De facto segregation & the roots of racial inequality

Erica Frankenberg\(^1\) & Kendra Taylor\(^2\)

Contact information:
Erica Frankenberg
207B Rackley Building
Pennsylvania State University
University Park, PA 16802
P: 814-865-5862
E: euf10@psu.edu

Kendra Taylor
200 Rackley Building
Pennsylvania State University
University Park, PA 16802
E: kat5123@psu.edu

---

\(^1\) Erica Frankenberg (Ed.D., Harvard University, A.B., Dartmouth College) is an associate professor in the Department of Education Policy Studies at the Pennsylvania State University. Her research interests focus on educational law and policy affecting racial desegregation and inequality in K-12 schools. Recent book publications include *Educational Delusions? Why Choice Can Deepen Inequality and How to Make It Fair*, *The Resegregation of Suburban Schools: A Hidden Crisis in American Education*, and *Integrating Schools in a Changing Society: New Policies and Legal Options for a Multiracial Generation*. She was a researcher at the Civil Rights Project focusing on K-12 integration prior to Penn State.

\(^2\) Kendra Taylor is a Ph.D. student in the Department of Education Policy Studies at the Pennsylvania State University. She recently received her M.Ed. from the Pennsylvania State University in Applied Youth, Family and Community Education. Her research focus is on the school to prison pipeline, restorative justice and mass incarceration.
INTRODUCTION

At the start of the 21st century, de facto segregation remains a legacy of the incomplete battles of the Civil Rights movement. The legal distinction between de jure segregation and de facto segregation is important because today there is no longer statutory segregation that once existed in many states in the 20th century and were dismantled as a result of Brown and subsequent federal decisions, laws, and enforcement action. Moreover, in late 20th century cases, jurisprudence regarding de jure segregation began accepting that segregation that remained might be due to “private” actions in ways that differed from earlier understandings. This paper investigates the phenomenon of de facto segregation, segregation that does not result from overt laws, which is at the root of existing inequality. In particular, it focuses on understanding the conceptualization of de facto segregation as whether it is actionable or inactionable by judicial remedies. The argument for remedying the effects of de facto segregation is one that understands racial segregation as caused by governmental actions (federal, local, state) even if not a result of an intentionally discriminatory policy or law.

Contemporary segregation of students is both similar and different to that of the first half of the 20th century. Today, unlike then, it is multiracial in nature, and even in the historic center of black population, the South, Latinos outnumber African-American students. While the South was the region of the country that had the largest share of black students in racially isolated schools at the time of the Brown ruling through 1968, by 1972 a dramatic reversal had occurred and the Northeast and Midwest had the most segregated states for black students, a trend that continues today. Increasing shares of Latino and black students are in extremely isolated schools by race and poverty while white students have the lowest exposure to students of other races. The coinciding trends of suburbanization and immigration have resulted in persisting residential segregation, particularly for Latino immigrant groups, between different suburb jurisdictions.

---

5 GARY ORFIELD & ERICA FRANKENBERG, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE (2014).
6 DENNIS LORD, SPATIAL PERSPECTIVES ON SCHOOL DESEGREGATION AND BUSING 7-8 (1977); Id.
Because of rising suburban poverty, depending on the geographic scale and patterns of school district boundaries, minority students may attend schools in rapid transition and/or decline.⁷

But segregation is also very much the same as it was in the first half of the 20th century in that there is separation of students in schools by race and economic status, and the consequences of these trends for individual students and our democracy are enormous. Research since Brown has confirmed the premise of long-term, perpetuating benefits of high-quality, integrated schools for black students.⁸ These students have vastly different life opportunities in terms of career, for example, and fewer harmful behaviors like involvement with the justice system and early parenting. Despite this, students of color are increasingly less likely to attend integrated schools, which is a threat to a healthy multiracial democracy as well as a thriving economy.

We argue in this paper that as the Supreme Court expanded the understanding of de jure segregation during the 1960s and early 1970s, it never resolved the question of whether de facto segregation was actionable and/or distinguishable from de jure. Indeed, there were often many contradictions when trying to distinguish between these forms of segregation that were never politically or legally defined at the national level. As a result, our review of lower court cases outside the South from the 1960s to early 1980s, an active time for federal intervention into desegregation, finds considerably murkiness about what constitutes de facto or de jure segregation and whether or not de facto segregation is actionable. In selected sets of facts and/or cases, judges broadly interpreted district practices to be segregative—even sometimes considering them to be de jure to avoid the morass around de facto segregation. In other cases, however, even within the same circuit, judges would find segregation to be inactionable. While patterns were not uniform across lower courts during this time, it did represent an opportunity for an expanded conceptualization of when state action or inaction was impermissible—an

opportunity that is largely not present today.⁹

This paper first considers the gradual expansion of the conceptualization of de jure segregation by the Supreme Court. It then reviews the more mixed conceptualization of de facto segregation in legislation and state law. We then describe our analysis of lower court decisions over approximately two-decade time span. We focus on two related findings. First, there was considerable murkiness in what judges considered to be de facto or de jure segregation. Second, we review the mixed record of what segregation was considered to be actionable as compared to inactionable. We conclude the paper with a brief consideration of the implications of these patterns.

EXPANDING CONCEPTUALIZATIONS OF DE JURE SEGREGATION, 1968-1973

The Supreme Court was silent for more than a decade after Brown II remanded desegregation back to district courts to fashion remedies appropriate to the local contexts. That Brown II long delayed the implementation of desegregation is without question.¹⁰ It also meant that lower courts were without guidance, and the halting progress, in part, spurred the Civil Rights Act a decade after Brown.

In such a vacuum—particularly when considering that many sitting district court judges were themselves products of segregated schooling—movement to desegregate was slow. A decade after Brown I, a tiny fraction of black students attended majority white schools.¹¹ District judges often accepted any plan presented by school districts even if such plans did not actually result in racial desegregation. Many of these plans relied on de facto segregation techniques that would subsequently be determined to be insufficient to comply with Brown once the Supreme Court once again considered school desegregation.

In 1968, the U.S. Supreme Court once again sought to clarify desegregation. In the interim, HEW officials had been developing increasingly tougher requirements for districts to be

---


¹¹ Id at 117-18
in desegregation compliance and qualify for ESEA funds. New Kent had, in fact, adopted its “freedom of choice” plan to comply with HEW guidelines. In this decision, the Supreme Court emphasizes repeatedly that the focus of whether a proposed desegregation plan meets the constitutional requirements is its effectiveness, particularly given the considerable time that had passed since Brown. Because the district didn’t adopt freedom of choice until 11 years after Brown—before then schools had been completely segregated—a fact which “Compounded the harm…such delays are no longer tolerable…The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.”

The Court was clear, however, that merely opening “the doors of the former "white" school to Negro children and of the "Negro" school to white children” was not enough to prove that it had met its duty of desegregating. The Court instead instructed that plans should be evaluated in light of other alternatives, and school board would have burden to explain use of a less effective alternative. The Court, while invalidating New Kent County’s plan, they did not say that all freedom of choice plans were unconstitutional, just that it was not “an end in itself”. The Court cited to the US Civil Rights Commission report about how freedom of choice had perpetuated racially identifiable schools in the South, including because of fears of violence and the poverty of black families that made such a choice difficult as part of its explanation.

Finally, the Court held that "School boards * * * [are] clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch". To do so, the Court identified six components, which became known as the Green factors, by which to judge whether the dual segregated system had been eliminated: students, faculty, staff, transportation, extracurricular activities and facilities.

The Swann decision three years later is commonly known as the decision legitimating the use of widespread busing for desegregation purposes from Charlotte-Mecklenburg (CMS), North Carolina, which was a large city-county district. Yet, it also discussed at length the way housing patterns and school patterns were connected and perpetuated segregation and ruled that race-
neutral policy mechanisms could be discriminatory, requiring more affirmative response by districts.

The Court found that the CMS plan of “neighborhood schools” perpetuated school segregation as well as residential segregation. The Nixon DoJ argued there was nothing unconstitutional about operating all black schools in ghettos despite the overwhelmingly white nature of the county’s enrollment. The Court held that districts must use all feasible means even if “awkward” or “inconvenient”, including busing. What was required was “the greatest possible degree of actual desegregation…all things being equal…it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation.”

Expanding further, the Court cautioned that neutral appearing plans may not necessarily be neutral and non-discriminatory in practice. They held, ““Racially neutral” assignment plans proposed by school authorities to a district court may be inadequate [to dismantle the dual system]; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation… In short, an assignment plan is not acceptable simply because it appears to be neutral.” At the time, this specifically referred to neighborhood schools policies, but could conceivably apply to other assignment plans as well.

Indeed, some of the race-neutral practices included building or closing schools, which not only affected the racial composition of those schools based on their location, but also perpetuated school racial isolation by influencing residential patterns. The Court described the rationale for how this could affect segregation as, “People gravitate toward school facilities…The location of schools may thus influence the patterns of residential development of a metropolitan area.” The Court also held the district responsible for imposing policy that maintained segregation created by other government action. They noted, “the [district] court also found that residential patterns in the city and county resulted in part from federal, state, and local government action other than school board decisions. School board action based on these patterns, for example, by locating

---

17 Id at 26-28
18 Id at 20-21.
schools in Negro residential areas and fixing the size of the schools to accommodate the needs of immediate neighborhoods, resulted in segregated education."\(^{19}\)

Finally, in several key portions of the Swann decision, the Court is careful to limit its holding to de jure districts, which at this time was only considered in states that had formerly imposed dual systems of segregation. For example: “In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight. In devising remedies where legally imposed segregation has been established, it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual system."\(^{20}\) Likewise, the Court held that district courts could prescribe certain ratios of black and white students in schools to reflect the districtwide percentages, but that would not be permissible without a prior finding of segregation.

A year after Swann, the Supreme Court again faced issues around boundaries, this time considering the formation of a new district within a larger countywide district that was in the process of dismantling a segregated system of schools. A new city district that would have formed would have been majority white, leaving schools that would have higher percentages of black students in the remaining schools in the county. The 5-4 majority opinion held,

> A city’s proposal to erect new boundary lines for the purpose of school attendance in a district where no such lines had previously existed and where a dual, racially segregated school system had long flourished, must be judged according to whether it hinders or furthers the process of school desegregation; if the proposal would impede the dismantling of the dual system, a district court in the exercise of its remedial discretion, may enjoin it from being carried out.\(^{21}\)

While the action of Emporia to create a new school district was not intentionally stated as being discriminatory, the effect on creating schools that would be racially identifiable on opposite sides of the new boundary along with the timing of the action—coming quickly after a court desegregation order affecting the district—was enough for the Court to prevent the

---

\(^{19}\) Id at 7  
\(^{20}\) Id at 21  
\(^{21}\) Wright v. Council of City of Emporia, 407 U.S. 451 (1972) at 460
formation of the district. The Court specifically noted that it was going to focus on the effect of
district’s actions. In particular, they noted that it was sometimes difficult to determine the intent
of individuals or actors so the Court would instead examine what can be determined, which is the
effect that school officials have on dismantling or maintaining a dual system.22

The Keyes decision in 197323 was important both for what it said, and what it did not say.
This was the first Supreme Court that found de jure segregation existing in a district outside of
the South for the first time. The Court described a variety of district practices as illustrative of a
dual segregated system: building schools of a certain capacity in certain neighborhoods to be
one-race, using mobile classrooms, student assignment and transfer policies, transportation, and
faculty/staff assignment in racially identifiable ways that created perceptions of schools that were
known by their racial composition. It also explicitly recognized the rights of Latino students to
be desegregated as prior desegregation cases had focused on black plaintiffs. There are two other
key parts of the decision. First, the Court declared that, as was the case in Denver, if one part of a
district is segregated, the presumption is that the rest of the district is segregated and the
presumption shifts to the defendant to prove that is not the case. Second, the Court continued to
understand the way in which schools and neighborhoods had a bidirectional effect on
composition, writing that segregated schools “may have a profound reciprocal effect on the racial
composition of residential neighborhoods within a metropolitan area, thereby causing further
racial concentration within the schools.”24 The Court held that if district policies furthered
segregated neighborhoods and if the school board then adopted neighborhood schools as its
assignment policy, this would be further evidence of state action to exacerbate segregation and
should be considered in determining a desegregation remedy.25

However, while extending the understanding of de jure in several important ways, the
decision also extended the confusion regarding de facto segregation. Several opinions by
different justices describe de facto segregation as actionable, and subsequent legal research as
suggested that a majority of justices agreed on this point, which would have eliminated any
conception of de facto segregation being distinguishable from de jure in terms of what districts

22 Id
24 Keyes at 201
25 Id at 203
were required to do. However, disagreements among the justices about the use of busing to remedy segregation ultimately prevented an opinion from five justices about de facto segregation being issued.  

CONTESTED CONCEPTUALIZATIONS OF DE FACTO

While the conceptualization of “de jure” was rooted in a relatively concrete notion of statutory discrimination, the origins of “de facto” segregation were complex. “De facto” became a topic of national interest and debate when it became clear during the lead up to and passage of the Civil Rights Act of 1964 that there was pervasive racial imbalance across the U.S. and federal legislation meant to address racial segregation in schools would have to reckon with the racial imbalance in schools outside the South. This phenomenon of racial imbalance became synonymous with “de facto” segregation and due to political pressures of the time was considered under the Civil Rights Act as largely beyond the scope of desegregation remedies used for de jure segregation. It was in the context of a civil rights movement, civil rights legislation, and the handing down of court ordered desegregation that the nation grappled with how far desegregation by federal force should extend beyond the seventeen southern and border states.

Federal Law

Despite the Court’s decisive ruling in Brown against de jure segregation, actual integration was slow to come to the schools of the South. It wasn’t until the passage of the Civil Rights Act and the Elementary and Secondary Education Act in 1964 and 1965 that meaningful desegregation began with all branches in government working together to fulfil the mandate of Brown. While the Civil Rights Act brought substantial change to the dual school systems of the de jure segregated states of the seventeen southern and border states, the act also served to create a distinction between de jure and de facto segregation by putting limitations on the forms of segregation that were subject to the full force of the Civil Rights Act. Most importantly, the Civil Rights Act entrenched into legislation the distinction between ‘segregation’ and racial

27 Frankenberg & Taylor 2015, supra note 12.
imbalance’ and the resulting action that could be taken in each context. Racial imbalance became equated with de facto segregation, and was considered less consequential than de jure segregation. Although the Civil Rights Act created this distinction between de jure and de facto segregation/racial imbalance, the legislation did not define each form, thus leaving the distinction ambiguous. This would have lasting implications as judges sought to interpret an often murky distinction between forms of segregation that would often appear only distinct in theory rather than in consequence.

The distinction between de jure and de facto segregation was made clear in Titles IV and VI of the Civil Rights Act, the primary mechanisms for assisting with and enforcing desegregation. Title IV provided technical assistance to schools that were desegregating and Title VI was an enforcement tool, deferring and/or terminating funds to districts that did not comply with desegregation. The use of both of these Titles was limited in terms of de facto segregation because of the distinction made in the Civil Rights Act between de jure segregation and racial imbalance (de facto segregation). One way that the final version of the Civil Rights Act was strengthened in its passage through Congress was that a provision was added to Title IV that provided for financial and technical assistance to be used for pupil transportation to aid in the process of desegregating dual school systems.28 Yet no such assistance was permitted for de facto segregated systems; it was expressly prohibited by Section 404 of Title IV which states “desegregation does not mean assignment of students to schools in order to overcome racial imbalance”. Further confirming that busing cannot be used to remedy de facto segregation, Section 407 of Title IV states “no official or court [is] empowered to issue any order seeking to achieve a racial balance for any school by requiring transportation of pupils or students from one school to another to achieve racial balance.”

Title VI was written more ambiguously in a way as to allow for continual interpretations of what discrimination means according to the governmental agencies tasked with the regulation of Title VI.30 Such a ‘regulatory model’ offered both inherent limitations and advantages to the powers of Title VI, with enforcement of Title VI through fund termination and deferral initially

29 Id
strong under President Johnson’s HEW and then coming to an end in 1969 under President Nixon’s HEW.³¹ Potentially Title VI could have been used to compel desegregation in de facto segregated contexts with the threat of fund deferral or termination under a regulatory model that allows for developing interpretations. However, demonstrating the disadvantages of the regulatory model, this framework placed a great burden on HEW, which was chronically understaffed and lacked expertise on desegregation. These challenges were exacerbated when HEW made any attempts to pursue de facto segregation cases through Title VI as de facto cases required greater resources and expertise, as well as tested political will.³² Despite HEW’s limited efforts to enforce Title VI in the non-South, the political climate as well as HEW’s limited resources meant that ultimately HEW was unable to pursue many cases in the non-South.³³

State Laws

Beginning in the 1960s, with the realization that racially imbalanced schools were widespread throughout the US and that federal legislation was not adequately addressing de facto segregation, a number of states in the non-South created their own pieces of legislation that sought to mitigate racial imbalance.³⁴ The states that crafted some sort of legislation meant to address racial imbalance, or de facto segregation, were California, Massachusetts, Connecticut, Pennsylvania, Illinois, New York, Minnesota and New Jersey. These states went beyond federal law and Supreme Court precedents of the time in deciding that segregation, regardless of its causes, was harmful to the education of minority students.³⁵ That eight states created laws related to de facto segregation is not insubstantial given that the seventeen southern and border state were previously de jure segregated and thus would not have laws pertaining to de facto segregation, leaving thirty-three possible states to craft laws on de facto segregation. Although the outcomes of the laws were mixed in terms of producing racial balance in schools, with many of the states experiencing growing racial isolation in schools following the adoption of the laws,

³⁵ JAMES BOLNER & ROBERT A. SHANLEY, supra note 28 at 169-172.
the intent behind the laws demonstrated an attempt to define de facto segregation in a manner that compelled a remedy.

This myriad of state laws played a role in shaping the definition of de facto segregation. Some of the laws did not specifically define the contentious issue of what ‘racial imbalance’ constituted while others defined the term using percentages. The state of New York developed policy guidelines on racial imbalance, yet left the ‘racial imbalance’ undefined, stating only that it occurs when the composition of the study body is unrepresentative of the school district as a whole. Similarly, an executive order issued on racial imbalance in the state of New Jersey declared only that schools should represent a cross-section of the population, not specifying when this occurs. Other states however went as far as to specify percentages at which racial balance/imbalance occurs, such as Illinois’ Armstrong Act and Massachusetts’ Racial Imbalance Act did. The Armstrong Act, passed in Illinois in 1963, considered a school to be segregated if the ratio of minority students to white students in that school exceeded the district average by a minimum of 15 percent. Included in the Armstrong Act was a threat of losing state funds, but also very lengthy appeals process that could be exploited. After little progress was made through the Armstrong Act, in 1983, the state board voted unanimously to abandon the previous definition of school segregation that involved a specific ratio and instead adopted new guidelines that did not contain any mathematical standard for deciding when a school is segregated. The Massachusetts Racial Imbalance Act of 1965 defined racial imbalance as “[the ratio] between non-white and other students in public schools which is sharply out of balance with the racial composition of the society in which non-white children study, serve and work…when the percent of non-white students in any public school is in excess of fifty percent of the total number of students in such school.” Once the act was passed in Massachusetts, public school boards that were found to be maintaining racially imbalanced schools were at risk of losing state funds if they did not take steps to reduce racial imbalance. However, the School Committee was

---

36 Minnesota’s policy on racial imbalance also specified a ratio for when racial imbalance occurred; when minority enrollment in a school exceeded the district by 15 percent minority enrollment. The Connecticut law on racial imbalance also specified a percentage: when a school’s minority population is more than 25 percent greater or less than the district’s average for that grade level.
38 Id
committed to the repeal of the act and exploited the judicial review process to avoid following the law. Under the law, the schools in Massachusetts grew more racially imbalanced, with 46 schools that were classified as racially imbalanced the year of the passage of the act in 1965 and a total of 63 schools classified as racially imbalanced by 1970.

Despite many failures of the state laws in delivering racially balanced schools, these laws provided frameworks for judges to consider what constituted de facto segregation and if it compelled a remedy. These laws were the subject of a number of court cases in both state and federal courts. In *Jackson v. Pasadena City School District*, the state supreme court of California wrote, “The right to equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as is reasonably feasible, to alleviate racial imbalance in schools regardless of its cause.” In Pennsylvania, the Pennsylvania Human Relations Commission (PHRC) was established in 1961 to take action against school boards that presided over school districts that were racially imbalanced. The case *Pennsylvania Human Relations Commission v. Chester School District* in 1967 court tested the authority of the PHRC and the verdict of the case empowered the PHRC to take steps to remedy de facto segregation in Pennsylvania schools. The Supreme Court of Pennsylvania also ruled in favor of the PHRC on the use of busing to address de facto segregation in schools, but the years that followed could be characterized by contentious litigation around desegregation. New Jersey’s state policy on racial imbalance was tested in the New Jersey Superior Court case *Piscataway TP. Board of Education v. Burke* in 1978. The origin of New Jersey’s state policy on racial imbalance was an Executive Order in 1965 from Governor Hughes. In *Piscataway*, the court ruled that while it was unclear whether or not the Constitution compelled action to remedy de facto segregation, the Constitution does not prohibit such action by state authorities in order to further a state law that

---


41 Id

42 See also Minnesota’s experience with their state policy on racial imbalance that initially had a comprehensive plan to address racial balance including a definition of racial imbalance, but the current rules adopted in 1992 heavily rely on school choice and voluntary integration efforts; New York’s experience where busing opposition in the mid-1960s impacted the racial balance policy, between 1965 and 1969, over 45 anti-busing bills were introduced.


seeks to do so. The state courts of New Jersey historically supported efforts to take action against
de facto segregation in schools. In 1965, the decision Booker v. Board of Education of
Plainfield the Supreme Court of New Jersey emphasized the democratic imperative of remedying
de facto segregation. Six years later, the same court ruled in Jenkins v. Township of Morris
School District and Board of Education that the state commissioner of education had the
authority to cross school district lines in order to pursue racial balance. Following Jenkins, the
urban Morristown school district was consolidated with the surrounding white suburban Morris
Township school district, and in 2013 the consolidated Morris district celebrated its 40th
anniversary as one of the most racially and socioeconomically balanced districts in the state of
New Jersey.

METHODS

In order to understand the ways in which the courts making decisions in cases dealing with
de facto segregation in the context of little guidance and no definition of what de facto
segregation was, nine key cases were chosen to Shepardize. Key cases were identified in the
book Race & place: A legal history of the neighborhood school which outlines the legal history
of the neighborhood school policy and de facto segregation. The cases that were used to generate
Shepard reports included Briggs v. Elliot, Bell v. School City of Gary Indiana, Webb v Board
of Education of Chicago, Downs v. Board of Education of Kansas City, Taylor v. Board of
Education of City School District of New Rochelle, Branche v. Board of Education of Town of
Hempstead, Blocker v. Board of Education of Manhasset, Booker v. Board of Education of
Plainfield, and Davis v. School District of Pontiac. These Shepard Reports generated
hundreds of cases which cited the original nine key decisions. Those subsequent cases were
considered for relevance to the de jure/de facto segregation issue, and a total of 55 federal cases were focused on for their bearing on the topic of de facto segregation. Relevance was determined by inclusion of reference to the de jure/de facto distinction, and the larger case context of school de/segregation.\(^{57}\)

Each of these 55 cases were analyzed in order to determine 1) the holding; 2) if de facto segregation was actionable or inactionable; 3) the rationale for that determination; and 4) the race of the plaintiffs. After reading through the cases based on these criteria, eleven cases were thrown out\(^{58}\) due to not having a direct bearing on the issue of de facto segregation leaving a total of 44 cases, 25 which had a holding of de facto segregation as actionable and 19 with a holding of de facto segregation as inactionable. These cases are the basis for the analysis of how judges were forming their decisions about de facto segregation in the context of an elusive distinction.

**THE MURKINESS OF DE JURE AND DE FACTO SEGREGATION**

The murkiness of “de facto” segregation as distinct from “de jure” segregation (and the associated implications for whether remedial action is required) becomes apparent in reviewing desegregation cases, particularly those outside the South, from the 1960s through early 1980s. Our review of desegregation cases suggests that there is no clear distinction for how a particular set of facts got classified as de facto or de jure.

In reviewing the above federal cases from the lower courts, judges seemed unclear about what differentiated de jure from de facto segregation. Part of this stemmed from not understanding what de facto segregation was and whether it was actionable; in some instances this caused judges to classify actions (or inaction) as de jure, which illustrated a more expansive definition of de jure segregation. This may be due to the fact judges were wary of wading into the uncertainty of finding de facto segregation, with the possibility it might someday be reversed.

Beginning in the mid 1960s as racial imbalance became more politicized and contested in Congress, several judges expressed the opinion that there was little to no difference between de facto and de jure segregation. In each case, these judges found de jure segregation outside of the

---

\(^{57}\) For example, a case would be thrown out of the analysis if it was in a previously de jure state and the judge was explicitly stating that they were seeking to remedy the effects of de jure segregation

\(^{58}\) For example, the case was thrown out if no decision was made as to the de jure/de facto issue because the court decided to wait for the Supreme Court to issue a decision in Keyes, what some judges thought would decisively resolve the de jure/de facto issue.
In the early 1970s, judges cited to research findings to dismiss a difference. For example, a judge found that it was “well documented…that the elimination of racial isolation in the schools promotes the attainment of equal educational opportunity and is beneficial to all students, both black and white.” In another case, a judge cited a series of federal and state decisions concluding, “While the Supreme Court has not yet acted in cases of de facto segregation, there is compelling authority in decisions of lower courts requiring its elimination.” The judge also mused, “In the end, the whole de facto versus de jure debate may turn out to be insignificant.”

In a case out of Kalamazoo, Michigan in the early 1970s, the judge reviewed social science evidence and concluded that there was an identical impact on students from de jure and de facto segregation. As a result, he saw no reason for differentiating the two types of segregation. The judge in a case in Springfield, Massachusetts elaborated further: “racially imbalanced schools are not conducive to learning, that is, to retention, performance, and the development of creativity. Racial concentration in his school communicates to the negro child that he is different and is expected to be different from white children. Therefore, even if all schools are equal in physical plant, facilities, and ability and number of teachers, and even if academic achievement were at the same level at all schools, the opportunity of negro children in racially concentrated schools to obtain equal educational opportunities is impaired, and I so find.” In another case, a court found that white students were similarly harmed by school segregation as were black children.

In other decisions, judges grappled with the ambiguity of de facto and de jure segregation. In a relatively early and influential case from Washington, DC, the judge wondered when a case stopped being de jure and became de facto segregation. In a later case, a judge noted “uncertainty has developed over what in fact constitutes "segregation imposed by law."” In a case from Clark County (Las Vegas), the Ninth Circuit clarified that prior decisions had been vague and imprecise in their earlier decisions. The decision said, “Whatever the district court may have meant by its occasional references to "de facto segregation" in the Clark County

---

61 Id.
63 Husbands v Pennsylvania, 395 F. Supp. 1107 (1975). In this case, white students were plaintiffs and the court found segregation to be unconstitutional.
School District, it is clear from the language of the district court quoted in the text that the court did not define the term, as the Supreme Court did in Swann, as referring to a situation ‘where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities.”66 In each case, the lack of clarity was apparent as the judges wrestled with interpreting the actions of school districts (and understanding of other decisions).

In a northern case from Springfield, a judge found the debate about racial imbalance irrelevant, redefining when imbalance became actionable segregation. In the decision, he held that the question was not whether there was a mandate to remedy racial imbalance, which the judge defined as becoming segregation when non-white students comprised a majority at any school in the district.67 “The question is whether there is a constitutional duty to provide equal educational opportunities for all children within the system.”68 Further, the decision continued that to answer this question there was not a “meaningful” distinction between de jure and de facto segregation: “the inadequacy of segregated education — is the same in this case [as in Brown], and I so find. It is neither just nor sensible to proscribe segregation having its basis in affirmative state action while at the same time failing to provide a remedy for segregation which grows out of discrimination in housing, or other economic or social factors.”69

Likewise, in an early case (1961) from New York State, the district court judge reasoned that the de jure-de facto distinction was irrelevant. He wrote, “if the illegal motive is present, 'it makes no meaningful difference whether the segregation involved is maintained directly through formal separation, or indirectly, through overrigid adherence to artifically created boundary lines, as in the present case…[and] it is of no moment whether the segregation is labelled by the defendant as 'de jure' or 'de facto', as long as the Board, by its conduct, is responsible for its maintenance.”70

66 Kelly v Guinn, 456 F.2d 100 (1972)
67 Barksdale supra note 62 at 544
68 Id at 546
69 Id at 546
70 TAYLOR V. BOARD OF EDUCATION OF CITY SCHOOL DISTRICT, 191 F.Supp. 181 (1961) at 194. In a footnote to this sentence, the court continues “‘de jure’ is defined as 'segregation created or maintained by official act, regardless of its form,' and 'de facto' is defined as segregation resulting from fortuitous residential patterns.” Id., footnote 12
In some decisions, the murkiness of de jure and de facto segregation was seen through the transference of the terms to contexts that were not congruent with their origins of the terms (i.e. seeking to hold a standard of finding de jure segregation in a classically de facto segregated context and seeking to find de facto segregated segregation in a historically de jure segregated context). In *Bryant v. Board of Education*, a New York District Court was deciding the merits of a neighborhood school policy that plaintiffs alleged segregated the students by race. The District Court decided that the standard by which to determine if a remedy was due would be a finding of de jure segregation. The state of New York had no history of statutory segregation, and thus creating this standard demonstrates a fluidity of the term. The District Court was conceptualizing a finding of ‘de jure’ to mean that there was segregative intent on the part of the school board in the absence of any law segregating the races. In *Bryant*, the court did not find evidence to meet the standard of a de jure finding, and thus ordered no action in the case to remedy the segregation. In a case from the Fifth Circuit, *Broussard v. Houston Independent School Dist.*, the fluidity of the de jure/de facto distinction flowed in the other direction. Plaintiffs in this previously de jure segregated state claimed they were experiencing de facto segregation in the public schools. Particularly, the school board was using the location of new schools in order to promote the de facto segregation of students. The Fifth Circuit ruled in this case that the operation of a freedom of choice plan in the district regardless of race demonstrated has led to students attending the schools of their choice. Further, the Fifth Circuit held that racial imbalance in itself is not violative of any constitutional rights. The code switching between de jure and de facto in different states demonstrates that these were not fixed terms, despite the distinction made between them.

Finally, as will be discussed in greater depth below, in a number of opinions, actions (or inactions) were described as reasons for requiring the district to take action against segregation. While these actions/inactions would likely today be viewed as de facto segregation, in each instance, they were declared to be de jure segregation, perhaps due to the imprecision of what de facto segregation was and a concern that a finding of de facto segregation might be overturned. In some cases, judges did not think it was important to find evidence of intent to declare de jure segregation, but that “school authorities have exercised powers given them by law in a manner

---

72 Broussard v. Houston Independent School Dist. 395 F.2d 817 (5th Cir. 1968).
which creates or continues or increases substantial racial imbalance in the schools. It is this governmental action, regardless of the motivation for it, which violates the Fourteenth Amendment”. In two other cases, however, judges presumed “segregative intent” because the school district’s decisions did not ameliorate “foreseeable” segregative consequences of their actions. Finally, some judges found neighborhood school plans to be de jure segregation if the plan overlaid residential segregation patterns.

**DE FACTO SEGREGATION AS ACTIONABLE AND INACTIONABLE**

One defining feature of de facto school segregation cases was a holding deciding whether or not the segregation in question was actionable (meaning due a remedy) or not. A holding that the segregation was actionable meant that de facto segregation was found to violate a right of the students in question, whereas a holding that the segregation was in actionable was arrived at from the view that de facto segregation did not violate any rights. Table 1 details federal cases between 1961 and 1982 where de facto segregation was found to be actionable and in actionable. For each year, the cases are marked in the actionable and in actionable column for the court that they were decided in. If the case was decided in an appeals court, Table 1 indicates the presiding circuit court. And if the case was decided in a district court, the district court is indicated along with the circuit court in parenthesis whose precedents the district court was operating under. When no decision related to de facto segregation as actionable or in actionable was registered in a particular year, an “X” is marked in the column to indicate no case was decided.

**Table 1: Decisions finding de facto segregation actionable or in actionable by year and court**

<table>
<thead>
<tr>
<th>Year</th>
<th>Actionable</th>
<th>Inactionable</th>
</tr>
</thead>
<tbody>
<tr>
<td>1961</td>
<td>Second Circuit</td>
<td>X</td>
</tr>
<tr>
<td>1962</td>
<td>District Court New York (2)</td>
<td>District Court Virginia (4)</td>
</tr>
<tr>
<td>1963</td>
<td>X</td>
<td>Seventh Circuit</td>
</tr>
<tr>
<td></td>
<td>District Court Illinois (7)</td>
<td></td>
</tr>
<tr>
<td>1964</td>
<td>District Court New Jersey (3)</td>
<td>District Court Ohio (6)</td>
</tr>
<tr>
<td></td>
<td>District Court New York (2)</td>
<td></td>
</tr>
</tbody>
</table>

73 Johnson supra note 60 at 1319
<table>
<thead>
<tr>
<th>Year</th>
<th>Circuit 1</th>
<th>Circuit 2</th>
<th>Circuit 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>1965</td>
<td>District Court Massachusetts (1)</td>
<td>Fourth Circuit</td>
<td></td>
</tr>
<tr>
<td>1966</td>
<td>Fourth Circuit</td>
<td>Sixth Circuit</td>
<td></td>
</tr>
<tr>
<td>1967</td>
<td>District Court D.C. (4)</td>
<td>District Court Louisiana (5)</td>
<td>District Court New York (2)</td>
</tr>
<tr>
<td>1968</td>
<td>Seventh Circuit</td>
<td>Fifth Circuit</td>
<td></td>
</tr>
<tr>
<td>1969</td>
<td>X</td>
<td>District Court Connecticut (2)</td>
<td></td>
</tr>
<tr>
<td>1970</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>1971</td>
<td>Sixth Circuit</td>
<td>District Court New Jersey (3)</td>
<td></td>
</tr>
<tr>
<td>1972</td>
<td>Seventh Circuit</td>
<td>Ninth Circuit</td>
<td>Seventh Circuit</td>
</tr>
<tr>
<td></td>
<td></td>
<td>District Court Maryland (4)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>District Court Michigan (6)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>District Court Minnesota (8)</td>
<td></td>
</tr>
<tr>
<td>1973</td>
<td>Seventh Circuit</td>
<td>District Court Nebraska (8)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>District Court Illinois (7)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>District Court Missouri (8)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>District Court Pennsylvania (3)</td>
<td></td>
</tr>
<tr>
<td>1974</td>
<td>X</td>
<td>Sixth Circuit</td>
<td>District Court Nebraska (8)</td>
</tr>
<tr>
<td>1975</td>
<td>Second Circuit</td>
<td>Eighth Circuit</td>
<td>X</td>
</tr>
<tr>
<td></td>
<td></td>
<td>District Court Pennsylvania (3)</td>
<td></td>
</tr>
<tr>
<td>1976</td>
<td>District Court California (9)</td>
<td>District Court California (9)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>District Court Wisconsin (7)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1977</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>1978</td>
<td>X</td>
<td>District Court Michigan (6)</td>
<td></td>
</tr>
<tr>
<td>1979</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>1980</td>
<td>Eighth Circuit</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>1981</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>1982</td>
<td>X</td>
<td>Sixth Circuit</td>
<td></td>
</tr>
</tbody>
</table>
The years 1971 through 1976 were very active years for decisions that found de facto segregation to be actionable, and the political and legal developments in the late 1960s and early 1970s provide context to the patterns of court decisions in the period considered. The period from 1971 through 1976 saw sixteen cases that found de facto segregation to be actionable, while the same period found only six cases to be inactionable. This period represents a change of executive strategy of desegregation enforcement, one that relied more on the courts. While President Johnson’s enforcement of Title VI through fund deferral and termination for school districts that did not follow HEW desegregation guidelines thrived in the mid-to-late 1960s, under President Nixon the enforcement strategy shifted to rely on the courts for desegregation. In the 1969 Mitchell-Finch policy statement, announced by Attorney General Mitchell and HEW Secretary Finch, the administration announced an approach towards desegregation enforcement that aligned with Nixon’s “southern strategy” by avoiding using fund termination and deferral as a sanction and instead relying on litigation. The statement emphasized that voluntary compliance to desegregation would be sought, and only in cases where voluntary compliance was not possible to gain would lawsuits be initiated by the Justice Department. The early 1970s also brought a number of important Supreme Court decisions on school desegregation that provided a window of opportunity for a more expansive understanding of what actions and remedies could be used for segregation, both de jure and de facto. In the unanimous Swann decision, the Court recognized the important link between schools and housing and emphasized the unique role that school officials play in shaping the composition of neighborhoods through various school policies. A much more divided Court in Wright held that courts will be guided by an effect test rather than intent test when determining if school officials’ actions are violating the Fourteenth Amendment. This case held particular relevance for de facto segregation as the standard of intent was often elusive to prove without discriminatory laws. This period also saw the first desegregation case from the non-South in the Supreme Court when Keyes was decided.

---

76 GARY ORFIELD, supra note 32.
78 STEPHEN C. HALPERN supra note 31 at 34.
79 Swann supra note 16.
80 Wright supra note 21.
in 1973. Although Keyes upheld the de jure/de facto distinction, the Court took issue with practices by school officials that had maintained segregation.

**ACTIONABLE CASES**

Because there was so much murkiness about what “de facto segregation” was, judges often came to difference conclusions about whether segregation was actionable even when confronted with very similar sets of facts. When examining the approximately two dozen cases that found segregation to be actionable, several themes emerge as to what judges cited as reasons to find segregation to be actionable: modifications in a neighborhood schools policy; boundary construction and/or transfers permitted across boundaries; teacher segregation; and the existence of statewide policies about segregation. Notably, some decisions also emphasized the harm of inaction and non-educational governmental policies.

**Race-Neutral Policies Aren’t Neutral**

In separate cases, two circuit courts were critical of the implementation of race-neutral policies because they judged both to not be neutral/innocent in their application. The sixth circuit faulted the Kalamazoo, Michigan school board’s attendance zones and construction of new schools which may “have appeared to some to be innocent on their face, and although they have ostensibly been adopted for economic reasons, the court finds that they have been intentionally designed to result in the maintenance of segregated education.” They continued that these “race-neutral policies were ‘‘state action’ [that] contributed to the creation and perpetuation of neighborhood segregation in Kalamazoo. The school board should not be heard to plead that its neighborhood school policy was racially neutral when in fact ‘state action under the color of law’ produced or helped to produce the segregated neighborhoods in the first place.” In a mid-1970s decision from Milwaukee, the judge was even firmer, declaring, “The facially neutral actions of state authorities constitute illegal and unconstitutional de jure segregation if they are intended to and have the effect of racial separation.”

---

81 Keyes supra note 23.
82 Note, per discussion above, some judges may have labeled this as “de jure” but as it went beyond what we consider to be “de jure” we will classify it as “de facto” segregation here.
84 Id at 183.
Even as late as 1980, the eighth circuit recognized that a facially race neutral assignment policy was not necessarily enough to remedy a prior history of segregation. They note, "The Court has consistently held that merely establishing a facially neutral school assignment system is not sufficient to eliminate the constitutional violation caused by past intentional discrimination."86 They later noted that the Court questioned “whether a racially neutral policy would ever be adequate to meet a school board's affirmative duty to disestablish a dual school system.”87

Part of some judges’ understanding was that school districts didn’t take actions that prevented segregation that occurred in part due to the actions of other governmental actors. According to the circuit court in the Omaha case, which overruled an earlier district court decision finding segregation to be inactionable, “The evidence established that segregated housing patterns in the city were the result of discriminatory state and private actions...By 1955, the school board was aware of the segregated nature of the housing projects and was struggling to cope with large increases in black enrollment causing overcrowding” at five elementary schools.88 Likewise, the circuit court found that the segregation of the Mark Twain school in NYC was due to both “forseeable” state action of the local school board as well as inaction. In a clear contrast to later decisions that would absolve districts due to changing population patterns, the district court noted, "demographic trends have been accentuated by government choices. Decisions have been made knowing that they would encourage segregation and failure to take available steps to reverse segregative tendencies have made a bad situation worse…School authorities acted and failed to act knowing segregation would be the result of their decisions."89

Later, the eighth circuit’s decision in the Omaha case also expanded this understanding of how districts should have understood the “forseeable consequences” of their actions. Indeed, this decision shifted the burden to defendant districts to prove that "segregative intent was not among the factors that motivated their actions.” The decision later continued,

87 Id at 1286. Citing McDaniel v Baresi (“In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race.'”)
88 UNITED STATES V. SCHOOL DISTRICT OF OMAHA, 521 F.2d 530, 534 (8th Cir. 1975).
To say that the foreseeable must be shown to have been actually foreseen would invite a standard almost impossible of proof save by admissions. When we consider the motivation of people constituting a school board, the task would be even harder, for we are dealing with a collective will. It is difficult enough to find the collective mind of a group of legislators. Speaking in de jure terms does not require us, then, to limit the state activity which effectively spells segregation only to acts which are provably motivated by a desire to discriminate… Aside from the difficulties of ferreting out a collective motive and conversely the injustice of ascribing collective will to articulate remarks of particular bigots, the nature of the "state action" takes its quality from its foreseeable effect (citations omitted).  

Both the district and the circuit court decisions in the Oliver v. Kalamazoo case cited different types of governmental action beyond that of school actors. The Circuit court noted that racially restrictive covenants contributed to racial discrimination in the schools. The earlier district court decision faulted the school board for “acquiesce[ing], even by inaction, in a housing development pattern, and then to disclaim liability for the eventual characteristic that such pattern created in the schools is for the Board to abrogate and ignore all power and control and responsibility." In the Hart case in NYC, the decision emphasized the city’s role in creating separate housing and school facilities.

*Use of Geography as a Segregating Mechanism*

While some of the above rationales are related to geography-based actions taken—or not taken—by school districts, two common policies that were frequently reason for declaring de facto segregation to be actionable were neighborhood school policies used in a way that were segregative or the construction of boundaries between or within districts.

Two of the neighborhood schools policy cases were in the mid-1960s before the Supreme Court had clarified what practices were de jure. In the Blocker case, neighborhood schools policy was considered to be actionable segregation because it was imposed on existing patterns of

---

90 Omaha, supra note 88  
92 Hart v. Community School Board of Education New York School District, 512 F.2d 37 (2d Cir. 1975)
residential segregation. The court declared this, in fact, to be “state imposed segregation”.\textsuperscript{93} In a case in D.C., not only did a neighborhood schools policy segregation Black/poor children from white/affluent children, but they found the policy was not uniformly enforced. They found that the policy “is relaxed by the Board through the use of optional zones for the purpose of allowing white children, usually affluent white children, "trapped" in a Negro school district, to "escape" to a "white" or more nearly white school, thus making the economic and racial segregation of the public school children more complete than it would otherwise be under a strict neighborhood school assignment plan.”\textsuperscript{94} A decade later, a district court in Wisconsin likewise faulted the Milwaukee school board for implementing a neighborhood school policy, but also allowing students to transfer from these schools under a transfer plan. The court declared, “The Board's fundamental purpose was the maintenance and preservation of the neighborhood school policy. The Board knew that adherence to the neighborhood school policy would result in a high proportion of racially imbalanced schools.”\textsuperscript{95}

In three northern cases, courts found that the way in school districts were created or merged deliberately created racially segregated school districts. Two cases were in Pennsylvania’s largest metropolitan areas. For example, in the 1973 Hoots case (metropolitan Pittsburgh),\textsuperscript{96} the district court opinion faulted city and county boards for the creation of districts that were segregative, which the court felt was created with deliberate intent. In a suburban St. Louis case, the court concluded, “The evidence showing that the boundaries of the City of Berkeley were of an irregular shape, conforming closely to the racial residential patterns and that the racial separation was virtually complete raises an inference of racial discrimination which the defendants have the burden of overcoming.”\textsuperscript{97}

A court was just as clear that drawing boundaries within districts could also be actionable. In the San Francisco case, “if the school board, as in this case, has drawn school attendance lines, year after year, knowing that the lines maintain or heighten racial imbalance,

\textsuperscript{93} Blocker V. BOARD OF EDUCATION OF MANHASSET, NEW YORK, 226 F. Supp. 208, 226 (E.D.N.Y., 1964)
\textsuperscript{94} Hobson v Hansen, 269 F. Supp. 401, 406 (D.D.C. 1967)
\textsuperscript{95} Amos v. Board of School Directors, 408 F. Supp. 765, 807 (E.D. Wis. 1976)
the resulting segregation is de jure.” Additional reasons that the court found San Francisco’s actions to be unconstitutional was building new schools or expanding capacity in ways that furthered racial imbalance.

**Cumulative District Practices**

A final way in which we categorized segregation practices that courts found to be actionable were those cases in which there were several practices that, combined, caused the courts to conclude that the segregation was unconstitutional. As was the case in the San Francisco case above, the siting of new schools was one among many practices that courts cited as proof that school boards had made discriminatory decisions. In a 1970 Seventh Circuit decision, the court agreed with the district court’s finding of “unlawful discrimination” by reciting several practices including site selection: “the drawing of attendance zones, pupil and teacher assignment, busing of pupils and selection of sites for additional schools.” The Minneapolis school board undertook a range of such actions such as adding portable classrooms to heavily black schools and building small schools in white neighborhoods in an effort to manipulate the racial composition and segregation in these schools.

Teacher segregation was likewise often not the sole factor to declare that district practices were discriminatory and therefore segregation was actionable. Typically, in the decisions reviewed, after the judge had recounted other factors pertaining to student assignment, the assignment of teachers in a discriminatory fashion would be cited as another indication of segregation, in part because such segregative patterns could not be explained away by residential segregation (as might be the case for students). In the Omaha case, the circuit court faulted the district for “seggregative results [that] were not only foreseeable, but that the defendants had conscious knowledge of the likelihood of such results, particularly with respect to faculty assignment, school construction, and the deterioration of [a high school].” Cases from Chicago and San Francisco also noted that teacher assignment led to inexperienced and black teachers being assigned almost exclusively to “black schools”.

---

99 United States v. School Dist. Of Cook County 432 F.2d 1147, 1148 (7th Cir. 1970).
101 Also, at least in southern jurisdictions, there were separate lines of teacher segregation cases.
102 Omaha supra note 88 at 535
INACTIONABLE CASES

There were fewer cases in the period considered where de facto segregation was found to be inactionable. Of the nineteen cases considered with an unfavorable decision towards remedying de facto segregation, there were a number of logics that were consistently applied to the decisions. The judges affirmed the constitutionality of the neighborhood school system as a non-discriminatory method for assigning students to schools, even when it did not produce integration. They relied on an intent test rather than an effect test when determining whether or not rights had been violated. And judges also relied on the notion of a colorblind Constitution to justify denying relief.

Neighborhood School Policies: Race-Neutral Policies are Indeed Neutral

A key logic for a finding of de facto as inactionable was that school attendance plans when administered in a facially non-discriminatory manner (i.e. not on the basis of race, color, creed, etc.) even when producing little or no integration were not violative of any student’s rights. Such logic finds basis in the Briggs Dictum which set the precedent that the Constitution does not require integration, it merely forbids discrimination. One of the most frequently cited decisions used as precedent to justify inaction in the context of de facto segregation that cannot be directly connected to state discrimination, Bell v. School City of Gary Indiana\textsuperscript{103}, dealt with the legality of a school board policy that was facially race-neutral, yet due to residential patterns of segregation resulted in school segregation. Judge Duffy affirms the Briggs Dictum in his decision in Bell, holding that there is no constitutional right to racial mixing, only a Constitutional duty to not discriminate. He argues that the context of Gary Indiana is “a far cry” from that of Brown and that there is no duty to change attendance zones that were innocently drawn in order to adapt to changing demographics and foster racial mixing\textsuperscript{104}. The representation of the school board’s decisions about attendance boundaries as ‘innocent’ is another key marker of cases where de facto segregation was found to be inactionable, and Judge Duffy’s representation of an ‘innocent’ school board is echoed in many cases where de facto segregation was found to be inactionable. When school boards are acting ‘innocently’ as opposed to with

\textsuperscript{103} Bell supra note 49.

\textsuperscript{104} Duffy supra note 49 at 23.
‘intent’ to segregate, the court is less likely to deem that a violation has occurred that merits a remedy.

Neighborhood school policies or geographic zoning were central to facially non-discriminatory methods of creating attendance plans. The courts that held that these plans were non-discriminatory methods of determining school attendance rested on the logic that schools and school boards were ultimately not responsible for remedying residential segregation. In Gilliam v. School Board of Hopewell105 from the Fourth Circuit, although de facto segregation was found to exist, since the attendance zones were geographically determined and were not gerrymandered, the holding was that there was no remedy due. The Fourth Circuit ruled that there is no basis for abandoning a neighborhood school plan even if it does not produce integration. Echoing the Briggs Dictum that the Constitution does not require integration, Judge Haynsworth writes, “The Constitution does not require the abandonment of neighborhood schools and the transportation of pupils from one area to another solely for the purpose of mixing the races in the schools.”106 In a similar case from the Sixth Circuit, Deal v. Cincinnati Board of Education107, the court considered whether plaintiff’s constitutional rights were violated by a school boards refusal to adopt a policy that would take affirmative action to balance the races in the Cincinnati public schools. The Sixth Circuit decides the case in favor of the school board, arguing that “factors in the private housing market, disparities in job opportunities, and other outside influences, (as well as positive free choice by some Negroes)… creates some schools which are predominantly or wholly of one race or another” and thus there is no duty on the part of the school board to take remedial action as they did not intentionally create the segregation108. The court admitted in this case that the geographic attendance system created “predominantly or wholly” one race schools, yet the test of whether or not a remedy was due was not the effect of the attendance plan but rather the intent of the school board.

The standard of intent, rather than the standard of effect, was integral to the permissiveness of facially race-neutral attendance policies that produced little to no integration.

105 Gilliam v. School Board of Hopewell 345 F.2d 325 (4th Cir. 1965).
106 Id. at 3.
107 Deal v. Cincinnati Board of Education 369 F.2d 55 (6th Cir. 1966).
108 Id. at 60.
Downs v. Board of Education of Kansas City\textsuperscript{109}, decided by the Tenth Circuit in 1964, considered if the racial imbalance in Kansas City schools warranted a remedy. The Tenth Circuit found the evidence to show that the segregation was attributable to shifts in the city’s population, which was the result of slum clearance projects which had a disproportionate impact on the city’s black population, and not the result of deliberate School Board action. The superintendent testified that the “change in boundary line was directly attributable to this shift in population and was made without knowledge of the number of white and Negro children to be affected and without race in mind.”\textsuperscript{110} While ignoring the official role in slum clearance and the disproportionate impact that such programs have historically had on minority populations\textsuperscript{111}, the court holds that the burden rests at showing discriminatory intent by the School Board. Judge Hill writes:

\begin{quote}
We conclude that the decisions in Brown and the many cases following it do not require a school board to destroy or abandon a school system developed on the neighborhood school plan, even though it results in a racial imbalance in the schools, where, as here, that school system has been honestly and conscientiously constructed with no intention or purpose to maintain or perpetuate segregation.\textsuperscript{112}
\end{quote}

Citing \textit{Bell} throughout the decision, Judge Hill finds that there is no affirmative duty to mix the races in the public schools and pursue racial balance in the absence of intentional discrimination on the part of the School Board. The neighborhood school plan, in the \textit{Downs} case and in others where de facto segregation was found to be inactionable, was taken to be a hallmark of an attendance plan where there was necessarily no discriminatory intent.

The case United States v. School District of Omaha\textsuperscript{113} perhaps touches upon all the key logics applied by the courts to find neighborhood schools that create and maintain de facto segregation to be inactionable. Considering the constitutionality of the neighborhood school

\textsuperscript{109} Supra note 51.
\textsuperscript{110} Supra note 51 at 21.
\textsuperscript{112} Supra note 51 at 26.
plan, the court held that the burden of proving intent rested on the appellants, and the District Court in this case finds that the appellants do not provide enough evidence of intent to segregate on the part of the school board. Judge Schatz affirms the principle of the Briggs Dictum vis-à-vis the neighborhood school system, stating, “A neighborhood school plan is not unconstitutional per se and is permissible if impartially maintained and administered, even though the result is racial imbalance….A school district has no affirmative obligation to achieve a balance of the races in the schools when the existing imbalance is not caused by school policies and is the result of housing patterns and other forces over which the school administration has no control.”¹¹⁴ The court ultimately rules that in the absence of a finding that there is an intent to segregate, a neighborhood school policy that produces school segregation does not violate the Constitution and thus there is no remedy due.

A Colorblind Constitution

Another important logic for finding de facto segregation as inactionable was the notion of a ‘colorblind’ Constitution. In the case Lynch v. Kenston School District Board of Education¹¹⁵, a District Court in Ohio considered an alleged violation of the Fourteenth Amendment by a School Board that employed a geographic attendance plan, resulting in ‘de facto’ segregation. The District Court does not find such segregation to be a violation of any constitutional right, and the court argues that in fact seeking a remedy to such de facto segregation is a form of discrimination in itself. Writing for the court, Judge Kalbfleisch states, “In this cause of action the plaintiffs are requesting the Court to do what the Constitution forbids, that is, to recognize their color and to order them admitted to a school because of that color… The law is color-blind and, in cases such as this, that principle, which was designed to insure equal protection to all citizens, is both a shield and a sword. While protecting them in their right to be free from racial discrimination, it at the same time denies them the right to consideration on a racial basis when there has been no discrimination.”¹¹⁶ Thus, remedying de facto segregation is conceived by the court as discriminatory rather than remedial. In a similar framing of a colorblind Constitution, in

¹¹⁶ Id.
Deal v. Cincinnati Board of Education\textsuperscript{117}, the Sixth Circuit ruled that de facto segregation was inactionable and argued that the essence of the Brown decision was that the Fourteenth Amendment does not allow for citizens to be classified on the basis of race. Such classifications were deemed to be arbitrary exercises of government power, and objectionable to the Constitution. The colorblind Constitution framework was employed by the courts in order to justify inaction towards de facto segregation.

CONCLUSION

What is clear from the cases considered is that judges were deeply divided over how to handle de facto segregation. Indeed, in similar contexts, judges would come to very different conclusions. This is particularly apparent when it comes to neighborhood schools, with judges split on the implications of the neighborhood school policy for de facto segregation and whether it was an indicator of a fair and non-discriminatory assignment policy or a veiled action at segregating students due to patterns of residential segregation. It was also apparent with the blurred application of the terms ‘de jure’ and ‘de facto’, so much so that at times it was unclear where de jure segregation ended and de facto began and what any meaningful distinction was between the two. That the Supreme Court never decisively ruled on what constituted de facto segregation, what if anything distinguished this form of segregation from de jure, and what the remedy should be for de facto segregation, created judicial chaos around desegregation in the period considered from the 1960s through the early 1980s. Judges had little definitive guidance on how to decide cases where de facto segregation was involved, and with little definitive guidance was the opportunity for the reliance on precedents of choice. With a decision of de facto segregation as actionable came a remedy, but with the decision of de facto segregation as inactionable, the plaintiffs were denied the relief they were seeking. The difference between these two outcomes were consequential for students and school districts, yet the basis for such outcomes relied on a distinction that was deeply contested and unresolved.

Today as de jure cases are rapidly dwindling, and few if any new de jure violations are established by courts, the segregation that is left behind is characterized as ‘de facto’, yet there is ample evidence that there has been a powerful role of government in shaping so called de facto

\textsuperscript{117} Supra note 107.
segregation. The period under consideration from the 1960s through the 1980s was a time where there was an opportunity for an expansive understanding of what constituted segregation that was actionable, an opportunity that has increasingly diminished in more recent decades. It is notable that during that period federal judges did find certain patterns and practices of de facto segregation to violate the Constitution and ordered relief, a rarer occurrence as the de jure/de facto distinction became more entrenched. In order to address the racial isolation in schools today, it will be necessary to define de facto segregation and determine appropriate remedies for this form of segregation that has become endemic to the U.S. today.

---