Id. at 18.

Id.

Id. at 26.
that school systems with a "history of segregation" and a "substantially disproportionate . . . racial composition" are presumed to be unconstitutional. This finding may be rebutted by proof that the children are assigned to schools on a "genuinely nondiscriminatory" basis.

It is noteworthy that in Swann, unlike Keyes, the school board was not required to affirmatively prove a policy of unintentional segregation. Also, under Swann, a showing of a neighborhood school policy would satisfy the school board's burden of establishing the absence of "invidious discrimination" or the operation of a "genuinely nondiscriminatory" school system. Keyes, however, imposes a more demanding burden of proof on the school boards. More specifically, once intentional segregation in a meaningful portion of the system is established, the school board is constrained to devise a plan to desegregate. Significantly, the entire system is presumed intentionally segregated. Thus, a showing by the school board of "isolated and individual" segregation resulting from an impartially administered neighborhood school policy will not be sufficient to eliminate the presumption.

Concurring Opinions — A Broader Perspective

The majority in Keyes narrowed the scope of its decision by failing to evaluate the constitutionality of a neighborhood school policy untainted by prior acts of de jure segregation. The concurring opinions of Justices Powell and Douglas, however, are addressed precisely to this issue. These opinions suggest answers to three questions: (1) whether in the absence of state action, separate educational facilities for blacks and whites constitute a denial of equal protection; (2) whether a duty to eliminate de facto segregation, with the consequent demise of the neighborhood school concept, can be imposed upon local school boards; and (3) whether the imposition of the neighborhood school policy on preexisting residential segregation is sufficient to invoke judicial enforcement of equal protection rights.

Desegregation in the Absence of State Action — The Impact Theory

To determine if pure de facto segregation is violative of the Constitution, it must initially be decided whether the Court should employ a cause or an impact standard. If Brown is construed exclusively in terms of causation, then public school segregation will be held unconstitutional only when state action causes or maintains segregation. Such an interpretation, however, is too narrow an application of the equal protection clause.
Thus, the concurring opinions agree that the distinction between de facto and de jure segregation should be eliminated and thereby implicitly adhere to the impact theory.

The effect of separate educational facilities in denying children equal protection should be analyzed from the vantage point of the psychological impact. Unfortunately, the extent of the psychological harm resulting from racial segregation cannot be precisely measured. Still, in Blocker v. Board of Education, the court recognized the absurdity of adopting adherence to the de facto — de jure distinction. The court reasoned that the de facto — de jure dichotomy in no way lessens the damaging effect of segregation on school children:

They are not so mature and sophisticated as to distinguish between the total separation of all Negroes pursuant to a mandatory or permissive State statute based on race and the almost identical situation prevailing in their school district. The . . . situation generates the same feeling of inferiority as to their status in the community as was found by the Supreme Court in Brown to flow from substantially similar segregation by operation of State law . . . .

Additionally, an impact analysis should consider the effects of de facto segregation on scholastic achievement. It is apparent that schools with a predominantly black population have achievement rates measurably inferior to integrated or predominantly white schools. The substandard quality of segregated education is reflected in lower achievement in reading comprehension, word recognition, spelling, arithmetic computation, and the Iowa Basic knowledge tests. In Keyes, for example, the achievement rates

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Mr. Justice Douglas states that "there is no constitutional difference between de jure and de facto segregation, for each is the product of state actions or policies." 413 U.S. at 216. Mr. Justice Powell concurs by stating that "[t]here is thus no reason as a matter of constitutional principle to adhere to the de jure / de facto distinction in school desegregation cases." Id. at 232. See Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142, 148 (5th Cir. 1972), cert. denied, 413 U.S. 920, rehearing denied, 413 U.S. 922 (1973); United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 413-14 (5th Cir. 1967) (Gewin, C.J. & Bell, J., dissenting) (en banc).

See The Northern Problem, supra note 10, at 501; The Elusive Spectre of Brown, supra note 10, at 285.


Id.

Id. See Hobsen v. Hansen, 269 F. Supp. 401, 506 (D.D.C. 1967), appeal dismissed, 393 U.S. 801 (1968); Goodman, supra note 1, at 299, where the author states:

Black children forced to attend such a school are demoralized by feelings of isolation from the white mainstream, and experience the same feelings of inferiority experienced by children in schools segregated de jure.

characteristic of the predominantly black and Hispanic schools were well below the Denver School District average and further inferior to the predominantly Anglo schools.

Clearly, the "inherently unequal" quality of segregated education operates whether or not the state created or maintained the system. Therefore, the concurring opinions properly disregarded the de facto—de jure distinction and tested the constitutionality of de facto school segregation in terms of impact rather than cause. Since children in de facto segregated public schools suffer the same psychological detriment and substandard quality of education as do those in de jure segregated schools, they too are denied equal protection. Consequently, this deprivation requires remedial action.

Local School Boards — The Duty to Act

The duty to end de jure segregated public school systems rests with the local school authorities. The second Brown v. Board of Education decision established "with all deliberate speed" as the operable standard for such desegregation. Thirteen years later, the Court, in acknowledging the arduous process of effective desegregation, altered this standard. Currently, "the burden on a school board . . . is to come forward with a plan
that promises realistically to work, and promises realistically to work now.”76 In essence, the objective of all desegregation plans is “to convert to a unitary system in which racial discrimination [will] be eliminated root and branch.”77 Therefore, expansion of the school boards’ duty to eliminate racial imbalance in de facto segregated systems seems a logical extension of prior judicial directives.

In imposing a constitutional duty on local school boards to operate “integrated school systems,”78 Mr. Justice Powell takes a position which arguably can be reconciled with Mr. Justice Harlan’s concept of a “color-blind” Constitution. In applying the “color-blind” standard, school boards are prohibited from considering race as a legitimate means of denying students equal educational opportunities.79 Implicit in Mr. Justice Powell’s formulation of an integrated school system, however, is the distinction between racial considerations which deprive constitutional rights and those required to insure compliance with the Constitution.80 Clearly, to

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77 Id. at 437-38. The courts have rejected any attempt to implement desegregation plans which have no impact on the racial concentration. In Norwood v. Tucker, 287 F.2d 798, 809 (8th Cir. 1961), the court stated:

The obligation to disestablish imposed segregation is not met by applying placement or assignment standards, educational theories or other criteria so as to produce the result of leaving the previous racial situation existing as it was before.

See Dove v. Parham, 282 F.2d 256, 258 (8th Cir. 1960).
78 Mr. Justice Powell states that “the constitutional obligation of public authorities in the school districts throughout our country [is] to operate integrated school systems.” 413 U.S. at 236 (emphasis in original) (concuring opinion). Justice Powell, therefore, adopts the view expressed by Judge Wright in United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 869 (5th Cir. 1966). There, the court established the duty-to-integrate doctrine by holding “that the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration.” (emphasis in original). See Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142, 145 (5th Cir. 1972), cert. denied, 413 U.S. 920, rehearing denied, 413 U.S. 922 (1973); Hobsen v. Hansen, 296 F. Supp. 401, 505 (D.D.C. 1967), appeal dismissed, 309 U.S. 801 (1968).

No person shall be refused admission into or be excluded from any public school in the state of New York on account of race . . . .

80 Judge Wright distinguished color-blindness and color-consciousness by stating:

The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.


Constitutional color blindness may be wholly apt when the frame of reference is an attack on official efforts toward segregation; it is not generally apt when the attack is on official efforts toward the avoidance of segregation.
meet a constitutional obligation of conducting an integrated school system, racial considerations are absolutely essential. The preclusion of color-consciousness in the effort to integrate will, in effect, perpetuate racially distinct schools.

Local school boards compelled to integrate must, therefore, develop plans designed to achieve a racial balance throughout the school system. The necessary consequences of such formulations will be: (1) the demise of the neighborhood school concept; (2) increased judicial involvement with school site locations; and (3) re-evaluation of methods for teacher assignments.

The neighborhood school policy, which mandates that a child attend the school nearest his home, is neither "immutable" nor "sacrosanct." It cannot lawfully be employed to perpetuate the confinement of blacks in an area initially demarcated by governmental acts. Clearly, the neighborhood concept is at odds with the duty to conduct racially balanced schools. Mr. Chief Justice Burger has indicated that once the district court deter-

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See Gegan, supra note 33, at 10, where the author states:

Yet, the difference between overt classification by race and functionally non-racial measures adopted out of racial considerations is significant in an equal protection analysis.

See Offerman v. Nitkowski, 378 F.2d 22, 24-25 (2d Cir. 1967), where Judge Smith in upholding a plan designed to eliminate de facto school segregation stated, with respect to race consciousness:

Where its use is to insure against, rather than to promote deprivation of equal educational opportunity, we cannot conceive that our courts would find that the state denied equal protection to either race by requiring its school boards to act with awareness of the problem.


There is a paucity of case law supporting the proposition that a school board must correct racially imbalanced schools. See Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 382 P.2d 878, 892, 31 Cal. Rptr. 606, 610 (1963), where Chief Judge Gibson did, however, uphold such a duty:

The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps . . . to alleviate racial imbalance in schools regardless of its cause (emphasis added).

Contra, United States v. Board of Educ., 459 F.2d 720, 724 (10th Cir. 1972), vacated sub nom. Smith v. Board of Educ., 413 U.S. 916 (1973); Clark v. Board of Educ., 369 F.2d 661, 666 (8th Cir. 1966); Deal v. Cincinnati Bd. of Educ., 369 F.2d 55, 60 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967); Bell v. School City, 324 F.2d 209, 213 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964). See also Rice, supra note 33, at 318, where the author states: "[T]he policy of racial balancing in pupil assignment to public schools is erroneous in theory and pernicious in effect."


Id.
mines that the school system is unconstitutionally segregated, the school board must devise an effective solution. Consequently, to eliminate de facto segregation in the public schools, the school boards must devise a transfer program that considers a pupil's race as a factor in his school placement. Perpetuation of the status quo through the neighborhood system is not "per se adequate to meet the remedial responsibilities of local school boards."  

In addition to limiting the justification for neighborhood schools, the requirement of racial balance within a school system will have a direct impact on the location of new public schools. The issue will no longer be whether the need for a new school outweighs the detrimental impact of a one race school. Instead, the court will be forced to determine whether the location of a new school expedites integration, and, more specifically,

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58 The Supreme Court has recently decided to hear a case involving the adoption of a metropolitan plan designed to eliminate de jure segregation in Detroit's public schools. Previously, the Sixth Circuit adopted the district court's rationale that an effective desegregation plan would have to reach beyond the boundaries of the Detroit school district. Bradley v. Milliken, 484 F.2d 214 (6th Cir.), cert. granted, 42 U.S.L.W. 3306 (U.S. Nov. 20, 1973) (No. 73-434).

In Goss v. Board of Educ., 373 U.S. 683 (1963), the Court rejected a transfer plan which permitted students to transfer from a school to which they were assigned because of rezoning back to their original segregated school where they were in the racial majority. Mr. Justice Clark held the plan unconstitutional by noting that "the transfer system proposed lends itself to perpetuation of segregation." Id. at 686. He continued:

> While transfers are available to those who choose to attend school where their race is in the majority, there is no provision whereby a student might transfer upon request to a school in which his race is in a minority, unless he qualifies for a "good cause" transfer.

Id. at 686-87.

The "majority to minority" transfer plan would be an effective means of achieving integrated education. The plan permits students assigned to a school in which their race exceeds more than half the total school population to transfer, without the necessity of showing good cause, to a school where their race comprises the minority. Such a policy "enables Negro children trapped in Negro neighborhoods...to transfer from predominantly Negro schools to schools where they can attain an integrated education." Dowell v. School Bd., 244 F. Supp. 971, 977 (W.D. Okla. 1965), modified, 375 F.2d 158 (10th Cir.), cert. denied, 387 U.S. 931 (1967).

Mr. Justice Powell supports the use of busing to achieve integration, but only on a limited scale. He noted:

> To the extent that Swann may be thought to require large-scale or long-distance transportation of students... I record my profound misgivings. Nothing in our Constitution commands or encourages any such court-compelled disruption of public education... . . .

> This obviously does not mean that bus transportation has no place in public school systems or is not a permissible means in the desegregative process.

413 U.S. at 238, 243 (concurring opinion) (emphasis in original). He concluded that "sound discretion under the circumstances" is the standard to determine the extent of student busing. Id. at 244.


58 See Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 481, 489 (M.D. Ala.), aff'd sub
whether such placement reduces the existing racial imbalance. Since school site location is a decisive factor in controlling residential patterns, altering site selection criteria will have the further effect of changing the composition of neighborhoods, thereby stimulating integration.

Finally, an integrated system requires a teacher assignment program which promotes racial balance within the schools. Such a system mandates that faculty assignments be made with the specific intent of ending all traces of a one race faculty. The ethnic breakdown of the assigned teachers to a large degree determines the categorizing of the school as either racially balanced or predominantly one race. In *United States v. Jefferson County Board of Education*, the Fifth Circuit recognized the importance of faculty integration by observing:

> A Negro faculty makes a Negro school; the Negro school continues to offer inferior educational opportunities; and the school system continues its psychological harm to Negroes.

**Enlarging the Scope of State Action**

Mr. Justice Powell's opinion that school boards have an affirmative duty to operate integrated systems, if adopted, would have a revolutionary impact on American education. A more cautious position, perhaps, is taken by Mr. Justice Douglas, whose view of state action is broad enough to permit increased judicial intervention where de facto segregation is discovered. By so doing, he resolves *Swann*’s previously unanswered questions. There, Mr. Chief Justice Burger stated:

> We do not reach . . . the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities is a constitutional violation . . . .

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96 Chief Judge Weick, in Deal v. Cincinnati Bd. of Educ., 369 F.2d 55, 61 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967), rejected the notion of a duty to conduct racially balanced schools. Furthermore, he noted that there is no "like duty to select new school sites solely in furtherance of such a purpose."

97 See text accompanying note 23 *supra.*

98 See Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142, 151-52 (5th Cir. 1972), *cert. denied*, 413 U.S. 920, *rehearing denied*, 413 U.S. 922 (1973), where the court required the school authorities to achieve "a ratio of Mexican-American teachers to total faculty that approaches the ratio of Mexican-American students to the total student population."

99 See Bradley v. School Bd., 345 F.2d 310, 323 (4th Cir. 1965) (concurring opinion).

100 *Id.* at 892. The court imposed on the school board the "affirmative duty to break up the historical pattern of segregated faculties . . . ." *Id.* at 895.

101 413 U.S. at 214-17.

102 402 U.S. at 23.
Mr. Justice Douglas holds that the state action doctrine is applicable to segregation where there is, paradoxically, either culpable state inaction or participation in the continuance of segregated residential patterns. Consequently, a school board, with knowledge of residential segregation in a community, could no longer implement the neighborhood school policy without subsequent efforts to undo the resulting gross racial imbalance in the schools. Such inaction on its part would constitute a definitive policy. The local board's failure to eradicate the segregated system it inadvertently created would not be shielded from the label of state action.

Expanding this rationale, one might consider the state's role in public housing as establishing the necessary foundation for judicial elimination of de facto segregated schools. State sanctioned construction of public housing at sites designed to create or maintain racial segregation arguably constitutes unconstitutional state action within the ambit of the fourteenth amendment. If the neighborhood school concept were maintained under these circumstances, the segregated housing would constitute a "continuing cause" of de facto segregation in the schools. Thus, such

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8 See Dowell v. School Bd. of Okla., 244 F. Supp. 971, 975 (W.D. Okla. 1965), modified, 375 F.2d 158 (10th Cir.), cert. denied, 387 U.S. 931 (1967), where the court held that inaction by the local board represented a specific program. "[A] school system does not remain static, and the failure to adopt an affirmative policy is itself a policy . . . ."

9 In Hart v. Community School Bd., Civil No. 72-1041, at 85-86 (E.D.N.Y., Jan. 28, 1974), Judge Weinstein astutely pointed out:

[When] racial characteristics determine place-of-residence, as undoubtedly they often do in our society, then the board's use of a "neighborhood" or residential criterion in student assignment . . . constitutes a racial classification once removed. To the extent that racial characteristics determine or have determined place-of-residence, the school board's use of a residential criterion effectively implicates the state in racial discrimination.

See Branche v. Board of Educ., 204 F. Supp. 150, 153 (E.D.N.Y. 1962), where the court held, inter alia, that the neighborhood school policy established in 1949 might be unconstitutional considering the "changing circumstances." See also Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142, 149 (5th Cir. 1972), cert. denied, 413 U.S. 920, rehearing denied, 413 U.S. 922 (1973).

10 Our government is "committed to a policy of balanced and dispersed public housing."


11 Mr. Justice Douglas notes:

When a State forces, aids, or abets, or helps create a racial "neighborhood," it is a travesty of justice to treat that neighborhood as sacrosanct in the sense that its creation is free from the taint of state action.


12 Comment, City Housing Authority Intentionally Discriminating in Selection of Public
state action in public housing could conceivably constitute the state involvement necessary to render the neighborhood school unconstitutional.  

Such analysis cannot, however, be applied to patterns of segregation created and maintained solely by private citizens. For example, judicial notice of a white community's resistance to blacks seeking to purchase homes in the neighborhood is not tantamount to an acknowledgement of state action. Unless they seek court enforcement of a discriminatory restrictive covenant, private individuals are permitted to discriminate without fear of invoking the prohibitions of the fourteenth amendment.

It is apparent that the concurring opinions have laid a foundation for achieving educational equality. Unfortunately, the majority of the Court refrained from adopting the far-reaching views of Justices Powell and Douglas. Nevertheless, the ideas expressed by the concurring Justices have affected subsequent case law.

JUDICIAL EXPANSION OF THE Keyes RATIONALE

Hart v. Community School Board

The concurring opinions in Keyes have recently been expanded by

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In Holland v. Board of Pub. Instruction, 258 F.2d 730, 732 (5th Cir. 1958), the court found state action, for desegregation purposes, in a city ordinance requiring residential segregation. Judge Rives stated:

In the light of compulsory residential segregation of the races by city ordinance, it is wholly unrealistic to assume that the complete segregation existing in the public schools is either voluntary or the incidental result of valid rules . . . .


If the opinions of Justices Powell and Douglas gain widespread acceptance, the authority of such cases as Hall v. St. Helena Parish School Bd., 268 F. Supp. 923 (E.D. La. 1967), will be severely weakened. The Hall court upheld de facto segregation which came about after the elimination of de jure segregation:

If the desegregation plan presently in effect has, in fact, ended de jure segregation in the schools, and if, because of deliberate, free choice, de facto segregation continues to exist, such a state of affairs would not require the conclusion that the plan in operation fails to meet constitutional standards.

Id. at 926-27.

It should be noted that Mr. Justice Rehnquist dissented on two grounds. First, he reasoned that the majority erred in equating a legislatively mandated segregated school system, as in Brown, with the Denver school system. Although state created or maintained discrimination is unconstitutional, Justice Rehnquist distinguished the situation presented in Keyes:

[T]he consequences of manipulative drawing of attendance zones in a school district the size of Denver does not necessarily result in a denial of equal protection to all minority students within the district.

413 U.S. at 254-55. Secondly, he noted that since the district court had viewed the Park Hill schools separately from the core-city schools, the Supreme Court was thereby precluded from interrelating the two. Thus, no presumption arising from the Park Hill situation could be applied to the core-city schools by the Court.
Judge Weinstein of the United States District Court for the Eastern District of New York in *Hart v. Community School Board.* Plaintiffs sought a court order requiring Community School Board 21 to end the racial imbalance at Mark Twain Junior High School in Brooklyn, New York. In 1973, the ethnic breakdown of the school population was 43.3% black, 38.6% Hispanic, and 18.1% other. This breakdown was in striking contrast to the other more racially balanced junior high and intermediate schools in the district. Moreover, Mark Twain had the lowest average daily attendance and reading scores of all the junior high schools in the district.

Although the policy adopted by the community school board was not the sole cause of racial imbalance at Mark Twain Junior High School, it nevertheless exacerbated the situation. Prior to September 1966, Public Schools 216 and 212 graduated their predominantly white sixth grade classes into Mark Twain. However, as a consequence of adjustments in school zoning, effective September 1966, subsequent graduates from these elementary schools would no longer attend Mark Twain. Furthermore, the community school board rejected both a plan for rezoning and the Chancellor's proposal designed to improve the racial balance of the school. Instead, the board implemented a free choice plan which ultimately failed to alter Mark Twain's racial imbalance.

Judge Weinstein embraced the views expressed in *Keyes*’ concurring opinions and determined that there exists a duty to integrate and to maintain racially balanced school systems. In declaring Mark Twain to be unconstitutionaly segregated, Judge Weinstein concluded:

> [R]acial segregation in public schools violates the equal protection clause absent statutory compulsion or authorization and absent even a finding of 'unlawful segregative design,' . . . not only by reason and authority, but also empirically, by the fact that such segregation inflicts upon the segregated, non-white students the selfsame harm which the Constitution as interpreted in *Brown I* sought to prevent.\(^\text{111}\)

The court qualified its holding by noting that the elimination of a de facto racial imbalance would be precluded if deemed "clearly impractical."\(^\text{112}\) This qualification was considered inapplicable in the case at bar, and the board was ordered to devise and submit a desegregation plan which would effectively equalize Mark Twain's racial make-up with that of the other junior high schools in the district. Further, Judge Weinstein recognized the interrelationship between racially imbalanced housing and segregated schools. Accordingly, he ordered the New York City Housing

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\(^{108}\) Civil No. 72-1041 (E.D.N.Y. Jan. 28, 1974).

\(^{109}\) Id. at 19.

\(^{110}\) Id. at 17, 18, 26.

\(^{111}\) Id. at 97 (emphasis added).

\(^{112}\) Id. at 101.
DE FACTO SEGREGATION

Authority and the federal housing authorities to formulate a joint plan designed to encourage white families to move into proposed publicly financed housing in the area. In its rejection of the de jure—de facto distinction, Hart represents a significant development of the ideas enunciated in the Keyes' concurring opinions.

New York — Fertile Soil for Desegregation

Judge Weinstein felt that his opinion was "congruent with New York State policy." However, New York courts have moved cautiously in recognizing the duty of local school boards to operate integrated school systems. To date, there has been no resolution of the constitutional issue as to whether a petitioner can compel a school district to correct racially imbalanced schools.

The New York Court of Appeals has sustained the Commissioner of Education's directive to local boards to take effective action to end all racial imbalances in the public schools. The City of Rochester, in compliance with the Commissioner's directive, implemented a noncompulsory "Open Enrollment Plan" and a voluntary transfer plan. Although both plans were validated by lower New York courts, it was emphasized in both instances that no child was compulsorily removed from the neighborhood school. The courts' emphasis on voluntariness implies that racial balancing is permissible provided the neighborhood school is maintained.

In Balaban v. Rubin, the Court of Appeals was forced to determine the validity of a New York City Board of Education districting plan. Pursuant to the board's scheme, the student body of Junior High School 237 was to be composed equally of blacks, Puerto Ricans, and whites. Chief Judge Desmond upheld the plan because "it exclude[d] no one from any school and ha[d] no tendency to foster or produce racial segregation." However, the force of the court's seemingly atypical decision was substan-

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\[113\] Id. at 104.
\[114\] Vetere v. Allen, 15 N.Y.2d 259, 206 N.E.2d 174, 258 N.Y.S.2d 77 (1965) (per curiam), cert. denied, 382 U.S. 825 (1965). The Board of Regents pursuant to section 270 of the New York Education Law had "declared racially imbalanced schools to be educationally inadequate." Id. at 267, 206 N.E.2d at 175, 258 N.Y.S.2d at 80. The Commissioner executed this policy decision "by directing local boards to take steps to eliminate racial imbalance." Id., 206 N.E.2d at 175-76, 258 N.Y.S.2d at 80. The court upheld the discretionary action of the Commissioner by stating that "[d]isagreement with the sociological, psychological and educational assumptions relied on by the Commissioner cannot be evaluated by this court." Id., 206 N.E.2d at 176, 258 N.Y.S.2d at 80. See N.Y. Educ. Law §§ 207, 301, 305 (McKinney 1972).

\[117\] See notes 115 & 116 supra.

\[119\] Id. at 199, 193 N.E.2d at 377, 250 N.Y.S.2d at 284.
tially weakened by its tenacious clinging to the neighborhood school concept. The court emphasized:

There are no oppressive results of the choice here made by the board. No child will have to travel farther to new School 275 than he would have to go to get to his "neighborhood" school.\footnote{Id.}

In view of these precedents, it would appear that New York courts will sustain the plans of local school boards establishing racially balanced schools only where the neighborhood school concept remains inviolate.

An examination of the school districts in Long Island's Nassau and Suffolk Counties illustrates the impact that compulsory integration would have on the de facto segregated school systems in New York. Currently, as a consequence of increased racial residential concentration,\footnote{U.S. BUREAU OF CENSUS, 2 CENSUS OF POPULATION 17-22 (1970).} Long Island schools are revealing marked tendencies toward segregation.\footnote{The following tables highlight the most racially imbalanced school districts in Nassau and Suffolk Counties:}

Perhaps more significantly, the concentration of blacks in several schools

\begin{table}[h]
\centering
\caption{Percentage Distribution of Students by Race, 1970-71}
\begin{tabular}{lll}
\hline
School District & Negro & Caucasian \\
\hline
NASSAU & & \\
Roosevelt & 90.9 & 6.6 \\
Hempstead & 76.4 & 18.7 \\
Westbury & 44.7 & 54.3 \\
Oceanside & 0.2 & 99.3 \\
Syosset & 0.2 & 99.1 \\
Floral Park & 0.2 & 98.7 \\
SUFFOLK & & \\
Wyandanch & 93.1 & 3.7 \\
Bridgehampton & 59.8 & 37.5 \\
Quogue & 56.4 & 43.6 \\
Smithtown & 0.3 & 93.3 \\
Kings Park & 0.3 & 99.3 \\
Hauppauge & 0.2 & 98.8 \\
\hline
\end{tabular}
\end{table}
DE FACTO SEGREGATION

exceeds the percentage of blacks in the community.\textsuperscript{122} Therefore, as the number of black families residing in a community increases, a disproportionately greater increase in the degree of de facto segregation in the neighborhood school results. Such relationship illustrates the principle that

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|}
\hline
\textbf{School District} & \textbf{Negro} & \textbf{Caucasian} \\
\hline
\textbf{NASSAU} & & \\
Roosevelt & 29.6 & 68.4 \\
Hempstead & 27.3 & 71.7 \\
Westbury & 14.0 & 85.7 \\
Oceanside & 0.4 & 99.2 \\
Syosset & 0.7 & 98.8 \\
Floral Park & ---- & 100.0 \\
\hline
\textbf{SUFFOLK} & & \\
Wyandanch & 36.5 & 61.4 \\
Bridgehampton & ---- & 100.0 \\
Quogue & ---- & 100.0 \\
Smithtown & 1.3 & 98.3 \\
Kings Park & 0.3 & 99.4 \\
Hauppauge & 1.5 & 97.5 \\
\hline
\end{tabular}
\caption{Percentage Distribution of Staff by Race 1970-71}
\end{table}

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|}
\hline
\textbf{Community} & \textbf{Negro} & \textbf{Caucasian} \\
\hline
\textbf{NASSAU} & & \\
Roosevelt & 67.53 & 31.52 \\
Hempstead & 35.81 & 63.19 \\
Westbury & 8.93 & 90.57 \\
Oceanside & 0.25 & 99.54 \\
Syosset & 1.01 & 98.61 \\
Floral Park & 0.41 & 99.24 \\
\hline
\textbf{SUFFOLK} & & \\
Wyandanch & 59.50 & 39.64 \\
Bridgehampton & 20.51 & 78.94 \\
Quogue & 19.88 & 79.08 \\
Smithtown & 1.50 & 97.96 \\
Kings Park & 0.14 & 99.53 \\
Hauppauge & 0.35 & 99.45 \\
\hline
\end{tabular}
\caption{Percentage Distribution of the Community By Race 1970-71}
\end{table}

\textit{State Education Department, Racial Ethnic Distribution of Public School Students and Staff In New York State 1970-71, at 28-82.}

\textit{U.S. Bureau of Census, 2 Census of Population 32-47 (1970). The percentages do not total 100 since Puerto Rican, Indian, and Oriental students have been excluded. These groups comprise a consistently small percentage of the total school population in each district.}\textsuperscript{122} \textit{See Tables I and III, supra note 122.}
rigid adherence to the neighborhood school concept in conjunction with segregated residential patterns will invariably produce de facto segregated schools. Furthermore, statistics disclose that several districts with significant racial imbalances contain faculties largely composed of members of the predominant race\textsuperscript{24} thereby accentuating the one race appearance of the schools.

If school boards were compelled to achieve racial balance, Nassau and Suffolk County school systems would undergo a significant transformation. Initially, compulsory racial balancing would result in the demise of the neighborhood school policy. Once a racial balance is achieved, adjustments in teacher employment practices would be carried out with the intent of reinforcing this balance. Unfortunately, the current New York approach with its mandate that neighborhood schools remain intact is too conservative to implement these desirable changes.

CONCLUSION — THE PROSPECT OF EQUALITY

The purpose of the fourteenth amendment cannot be achieved unless we are willing to accept changes in our institutions and ideas. In this regard, legislators continue to enact statutes in compliance with the amendment's intent to eradicate all traces of servitude and to establish true equality.\textsuperscript{25} Civil rights leaders alert the people to the necessity for peaceful cooperation among the races. The real solution, however, to the inequitable economic and social conditions existing between the races lies not in legislative fiat or political speeches, but in the educational system. Diligent efforts "to help youngsters of diverse heritages and backgrounds to understand, appreciate, and come to terms with one another as individuals rather than as stereotypes"\textsuperscript{26} must be a national priority.

The Supreme Court in Keyes has taken a bold step toward achieving equal educational opportunities for all children regardless of race. However, the Court has, once more, failed to determine the constitutionality of the neutrally administered neighborhood school policy. When this issue is squarely faced, hopefully, the Court will recognize that "adventitious" segregation is as harmful to school children as segregation mandated or encouraged by the state. For now, however, proponents of racially balanced school systems must seek comfort in the Hart decision and hope it foreshadows the future of integrated education.

\textsuperscript{124} See Tables I and II, supra note 122.


\textsuperscript{126} Goodman, supra note 1, at 366.