The Muddled Distinction Between *De Jure* and *De Facto* Segregation

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**Abstract and Keywords**

In 2007, the U.S. Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1* declared unconstitutional voluntary, race-based plans to integrate public schools in Jefferson County, Kentucky and Seattle, Washington. The decision rested on a critical distinction in constitutional law between “de jure” segregation—resulting from purposeful discrimination by the government—and “de facto” racial imbalance derived from unintentional or “fortuitous” actions by state and private entities. The Court held that de facto school districts could not voluntarily assign students to schools according to their race for purposes of promoting integration. In a vigorous dissent, Justice Breyer argued the “futility” of the de jure–de facto distinction, contending that both districts should have been afforded the constitutional flexibility to pursue voluntary remedies that address racial imbalance in their schools. This chapter takes up Justice Breyer’s dissent to explore the complicated origins of school segregation outside the South and the federal cases that adjudicated its constitutionality. Its central contribution is to recover the often confusing legal narratives about segregation in the period after *Brown* and how federal courts struggled to discern the constitutional boundaries between de jure and de facto discrimination. The chapter briefly describes the constitutional turns that facilitated the Court’s decision in *Parents Involved*, including the advent of the intent requirement in equal protection and “colorblindness” doctrine, which treats any use of race as presumptively unconstitutional, regardless of its integrative purpose.


**Introduction**

In 2007, the U.S. Supreme Court, in *Parents Involved in Community Schools v. Seattle School District No. 1*, declared unconstitutional voluntary, race-based plans to integrate public schools in Jefferson County, Kentucky, and Seattle, Washington.¹ The decision, by a narrow 5–4 majority, rested on a critical distinction in constitutional law between “de ju-
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re” segregation—resulting from purposeful discrimination by the government—and “de facto” racial imbalance derived from unintentional or “fortuitous” actions by state and private entities. The Court held that de facto school districts could not voluntarily assign students to schools according to their race for purposes of promoting integration. Although a concurrence by Justice Kennedy left open the possibility of advancing integration through other means, the decision fit the conservative Court’s long-standing pattern of striking down race-based policies that favored historically disadvantaged racial groups at the perceived expense of the white plaintiffs who challenged them. In a vigorous dissent, Justice Breyer argued the “futility” of the de jure–de facto distinction, especially as applied to Seattle. Given that government discrimination in the era of *Brown v. Board of Education* often extended beyond “explicitly racial laws,” Justice Breyer contended that the majority should have afforded both districts the constitutional flexibility to pursue voluntary remedies that address racial imbalance in their schools.

There were other reasons to uphold the integration policies in Jefferson County and Seattle. Unlike *Brown v. Board of Education*–era cases in which southern school districts had used race to segregate students, the policies at issue in *Parents Involved* had been created to bring students from different racial backgrounds together. Under the logic of *Brown*, therefore, the Court could have concluded that using race to promote integration was constitutional. Further, in earlier cases, the Court had strongly favored releasing school districts that had been intentionally segregated from federal court oversight in order to return them to the control of their local school boards. The Court’s heavy emphasis on the virtues of local control, coupled with the fact that both Seattle and Jefferson County wanted integration, should have cut in the districts’ favor. After all, if the Court could make it easier for districts to extract themselves from federal judicial supervision in the name of local control, then surely it could give districts the freedom to pursue integration of their own accord.

Another quirk in Jefferson County’s case in particular highlighted the peculiarity of the de jure–de facto distinction and its practical application. The County’s posture as a defendant in *Parents Involved* was ironic as several years earlier it had been under a federal court mandate to remedy the vestiges of segregation it had once imposed. In 2000, however, a federal court declared the school district “unitary,” concluding that it had sufficiently eliminated its prior racially dual system to be released from judicial oversight. Thus, although racial imbalance persisted in the Jefferson County school system, that separation was no longer considered de jure “segregation,” but merely de facto “racial imbalance.” In constitutional terms, the County’s previous record of racial discrimination had been wiped clean.

That still left Seattle. In dissent, Justice Breyer argued that there was little practical difference between de jure and de facto segregation, especially as applied to Seattle. Despite its supposed “de facto” status, the Seattle school board had carried out policies that “helped to create, maintain, and aggravate racial segregation.” The de facto label
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Thus belied the practical scope and impact of the board’s actions. According to Justice Breyer, the de jure–de facto distinction is not—or should not be—as clear as it seems.13

So how did the Court get here—from the time of *Brown*, in which school districts were required to pursue desegregation,14 to *Parents Involved*, which declared voluntary race-based integration plans unconstitutional?15 The Court’s decision can be attributed to two consequential turns in constitutional law. The first is the advent of the intent requirement in equal protection—which, as interpreted by the Court’s increasingly conservative majority, widened the constitutional gap between de jure and de facto segregation.16 The second reason relates to the rise of “colorblindness” doctrine, which treats any use of racial classifications as presumptively unconstitutional, regardless whether such use is meant to benefit or to harm people from historically disadvantaged racial groups.17 Together these doctrines cemented the modern constitutional distinction between de jure and de facto segregation. Although the particulars of de jure segregation depend on the facts of each case,18 it has long been generally understood to refer to racial separation that is purposefully created, maintained, or enforced by the government.19 “De facto” segregation is its constitutional opposite: a fortuitous “racial imbalance”20 tending to result from the confluence of governmental and private action that is not specifically intended to separate students on the basis of race. This distinction matters. While de jure segregation is unconstitutional, de facto segregation is not.21 *Parents Involved* concluded that school districts may not classify students by race to rectify—even voluntarily—segregation that is not itself unconstitutional.22

Justice Breyer’s dissent reminds us that the result in *Parents Involved* was not inevitable. By identifying the muddled distinction between de jure and de facto segregation, his dissent points to a constitutional path for allowing voluntary remedies in school districts with a history of governmentally generated racial imbalance. Indeed, as this chapter discusses, litigants in the lower courts pushed vigorously for an expansive reading of *Brown* in public schools outside de jure districts in the South that would have obviated the need to prove the modern-day version of intentional discrimination. Had Justice Breyer’s interpretation prevailed, it would have laid the constitutional predicate for voluntary integration in districts that had practiced some form of school segregation, whether specifically intended or not.

This chapter takes up Justice Breyer’s dissent to explore the complex origins of racial imbalance in public schools outside the South, which I refer to generally here as “northern segregation.”23 Its central contribution is to recover the often confusing legal narratives about segregation in the period after *Brown*.24 Northern segregation resulted from a constellation of policies and practices that isolated black students, with effects that were nearly as profound as the overtly discriminatory policies in the South. These policies and practices ran the constitutional gamut, with some that today might be considered intentionally discriminatory and others that would fall into the modern category of de facto segregation,25 placing them beyond federal judicial remedy under current law. In the intervening years between *Brown* and the full eruption of the intent doctrine, however, this
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The latter group of cases defied easy categorization given the uncertain boundaries of the de jure–de facto distinction.

The first part of this chapter discusses the origins of northern segregation. The second part describes the evolution of the de jure–de facto distinction in federal courts. Specifically, it discusses that evolution through the lens of cases in northern and southern jurisdictions. The third part explains the blurring of the de jure–de facto distinction and the rise of the intent doctrine in the Court’s 1973 decision in Keyes v. School District No. 1. It then discusses how an increasingly conservative Court narrowed the definition of discriminatory intent while embracing “colorblind” interpretations of equal protection that treated the use of racial classifications—even for integrative purposes—as presumptively unconstitutional. Together, these doctrinal shifts made it harder both for lower federal courts in the decades after Brown to mandate desegregation and for modern “de facto” school districts to pursue even voluntary measures that assigned students to public schools by race.

The Origins of Northern Segregation

Northern segregation was arguably as pervasive as it was in the South though its origins were more complex due to the layers of practices that created and reinforced it. Government housing policies that confined black people to racially isolated neighborhoods were a major culprit. Other sources were less defined. As Robert L. Carter, then general counsel of the NAACP and a principal architect of Brown wrote, “the widespread extent of de facto school segregation stems in part from the indifference, in part from the acquiescence, and in part from the conscious acts of public school officials.” This behavior ranged from passive acquiescence to racial separation, to explicit racism and subtler racial ideologies that inhibited integration. The constitutionality of the more overt maneuvers by school officials was easier to diagnose, while other tactics were harder to categorize.

Northern school officials used seemingly endless techniques to avoid integration. Optional attendance zones and transfer policies allowed white students to leave schools with increasing numbers of black students for predominantly white schools. School feeder patterns channeled students into schools according to their race. The failure of school boards to maintain and adequately staff buildings deepened segregation, as did hiring practices that tracked and reinforced a school’s racial identifiability. Overcrowded classrooms, lower per-pupil expenditures, and substandard educational materials in black schools were contributing factors to segregation. So was school construction. When opportunities arose for new schools in the years after Brown, local officials often located them in racially isolated communities, suggesting that they were motivated by discriminatory purpose. Other kinds of “routinized” inequality in the form of racially biased teacher training, “discriminatory placement, and color-class attitudes” skewed the system toward racial separation. Testing and tracking and low expectations further disadvantaged black children and impeded their mobility. Neighborhood schools were another
major obstacle to integration. In racially mixed communities white parents avoided them. But as residential segregation grew, so did the demand for neighborhood-based education.

In short, northern school officials were often complicit in school segregation, though their complicity varied in degree and in kind. Although these practices were educationally harmful, lower courts were divided on their constitutionality. Eventually, the U.S. Supreme Court would require more specific showings of discriminatory intent to establish an equal protection violation. This shift widened the gap between de jure and de facto segregation and narrowed the field of possible constitutional claims for achieving integration. In the meantime, lower federal courts throughout the country grappled with how to adjudicate racial separation in public schools.

The Evolution of the De Jure-De Facto Distinction

Brown nurtured black consciousness about the harms of school segregation and helped set the stage for northern protests. Black parents and their children marched, organized sit-ins and boycotts, and held meetings to agitate against segregation in Boston, Cincinnati, Chicago, Cleveland, New York City, and Oakland, as well as in smaller communities across New York and New Jersey. A 1962 U.S. Civil Rights Commission Report documented protest activity in fourteen northern and western states and forty-three cities. Black families filed lawsuits challenging government policies and practices that knowingly, or indifferently, isolated black children in public schools in California, Indiana, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, and Pennsylvania. Cases that focused on the psychological harms of segregation pressed the boundaries of the de jure–de facto distinction, requiring federal courts to determine whether school districts had violated equal protection. The following sections discuss the role of northern and southern desegregation cases respectively in the development of the de jure–de facto doctrine.

The Role of Northern Cases

As discussed in the previous section, the policies and practices of northern school officials in the immediate post-Brown era spanned the de jure–de facto continuum. Although the motives of these officials were often unclear, the negative educational consequences of racial imbalance were relatively apparent. This raised a critical question: was segregation that was neither mandated nor overtly permitted by school officials constitutional under Brown? The answer turned on additional questions—that I do not explore here—about the scope of state action doctrine and concerns about the use of federal judicial power against public schools.
Central to the confusion was whether discriminatory intent was required to establish a constitutional claim or whether racial imbalance alone would suffice. Brown itself was unclear. Although the consolidated cases that were decided under Brown were brought in jurisdictions that either required or permitted segregation, the language of the decision was more equivocal. By declaring that “[s]eparate educational facilities [were] inherently unequal,” Brown suggested that a constitutional violation could be sustained by the mere fact of racial imbalance across public schools. Given this lack of clarity, lower federal courts struggled to determine the constitutionality of practices that racially isolated black students, producing a spectrum of opinions on the lawfulness of northern segregation.

The terminology of segregation reflected and reinforced the confusion. School officials resisted the label “segregation” because it implied immoral, intentionally discriminatory behavior and inaccurately depicted, in their view, the “realities” of northern school systems. But other descriptors failed to capture the degree of governmental involvement in creating racially imbalanced schools and the seriousness of the educational and sociological harms it caused. As Robert Carter observed, “de facto” suggested that segregation was “purely accidental” and, therefore, relieved government officials of remedial responsibility. “Racial imbalance,” though commonly used, was also problematic as it appeared to minimize the harms to black children, as well as conveying notions that racial separation was natural and inevitable.

Many questions lingered in the shadows of the de jure–de facto distinction. For example, how should courts evaluate governmental conduct that “foreseeably” led to racially separate public schools? The answer depended on whether courts prioritized intent as an element of equal protection and on how broadly or narrowly they defined it. Though foreseeability meant that state actors were likely aware of a policy’s segregative impact, for some courts simple awareness was not enough to establish that a policy was unconstitutional. A result may have been predictable based on the chosen course of action, but it did not necessarily mean that it was motivated by a specific desire to harm black students.

For other courts, foreseeability or some level of awareness was sufficient. In U.S. v. Board of School Commissioners of City of Indianapolis, for example, a district court in Indiana concluded that intent could be inferred from “consciously consummated acts.” Several courts of appeals reached similar decisions in cases arising out of Michigan, New York, and Massachusetts. Berry v. School District of City of Benton Harbor held that a “presumption of segregative intent arises when plaintiffs establish that the natural, probable and foreseeable result of public officials’ action or inaction was an increase or perpetuation of public school segregation.” The Second Circuit Court of Appeals similarly concluded in Hart v. Community School District Board of Education and in United States v. Yonkers. In Morgan v. Kerrigan, which challenged segregation in Boston’s public schools, the court held that the “foreseeable racial impact” of the school district’s deci-
sions, coupled with “statements of express intention not to counter anti-integration sentiment” among white parents, constituted segregative intent.

Still, ambiguity about the constitutional standard in Brown created uncertainty about when school districts were under an affirmative duty to desegregate. That northern school segregation resulted from multiple sources—including school officials, public agencies, and government policies that required or incentivized racial segregation in housing—complicated the analysis. Thus, governmental activity that merely furthered segregation fell into a constitutional gray zone: racially motivated conduct was plainly unlawful, but courts divided on whether so-called “fortuitous” separation passed constitutional muster.

For example, in Bell v. School City of Gary, the district court rejected the claim that a school district had an “affirmative duty” to integrate racially imbalanced schools in the absence of a showing of discriminatory purpose. The Seventh Circuit Court of Appeals affirmed the district court’s ruling that no constitutional violation occurred based on a “neighborhood school plan, honestly, and conscientiously constructed with no intention or purpose to segregate the races.” However, in Barksdale v. Springfield School Committee, a district court set aside a neighborhood plan that resulted in the nearly complete isolation of black students. While finding that district lines had been drawn based on location, capacity, safety, and convenience and not discriminatory intent, the court nonetheless determined that the plan was “tantamount to law compelling segregation.” It was “neither just nor sensible,” the court observed, “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.” Concerns about the actual educational performance of black schools factored into the district court’s decision, as did more subjective concerns about the stigma of segregation and what it conveyed to black students.

Barksdale probably occupies the far end of the spectrum of lower court opinions that declared racial separation in public schools unconstitutional. Other decisions that struck down school policies ranged in their focus—from emphasizing the simple fact of segregation itself, as in Barksdale, to imputing awareness of segregative outcomes to school officials based on activity that furthered racial separation. Courts wrestled with whether “inaction” by school officials, in the face of growing segregation and the “educational deterioration [that] followed in its wake,” was enough to establish a constitutional violation. Given such uncertainty, some courts were reluctant to declare racial separation categorically unconstitutional and instead limited their rulings to the specific facts of a case. These cases made it even more difficult to delineate a clear boundary between schools that were merely “racially imbalanced” and those that were unconstitutionally “segregated.”

In Blocker v. Board of Education of Manhasset, for example, the district court appeared to hold on the facts presented that racial separation in the schools was unconstitutional, so long as it could be feasibly remedied. Yet its ultimate conclusion was imprecise:
The court does not hold that the neighborhood policy per se is unconstitutional: it does hold that this policy is not immutable. It does not hold that racial imbalance and segregation are synonymous or that racial imbalance, not tantamount to segregation, is violative of the Constitution. It does hold that, by maintaining and perpetuating a segregated school system, the defendant Board has transgressed the prohibitions of the Equal Protection Clause of the Fourteenth Amendment.\(^80\)

In the absence of clear guidance from the U.S. Supreme Court, some lower courts helped to define the constitutional parameters of northern claims against intentional segregation. One influential district court decision was *Taylor v. Board of Education of New Rochelle*, in which plaintiffs successfully sued to enjoin new school construction on the site of an all-black school in New Rochelle, New York, on grounds that it would perpetuate segregation.\(^81\)

*Taylor*'s significance lay in its finding of discriminatory intent by a predecessor school board based on a variety of racial practices, including the selective use of transfers for white students\(^82\) and gerrymandered school district lines that tracked demographic shifts in the black population.\(^83\) *Taylor* also exposed the racial underpinnings of white preferences for neighborhood schools,\(^84\) which dissipated as communities became more integrated.\(^85\) According to the district court, this “total course of conduct” by the prior school board fell “squarely within the plain meaning” of *Brown*.\(^86\) The court found that the existing board’s “deliberate intransigence and inflexibility” to remedy the vestiges of this segregation “in the face of public pressures and expert advice” were “motivated by a desire” to maintain it.\(^87\)

*Taylor* generated national attention\(^88\) and spurred protests and additional lawsuits across the country.\(^89\) Its allure seemed to lie in the district court’s ability to discern the subtle deliberateness of northern-style discrimination as well as the court’s insistence that “compliance with the Supreme Court’s edict [in *Brown* would be] no less forthright in the North than in the South [and that] no double standard [would] be tolerated.”\(^90\) In this context, the de jure–de facto distinction proved relatively useless. “[I]t is of no moment whether the segregation is labelled by the defendant as ‘de jure’ or ‘de facto,’” the court observed, “as long as the Board, by its conduct, is responsible for its maintenance. Constitutional rights are determined by realities, not by labels or semantics.”\(^91\) The touchstone of constitutionality was segregative “motivation,” whether pursued through “formal separation” or “indirectly, through over-rigid adherence to artificially created boundary lines as in the present case.”\(^92\)

A standard that inquired into a school board’s motivation, however, presented its own difficulties. One commentator questioned how such a requirement could be reconciled with the common principle that motive was not a legitimate basis for finding a statute unconstitutional.\(^93\) There was also the practical problem of how to decide cases in which discriminatory motive was held by a minority of a board or mixed motive cases where an outcome could be traced both to “innocent” and discriminatory rationales.\(^94\) Questions surfaced about the legitimacy of judicial intervention in cases involving attenuated racial mo-
tive, such as when legislators engaged in segregative action based supposedly not on their own motivations but on the racial prejudices of their constituents. Thus, a constitutional framework that emphasized motive was complicated.

As litigants and courts struggled to assess the constitutional boundaries of segregation and the remedies for redressing it, the very meaning of “discrimination” became contested. Plaintiffs argued that the conscious use of race to advance integration was not only desirable but constitutionally required. School districts countered that the explicit use of race was itself discriminatory, regardless of its purpose, and deployed “colorblindness” narratives to resist race-specific remedies for segregation. In Philadelphia, for example, school officials insisted that the district remain “colorblind” despite the acknowledged “racial imbalance” in its public schools, while black leaders argued for race-conscious measures to promote integration. These debates in school desegregation cases foreshadowed the narrow interpretation of Brown decades later in the Supreme Court’s plurality opinion in Parents Involved and its adoption of “colorblindness” rationales that undermined the possibilities for even voluntary integration.

In sum, the northern dimensions of the de jure–de facto distinction were layered; and courts approached the constitutional questions it raised in a variety of ways. Two decades after Brown, the U.S. Supreme Court decided cases that would eventually limit federal judicial remedies over school desegregation, first by requiring a showing of discriminatory intent in Keyes v. School District No. 1 and then, in Personnel Administrator of Massachusetts v. Feeney, by tightening intent to require a state-of-mind “akin to malice.” As discussed in the section, “Keyes, the Blurring of the De Jure–De Facto Distinction, and the Rise of the Intent Doctrine,” below, this new intent standard would come at a significant cost, as it later substantially limited the constitutional basis for finding de jure segregation and for justifying race-conscious remedies to advance integration. In the meantime, lower courts continued to adjudicate school desegregation cases in the South. Supreme Court decisions in these cases also would shape the contours of the de jure–de facto distinction.

The Role of Southern Cases

Complexity over the meaning of de facto segregation also surfaced in southern cases, though less directly than in their northern counterparts. After disbanding mandatory segregation policies, southern school boards adopted facially race-neutral “freedom-of-choice” plans that ostensibly allowed black students to choose to attend white schools. However, questions soon arose about whether these policies satisfied the boards’ constitutional obligations to eliminate the vestiges of school segregation. In these cases, the U.S. Supreme Court broadly construed the meaning of “de jure,” signaling that it would not fully abide the de jure–de facto distinction.

For example, in its 1968 decision in Green v. New Kent County, the Court rejected formalistic “choice” remedies that failed to take realistic account of segregation’s persistent and systemic nature. The school board’s plan allowed students to choose between all-white
and all-black schools that had been segregated by law. In the three years of the plan’s operation, however, not a single white student had opted into the black school, while approximately 15 percent of black students had selected the white school.\textsuperscript{101}

In a unanimous opinion by Justice Brennan, the Court concluded that the school board’s plan failed to discharge its affirmative duty to eliminate its vestigial discrimination “root and branch.”\textsuperscript{102} Thus, the proper constitutional inquiry was not whether the school board in adopting the policy intended the schools to remain racially identifiable, but whether its action “promise[d] realistically to convert promptly to a system without a ‘white’ school and a ‘Negro’ school, but just schools.”\textsuperscript{103} The Court reached the same result in \textit{Monroe v. Board of Commissioners of City of Jackson}, striking down a board policy that had allowed students to avoid integration by transferring out of their assigned schools.\textsuperscript{104} As in \textit{Green}, the district’s policy had the practical effect of perpetuating its formerly de jure system, even if it no longer formally demanded segregation.

As one commentator observed at the time,\textsuperscript{105} the segregation in \textit{Green} technically could have been construed as de facto because it had not been mandated by school authorities. The same was true in another case, \textit{Swann v. Charlotte-Mecklenburg Board of Education},\textsuperscript{106} which affirmed the broad powers of federal courts to remedy the effects of the prior de jure system. As in \textit{Green}, the \textit{Swann} Court required former de jure jurisdictions to ensure that schools were no longer racially identifiable.\textsuperscript{107} At issue was whether the federal district court had exceeded its authority in imposing an ambitious desegregation plan to bus students fifteen miles round-trip across noncontiguous neighborhoods. Reversing the court of appeals, which had found against the district court, the Court in an opinion by Justice Burger noted that “an assignment plan is not acceptable simply because it appears to be neutral.”\textsuperscript{108} The problem was that an ostensibly “neutral” plan could “fail to counteract the continuing effects of past school segregation.”\textsuperscript{109}

Once again, the Court stressed the school board’s “affirmative” obligation “to achieve truly nondiscriminatory [student] assignments.”\textsuperscript{110} By continuing federal judicial oversight over school systems that remained segregated “in fact” these decisions indicated that \textit{Brown} applied not only to states and localities that explicitly required or permitted segregation but also to those in which the effects of prior de jure segregation persisted as a matter of private choice or community custom. While cautioning “that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law,” the Court nonetheless directed the district judge or school officials to “make every effort to achieve the greatest possible degree of actual desegregation.”\textsuperscript{111} Because the breadth of these remedies appeared to depend on expansive conceptions of the underlying equal protection violation, \textit{Green} and \textit{Swann} generated questions about the practical constitutional difference between de jure and de facto segregation.\textsuperscript{112} As discussed in the next section, the Court’s decision in \textit{Keyes v. School District No. 1} further eroded this distinction.\textsuperscript{113}
As battles over northern segregation unfolded in the lower courts, the U.S. Supreme Court’s 1973 decision in *Keyes v. School District No. 1* charted a new path for school desegregation doctrine. *Keyes* is probably best known today for steering the Court toward an intent requirement in school cases, but in this early era it also blurred the line between de jure and de facto segregation.

The key issue in *Keyes* was whether racial separation across Denver, Colorado’s school system could be attributed to intentional segregation in a discrete portion of the district. The Denver school board had never operated a statutorily dual system, but as in other northern jurisdictions, it used a variety of practices that maintained segregation, including gerrymandered attendance boundaries and policies that allowed white students to opt out of integrated schools. As the first school desegregation case in a major city outside the South, some argued that *Keyes* presented an opportunity for the Court to reject the troublesome de jure–de facto distinction.

As Mark Tushnet has observed, the Justices in *Keyes* were more focused on remedies—specifically busing—than on liability. Indeed, the Court was nearly unanimous in its conclusion that the Denver school board’s actions were unconstitutional. The doctrinal path to that result, however, was tricky. Justice Powell—a southerner and a key vote on the Court—wanted to eliminate the de jure–de facto distinction because it generated resentment in the South. But the price of his vote was to eliminate busing. Justice Brennan, who authored the majority opinion, compromised by retaining the de jure–de facto distinction but created a rule that would allow federal courts to reach “large swaths of Northern segregation.” Clarifying that the dividing line between de jure and de facto segregation was “purpose or intent to segregate,” the new rule provided that intentional segregation in a “substantial portion” of a school district justified a finding of de jure segregation across the entire system and “root and branch” remedies to address it. The compromise had the potential to be far-reaching: while leaving the de jure–de facto distinction intact, *Keyes* had effectively hollowed it out. As Myron Orfield notes, because systematic conduct “was virtually always present in segregated systems, most *Keyes* claims were successful.” Indeed, the Court later would rely on *Keyes* to uphold system-wide remedies in two cases out of Ohio, *Columbus Board of Education v. Penick* and *Dayton Board of Education v. Brinkman*.

But if *Keyes* was the “high water mark” for northern integration, its intent requirement boomeranged following the Court’s decision in *Milliken v. Bradley* one year later. The question in *Milliken* was whether a federal district court could mandate the participation of white suburbs in a desegregation plan for public schools in the city of Detroit. With a growing black population in Detroit and dwindling numbers of white children in the local schools, the court had concluded that desegregation could not be accomplished by limiting the remedy to city borders.
The constitutional problem was that responsibility for the underlying segregation lay solely with Detroit officials; there was no real proof that the suburbs had caused it. Over a vigorous dissent by Justice Marshall, who had litigated Brown, the Milliken Court blocked the metropolitan plan. Plaintiffs seeking interdistrict remedies had to show that “racially discriminatory acts” by the state or the suburban districts were a “substantial cause of interdistrict segregation.” Without that predicate finding, the district court could not constitutionally order a remedy that crossed district lines.

Milliken’s impact was substantial in the wake of government housing policies around the country that had instigated white flight to the suburbs and confined black people to central cities. Options for integrating schools within districts also became more limited as the Court tightened the requirements for establishing an equal protection violation. Two years after Milliken, the Court, in Washington v. Davis, explicitly held that a showing of intent—rather than impact alone—was essential to an equal protection claim. Firing a warning shot over school desegregation, the Davis Court took pains to note that “predominantly black and predominantly white schools” would not violate the Constitution in the absence of demonstrated intent. The basis for an equal protection claim narrowed further in Personnel Administrator of Massachusetts v. Feeney. There the Court defined “intent” to mean governmental action taken “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” After Feeney, government actions that “foreseeably” disadvantaged groups would no longer alone violate equal protection. Although during the same term Justice Rehnquist had unsuccessfully pushed in Columbus and Dayton to limit equal protection violations to government action that specifically “caused” segregation, Davis and Feeney would prove to be a victory for the Court’s increasingly conservative wing. By widening the space between de jure and de facto segregation, the Court’s decisions in Milliken, Davis, and Feeney collectively unraveled the opportunities for systemic school desegregation in northern districts that had initially been presented by Keyes.

The damage done by the Supreme Court in school desegregation spread beyond northern cases. Shifts in the balance of power on the Court in the late 1980s led to other decisions that undermined school desegregation in the South. For example, in Board of Education of Oklahoma City v. Dowell, the durability of prior findings of intent as a basis for desegregation remedies weakened as the Court sought to limit district courts’ remedial powers in older cases. Instead of focusing on the persistence of racial imbalance in the former de jure districts, the Dowell standard emphasized the school boards’ “good faith” in complying with ongoing desegregation decrees and “whether the vestiges of past discrimination had been eliminated to the extent practicable.” The Supreme Court’s focus on the “practicability” of desegregation remedies, combined with its decision to impose—and then tighten—the intent requirement reflected its impatience with segregation as a constitutional concern. This impatience manifested in the Court’s efforts to limit federal judicial power in cases challenging northern segregation and was further reflected in its skepticism that ongoing racial imbalance was constitutionally traceable to prior de jure discrimination.
Conclusion

The modern de jure–de facto distinction rests on a troubling irony: Equal protection now makes it harder for federal courts to find that segregation in public schools is unconstitutional and easier to strike down racial classifications that promote voluntary integration. Under a malice-based standard of intent, government practices that generate school segregation—which might have triggered federal court findings of unconstitutionality in the period after Brown—no longer elicit meaningful constitutional scrutiny. As a result, pervasive “racial imbalance” in public schools has collapsed into the “de facto” category of segregation, placing it beyond federal judicial remedy.

At the same time, racial discrimination claims on behalf of traditionally marginalized groups have become less viable under equal protection’s more rigorous intent standard, while “colorblindness” narratives successfully advocated by white plaintiffs have become increasingly salient. Under this colorblindness framework, any typing of individuals by race—even for beneficial purposes—is presumptively unconstitutional. In practical terms, this means that it is easier for white plaintiffs to challenge race-conscious policies that directly benefit people of color—like voluntary integration—than it is for people of color to prove their own claims of intentional discrimination.

These consequential turns in equal protection set the stage for the Court’s 2007 decision in Parents Involved in Community Schools v. Seattle School District No. 1. As discussed in this chapter’s introduction, Parents Involved struck down voluntary integration plans that assigned students by race to promote integration across public schools in Seattle, Washington, and Jefferson County, Kentucky. Having obscured the government’s role in fostering segregation in Seattle in particular, the Court’s decision presumed that the school districts had harmfully injected race into a context that was itself race-neutral. Four of the Justices even equated the districts’ race-conscious efforts to redress “de facto” segregation with overtly racist practices from the de jure era of Brown.

These collective shifts in equal protection have normalized segregation. Federal courts now attribute racial separation in public schools to private choices and preferences, rather than to patterns rooted in or derived from government policies and practices, conditioning us to believe that segregation is natural. As segregation has become invisible to law, it has lapsed in the public’s consciousness as a legitimate source of social concern and the stories of its origins have faded.

We are left to wonder what might have happened had the Court adopted the broad meaning of Brown initially pursued by some northern courts. Spurred by litigants who pressed Brown’s boundaries, these courts took to heart Brown’s urging that segregation is “inherently” unequal. This chapter reveals just how far they pushed equal protection doctrine as well as how far we have regressed under modern constitutional law. At present, northern schools are more segregated than schools in the South. Had the Court taken a different turn, this country might have pursued a more racially inclusive path in the struggle for educational opportunity and inclusion. Having now disabled voluntary integration
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plans, *Parents Involved* has pushed this country even further from the promise of *Brown*. This chapter closes with Justice Breyer’s dissent, which eloquently makes this point:

In this Court’s finest hour, *Brown v. Board of Education* challenged [this country’s history of segregation] and helped to change it. For *Brown* held out a promise. It was a promise embodied in [constitutional] Amendments designed to make citizens of slaves. It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation’s cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live ...

The last half century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the [voluntary integration] plans ... is to threaten the promise of *Brown*. The plurality’s position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.153

Notes:


(2.) *Id.* at 788–789 (Kennedy, J., concurring).

(3.) *See e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (declaring unconstitutional affirmative action in admissions at state medical school); *see also* Richmond v. J.A. Croson, 488 U.S. 469, 510–511 (1989) (declaring unconstitutional affirmative action in local government contracting program).


(5.) *See* Freeman v. Pitts, 503 U.S. 467, 489 (1992) (noting that court’s “end purpose,” in addition to remedying the constitutional violation, is to restore state and local control over its school system); *see also* Bd. of Educ. v. Dowell, 498 U.S. 237, 248 (1991) (discussing importance of local control).

(6.) *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 845 (2007) (Breyer, J., dissenting) (“I do not understand why this Court’s cases, which rest the significance of a ‘unitary’ finding in part upon the wisdom and desirability of returning schools to local control, should deprive those local officials of legal permission to use means they once found necessary to combat persisting injustices.”) (emphasis in original).


(8.) *See Parents Involved*, 551 U.S. at 715–716.
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(9.) *Id.*

(10.) *Id.* at 806 (Breyer, J., dissenting) (“[T]he distinction between *de jure* segregation (caused by school systems) and *de facto* segregation (caused, e.g., by housing patterns or generalized societal discrimination) is meaningless in the present context[.]”).

(11.) *Id.* at 820 (“No one here disputes that Louisville’s segregation was *de jure*. But what about Seattle’s? Was it *de facto? De jure? A mixture? Opinions differed.*”).

(12.) *Id.* at 807.

(13.) *Id.*; see also Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 283 (1972) (“If the distinction between *de facto* and *de jure* segregation was, in principle, reasonably clear at the time of *Brown*, subsequent developments have done much to blur it.”); Robert Allen Sedler, *School Segregation in the North and West: Legal Aspects*, 7 ST. LOUIS U. L.J. 228, 228–229 (1963) (describing confusion about the distinction between “*de jure*” and “*de facto*” segregation).


(15.) See *Parents Involved*, 551 U.S. at 748.

(16.) See infra section in this chapter, “*Keyes*, the Blurring of the *De Jure–De Facto* Distinction, and the Rise of the Intent Doctrine.”


(20.) *Id.* at 503; see also Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R. C.L.L. REV. 1, 25 note 131 (2016) (“*De facto* segregation was the term used in the 1970s to describe segregation that was not caused by intentional segregationist state action (intentionally or facially segregationist state action was referred to as “*de jure*” segregation)).

(21.) See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Ed.* 402 U.S. 1, 28 (1971) (“Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis.”).


(23.) Unless otherwise specified, throughout this chapter I use “segregation” and “racial imbalance” to refer to all forms of racial separation, including racial separation across public schools that would be considered both constitutional and unconstitutional.
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(25.) See Sidney M. Peck & David K. Cohen, The Social Context of De Facto School Segregation, 16 CASE W. RES. L. REV. 572, 585 (1965) (describing confusion in the use of the term “de facto,” which was variously understood to “mean school segregation resulting from residential accident, not intent or design on the part of school officials” and to include “deliberate administrative action,” which technically was “equivalent to de jure segregation”).

(26.) This chapter focuses on federal courts, but state courts also grappled with the de jure–de facto distinction under their state constitutions. See, e.g., Jenkins v. Twp. of Morris Sch. Dist., 279 A.2d 619, 629 (N.J. 1971) (noting state’s affirmative obligation to “eliminate racial imbalance[] regardless of its causes”) (internal citation omitted); Crawford v. Bd. of Educ., 551 P.2d 28 (Ca. 1976) (observing that a “significant line” of state court decisions “authoritatively establish[es]” the constitutional obligations of state school boards “to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin”).


(28.) See Keyes, 413 U.S. at 218 (Powell, J., concurring in part and dissenting in part) (“There is segregation in the schools of many of these cities fully as pervasive as that in southern cities prior to the desegregation decrees of the past decade and a half.”); JEANNE THEOHARIS, A MORE BEAUTIFUL AND TERRIBLE HISTORY: THE USES AND MISUSES OF CIVIL RIGHTS HISTORY 31–61 (2018); Carter, supra note 19, at 503 (“In many instances, the separation of the races exists to the same extent as in the South, despite the absence of formal pupil assignment criteria based specifically on race.”); Peck & Cohen, supra note 25, at 587 (describing a national survey which reported that public school segregation in the North was “widespread and substantial”); see also generally THE UNITED STATES COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS U.S.A.: PUBLIC SCHOOLS NORTH AND WEST 1962 (1962) [hereinafter CIVIL RIGHTS U.S.A.] (discussing northern school segregation).

(29.) As Sidney Peck and David Cohen noted:

[T]he color line in Northern public schools is the consequence of past statutes and community traditions, present policies and practices, and acceptance by school officials of the residential expression of racism in the larger society. The sheer physical aspect of school segregation is not only the product of multiple intent, but it is becoming increasingly massive in dimensions and rigid in character. School officials have either passively reflected or actively intensified America’s apartheid ecology in their policies and practices. It is this ecology which provides the structural foundation of the system of school segregation. However, it is not simply the where of education, but also the how which is in question, for the prevailing pattern of segregation pervades the educational process and presents itself on a variety of levels in the everyday operation of schools.
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Peck & Cohen, *supra* note 25, at 590 (internal citations omitted, emphasis in original).


(32.) See Peck & Cohen, *supra* note 25, at 588; cf. Davis v. Sch. Dist. of City of Pontiac, 443 F.2d 573, 576 (1971) (noting “that school location and attendance boundary line decisions ... more often than not tended to perpetuate segregation”).


(34.) *Id.* at 590–591.

(35.) *Id.* at 593–596.

(36.) *Id.* at 589 (“Current programs of construction in segregated neighborhoods have represented a continued, large-scale capital investment in new segregated facilities. The largest block of new school construction since the twenties appears to have taken place in the past decade, and is still fully under way. In those cities where data on construction programs exist, it appears that only a small number of classrooms have been built to serve integrated school populations.”).

(37.) *Id.* at 590 (“It is ironic and perhaps not without meaning that the pattern of constructing new Negro schools in the North since 1954 parallels a similar pattern in the South during the pre-1954 period.”).

(38.) *Id.* at 593, 595–596.

(39.) See John Leubsdorf, *Completing the Desegregation Remedy*, 57 B.U. L. REV. 39, 45 (1977); Peck & Cohen, *supra* note 25, at 586 (“The ‘neighborhood’ policy of school attendance, expressing as it does the color and class characteristics of urban populations, has resulted in increasingly massive concentrations of schools wholly or predominantly Negro in pupil composition.”).

(40.) See Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 461 n.8 (1979) (“Despite petitioners’ avowedly strong preference for neighborhood schools, in times of residential racial transition, the Board created optional attendance zones to allow white students to avoid predominantly black schools, which were often closer to the homes of white pupils.”).

(41.) See Peck & Cohen, *supra* note 25, at 586 (“The more intense and expansive residential segregation has become, the more insistent have grown the voices seeking to maintain the neighborhood school as the sacred touchstone of American education.”); *see also* Kelly v. Guinn, 456 F.2d 100, 108 (9th Cir. 1972) (describing Clark County, Nevada’s use of neighborhood schools to promote and maintain segregation); Spangler v. Pasadena Bd.
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(42.) See Matthew D. Lassiter, *De Jure/De Facto Segregation: The Long Shadow of a National Myth*, in *THE MYTH OF SOUTHERN EXCEPTIONALISM* 32 (Matthew D. Lassiter & Joseph Crespino eds., 2010) (In the year *Brown* was decided, the New York City board of education “passed a resolution pledging to comply with *Brown*, which it characterized as a ‘challenge to ... Northern as well as Southern communities.’”). One might wonder about the role that southern activism played in the struggle for integration in northern schools. Although the contours of their collaboration are unclear, Thomas Sugrue writes that “[n]orthern activists shared their experiences with their southern counterparts, and by turn ... were moved to action by the example of the southern civil rights movement.” THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* xvi (2008). He also notes that “[m]any veterans of the battles against segregated facilities in the North” participated in sit-ins in the South during the 1950s and offered lessons and advice to southern activists. *Id.* The black press was also a crucial source of information. As a result of their reporting, “activists in Detroit could learn lessons from their counterparts in suburban New Jersey, who in turn followed the progress of protests in places as far away as Cincinnati, Atlanta, or Birmingham.” *Id.* at xviii–xix.

(43.) Carter, *supra* note 19, at 505.


(46.) A key question in northern school desegregation cases was whether the harms of segregation alone could establish a constitutional claim:

It is a difficult question whether *Brown v. Board of Education* applies to mere racial imbalance—sometimes called de facto segregation—that is, to a case in which a neighborhood school policy, without gerrymandering or without other misconduct of the school authorities, has led to a preponderantly Negro school. Some of the Supreme Court’s language in *Brown* can apply to this type of segregation ... since this type of imbalance may also “generate a feeling of inferiority as to [the Negro children’s] status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”


(47.) The fact that northern school segregation often originated with multiple actors, including school officials, public agencies, and private individuals, further complicated the analysis. See Peck & Cohen, *supra* note 25, at 585 n.48.
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(49.) See Eyer, supra note 20, at 24-25 (noting that the Court from 1964 to 1970 increasingly used doctrines such as the state action doctrine, or remedial arguments “to sidestep disputes over whether de facto discrimination was actionable”).

(50.) See Milliken v. Bradley, 418 U.S. 717, 741 (1974) (discussing importance of local control of public schools as justification for limiting power of federal courts to order interdistrict relief without predicate showing of an interdistrict violation).


The fundamental legal question arising in all northern and western cities having a large Negro population is found here: Does the Constitution require a school board which has not had and does not have a policy to segregate by race to take action to remedy racial segregation in fact existing in the schools?


(53.) Id. at 495.

(54.) Compare Dennis Powers, De Facto School Segregation and the “State Action” Requirement: A Suggested New Approach, 48 INDIANA L.J. 304, 306 (1973) (“[T]he constitutionally significant fact of Brown was segregation’s harmful impact on black children, rather than the origin and nature of the segregation itself.”), with Goodman, supra note 13, at 277 (arguing that the “major premise” of Brown was “that legislative classifications based on race, at least when disadvantageous to Negroes or other minorities, are constitutionally disfavored”) (emphasis in original). See also Mark Tushnet, A Clerk’s-Eye View of Keyes v. School District No. 1, 90 DENV. U. L. REV. 1139, 1144 (2013) (“[I]t was plausible to think that it was the fact of segregation, not the fact of segregation by law, that did the damage that was articulated as one of the Court’s concerns.”).

(55.) See Carter, supra note 19, at 503.

(56.) See id. Indeed, Matthew Lassiter attributes the concept of “de facto” segregation to civil rights activists who thought the term would appease “the collective conscience of white liberals and public policy makers.” Matthew D. Lassiter, De Jure/De Facto Segregation: The Long Shadow of a National Myth, in THE MYTH OF SOUTHERN EXCEPTIONALISM 26 (Matthew D. Lassiter & Joseph Crespino eds., 2010). Some courts were sensitive to these connotations. See, e.g., Johnson v. San Francisco Unified Sch. Dist., 339 F. Supp. 1315, 1319 (N.D. Cal. 1971) (observing that “the term de jure ... need not be one stigmatizing school authorities [because] [i]t does not imply criminal or evil intent”). The strategy backfired, however, as white decision makers “seized upon the ‘de facto’ rationale through a ‘color-blind’ discourse that defended neighborhood schools and segregat-
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...housing as the products of private action and free-market forces alone, a sphere in which government had not caused, and therefore had no right or obligation to remedy, racial inequality.” Id. at 27; cf. U.S. v. Jefferson Cnty. Bd. of Educ., 372 F.2d 836, 852 (5th Cir. 1966) (“This Court has not had to deal with nonracially motivated de facto segregation, that is, racial imbalance resulting fortuitously in a school system based on a single neighborhood school serving all white and Negro children in a certain attendance area or neighborhood.”).

(57.) See Carter, supra note 19, at 503.

(58.) Legal commentators at the time perpetuated the innocence associated with these terms. See Goodman, supra note 13, at 275 (describing “racial imbalance” as “resulting merely from adherence to the traditional, racially neutral, neighborhood school policy in a community marked by racially segregated residential patterns”); see also Matthew D. Lassiter & Joseph Crespino, Introduction: The End of Southern History, in THE MYTH OF SOUTHERN EXCEPTIONALISM 9 (Matthew D. Lassiter & Joseph Crespino eds., 2010) (describing how the de jure–de facto distinction “naturalized the racial system in ‘the North’”).

(59.) See Arthur v. Nyquist, 573 F.2d 134, 142 (2d Cir. 1978) (“foreseeability cannot be identified with intention, for there are surely many cases in which events are both known to be likely, but nevertheless not intended”).

(60.) United States v. Bd. of Sch. Comm’rs, 474 F.2d 81, 85 (7th Cir. 1973).


(62.) Hart v. Cmty. Sch. Bd. of Educ., 512 F.2d 37, 51 (2d Cir. 1975) (concluding that foreseeability creates a presumption of segregative intent).

(63.) United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1229 (2d Cir. 1987) (concluding that intent was “inferrable [sic] from the foreseeably increasingly segregative effect of its neighborhood-school policy” as well as its pursuit of other policies that aggravated racial imbalance in the schools); see also Lee v. Nyquist, 318 F. Supp. 710, 720 (W.D.N.Y. 1970) (declaring unconstitutional state law that prohibited plans to alleviate racial imbalance in schools without approval of local elected school board), aff’d, 402 U.S. 935 (1971).

(64.) 509 F.2d 580, 588 (1st Cir. 1974).

(65.) See Goodman, supra note 13, at 276–277.

(66.) Peck & Cohen, supra note 25, at 585 n.48.

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(69.) Bell v. Sch. City of Gary, 324 F.2d 209, 213 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964); cf. Ybarra v. City of San Jose, 503 F.2d 1041, 1043-1044 (9th Cir. 1974) (describing law as “unsettled” on question whether school segregation resulting from actions of state agencies and various local land use policies was constitutionally cognizable).


(71.) *Id.* at 545-546.

(72.) *Id.* at 544.

(73.) *Id.* at 546.

(74.) *Id.*

(75.) *Id.* The court of appeals vacated the district court’s judgment on the grounds that the court’s interlocutory order—directing the school district to prepare a remedial plan—was premature. *See* Springfield Sch. Comm. v. Barksdale, 348 F.2d 261, 264-266 (1st Cir. 1965) (concluding that federal interference was unwarranted given voluntary efforts by state to integrate prior to litigation).

(76.) *See* Carter, *supra* note 19, at 504.


(78.) Note the following observations by the court:

On the facts of this case, the separation of the Negro elementary school children is segregation. It is segregation by law—the law of the School Board. In light of the existing facts, the continuance of the defendant Board’s impenetrable attendance lines amounts to nothing less than state imposed segregation. The defendant Board ‘cannot accept and indurate segregation on the ground that it is not coerced or planned but *accepted.*’

*Id.* at 226.

(79.) *See* *Id.* at 229 (“There are, no doubt, situations in which no alternative may be feasible. No such insurmountable obstacle appears to be present here.”).

(80.) *Id.* at 230.


(83.) *Id.* at 184–185.

(84.) *See* Carter, *supra* note 19, at 506-508.
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(85.) *See Taylor*, 191 F. Supp. at 185 (observing that purpose of gerrymandered attendance zones was to “confine” black students within one school “while allowing whites living in the same area to attend a school [that] was not predominantly Negro in composition... produc[ing] the anomaly ... of children living in adjoining houses attending different schools solely on the basis of their race”).

(86.) *Id.* at 192.

(87.) *Id.* at 195.

(88.) CIVIL RIGHTS U.S.A., *supra* note 28, at 1 (“Success in New Rochelle has stimulated Negro citizens in other cities from coast to coast to protest the segregation of their children in public schools.”).

(89.) *Id.*

(90.) *Taylor*, 191 F. Supp. at 187; *see also* Carter, *supra* note 19, at 519 (“Certainly, if there is injury and detriment in segregation, the Negro child cannot be expected to discern the subtle distinction between Atlanta’s segregation and New York’s racial imbalance.”).


(92.) *Id.* at 195. Despite its finding of discriminatory intent, the court pointedly avoided suggestions of racial animus or malice:

When this course of conduct is viewed in its totality, the desire to maintain segregation is clear. This does not necessarily mean that individual members of the Board are segregationists or racists. But it is apparent that they have failed to accept or recognize their moral and legal responsibilities and have chosen instead to yield to pressures of certain groups who wish to avoid an influx of Negro children into the schools in their districts.

*Id.*

(93.) Goodman, *supra* note 13, at 284 (citing U.S. v. Sch. Dist. 151, 404 F.2d 1125 (7th Cir. 1968); Clemons v. Bd. of Educ., 228 F.2d 853 (6th Cir. 1956); Jackson v. Pasadena City Sch. Dist., 382 P.2d 878 (1963)).

(94.) *Id.* at 284–285.

(95.) *Id.* at 284–285; *see also* Eyer, *supra* note 20, at 9–10 (discussing constitutional “bars on interrogating legislative intent”).

(96.) CIVIL RIGHTS U.S.A., *supra* note 28, at 116 (The Philadelphia school board resisted plaintiffs’ claim that it had the affirmative duty to eliminate school segregation, responding that it had “the duty to ignore the race and color of both pupils and teachers in establishing boundaries and making assignments” and analogized race-conscious measures to racial discrimination).
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(97.) Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973). As Professor Katie Eyer has observed, the Court initially was reluctant to accept intent as a justification for invalidating governmental action and did not explicitly do so until *Griffin v. County School Board of Prince Edward County*, 375 U.S. 391 (1964). *See* Eyer, supra note 20, at 20–22. As Professor Ian Haney-Lopez has noted, *Keyes v. School District No. 1* was the first in a trilogy of cases—the others being *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*—to require intent in equal protection, though it did not introduce “the restrictive malice test we now labor under.” Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1802 (2012).

(98.) *See* Personnel Adm’r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (defining “discriminatory purpose” to refer to decisions “elected or reaffirmed … at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”).


(100.) *See* Goodman, supra note 13, at 285–292 (arguing that the extensive remedial obligations imposed on southern districts undergoing desegregation blurred the de jure-de facto distinction).

(101.) *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 441 (1968) (“In three years of operation not a single white child has chosen to attend [the black] school and … 85% of the Negro children in the system still attend the all-[black] school. In other words, the school system remains a dual system.”).

(102.) Id. at 437–439.

(103.) Id. at 442.


(105.) *See* Goodman, supra note 13, at 286 (“In imposing an affirmative duty to end what might be called ‘post–de jure’ segregation—continued racial imbalance in schools formerly segregated by law—[*Green* and *Swann*] presuppose that de jure segregation has ill effects that continue even when legislative racial classification is removed.”); *see also* Id.:

If the evil struck at in *Brown* were simply the use of racial laws to separate black students from white students or to exclude them from particular schools, and if the harmfulness of segregation pending more persuasive empirical evidence were otherwise considered uncertain, no more should be required of the state than to abstain from drawing racial lines.


(107.) Id. at 18–20.

(108.) Id. at 28.
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(109.) *Id.*

(110.) *Id.*

(111.) *See* Swann, 402 U.S. at 26.

(112.) *Id.*

(113.) Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208 (1973) (“We emphasize that the differentiating factor between de jure segregation and so-called de facto segregation to which we referred in Swann is purpose or intent to segregate”) (footnote omitted).

(114.) In her comprehensive article exploring the history of the intent doctrine, Professor Katie Eyer discusses the struggles on the Court over whether to invalidate school segregation on the basis of effects or intent. *See* Eyer, *supra* note 20, at 14–31. She points out that in *Keyes*, the Court shifted course “away from effects-based theories and toward an intent-mandatory regime.” *Id.* at 47.

(115.) *See* Tushnet, *supra* note 54, at 1139, 1147.


(117.) *Id.* at 201.

(118.) *Id.* at 202.

(119.) *Id.* at 217 (Powell, J., concurring in part and dissenting in part).

(120.) Seth F. Kreimer, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317, 318 (1976) (“Integrationists hoped for an affirmation that ‘there is but one Constitution’ and a burial of the de facto/de jure distinction.”).

(121.) *See* Tushnet, *supra* note 54, at 1141 (“From the point of view of what was going on inside the Court, Keyes was not a case about the standard for determining whether a constitutional violation had occurred ... It wasn’t a case about the violation; it was a case about remedies (that is, it was a case about busing.”)).

(122.) *Id.* at 1144–1145.

(123.) *Id.* 1145–1146.

(124.) *Id.* at 1146.

(125.) *Id.*

(126.) *Id.* at 208.

(127.) *Id.* at 203.
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(128.) *Id.* at 213.


(134.) *Id.* at 739-740.

(135.) *Id.* at 745 (“The record before us, voluminous as it is, contains evidence of de jure segregated conditions only in the Detroit schools.”).

(136.) *Id.* at 733 (“The [district] court acknowledged ... that it had 'taken no proofs with respect to the establishment of the boundaries of the [suburban] districts ... nor on the issue of whether ... such school districts [had] committed acts of de jure segregation.'”). Although the district court also found the state responsible for Detroit’s segregation, *id.* at 726-728, the Court concluded that these findings did not justify an interdistrict remedy, *Id.* at 748.

(137.) *Id.* at 781-815 (Marshall, J., dissenting).

(138.) *Id.* at 752.

(139.) *Id.* at 744-745; see also Missouri v. Jenkins, 515 U.S. 70, 94 (1995) (concluding that a federal district court exceeded its authority to remedy intradistrict segregation in Kansas City when it ordered the state to fund an interdistrict remedy designed to attract white students from outside the district into Kansas City schools).

(140.) See generally ROTHSTEIN, *supra* note 30.


(142.) See *Davis*, 426 at 240 (“The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.... . The essential element of De jure segregation is ‘a current condition of segregation resulting from intentional state action. The differentiating factor between De jure segregation and so-called De facto segregation ... is [p]urpose or Intent to segregate’”) (citing Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 205 (1973)).

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(144.) *See* PAUL R. DIMOND, BEYOND BUSING: REFLECTIONS ON URBAN SEGREGATION, THE COURTS & EQUAL OPPORTUNITY 382 (2008) (discussing Rehnquist’s objections to the majority rulings in *Columbus* and *Dayton*).

(145.) *See, e.g.*, Bd. of Educ. of Okla. City Pub. Schs v. Dowell, 498 U.S. 237, 247 (1991) (emphasizing that “federal supervision of local school systems was intended as a temporary measure to remedy past discrimination”); *cf.* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436 (1976) (“[T]he District Court was not entitled to require the [school district] to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity.”). For a broader discussion of the role of time in school desegregation cases, *see* Elise C. Boddie, *The Contested Role of Time in Equal Protection*, 117 COLUM. L. REV 1825, 1835–1854 (2017).

(146.) *Dowell*, *supra* note 145, at 249-250.


(148.) *Id*.

(149.) Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007). Justice Kennedy concurred in the result but disagreed with the plurality’s conclusion that “diversity” is not a “compelling” goal in K–12 education. He voted to allow school districts to use general race-conscious means to promote racially diverse student bodies:

> If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

*Id.* at 788-789.

(150.) *Id.* at 747–748 (“For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way ‘to achieve a system of determining admission to the public schools on a nonracial basis,’ [quoting *Brown v. Bd. of Educ.*., 349 U.S. 294, 300–301 (1955)], is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

(151.) *See generally* ROTHSTEIN, *supra* note 30.

writing, efforts are under way in New Jersey to integrate its public schools. On May 17, 2018—the sixty-fourth anniversary of *Brown v. Board of Education*—a diverse group of plaintiffs sued the state under state law to challenge statewide school segregation by race and socioeconomic status. (New Jersey's school segregation is among the worst in the country. This author has been involved in this effort.) *See* Complaint for Declaratory Judgment and Other Relief, *Latino Action Network, et al. v. State of New Jersey, et al.*, https://www.inclusiveschoolsnj.org/. Work is also under way to promote integration and equitable policies and practices in New York City public schools. IntegrateNYC, a student-led organization, is at the helm of this initiative. INTEGRATENYC, https://www.integratenyc.org/ (last visited July 23, 2019).

(153.) *Parents Involved*, 551 U.S. at 867-868 (Breyer, J., dissenting).

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