Fordham Law Review

Volume 43 | Issue 2 Article 6

1974

School Desegregation: New Quandaries and Old Dilemmas

Alan Jay Stein

SCHOOL DESEGREGATION: NEW QUANDARIES AND OLD DILEMMAS

Virginia's Newport News School District was created in 1958, by the consolidation of the old cities of Newport News and Warwick. Because of the locations of these two cities, the configuration of the district is an odd one, somewhat like a cigar.[1] Over the years, population changes have resulted in the development of two discernible racial communities.[2] Within these identifiable neighborhoods have arisen racially segregated public schools. Plaintiff, Frank V. Thompson, a child attending a predominantly black school, brought suit by his father and next friend to have the Newport News School District ordered desegregated. The School District submitted a desegregation plan on August 6, 1971, which was approved by the District Court for the Eastern District of Virginia. The plan called for children in grades one and two to attend their own neighborhood elementary schools.[3] In grades three through five, children were assigned to schools formerly identifiable as white schools, while those children in grades six and seven were assigned to schools formerly identifiable as black schools.[4] Black children were to be bused beginning in grade three, while white children were not to be bused out of their neighborhoods until they reached the sixth grade.[5]

Plaintiffs appealed the district court's determination, taking exception to the assignment of children to neighborhood schools in grades one and two. On oral argument, plaintiffs objected to the assignment in grades three through five. It was alleged that "such assignments placed an undue and discriminatory burden on black students."[6] The United States Court of Appeals for the Fourth Circuit remanded the case to the district court with specific instructions to make further findings on two issues.[7] The first was whether a plan different from the one originally accepted for grades one and two should be

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1. Thompson v. School Bd., 465 F.2d 83, 86 (4th Cir. 1972), cert. denied, 413 U.S. 920 (1973). Newport News is located at the southern tip of the Virginia peninsula, comprising four square miles. Warwick is situated northeast of Newport News. As a result, the school district is approximately twenty-two miles long and varies in width from upwards of six miles, down to seven-tenths of a mile.

2. At the time plaintiffs brought their action, 80% of the black community lived in what was the old city of Newport News. Outside of this old city the black population was minimal. Id. at 86-87.

3. Id. at 84. The problem of busing here is complicated by various geographical factors. In order to achieve a meaningful racial mix, children must be transported to and from the extreme ends of the school district. The available routes are heavily trafficked, especially during rush hours when school busing would be carried on. Travel time would vary between forty minutes and one hour over a distance averaging 11.2 miles each way. Id. at 87.

4. Id. at 84. By busing grades three through seven, the plan would achieve a racial balance of three to two, which would closely approximate the population ratio for the entire district. Achieving such a balance requires transferring about 60% of the black children from their neighborhood schools. Thompson v. School Bd., 498 F.2d 195, 197 (4th Cir. 1974) (per curiam).

5. 465 F.2d at 84-85.

6. Id.

7. Id. at 90.

chosen as more practicable in light of the age of the children and problems of transportation.[8] The second issue was whether the groupings in grades three through seven and the busing procedures "were based on non-discriminatory grounds."[9]

The district court made additional findings of fact and reapproved the original desegregation plan.[10] In regard to the grouping in grades one and two, the judge concluded that "[d]iscrimination is not in issue in this case."[11] Relying on the testimony of a qualified pediatrician that children in grades one and two would be adversely affected by prolonged bus trips, the district court balanced the interests in favor of protecting the child.[12] No mention was made of the issue of assignments to grades three through seven; it appears from both the district court opinion and the earlier court of appeals decision that the assignments in grades three through seven were regarded as of minor importance.[13] This issue, however, appears to raise problems of greater import in the field of desegregation litigation than does the issue of allowing children in grades one and two to attend their own neighborhood schools.

The court of appeals, sitting en banc, affirmed the district court's decision in *Thompson v. School Board.*[14] The court's affirmance of the desegregation plan rested on a statement by the plan's originator that the decision to bus black children at an earlier grade than white children was simply a "matter of choice."[15] Without offering any supportive reasoning, the court cited three other cases in which similar plans had been approved.[16] Two judges dissented, finding the majority analysis inadequate and the nature of the plan unfortunate.[17]

The *Thompson* case presents a relatively new problem in the expanding area of litigation involving school desegregation. It may also represent a change in the tide of desegregation cases—a reevaluation of what end desegregation is meant to achieve.

It has been twenty years since the United States Supreme Court in *Brown*

8. Id. at 89-90.

9. Id. at 85.

10. Thompson v. School Bd., 363 F. Supp. 458 (E.D. Va. 1973), aff'd, 498 F.2d 195 (4th Cir. 1974) (per curiam). The district court rejected alternate plans set forth by plaintiffs, because of their failure to consider the problems of transporting young children. Id. at 462. See Comment, Busing, Swann v. Charlotte-Mecklenburg, and the Future of Desegregation in the Fifth Circuit, 49 Texas L. Rev. 884, 895 (1971).

11. 363 F. Supp. at 460.

12. Id. The testimony of the pediatrician was uncontradicted. The person who formulated one of the plaintiffs' alternate plans, Dr. Strickler, was willing to concede that where the issue came down to an adverse effect on a child's mental health, then the child's "health should take precedence over equality of education." Id. at 460 n.3. See Comment, School Desegregation After Swann: A Theory of Government Responsibility, 39 U. Chi. L. Rev. 421, 443 (1972).

13. See 465 F.2d at 84; 363 F. Supp. at 458-59.

14. 498 F.2d 195 (4th Cir. 1974) (per curiam) (4-3). Judges Winter and Butzner wrote dissenting opinions.

15. Id. at 197.

16. See notes 87-96 infra and accompanying text.

17. 498 F.2d at 198-201 (Winter & Butzner, JJ., dissenting).

v. Board of Education[18] faced the question whether racial segregation in public schools violated the equal protection clause of the fourteenth amendment. Though the Supreme Court concluded that it did,[19] no specific desegregation guidelines were set down. A year later, the Court spoke again,[20] ruling that school authorities were responsible for resolving the problems of segregation.[21] In addition, lower courts, and, more specifically, the court in which any litigation originated, were charged with evaluating the methods chosen by the school authorities, in terms of the constitutional requirements established.[22] Having delegated this responsibility, the Court failed to offer instructions as to how desegregation was to be accomplished, or even how, within the limits of the Constitution, it could be achieved.[23]

Much of the furor over the presence of racially segregated public schools involves the distinction between de jure and de facto segregation.[24] The problem is two-fold. First, what do the terms de jure and de facto mean?[25] Second, should equal protection principles be applied equally to both de jure and so-called de facto segregation?[26]

In *Hobson v. Hansen,*[27] the District Court for the District of Columbia set itself to the task of differentiating between de jure and de facto segregation. According to the court in *Hobson,* de jure segregation "adverts to segregation specifically mandated by law or by public policy pursued under color of law."[28] However, the segregation is de facto in a situation resulting from "social or other conditions for which government cannot be held responsible."[29]

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18. 347 U.S. 483 (1954) [hereinafter cited as Brown I].

19. Id. at 493.

20. Brown v. Board of Educ., 349 U.S. 294 (1955) [hereinafter cited as Brown II].

21. Id. at 299.

22. Id.

23. In Brown II, the Court said only that the district court should "take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases." Id. at 301.

24. The most basic question is whether there actually are two distinct forms of segregation.

25. See Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc).

26. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Spencer v. Kugler, 326 F. Supp. 1235 (D.N.J. 1971), aff'd mem., 404 U.S. 1027 (1972); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

27. 269 F. Supp 401 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc).

28. Id. at 493. The court also noted that de jure segregation had been clearly denounced as unconstitutional by the Supreme Court in Bolling v. Sharpe, 347 U.S. 497 (1954) and in Brown v. Board of Educ., 347 U.S. 483 (1954). 269 F. Supp. at 493.

29. 269 F. Supp. at 493. The court went on to question whether what it calls de facto segregation falls within the mandate of Brown I, in that the Supreme Court had not at that time decided the issue. Id. at 493, 508. However, more than once since the Hobson decision, the Supreme Court has intimated that such segregation is outside the proscriptions of Brown I. See

The segregation in the Newport News School District, as presented in the *Thompson* case, does not fit neatly into either of the two categories set forth in *Hobson*. Since constitutional and statutory provisions once existed in Virginia which mandated racial segregation in public schools,[30] *Thompson* might be interpreted as involving de jure segregation subject to the *Brown I* mandate.[31] Thus, the *Thompson* desegregation plan would be viewed in constitutional terms to determine its compliance or noncompliance with current desegregation guidelines. Since this type of plan has not been examined by the Supreme Court, it must be analyzed by comparison to other plans and to the underlying rationale in prior case law. If, on the other hand, the school segregation were seen as so called de facto, the question would become whether such segregation is in any sense within the bounds of equal protection proscriptions.[32] It is for the foregoing reasons that this discussion presents an analysis of the de jure-de facto segregation problem.

Title IV of the Civil Rights Act of 1964[33] provides a definition of the term "desegregation":

> "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.[34]

The use of the term "desegregation" instead of "integration" is a significant one. "Integration" connotes the requirement of affirmative action to see that racial balance exists. It does not imply that any segregation of the races is present, but rather that the person charged with the duty to "integrate" must make certain that there is none. "Desegregation" in itself connotes the prior existence of segregation. One might infer that a person with the duty to "desegregate" is being ordered to cease segregation, or still further, to refrain from segregative practices. This is in fact implicit in the definition of "desegregation" given in Title IV.[35]

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notes 37-43 & 52-57 infra and accompanying text. See also Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis, 60 Calif. L. Rev. 275 (1972).

30. The constitution of the State of Virginia once mandated that "[w]hite and colored children shall not be taught in the same school." Va. Const., art. IX, § 140 (1902). Section 22-221 of the Virginia Code of 1950 also compelled racial segregation. Both provisions were declared unconstitutional under the United States Constitution in Davis v. County School Bd., decided with Brown v. Board of Educ., 347 U.S. 483, 487 (1954). Section 22-221 was repealed in 1971. Va. Acts of Assembly, Spec. Sess. 1971, ch. 102. A deletion of section 140 of the constitution of Virginia was proposed in 1969, on the basis that segregated schools were unlawful. The Constitution of Virginia, Report of the Commission on Constitutional Revision, January 1, 1969, at 405, 480. A new Virginia constitution became effective on July 1, 1971.

31. See note 28 supra.

32. See note 29 supra.

33. 42 U.S.C. § 2000c (1970). It authorizes the Attorney General to act against segregation. See note 40 infra.

34. 42 U.S.C. § 2000c(b) (1970).

35. According to that definition "desegregation" is the assignment of pupils without regard to race, etc. It is thus in no way an attempt to achieve a racial balance. On the other hand, the term "integration" would seem to require such an end.

Had the term "integration" been used, much of the de jure-de facto debate might have been avoided, and all forms of existing segregation would be subject to judicial remedies. The use of the term "desegregation," however, may demonstrate a congressional intention to raise and leave undecided the question of just what kind of segregation is to be proscribed. Further, the choice of the term may in fact demonstrate a positive intention to exclude de facto segregation from the purview of the statute.[36]

The leading case of *Swann v. Charlotte-Mecklenburg Board of Education,*[37] lends some indirect support to this argument. *Swann* clearly recognized that the decision in *Brown I* held state-imposed racial segregation in public schools to be a denial of equal protection.[38] *Swann* arose in a state which had a record of purposely requiring racially segregated schools.[39] Accordingly, the Court clearly addressed itself to questions of de jure segregation. It was while quoting from Title IV that the Court suggested its position on de facto segregation.

Title IV authorizes the Attorney General of the United States to bring actions against school districts which practice segregation.[40] At the same time there is a specific provision in section 2000c-6 of the Act which qualifies the Attorney General's power. The provision states that:

> [N]othing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.[41]

The Court in *Swann* considered not only the provisions of Title IV, but also the legislative history of the Act.[42] Congress was fearful that the Civil Rights Act of 1964 would be interpreted as condoning a constitutional right of action against de facto segregation without any requirement of proof of discriminatory state action.[43] That the Court also regarded section 2000c-6 as foreclosing "any interpretation of the Act as expanding the existing powers of federal courts to enforce the Equal Protection Clause"[44] implies that judicially imposed prohibitions reach only as far as de jure segregation.

Justice Powell, sitting as a Circuit Justice in *Drummond v. Acree,*[45] has

36. See text accompanying notes 45-51 infra.

37. 402 U.S. 1 (1971).

38. Id. at 11. Cf. Note, De Facto School Segregation and the "State Action" Requirement: A Suggested New Approach, 48 Ind. L.J. 304, 306 (1973).

39. 402 U.S. at 5-6 (North Carolina).

40. 42 U.S.C. § 2000c-6 (1970).

41. Id. § 2000c-6(a).

42. The Court placed its discussion in terms of congressional intent based on the legislative history of the act, thereby avoiding the necessity of putting on official record whether it accepted the position that there exists a de facto segregation which is not violative of the fourteenth amendment's equal protection clause. 402 U.S. at 17-18 (1971). However, by its discussion in Swann, the Court implied that it leans toward such a position.

43. Id.

44. Id. at 17 (emphasis omitted).

45. 409 U.S. 1228 (1972).

observed that Congress was well aware of the legal importance of its use of the phrase "to achieve such racial balance" in section 2000c-6,[46] and that such use referred to the immunization of "de facto segregation" from equal protection challenges.[47]

Drummond also dealt with sections 802[48] and 803[49] of the Education Amendments Act of 1972, which prohibited the use of federal funds for busing and provided for the postponement of district court ordered transportation of students. Analyzing the statute, Justice Powell concluded that "Congress intended to proscribe the use of federal funds for the transportation of students under *any* desegregation plan but limited the stay provisions of § 803 to desegregation plans that seek to achieve racial balance."[50] With the use of the phrase "racial balance" it again appeared that Congress wished to distinguish de facto segregation from de jure segregation, just as it had in Title IV of the Civil Rights Act of 1964.[51]

Though the Supreme Court has refused to alleviate much of the confusion surrounding the de jure-de facto controversy, a district court did seize the opportunity to do so, relying heavily upon the *Swann* implications. In *Spencer v. Kugler,*[52] the court interpreted *Swann* as drawing a "critical distinction" between de jure and de facto segregation.[53] This distinction, however, falls far short of dividing de jure and de facto into two completely separate concepts. As one commentator has observed, attempts to place segregation into one of the two categories often create more problems.[54] Following extensive quotation from the *Swann* opinion, the district court concluded that the courts were without power to saddle school officials with the obligation of curing any racial imbalance which resulted from de facto segregation.[55]

The Supreme Court summarily affirmed the district court's decision in *Spencer* and thus moved a step closer to final acknowledgment of a distinct

46. Id. at 1229.

47. Id. at 1230. See also 2 U.S. Code Cong. & Adm. News 2508 (1964).

48. 20 U.S.C.A. § 1652 (1974).

49. Act of June 23, 1972, Pub. L. No. 92-318, § 803, 86 Stat. 235 (expired Jan. 1, 1974).

50. 409 U.S. at 1229.

51. For an excellent discussion concerning the congressional attitude toward busing and desegregation, see Scott, Busing to Desegregate Schools: The Perspective from Congress, 8 U. Richmond L. Rev. 105 (1974). On the topic of proposed comprehensive legislation to remedy segregation, see Preyer, Beyond Desegregation—What Ought to Be Done?, 51 N.C.L. Rev. 657, 661-73 (1973).

52. 326 F. Supp. 1235 (D.N.J. 1971), aff'd mem., 404 U.S. 1027 (1972).

53. The distinction was said to be "between those states which have a history of dual school systems and a separation of the races which has continued through 'freedom-of-choice' and 'geographical zoning' plans which create the illusion of conforming to law, and those wherein so-called 'de-facto' segregation results from housing patterns and conventional drawing of school district zones." Id. at 1242.

54. See Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis, 60 Calif. L. Rev. 275, 283 (1972).

55. 326 F. Supp. at 1243. The court went further in declaring that federal judges were forbidden from any form of intervention even in the face of increased racial imbalance due to changing residential patterns within school districts. Id.

category of de facto segregation.[56] The only opinion was the dissent of Justice Douglas.[57] The manner in which the *Spencer* case was affirmed may demonstrate that, in the view of the Court, the time is not yet ripe for a clear-cut decision on the de jure-de facto distinction. The problems of desegregation in public schools may well require a deliberate, step-by-step confrontation of the issues specifically in question. The Court may also wish to refrain from overwhelming the lower courts, the school districts and the parents of public school children with absolute duties and guidelines. If so, this would seem to create a dichotomous situation. On the one hand, the Court has demanded that school officials comply with judicial desegregation mandates expeditiously,[58] while on the other hand, it has chosen to act slowly in setting down rules or formulae which these officials are to follow.

Despite Supreme Court reluctance to decide the issue, lower courts have not been so hesitant. In addition to the more recent *Spencer* case are earlier

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56. 404 U.S. 1027 (1972) (mem.). The Court also approached a finding of a distinct category of de facto segregation by its decision in Keyes v. School Dist., 413 U.S. 189 (1973). See 52 N.C.L. Rev. 431 (1973).

57. Justice Douglas dissented: "The Constitution condemns 'discrimination, whether accomplished ingeniously or ingenuously,' Smith v. Texas, 311 U.S. 128, 132 (1940), and where there has been any such discrimination our 'objective [is] . . . to eliminate from the public schools all vestiges of state-imposed segregation.' Swann v. Board of Education, 402 U.S. 1, 15 (1971). . . .

"There is, moreover, an ancient American doctrine that as, if, and when public facilities are separate for the races they must be equal. Plessy v. Ferguson [163 U.S. 537 (1896)] held that a State could maintain separate facilities for different races providing the facilities were equal. We have long since repudiated the notion that a State may maintain racially distinct facilities for the races, because classifications based upon race are invidious and thus violative of the Fourteenth Amendment. But there can be de facto segregation without the State's being implicated in the creation of the dual system and it is in such situations that Plessy's mandate that separate facilities be equal has continuing force. Our conclusion in Brown v. Board of Education, 347 U.S. 483, 495, that '[s]eparate educational facilities are inherently unequal,' has been convincingly borne out by scholarly studies." 404 U.S. at 1030-31 (1972) (emphasis omitted).

Justice Douglas' dissent is grounded in his belief that the district court in Spencer sought an easy way out of a difficult situation by relying on the de facto segregation argument. In his view, there has been a migration of the white population away from the cities, while the black population remains. Such a "shift in residential patterns has been both encouraged and facilitated by federal, state and local actions." Id. at 1029 n. " '[T]he categorical distinction between de jure and de facto segregation is not as clear-cut as it would appear.' " Id. at 1030 n. (italics deleted) (quoting Hearings before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare, 91st Cong., 2d Sess. 352-54 (1970)). This approach would lead to a finding of state-imposed segregation. While conceding that de facto segregation may exist without state involvement, Justice Douglas asserted that there is state involvement in shifting residential patterns, which in turn leads to state involvement in racial segregation.

58. E.g., Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) (immediate implementation of a desegregation plan, requiring integration before litigation); Green v. County School Bd., 391 U.S. 430 (1968) (requiring a desegregation plan which works now); Griffin v. County School Bd., 377 U.S. 218 (1964) (the time for all deliberate speed had passed); Brown v. Board of Educ., 349 U.S. 294 (1955) (requiring all deliberate speed to desegregate); see Carter, An Evaluation of Past and Current Legal Approaches to Vindication of the Fourteenth Amendment's Guarantee of Equal Educational Opportunity, 1972 Wash. U.L.Q. 479.

cases such as *Bell v. School City*[59] and *Deal v. Cincinnati Board of Education.*[60] In reponse to a challenge to de facto segregation, *Bell* concluded that the proscriptions of *Brown I* extended only to forced racial segregation of public school pupils,[61] and that the Constitution imposes no duty to remedy a situation where there is segregation merely because of shifts in population.[62] The court reached a similar determination in *Deal,* stating that obligations imposed by the Constitution do not include that of alleviating racial imbalance; without a showing of discriminatory practices, there can be no denial of equal protection.[63]

In contrast to the above clear declarations of the existence of de facto segregation, necessarily immune from equal protection challenges, there is no overwhelming authority which takes the opposite view that all segregation should be viewed as de jure and therefore subject to the application of equal protection principles.[64] The starting point of the disagreement between the proponents of a de facto form of segregation immune to equal protection application and those who oppose it appears to be in the approaches taken to the meaning of the terms de jure and de facto. Advocates of the existence of de facto exclusion point out that there are two identifiable types of segregation; thus, if segregation exists, it must be one of the two types. However, their opponents argue that attempts to define separate classes of segregation cannot succeed. This is the view favored by Justice Douglas.[65] Though a majority of the Supreme Court Justices does not overtly support either standpoint, Justice Powell, in *Keyes v. School District,*[66] did join in urging elimination of arbitrary lines drawn to distinguish de facto from de jure segregation.[67] *Brown I* prohibited state-imposed racial segregation, a doctrine implemented a year later in *Brown II.* More recent decisions have abrogated the exception made for state neutrality.[68] The constitutional principle as it now stands requires "affirmative state action to desegregate school systems."[69] And, Justice Powell concluded, it should be irrelevant whether the existing segregation is "state-created," "state-assisted," or "state-perpetuated," since public schools are created under the auspices of the state.[70]

59. 324 F.2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964).

60. 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967).

61. 324 F.2d at 212-13. See Smalls, The Path and the Promised Land: School Desegregation, 21 Am. U.L. Rev. 636, 644 (1972).

62. 324 F.2d at 213.

63. 369 F.2d at 61-62.

64. One commentator has set forth several possible reasons for subjecting all segregation to equal protection principles. Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis, 60 Calif. L. Rev. 275, 298-374 (1972). See Horowitz, School Desegregation: A Lawyer's View, 2 L. & Soc'y Rev. 119, 121 (1967); Rose, School Desegregation: A Sociologist's View, 2 L. & Soc'y Rev. 125, 129-30 (1967).

65. See note 57 supra.

66. 413 U.S. 189, 217-53 (1973) (Powell, J., concurring and dissenting).

67. Id. at 217-36.

68. Id. at 220-21.

69. Id.

70. Id. at 227.

Justice Powell's analysis in *Keyes* appears to refer to the situation where, at one time, de jure segregation existed within the school district, following which a de facto form of segregation grew as a result of the withdrawal of state-imposed separation of the races pursuant to constitutional and judicial mandates. If so, the question still remains whether a distinction should be drawn between de jure and de facto segregation where de jure segregation has never existed, but de facto segregation exists solely as a result of residential patterns.[71]

The situation is further complicated by the fact that court-imposed duties pursuant to the fourteenth amendment must reflect uniformity with respect to all areas of the country. Constitutional mandates are the same, regardless of location, population, or geographical size. At least one commentator has recognized this problem.[72] In a large city, it is doubtful that a court order could bring about a racially balanced public school system in a short time.[73] To do so could require a complete restructuring of the social system. In such circumstances it also becomes more difficult to identify the form of segregation, or whether segregation even exists. In smaller communities, the possibility of detecting segregation becomes greater simply because of the decrease in numbers. Remedying the situation in a smaller community may cause fewer difficulties.[74]

In *Hobson v. Hansen,*[75] the possible abolition of the de jure-de facto distinction was adumbrated. The court recognized that to try to differentiate the two types of segregation absolutely would result in superficial distinctions. The court considered two extremes of constitutional interpretation. The orthodox approach to equal protection is that "government action which without justification imposes unequal burdens or awards unequal benefits is unconstitutional."[76] At the other extreme is a recognition that "the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."[77] The former view calls for absolute lines drawn to distinguish de facto from de jure segregation, with any segregation in question being placed in one of the two categories. However, the latter interpretation recognizes that often no such

71. "Where state action and supervision are so pervasive and where, after years of such action, segregated schools continue to exist within the district to a substantial degree, this Court is justified in finding a prima facie case of a constitutional violation. The burden then must fall on the school board to demonstrate it is operating an 'integrated school system.' " Id. at 227-28.

72. See A. Bickel, The Supreme Court and the Idea of Progress 133 (1970).

73. Id. at 132. In a city the size of New York, for example, there are great numbers of people with varied social and economic backgrounds. It is to be expected that different groups will assemble into more or less separate locales; thus de facto segregation becomes almost inevitable. See Preyer, Beyond Desegregation—What Ought to Be Done?, 51 N.C.L. Rev. 657, 660 (1973).

74. See A. Bickel, The Supreme Court and the Idea of Progress 132-34 (1970).

75. 269 F. Supp. 401 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). See notes 27-29 supra and accompanying text. It should be noted that much of the discussion in Hobson is dictum.

76. 269 F. Supp. at 497.

77. Id.

classification can be made. While it might be possible to speak of a single class of de facto segregation, de jure segregation lends itself to different degrees. It might be said that even though a specific form of segregation is neither de facto nor de jure, it is nonetheless "in the nature of de jure."

As previously mentioned,[78] pursuant to both the constitution of Virginia and the laws of that state, public schools were required to be segregated. Though the Newport News School District was formed in 1958, not until 1971 was the provision in the Virginia code prohibiting racially mixed schools repealed.[79] The year 1958 was also four years after the landmark decision in *Brown I*. These dates are significant. As *Thompson* points out,[80] the residential patterns of the school district have evolved through the years by shifts in population. Even though natural population movements are responsible for the segregated conditions, and the "unenforced" segregation statute is not, the existence of the statute until 1971 cannot be ignored.[81] At the very least, this would seem to suggest state-endorsed racial segregation.[82]

The determination whether the form of segregation found in the *Thompson* case was de jure or de facto is a complicated one. In order for a form of segregation to be outside the control of the fourteenth amendment's equal protection clause, there must be a *complete absence* of state encouragement. Where once there was a dual system of education purposely maintained, all vestiges of state-imposed segregation must be wiped away before a court is without the power to order desegregation.[83]

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78. See note 30 supra and accompanying text.

79. See notes 1 & 30 supra and accompanying text.

80. See note 2 supra and accompanying text.

81. Although no state statute is above the United States Constitution, and hence no state statute has validity if in conflict with the Constitution, the Virginia statute remained on the books until repealed in 1971. If it had no effect or validity, there would seem to be no significant purpose in repealing it. Its repeal is some evidence at least that Virginia schools were being operated in reliance on the statute rather than on constitutional and Supreme Court mandates.

82. Some confusion may occur from the fact that, in Virginia, local school boards have the exclusive power of operating and maintaining the public schools. County School Bd. v. Griffin, 204 Va. 650, 133 S.E.2d 565 (1963). But such local power is acquired from the state itself, and it is the state that, for so many years, compelled segregated public schools. The local control exerted by the individual school boards must of necessity comply with the state constitution and state statutes. See Bickel, The New Supreme Court: Prospects and Problems, 45 Tul. L. Rev. 229, 232-33 (1971); Note, Merging Urban and Suburban School Systems, 60 Geo. L.J. 1279, 1291-93 (1972); Comment, School Desegregation After Swann: A Theory of Government Responsibility, 39 U. Chi. L. Rev. 421, 438 (1972); 25 Ala. L. Rev. 389, 398-400 (1973).

83. Bradley v. School Bd., 462 F.2d 1058, 1069 (4th Cir. 1972), aff'd, 412 U.S. 92 (1973). In Bradley, because of residential segregation, the district court ordered the integration of schools within the City of Richmond, Virginia, with those schools in adjacent counties. The court of appeals reversed, finding that state-imposed segregation had been totally eliminated in favor of unitary school systems. Because the composition of the schools involved was not shown to be caused by invidious state action, the court ruled that judicial intervention was incorrect. 462 F.2d at 1070. The Supreme Court affirmed the court of appeals decision by an equally divided Court. Justice Powell took no part in the decision. See Comment, Busing and Racial Imbalance: Judicial Sword and Social Dragon, 39 Tenn. L. Rev. 647, 672-77 (1972).

The burden is on the plaintiffs to show that current racial segregation exists and that the school district wherein it is found had operated a dual system under statutory compulsion at the time of the Supreme Court's decision in *Brown I*.[84] Once this is shown, the duty shifts to the state to assure a nondiscriminatory school system, and to eliminate all remnants of state-imposed segregation.[85] It is apparent that the Newport News School District has such a duty. There is no evidence of a dispute as to the existence of a segregated school system within the district. Nor is there any question that under Virginia law, segregation by race in schools was required. The school segregation seen in *Thompson,* though it may fit in the gray area between de jure and de facto where no precise label can be affixed to it, is quite clearly in the nature of de jure. Perhaps absolute de facto segregation exists only in theory. In practice, when there is a showing of segregation and a showing of one-time state involvement in it, though there may be none now, enough has been proven to warrant an application of equal protection principles. As the Supreme Court said in *Keyes:* "[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate."[86] Purpose or intent to segregate, whether past or present, is sufficient in the face of current racial segregation.

In its affirmance of the district court's opinion, the Court of Appeals for the Fourth Circuit in *Thompson* made no mention of the de jure-de facto distinctions. Nor was there a great deal of explanation or reliance on precedents for its decision. Regarding the desegregation plan for grades three through seven, the court accepted the explanation of school officials that the reason that black children are bused beginning in grade three, while white children are not bused until grade six, was that it was simply a matter of choice as to which group should go first.[87] This was supported by the statement that the *Thompson* plan was similar to those plans which had been accepted in three other cases,[88] *Allen v. Asheville City Board of Education,*[89] *Clark v. Board of Education,*[90] and *Hart v. County School Board.*[91]

In *Hart*, the Fourth Circuit had recognized that the manner in which the abolition of a dual school system is accomplished is somewhat within the discretion of the district court. All that is required is that the end product be a unitary system.[92] The desegregation plan in *Hart* was attacked because it called for the busing of black children away from their neighborhoods, the

84. Keyes v. School Dist., 413 U.S. 189, 200 (1973).

85. Id. See Note, Demise of the Neighborhood School Plan, 55 Cornell L. Rev. 594, 608-09 (1970); Note, De Facto School Segregation and the "State Action" Requirement: A Suggested New Approach, 48 Ind. L.J. 304, 314–18 (1973).

86. 413 U.S. at 208. This intent test may only add to the confusion already present in desegregation cases. 52 N.C.L. Rev. 431, 438 (1973).

87. 498 F.2d at 197.

88. Id. at 197-98.

89. 434 F.2d 902 (4th Cir. 1970).

90. 449 F.2d 493 (8th Cir. 1971), cert. denied, 405 U.S. 936 (1972).

91. 459 F.2d 981 (4th Cir. 1972).

92. Id. at 982.

claim being that this imposed unconstitutional burdens on the black children. The court rejected this allegation due to the lack of a showing of any invidious discrimination.[93]

In *Clark,* the Court of Appeals for the Eighth Circuit offered a summation of how far the district court might be allowed to go in exercising its discretion. The court stated that:

> [P]airing, clustering, the use of contiguous and noncontiguous zones, and the transportation of students are legitimate techniques to achieve the constitutional objective of a unitary school system . . . that the burden on all students, black and white, should be as equitable as possible; that every school need not reflect the same racial composition as the district as a whole; that elementary students who already attend integrated schools in their own neighborhoods should not be disturbed for other than compelling circumstances . . . .[94]

It is difficult to understand the basis on which the court in *Thompson* relied on the *Hart* and *Clark* cases, other than that the *Thompson* desegregation plan was somewhat similar to those plans. Since the district court failed to explain its acceptance of the desegregation plan for grades three through seven, there was little information to go on. The *Clark* court in fact stated that in a desegregation plan, the burden on all students should be as equitable as possible. The busing of black children at an age three years younger than when white children are to be bused falls short of meeting the *Clark* requirement.

Of the three cases cited by the court in *Thompson* in support of its decision, the most pertinent was its own decision in *Allen.* In *Allen,* the Fourth Circuit had reviewed a desegregation plan[95] closely related to the plan proposed in *Thompson.* There the plan called for the busing of black children in grades one through five to formerly all-white schools; white children would be bused from grades six through twelve. The challenge to the plan paralleled the *Thompson* challenge. The Fourth Circuit approved the *Allen* plan, asserting that the worst that could be said about the plan was that in the earlier grades the burden was placed on black children, while in the later grades it was on white children.[96]

Though ignored in *Thompson,* other cases have approved similar plans. *Kelley v. Metropolitan County Board of Education*[97] involved the busing of black children in grades one through four and white children in grades five and six. Not surprisingly, however, that court was unable to offer a convincing rationale in support of its decision. Unlike the court in *Thompson,* the

93. In fact more white children were scheduled for busing than black children. The point of contention, however, was apparently that black children would have to travel longer distances and greater lengths of time, while white children would be able to remain within their own neighborhoods. Id.

94. 449 F.2d at 499.

95. 434 F.2d at 907.

96. Id. It is submitted that this rationale misses the point. The court does not consider the disproportionate burden as essential to its decision. Yet it is this burden which is the focal point of the plaintiffs' claim.

97. 463 F.2d 732 (6th Cir.), cert. denied, 409 U.S. 1001 (1972).

Sixth Circuit in *Kelley* acknowledged this difficult situation.[98] *Kelley* sought support from the Supreme Court decision in *Swann,* where the method of desegregation was closely related to those just discussed.[99] However, in its lengthy opinion in *Swann,* the Court made no reference to this aspect of the desegregation plan.[100] This omission can be interpreted in two ways. First, it could mean a tacit approval of the plan. However, it seems unlikely that the Court would approve it in this manner, without explanation. Second, *Swann* may be evidence that even the Supreme Court was unable to find the plan repugnant to the equal protection clause, or by the same token, to find adequate support for it.

The latest decision from the Supreme Court on public school desegregation is *Milliken v. Bradley.*[101] Though it involved the basic issue of cross-district busing to desegregate, the decision has great relevance to the de jure-de facto problem. The majority found evidence of de jure segregation in one of the school districts involved,[102] but was unable to find any such violation in any of the other districts which came under the cross-busing plan.[103] Since the "scope of the remedy is determined by the nature and extent of the constitutional violation,"[104] and no such violation was exhibited in some of the districts, the Court concluded that the cross-district busing plan would impose an impermissible remedy on these districts.[105] Before such a remedy could be possible, *Milliken* requires a showing that the state or school district has committed acts of racial discrimination which result in segregation.[106] This is clear support for the view that there does exist a form of de facto segregation which enjoys immunity from equal protection principles.

The *Milliken* decision points out the rife disagreement on the Supreme Court over the issue of de jure and de facto segregation. Four Justices dissented from the majority holding. Justice Douglas flatly asserted that in the area of school cases there is no difference between de jure and de facto segregation.[107] He would find state action in such cases in the form of the

98. Id. at 746. The court did qualify its support of the desegregation plan by noting that the plan could be either a temporary method of alleviating racial separation or, if practical reasons for keeping it could be found, it might find justification for a longer time. Either way, should the plan prove detrimental, the district court could modify it. Id.

99. The desegregation plan in Swann achieved its end by "grouping two or three outlying schools with one black inner city school; by transporting black students from grades one through four to the outlying white schools; and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black school." 402 U.S. at 10.

100. See 402 U.S. 1 (1971); Kelley v. Metropolitan County Bd. of Educ., 463 F.2d 732, 746 (6th Cir.), cert. denied, 409 U.S. 1001 (1972).

101. 94 S. Ct. 3112 (1974).

102. Id. at 3127.

103. Id.

104. Id.

105. Id.

106. Id. Justice Stewart concurs in this viewpoint. The mere fact that schools within some districts contain a greater proportion of white students than schools in other districts is insufficient to constitute a violation of equal protection. Id. at 3132–33 (Stewart, J., concurring).

107. Id. at 3135 (Douglas, J., dissenting). Justice Douglas stands firm with his dissent in Spencer, as discussed in note 57 supra.

building of schools and the allocation of students.[108] Justice White also dissented, seemingly in agreement with Justice Douglas on the issue of state action.[109]

Justice Marshall's dissent does little to alleviate the confusion of the de jure-de facto argument. He found evidence that black students were "intentionally confined to an expanding core of virtually all-Negro schools immediately surrounded by a receding band of all-white schools."[110] He saw a systematic program of segregation. Thus, his argument is based primarily on the presence of state-imposed segregation. However, Justice Marshall appears to differ with Justice Douglas on the place of de facto segregation in fourteenth amendment applications. In support of his dissent, he stated that "[t]he constitutional violation found [in *Milliken*] was not some *de facto* racial imbalance, but rather the purposeful, intentional, massive, *de jure* segregation of the Detroit city schools . . . ."[111] The implication seems obvious: Justice Marshall is not yet prepared to deny the possibility of de facto segregation that is not violative of the equal protection clause.

The five to four split on the Supreme Court in *Milliken* is a far cry from the unanimous decision in *Brown I*. The diverse views of the Justices indicate a badly divided Court. As the Court stands today, any hope of unity in school desegregation cases would be presumptuous.

"The measure of any desegregation plan is its effectiveness."[112] School officials are charged with the duty of assuring a unitary system and removing racial segregation and discrimination.[113] In doing this, racial classifications are to be avoided,[114] but it has been recognized that some leeway must be granted. Where the remedial desegregation process is involved, some students will have to be assigned solely because of race.[115] This alone is not violative of equal protection.[116]

But the situation in *Thompson* was different. There, racial classifications were not made to determine which children were to be assigned to which schools. Both black and white pupils were being transported. The problem arose because black children were to be bused at a younger age than white children; and, it might be added, in a manner not the most equitable possible.[117]

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108. 94 S. Ct. at 3135. See 82 Yale L.J. 1681, 1684-85 (1973).

109. See 94 S. Ct. at 3136 (White, J., dissenting).

110. Id. at 3147 (Marshall, J., dissenting). See Note, Merging Urban and Suburban School Systems, 60 Geo. L.J. 1279, 1279-80 (1972).

111. 94 S. Ct. at 3147 (Marshall, J., dissenting).

112. Davis v. Board of Comm'rs, 402 U.S. 33, 37 (1971).

113. Green v. County School Bd., 391 U.S. 430, 437-38 (1968).

114. Goss v. Board of Educ., 373 U.S. 683, 687 (1963). Goss involved a transfer provision plan whereby a pupil assigned to a school in which he or she is in a racial minority may request a transfer to a school in which he or she would be in a racial majority. See Note, Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board, 81 Harv. L. Rev. 1511, 1511-12 (1968); 25 Vand. L. Rev. 893, 894 (1972).

115. McDaniel v. Barresi, 402 U.S. 39, 41 (1971).

116. Id.

117. It is submitted that, with five grades involved, it is not necessary to have the disparity of

Admittedly, the *Thompson* case presents multifaceted problems. The validity of busing itself is not in question.[118] In recent decisions, the Supreme Court has undertaken a reevaluation of its position on school desegregation but unanimity on the Court appears to be a thing of the past. The Fourth Circuit in *Thompson* faced varied issues which could not readily be determined on the basis of current desegregation law. If the Constitution requires merely that a racial mix of bodies be maintained in the public schools, then the *Thompson* plan will meet its requirement. But if more is required, then there remain numerous problems to be resolved. The goals of desegregation will have to be reassessed.

The Supreme Court would first affirmatively have to decide whether there are two absolutely distinct forms of school segregation, and, if there are, what factors will lead to a determination that segregation is de jure. This is not only conceptually difficult, but also difficult from a practical point of view, given the present division on the Court. The Court would further have to decide whether the equal protection doctrine extends to all aspects of desegregation—whether the plan achieves a racial mix and whether the plan does so in a manner not itself violative of equal protection principles. At present, it appears that the Court has not addressed itself to this latter issue. Yet, clearly there is some point at which a desegregation plan which placed burdens resulting from operation of the plan largely on one racial group would run afoul of equal protection principles. This second equal protection issue should not go unchallenged. An easy remedy is not suggested, if one exists at all. The decision in the *Thompson* case at least took a strong step in the direction of awakening the judicial process to the great problems of desegregation that have not yet been resolved. Whether the judiciary is capable at all of responding to this awakening remains to be seen.

Alan Jay Stein

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three grade years between the time black children and white children are bused away from their respective neighborhoods. Certainly, more equitable remedies are possible, even within the basic framework of the Thompson plan. One possibility would be to bus both black and white children in each grade in a ratio sufficient to meet the desired racial balance. The burden placed on black children in grades three through five is easily avoided. Cf. Smalls, The Path and the Promised Land: School Desegregation, 21 Am. U.L. Rev. 636, 662 (1972).

118. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29-30 (1971); May, Busing, Swann v. Charlotte-Mecklenburg, and the Future of Desegregation in the Fifth Circuit, 49 Texas L. Rev. 884, 885-86, 901 (1971); Smalls, The Path and the Promised Land: School Desegregation, 21 Am. U.L. Rev. 636, 657 (1972).