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Marea C. Mule

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CONSTITUTIONAL LAW

REBUTTABLE PRESUMPTION OF SEGREGATIVE INTENT MAY BE
ESTABLISHED BY EVIDENCE OF FORESEEABLE CONSEQUENCES

Arthur v. Nyquist

In the landmark decision of Brown v. Board of Education, the
Supreme Court held that state-imposed segregation in public
schools violates the equal protection clause of the fourteenth
amendment. Twenty years later the Court clarified the Brown hold-

2 Id. at 495. The fourteenth amendment provides that a state shall not "deny to any
person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §
1. Its prohibitions reach the discriminatory application of laws which appear fair on their
face as well as laws which patently discriminate against minorities. See Yick Wo v. Hopkins,
118 U.S. 356 (1886); Strauder v. West Virginia, 100 U.S. 303 (1880). In determining whether
particular official action violates the equal protection clause, the Supreme Court utilizes a
"two-tier" test. See Schwemm, From Washington to Arlington Heights and Beyond: Discrim-
inatory Purpose in Equal Protection Litigation, 1977 U. Ill. L.F. 961, 962. State action
"impermissibly interfer[ing] with the exercise of a fundamental right or operat[ing] to the
peculiar disadvantage of a suspect class" is subject to strict judicial scrutiny. Massachusetts
Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976). Thus, in the absence of a "compelling
governmental justification" such action will be found unconstitutional. L. Tribe, AMERICAN
CONSTITUTIONAL LAW 1002 (1978); see Roe v. Wade, 410 U.S. 113, 152-54 (1973); Shapiro v.
fundamental rights or suspect classifications are not involved, state action simply must be
"rationally related to furthering a legitimate state interest" to be upheld. 427 U.S. at 312;
see Dandridge v. Williams, 397 U.S. 471, 485 (1970). Since education is not considered a
fundamental right, see San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 40-44 (1973);
Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Schwemm, supra, at 963, in order to trigger strict
scrutiny of facially neutral official action in school segregation cases, it must be shown that
the challenged action invidiously discriminates on the basis of race. Id. at 964-65.

The constitutional vitality of dual school systems was predicated on the "separate but
equal" doctrine adopted by the Supreme Court in Plessy v. Ferguson, 163 U.S. 537 (1896).
It was believed that constitutional rights would not be violated if the races were granted equal
though separate treatment under the law. Id. at 551. Thus, so long as educational facilities
were equal in terms of tangible features, such as the condition of buildings, competency of
students that may affect
The vigor of this tenet was eroded as courts recognized that despite equality of tangible
factors, apartheid educational facilities at the graduate school level deprived individuals of
the psychological well-being of minority children, the Court stated
that such separation "generates a feeling of inferiority [in black children] that may affect
their hearts and minds in a way unlikely ever to be undone." Id. at 494.
ing by declaring that only segregation resulting from intentional governmental action—de jure segregation—\(^3\) would be held to violate the constitution.\(^4\) The Court, however, offered little guidance on the question of what constitutes segregative intent.\(^5\) Consequently,

\(^3\) De jure segregation has been defined by the Supreme Court to be “a current condition of segregation resulting from intentional state action . . . .” Keyes v. School Dist. No. 1, 413 U.S. 189, 205 (1973). Where dual school systems are required or permitted by statute, or where racial separation results from school policy subtly designed to serve a “racially discriminatory purpose,” de jure segregation exists. Washington v. Davis, 426 U.S. 229, 240 (1976); 413 U.S. at 208. Where separation of the races exists despite neutral legislative and administrative racial policy, and is produced by socio-economic factors beyond the control of governmental units, there is de facto segregation. \(\text{id. at 222-23 (Powell, J., concurring in part and dissenting in part). It is the presence of “purpose or intent to segregate” which the Constitution proscribes and which is the distinguishing factor between de jure and de facto segregation. \(\text{id. at 208 (emphasis in original).}\)

\(^4\) Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973). In Keyes, the parents of students attending Denver public schools filed suit alleging that the Denver School Board created or maintained segregated schools throughout the school system. \(\text{id. at 191. Finding that schools in a section of the system were intentionally segregated, the district court ordered desegregation of that area. \(\text{id. at 192. The court, however, declined to order desegregation of the entire school system based on its finding of de jure segregation in a portion of the system, requiring instead that the plaintiffs independently establish intentional segregation in each part of the system for which desegregation was sought. \(\text{id. at 193. The Court of Appeals for the Tenth Circuit affirmed this aspect of the district court’s decision. \(\text{id. at 195. The Supreme Court reversed, holding that “a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious,” shifting the burden to school officials to show that the “other segregated schools . . . are not also the result of intentionally segregative actions.” \(\text{id. at 208.}\)

The idea of using “segregative intent” to identify impermissible segregation has been severely criticized. In Keyes, Justice Powell argued that the concept of segregative intent is not a reliable standard for measuring official conduct since it is “so nebulous and elusive an element.” \(\text{id. at 227 (Powell, J., concurring in part and dissenting in part). Justice Powell also believes that the de jure/de facto distinction deviates from the mandate of Green v. County School Bd., 391 U.S. 430 (1968), which imposed an affirmative duty on public officials to establish “integrated school systems.” \(\text{413 U.S. at 224-26 (Powell, J., concurring in part and dissenting in part). A preferable test, according to Justice Powell, would be one that merely inquires whether a school district is segregated to a “substantial degree,” and then shifts the burden to school officials to show that the school system is actually integrated. \(\text{id. at 228 (Powell, J., concurring in part and dissenting in part). For a discussion of the ramifications of the distinction between de jure and de facto segregation, see Note, Toward the Elimination of De Facto Segregation in Public Schools, 20 CATH. LAW. 60 (1974).}\)

\(^5\) See 413 U.S. at 233 (Powell, J., concurring in part and dissenting in part); Note, Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction, 86 YALE L.J. 317, 318-20 (1976) [hereinafter cited as Reading the Mind of the School Board]. Courts have had little difficulty in finding segregative intent where school systems were segregated under mandate of state law. \(\text{See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). More recently, however, in cases where state law was silent concerning separation of the races but school systems were nevertheless segregated, see, e.g., Keyes v. School Dist. No. 1, 423 U.S. 189 (1973), courts struggled to ascertain whether that segregation was de facto or de jure. See Reading the Mind of the School Board, supra, at 317-18.}\)
in attempting to apply the Supreme Court's directive the lower federal courts developed differing legal standards against which evidence of segregative intent was evaluated. While some courts required direct evidence of the decisionmaker's motivation, others allowed the plaintiff to rely on a presumption of segregative intent arising from foreseeable segregative consequences. Recently, however, the validity of the existing tests was cast in doubt by two Supreme Court decisions which established that intent to segregate may not be inferred solely from official action having a racially disproportionate impact. In light of this authority, the Second Cir-

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* See Husbands v. Pennsylvania, 395 F. Supp. 1107 (E.D. Pa. 1975); Soria v. Oxnard School Dist. Bd. of Trustees, 386 F. Supp. 539 (C.D. Calif. 1974). The Husbands court believed that a subjective standard was most in accord with the import of the decision in Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). The Husbands court stated that the language and thrust of the entire Keyes opinion does not support the idea that the Court meant to allow actions of schools officials to be held unconstitutional without regard to the purpose or aim behind those actions, but simply on the basis that those actions were taken voluntarily and with cognizance that they would not reduce existing segregated conditions. Such a position would hold school officials in violation of the Constitution for actions take [sic] solely for reasons of economic or administrative feasibility, completely without any segregative desire or aim. Such is not, we think, the position in which the court in Keyes meant to place school officials.


† See, e.g., United States v. School Dist., 521 F.2d 530, 536 (8th Cir. 1975), cert. denied, 429 U.S. 908 (1976), Arlington Heights factors utilized to determine segregative intent in housing discrimination suit. Likewise, in Soria, the district court adopted a highly subjective standard to determine the presence of discriminatory motive. See 386 F. Supp. at 541. See Reading the Mind of the School Board, supra note 5.

* See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 656 (1977); Washington v. Davis, 426 U.S. 229, 239 (1976). In Davis, black applicants who had been denied positions as police officers brought suit under the fifth amendment and 42 U.S.C. § 1981 (1976), alleging that police department recruitment examinations discriminated against black applicants because a disproportionately large number failed the test and were excluded on that basis. Id. at 232-33. The Supreme Court rejected the argument that disproportionate impact alone could establish unlawful discrimination under the equal protection clause and held that the plaintiff must prove that the defendant acted with "invidious discriminatory purpose." 426 U.S. at 238-39. In setting forth the requirements necessary to establish a violation of the equal protection clause, the Davis Court distinguished the standards applicable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1976). Title VII, designed to promote equal employment opportunity, proscribes "disparate treatment" of minorities for constitutionally impermissible reasons and "disparate impact" against minori-
cuit, in *Arthur v. Nyquist,* modified its standard by holding that evidence of foreseeable consequences gives rise to a rebuttable presumption of segregative intent which becomes conclusive if the defendant fails to establish that its educational objectives could not have been achieved by less segregative policies.

In *Arthur,* the parents of students attending Buffalo public schools brought a class action suit against state and city officials, alleging that the defendants intentionally created and maintained racially segregated schools in the city of Buffalo. The evidence showed substantial concentrations of white and minority students in separate schools at the elementary, middle and high school levels. The plaintiffs alleged that Buffalo school officials had pur-

According to one authority, the Supreme Court's decision in *Washington v. Davis* that only purposeful racial discrimination violates the equal protection clause marks the beginning of a new era in civil rights law. Despite [the Court's] contention that this requirement was supported by a century of precedent, the Court had never before determined whether the discriminatory effect of official action alone would suffice to establish racial discrimination for equal protection purposes.

Schwemm, supra note 2, at 1048.

The Court reaffirmed the *Davis* holding in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.,* 429 U.S. 252 (1977), decided the following term.

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* See Hart v. Community School Bd. of Educ., 512 F.2d 37 (2d Cir. 1975); notes 20-22 and accompanying text infra.

8 573 F.2d at 142-43.

9 Id. at 143.


posely established a dual school system by gerrymandering attendance zones, siting new schools in a prejudicial manner, using "optional attendance areas" and "language transfers" discriminato-

rily, and hiring and placing staff on a racist basis. The New York State Commissioner of Education and the members of the State Board of Regents were alleged to have intentionally contributed to the segregation by failing to act more forcefully to eliminate the racial imbalance that existed in the Buffalo school system. Utilizing a foreseeable consequence standard to assess evidence of intent, the district court held that both the city and state defendants intentionally engaged in unconstitutional discriminatory conduct.

On appeal to the Second Circuit, the defendants challenged both the legal standard applied by the district court to determine the existence of segregative intent and the court’s ultimate finding.

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11 415 F. Supp. at 911. In several instances, attendance zones in the school system were drawn in ways that produced racially imbalanced school populations. 573 F.2d at 144. Optional attendance areas were utilized in the Buffalo Public School System to allow students to attend either the school in the attendance zone in which they resided or one in a contiguous area. 415 F. Supp. at 924 n.23. This enabled white students to avoid attending predominantly black schools. Id. at 939. In addition, language transfers were available so that students could take special foreign language courses not offered in their own schools. Id. at 926. The evidence indicated that language course offerings were instituted in some instances to prevent the unnecessary transfer of students from a school and in other instances to enable students to transfer out of predominantly black schools. Id. at 926-27.

12 573 F.2d at 146. Department of Education intervention in Buffalo commenced in 1960 when the Board of Regents issued a policy statement urging desegregation of the Buffalo Public School System. Through 1975, however, the city and state officials responsible for educational policy failed to agree on a desegregation plan and no action was taken to desegregate. The final attempt by the state to remedy the situation existing in Buffalo was in 1975 when the Commissioner of Education threatened to enforce his directives through statutory provisions. Id. at 145.

17 429 F. Supp. at 211-13. The district court’s original finding of liability emphasized the foreseeability of disproportionate impact, a standard established by the Second Circuit in Hart v. Community School Bd. of Educ., 512 F.2d 37 (2d Cir. 1975). See 415 F. Supp. at 940. Before appeal was taken, the lower court had the parties brief three newly-decided Supreme Court cases germane to the topic of segregative intent. 429 F. Supp. at 207. See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Austin Independent School Dist. v. United States, 429 U.S. 900 (1976)(per curiam); Washington v. Davis, 426 U.S. 229 (1976). Issuing a supplemental opinion, the court stated that the three decisions rejected the foreseeable consequence test when used to establish liability solely on the basis of foreseeable segregative impact. Reevaluating the Hart standard, Judge Curtin reasoned that mere cause and effect, mere analysis by way of a “reasonable and foreseeable consequence” test which amounts to a finding that disproportionate impact is sufficient to impose liability for school segregation under the fourteenth amendment, . . . is refuted by Washington v. Davis and Arlington.

429 F. Supp. at 210; see notes 21 & 22 infra. Nevertheless, the district court concluded that the foreseeable consequence standard was a valid method of evaluating evidence of intent. Id. at 211.
that such intent was shown. Writing for a unanimous panel, Judge Smith used, as a starting point, the "foreseeable consequence" test promulgated by the Second Circuit in Hart v. Community School Board to determine whether the requisite intent was present. The court interpreted the Hart standard to signify

18 573 F.2d at 136, 143. The defendants raised several issues on appeal. When the plaintiffs first brought suit, the defendants named in the complaint were the Buffalo Board of Education and Superintendent of Schools, the Board of Regents of the University of the State of New York and the State Commissioner of Education. 415 F. Supp. at 972. After trial on the merits, the plaintiffs moved to add the individual members of the Buffalo Board of Education and the Board of Regents as parties defendant. Id. at 973. The plaintiffs' motion was made in response to the state defendants' contention that the court lacked subject matter jurisdiction over them, since school boards were not considered to be persons within the meaning of 42 U.S.C. § 1983 (1976). 415 F. Supp. at 972; see City of Kenosha v. Bruno, 412 U.S. 507 (1973); Monroe v. Pape, 365 U.S. 167 (1961); Monell v. Department of Social Servs., 532 F.2d 259 (2d Cir. 1976), rev'd, 98 S. Ct. 2018 (1978); U.S. Const. amend. XI (states and their agencies are immune from suit in federal courts). The district court granted plaintiffs' motion. 415 F. Supp. at 911, 972.

On appeal, the Arthur court upheld the lower court's order reasoning that while city and state agencies may be immune from liability under § 1983, their members are liable for unconstitutional conduct under the doctrine of Ex parte Young, 209 U.S. 123 (1908), when sued in their official capacities for injunctive relief. Such individual members, moreover, are "persons" within the meaning of § 1983. Monell v. Department of Social Servs., 532 F.2d 259 (2d Cir. 1976), rev'd, 98 S. Ct. 2018 (1978); Wright v. Chief of Transit Police, 527 F.2d 1262, 1263 (2d Cir. 1976). The defendants, however, argued that the district court did not have jurisdiction over the board members since they were not added as parties defendant until after trial on the merits and, for the most part, were not members of the board at the time of the alleged unconstitutional acts. 573 F.2d at 139. Rejecting this argument, the Second Circuit reasoned that since a board and its constituent members are the "same entity viewed from different perspectives . . . they are freely interchangeable, for jurisprudential purposes, before, during and after trial." Id. at 140. The court concluded that joining board members as parties defendant following trial was merely the substitution of "equivalent parties" since the board members were sued in their official capacities and not as individuals. 573 F.2d at 140 & n.7 (citing Fed. R. Civ. P. 15(c), 21). Thus, proof at trial directed against the boards constituted proof against its members in their official capacities. Id.

Shortly after the Second Circuit's decision in Arthur, the Supreme Court held that "municipalities and other local government units [are] . . . among those persons to whom § 1983 applies." Monell v. Department of Social Servs., 98 S. Ct. 2018, 2035 (1978). Reversing the Second Circuit in Monell, the Supreme Court chose to overrule Monroe v. Pape, 365 U.S. 167 (1961) "insofar as it holds that local governments are wholly immune from suit under § 1983." 98 S. Ct. at 2022 (footnote omitted). The Court's decision was based on an exhaustive review of the legislative history of the Civil Rights Act of 1871. See 98 S. Ct. at 2022-35. In the Monell Court's view, Congress intended to include local governmental units within the meaning of persons for § 1983 purposes. 98 S. Ct. at 2035. For an excellent discussion of Monell, see Note Governmental Liability Under Section 1983 and the Fourteenth Amendment After Monell, 53 St. John's L. Rev. 66 (1978).

19 The Arthur panel was composed of Chief Judge Kaufman and Judges Smith and Mulligan.

20 512 F.2d 37 (2d Cir. 1975).

21 573 F.2d at 141-42. Hart was a class action suit brought by students who alleged that local school board action resulted in the segregation of the junior high school they attended. 512 F.2d at 40. In Hart, the Second Circuit held that de jure segregation may be found to
that a rebuttable presumption\textsuperscript{22} of intent arises when the plaintiff establishes that segregative results were the natural and foreseeable

exist where governmental conduct foreseeably causes educational segregation. \textit{Id.} at 50. In essence, this test employs an impact standard in that it considers "lack of racial motivation . . . irrelevant" if the "foreseeable effect" of state action is segregation. \textit{Id.} at 51. Under this approach, segregative intent and a finding of de jure segregation are premised solely on the foreseeable impact of official conduct. \textit{See Note, Foreseeable Consequence Test for De Jure Segregation, 50 St. John's L. Rev. 329 (1975). See generally Perry, The Disproportionate Impact Theory of Racial Discrimination, 125 U. Pa. L. Rev. 540 (1977). This test is akin to the tort theory that an individual is deemed to have intended the foreseeable consequences of his acts. \textit{See, e.g.,} W. Prosser, \textsc{The Law of Torts} \S 8 (4th ed. 1971). \textit{See also} Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

The \textit{Hart} court expressly refused to adopt a subjective standard to establish intent because of the difficult evidentiary problems such an inquiry poses in evaluating the "collective will" of school boards. 512 F.2d at 50. It was also believed that it may be unreasonable to challenge the policy decision of a group on the basis of the personal beliefs of its individual members. \textit{Id.} The \textit{Hart} court noted, moreover, that its foreseeable consequence test was similar to the approach adopted by the Sixth Circuit in \textit{Oliver v. Michigan State Bd. of Educ.}, 508 F.2d 178, 182 (6th Cir. 1974), \textit{cert. denied}, 421 U.S. 953 (1975). In finding that the plaintiffs established a prima facie case, the \textit{Oliver} court stated that when the "foreseeable result of public officials' action or inaction" is segregation, a rebuttable presumption that the defendant acted with discriminatory purpose is created. \textit{Id.} at 182.

Yet, the precise position taken by the Second Circuit in \textit{Hart} is a matter of controversy. Some commentators argue that the \textit{Hart} test was strictly objective and failed to adequately distinguish between de jure and de facto segregation. \textit{See, e.g.,} \textit{Reading the Mind of the School Board, supra} note 5, at 331 n.72; \textit{Note, Foreseeable Consequence Test for De Jure Segregation, 50 St. John's L. Rev. 329, 330 (1975). This interpretation apparently is premised on the \textit{Hart} court's reliance on the foreseeability of segregatory consequences and its statement that actual racial motivation is unimportant once foreseeable racial impact is found. \textit{See also} 429 F. Supp. at 210. On the other hand, some commentators have focused on \textit{Hart}'s approval of the foreseeable consequence test used by other circuits through which a rebuttable presumption of intent is created. This approach is viewed to be an adequate means of assessing evidence of intent since defendants are afforded an opportunity to rebut the presumption by demonstrating that they in fact did not act with a discriminatory purpose. \textit{See, e.g.,} \textit{Note, Intent to Segregate: The Omaha Presumption, 44 Geo. Wash. L. Rev. 775 (1976) [hereinafter referred to as Omaha Presumption].}

\textsuperscript{22} A presumption has been defined as "a procedural rule requiring the court, once it concludes that the 'basic fact' is established, to assume the existence of the 'presumed fact' until the presumption is rebutted and becomes inoperative." J. \textsc{Maguire}, J. \textsc{Weinstein}, J. \textsc{Chadburn} \& J. \textsc{Mansfield}, \textsc{Cases and Materials on Evidence} 1046 (6th ed. 1973) [hereinafter cited as \textsc{Maguire} \& \textsc{Weinstein}]. When a presumption is created, a party's burden of proof is satisfied, and the burden shifts to the opposing party to come forward with evidence sufficient to overcome the presumption. \textit{See 9 J. Wigmore, Evidence} \S 2487 (3d ed. 1940). Thus, "a presumption is compulsory and prima facie establishes the fact to be true; it remains compulsory if it is not disproved." \textsc{Maguire and Weinstein, supra}, at 1047.

The Supreme Court has recognized the utility of a presumption to establish discriminatory intent. For example, in \textit{Swann v. Charlotte-Mecklenburg Bd. of Educ.}, 402 U.S. 1 (1971), the Court found the continued existence of identifiable black or white schools in a statutorily mandated dual school system to raise a presumption of racial discrimination in violation of the equal protection clause. \textit{Id.} at 18, 26. In \textit{Keyes v. School Dist. No. 1, 413 U.S. 189 (1973),} the Court utilized a presumption of illicit racial intent in a similar context. The Court stated that

a finding of intentionally segregative school board actions in a meaningful portion
of a school system, . . . creates a presumption that other segregated schooling within the system is not adventitious. It establishes . . . a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions.  

Id. at 208. It should be emphasized, however, that in both Swann and Keyes a presumption of intent was utilized as an evidentiary device only after a prior showing of intentional racial discrimination had been made concerning the school systems in question. As formulated in Hart and utilized in Arthur, on the other hand, “the foreseeable effects presumption facilitates an initial finding of segregative intent rather than amplifying the ramifications of a prior finding.” Omaha Presumption, supra note 21, at 789.

21 573 F.2d at 142. In utilizing a foreseeable consequence test, the court was cognizant of the evidentiary difficulties facing plaintiffs in segregation suits. See id. Further, the Arthur panel noted that the Supreme Court has recognized the difficulty in applying a subjective approach to proving intent when dealing with governmental units. Id. For excellent discussions of this problem, see Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95 (1971); Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970). At the same time, the Arthur court observed that a completely objective standard should not be used to establish segregative intent since it tends to obliterate the distinction between de jure and de facto segregation by making any action, racially motivated or not, unconstitutional if its segregative effects were foreseeable. 573 F.2d at 143.

22 573 F.2d at 142-43. In Hart, the court stated that “lack of racial motivation [is] irrelevant in the face of . . . findings of foreseeable effect.” 512 F.2d at 51. In addition, the court did not indicate how, under its standard, the defendant could rebut a prima facie case. Thus, the Arthur decision can be understood to clarify Hart by providing a standard for defendants attempting to rebut the presumption of discriminatory intent.

23 See 573 F.2d at 143. Judge Smith reasoned that such an approach fulfilled the requirement of Washington v. Davis, 426 U.S. 229 (1976), that segregative intent, be the predicate for a finding of unlawful conduct. 573 F.2d at 143. The Second Circuit concluded that the test “is a cogent application of the Supreme Court’s requirement of proof of segregative intent, that it avoids conceptual pitfalls inherent in alternative approaches, and that it provides a method of proof which is fair to both plaintiffs and defendants in cases of alleged unlawful racial segregation.” Id.

In arriving at its conclusion that a foreseeable consequence approach remained valid following Davis and Arlington Heights, the Second Circuit had to reconcile its decision with the Supreme Court’s vacatur and remand of Austin Independent School Dist. v. United States, 429 U.S. 990 (1976)(per curiam). In Austin, the Fifth Circuit had inferred discriminatory purpose from the foreseeably segregative effect of utilizing a neighborhood school plan in a residentially segregated community. United States v. Texas Educ. Agency, 532 F.2d 380, 390 (5th Cir.), vacated and remanded per curiam sub nom. Austin Independent School Dist. v. United States, 429 U.S. 990 (1976). The Arthur court did not view the Supreme Court’s action in Austin as a complete rejection of the foreseeable consequence test when used alone
Turning to the merits, the court found that the natural and foreseeable consequence of the city official's conduct was increased segregation. Because there were reasonable alternative policies available to the board which would have had a less segregative effect, the court found that the prima facie case of de jure segregation had not been rebutted and affirmed the finding of liability as to these defendants. On the other hand, the court held that the state defendants dispelled what evidence of segregative intent existed as to them by showing that valid policy objectives justified their failure to act more forcefully to remedy the situation.

It is submitted that the legal standard promulgated by the Arthur court is at odds with recent Supreme Court pronouncements on the burden to be met by plaintiffs seeking to prove de jure segre-
The Supreme Court has stated that "invidious discriminatory purpose may be inferred from the totality of the relevant facts" and disproportionate impact is only one factor to be considered in this inquiry. In Village of Arlington Heights v. Metropolitan Housing Development Corp., the Court was faced with a challenge to certain zoning practices of the Village of Arlington Heights. Stating that a critical analysis of the evidence is required before a finding of invidious discriminatory intent will be found to be a "motivating factor" in a given decision, Justice Powell suggested several evidentiary sources which may be utilized in this inquiry. Thus, the "historical background of the decision," the "specific sequence of events" preceding the decision, "departures from the normal procedural sequence" of the decisionmaking body and the "legislative or administrative history" of the decision in the form of statements of its members, minutes, and reports were considered relevant. Implicit in these guidelines is the suggestion that the

32 Id. at 255. Arlington Heights involved the denial of a request for rezoning which would have permitted the construction of low and middle income housing in a Chicago suburb. Id. at 255-58. Individuals who would have qualified to live in the proposed units and its developer brought suit, alleging that the refusal was racially discriminatory and therefore violated the fourteenth amendment. Id. at 257, 263-64. The Seventh Circuit held that the village's desire to preserve the integrity of the zoning plan previously adopted for Arlington Heights was not a sufficiently compelling state interest to permit the disproportionate impact on blacks that the denial would have. 517 F.2d 409, 415 (7th Cir. 1975), rev'd, 429 U.S. 252 (1977).
33 429 U.S. at 265. In commenting upon Arlington Heights, one author has noted that "because the court undertook to develop this list [of guidelines pertinent to determining whether invidious racial purpose motivated official action] and because seven of the eight justices who participated in the case joined this part of the opinion, the list is likely to be an important guide in future cases." Schwemm, supra note 2, at 1022.
34 429 U.S. at 267-68. The Court stated that the enumerated factors were merely indicative of the inquiry that should be pursued to determine if unlawful segregative intent exists. Id. at 268. Analyzing the evidence presented in Arlington Heights, the Court noted that the impact of the zoning decision did "arguably bear more heavily on racial minorities." Id. at 269. Because the sequence of events preceding the denial for rezoning appeared to conform to normal procedures, and the legislative history of the decision revealed reliance on criteria usually considered by the board, however, the Court found that the plaintiffs had failed to carry their burden. Id. at 269-70. In holding that the evidence did not support a finding of illicit discriminatory purpose, the Court deemed the discriminatory impact of the village's decision to be "without independent constitutional significance." Id. at 271. Justice White dissented on the ground that the judgment should have been vacated and remanded to the lower court for reconsideration in light of the Court's intervening decision in Washington v. Davis, 426 U.S. 229 (1976). 429 U.S. at 272 (White, J., dissenting).
concept of intent may not be adequately evaluated solely in terms of objective criteria. Indeed, actual inquiry into the practices and purposes of the decisionmaking body would provide the most salient evidence of intent. The foreseeable consequence test, however, is an objective standard which emphasizes the impact of official decisions. Thus, to the extent that focusing on the foreseeable consequences of decisions sidesteps an inquiry into the decisionmakers' motivations and purposes, the Arthur test is incompatible with Arlington Heights.

According to Professor Schwemm:

'The Arlington Heights opinion not only used "purpose" and "intent" interchangeably, but also indicated that the crucial question is whether the discriminatory intent or purpose was "a motivating factor" in the decision under review. This choice of words, coupled with Justice Powell's observation that legislators and administrators take many considerations into account in reaching their decisions, suggests that a court may appropriately examine the subjective motives of official decisionmakers as well as the objective consequences of their actions.


The Supreme Court's decision in Castaneda v. Partida, 430 U.S. 428 (1977), a jury selection discrimination suit decided shortly after Arlington Heights, initially appears to be a retreat by the Court from its emphasis on purpose rather than impact. In Castaneda, the Court stated that "once the [complaining party] has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden shifts to the State to rebut that case." Id. at 495. In jury discrimination suits, however, "the selection process should be completely random," thus making disproportionate impact a more probative factor. See Schwemm, supra note 2, at 1022. As Professor Schwemm notes, the variation in the standard utilized in Castaneda "reinforces the suggestion of Justice Stevens in Davis, that the proof necessary to establish discriminatory purpose will vary in different contexts." Id. at 1022 n.348. See Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

It should be noted that in analyzing intent, the Supreme Court has focused on the purposes and motivations of the decision-making body, rather than on those of individual officials. See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

A test for determining intent which focuses solely on the foreseeability of racially segregative consequences has been criticized by several commentators as tending to obliterate the distinction between de jure and de facto segregation. See, e.g., Omaha Presumption, supra note 21, at 812; Reading the Mind of the School Board, supra note 5, at 329. A strict foreseeable consequence test, in which intent is conclusively established once it is found that school officials should have foreseen that segregation would be the result of a policy, does not evaluate the purpose or intent behind a given action. In this vein, it has been noted that "[t]he defendant may have foreseen consequences incidental to his action though such action was undertaken for other purposes." Omaha Presumption, supra note 21, at 812. Consequently, a test that utilizes foreseeable consequences alone fails to satisfy the requirement that intent to segregate be shown before unconstitutional conduct can be found. See id.

In a recent line of cases involving the Austin Independent School District, the Fifth Circuit gradually retreated from sole reliance on an inference of segregative intent arising from foreseeable consequences. See United States v. Texas Educ. Agency, 467 F.2d 848 (5th Cir. 1972) (en banc), aff'd in part, rev'd in part, 532 F.2d 380 (5th Cir.), vacated and re-
The validity of the *Arthur* court's standard for establishing a prima facie case is undermined further when analyzed in light of the stringent rebuttal burden placed on the defendant. While not very detailed in its discussion, the Supreme Court has stated that proof of discriminatory intent may be rebutted by evidence that the discriminatory result was the product of racially neutral action.49 Thus,

*manded per curiam sub nom.* Austin Independent School Dist. v. United States, 429 U.S. 990 (1976). In *Austin*, the plaintiffs challenged policies concerning the assignment of Mexican-American students in the Austin Independent School District. 532 F.2d at 385. In light of the Supreme Court's mandate in *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973), that purpose or intent to segregate is essential to a finding of de jure segregation, the Fifth Circuit rejected the impact standard it had previously utilized. 532 F.2d at 387-88; see United States v. Texas Educ. Agency, 467 F.2d 848 (5th Cir. 1972) (en banc); Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142 (5th Cir. 1972) (en banc), *cert. denied*, 413 U.S. 920 (1973). Nevertheless, the court stated that where a discriminatory effect is foreseeable, segregative intent may be inferred. 532 F.2d at 388. Thus, since the foreseeable and inevitable effect of using a neighborhood assignment policy in a residentially segregated community was the maintenance of segregated schools, the court found a constitutional violation. *Id.* at 392. The Supreme Court remanded the case to the Fifth Circuit in light of *Washington v. Davis*. See *Austin Independent School Dist.* v. United States, 429 U.S. 990 (1976). Justice Powell, in a concurring opinion, suggested that the Fifth Circuit had erred in “[imputing] to school officials a segregative intent far more pervasive than the evidence justified.” *Id.* at n.1 (Powell, J., concurring). On remand, the court reviewed the totality of the defendant's conduct and utilized the specific factors propounded in *Arlington Heights* to find that school officials acted with invidious discriminatory purpose. Austin Independent School Dist. v. United States, 564 F.2d 162, 170-74 (5th Cir. 1977). Despite the court's retreat from complete reliance on a foreseeable consequence approach, analysis of foreseeable consequences was nevertheless endorsed as a valuable tool in evaluating evidence of intent. *Id.* at 168-69; see *Austin Independent School Dist.* v. United States, 579 F.2d 910 (5th Cir. 1978), *denying rehearing to* 564 F.2d 162 (5th Cir. 1977).


49 *Arlington Heights* v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). The *Arlington Heights* Court stated that to rebut a plaintiff's evidence of discriminatory intent, the defendant must show "that the same decision would have resulted even had the impermissible purpose not been considered." *Id.* at 270 n.21. In *Washington v. Davis*, 426 U.S. 229 (1976), the Court stated that the state must show that "permissible racially neutral selection criteria and procedures have produced the monochromatic result." 426 U.S. at 241 (citing
even assuming that the Supreme Court would allow a prima facie case to be based on a presumption of intent arising from foreseeable consequences, it is clear that the defendant must be given the opportunity to rebut the presumption by showing that racial bias in fact did not lead to a segregated school system. The Second Circuit, however, circumscribes the defendant's ability to rebut by requiring a showing that "no reasonable alternative policy would have achieved the same permissible educational goals with less segregative effect." Moreover, since this burden of rebuttal appears almost insurmountable, the Arthur standard virtually assures victory to the plaintiff who merely comes forward with evidence of foreseeable consequences. In effect, evidence of segregative impact is dispositive, a standard clearly rejected by the Supreme Court.

The Second Circuit's standard, which enables plaintiffs to establish a prima facie case of discriminatory intent more readily than is possible under the Arlington Heights approach, should aid in the elimination of subtle state-imposed segregation. It would appear that the foreseeable consequence test, and the presumption it produces, reflect a social policy judgment that official decisionmakers should bear the responsibility for demonstrating the constitutionality of challenged actions. At issue in the development of stan-

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Alexander v. Louisiana, 405 U.S. 625, 632 (1972)). In Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), the Supreme Court espoused a similar burden of rebuttal, requiring only that defendants "adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions." Id. at 210. According to the Court, defendants may show this by demonstrating that "a lesser degree of segregate schooling... would not have resulted even if the board had not acted as it did." Id. at 211. Thus, the evidence necessary to rebut a prima facie case suggested in Davis, Arlington Heights, and Keyes, appears to encompass subjective as well as objective evidence of intention.

573 F.2d at 143; see notes 17-27 and accompanying text supra. In contrast to the stringent rebuttal burden placed on the defendant by the Second Circuit, the Sixth Circuit has adopted a more lenient standard, requiring only that officials demonstrate that their practices were a "consistent and resolute application of racially neutral policies." Oliver v. Michigan State Bd. of Educ., 508 F.2d 178, 182 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975); NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1046 (6th Cir.), cert. denied, 434 U.S. 997 (1977); note 21 supra. Similarly, under the rule in the Eighth Circuit, a defendant can dispell the presumption of intentional segregation by providing proof that the policies and practices were not prompted by a discriminatory purpose. United States v. School Dist., 541 F.2d 708 (8th Cir. 1976) (per curiam), vacated and remanded per curiam, 433 U.S. 607 (1977).

As one commentator has suggested:

[Improper purpose is hard to prove, and Davis, Arlington Heights, and Castaneda all demonstrate that an equal protection claimant will be hard pressed to establish the necessary discriminatory racial purpose. The effect, if not the actual purpose of these decisions will be to reduce the number of meritorious civil rights claims that can be successfully brought under the equal protection clause.


See Note, "Intention" as a Requirement for De Jure School Segregation, 37 Ohio St.
dards through which the existence of intention segregation may be ascertained, therefore, are not only evidentiary considerations, but also fundamental assumptions concerning the obligation to eliminate educational segregation. While the Second Circuit’s standard may be justified by social policy objectives, the rigorous rebuttal burden placed on defendant officials may result in the imposition of liability for conduct that was not prompted by invidious discriminatory purpose. Since the Supreme Court has rejected the notion that educational authorities should be liable under such circumstances, the exacting standard to which these officials are held in the Second Circuit seems untenable.

Marea C. Mulé


See Omaha Presumption, supra note 21, at 803.