Washington Law Review

Volume 55 | Number 3

6-1-1980

Constitutional Law—Equal Protection and the Neighborhood School Concept: The Demise of the De Jure-De Facto Distinction—Seattle School District No. 1 v. Washington, 473 F. Supp. 996 (W.D. Wash. 1979), appeal docketed N. 79-4674 (9th Cir. Sept. 19, 1979)

Dan M. Albertson

CONSTITUTIONAL LAW—EQUAL PROTECTION AND THE NEIGHBORHOOD SCHOOL CONCEPT: THE DEMISE OF THE DE JURE-DE FACTO DISTINCTION—*Seattle School District No. 1 v. Washington*, 473 F. Supp. 996 (W.D. Wash. 1979), *appeal docketed* No. 79-4676 (9th Cir. Sept. 19, 1979).

On November 7, 1978, voters of the State of Washington passed Initiative Measure 350, an "antibusing" statute,[1] which would prohibit the assignment of public school students to any school other than the one nearest, or next nearest, their residence.[2] The Seattle School District subsequently brought suit in the United States District Court for the Western District of Washington seeking to enjoin implementation of the initiative

1. The term "antibusing statute," as used throughout this note, refers to any statute that impedes the racial integration of public school students through a restriction on the transportation or assignment of public school students. *See generally* North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 44 n.1 (1971) (statute provided: "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited and public funds shall not be used for any such bussing."); Lee v. Nyquist, 318 F. Supp. 710, 712 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971) (statute stated: "[N]o student shall be assigned or compelled to attend any school on account of race . . . .").

2. Initiative Measure 350, as adopted by the voters of Washington, provides:

> Section 1. Notwithstanding any other provision of law, after the effective date of this act no school board, school district, educational service district board, educational service district, or county committee, nor the superintendent of public instruction, nor the state board of education, nor any of their respective employees, agents or delegates shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence within the school district of his or her residence and which offers the course of study pursued by such student, except in the following instances:
>
> (1) If a student requires special education, care or guidance, he may be assigned and transported to the school offering courses and facilities for such special education, care or guidance;
>
> (2) If there are health or safety hazards, either natural or man made, or physical barriers or obstacles, either natural or man made, between the student's place of residence and the nearest or next nearest school; or
>
> (3) If the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities.
>
> Sec. 2. In every such instance where a student is assigned and transported to a school other than the one nearest his place of residence, he shall be assigned and transported to the next geographically nearest school with the necessary and applicable courses and facilities within the school district of his or her residence.
>
> Sec. 3. For purposes of section 1 of this act, "indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence within the school district of his or her residence and which offers the course of study pursued by such student" includes, but is not limited to, implementing, continuing, pursuing, maintaining or operating any plan involving (1) the redefining of attendance zones; (2) feeder schools; (3) the re-organization of the grade structure of the schools; (4) the pairing of schools; (5) the merging of schools; (6) the clustering of schools; or (7) any other combination of grade restructuring, pairing, merging or clustering: PROVIDED, That nothing in this

on the ground that the measure would re-segregate[3] Seattle public schools in violation of the fourteenth amendment.[4] The district court ruled in favor of the Seattle School District, holding that the initiative was passed with discriminatory intent, that it improperly prohibited mandatory busing only when used to achieve racial balance, and that it improperly restricted the ability of local school boards to eliminate illegal segregation.[5]

This note analyzes the district court's opinion in *Seattle School District No. 1 v. Washington* in the context of current doctrines in the field of school desegregation and concludes that the protected status previously accorded to the neighborhood concept[6] will be substantially undermined if the *Seattle* decision is upheld on appeal.

I. BACKGROUND

The earliest school desegregation cases to reach the United States Supreme Court challenged the constitutionality of racially segregated school districts within which minority students were prohibited by law from attending majority-race schools.[7] The cases generally arose out of southern

---

chapter shall limit the authority of any school district to close school facilities.

Sec. 4. For the purposes of section 1 of this act "special education, care or guidance" includes the education, care or guidance of students who are physically, mentally or emotionally handicapped.

Sec. 5. The prohibitions of this chapter shall not preclude the establishment of schools offering specialized or enriched educational programs which students may voluntarily choose to attend, or of any other voluntary option offered to students.

Sec. 6. This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools.

Sec. 7. Sections 1 through 6 of this act are added to chapter 223, Laws of 1969 ex. sess. and shall constitute a new chapter in Title 28A RCW.

Sec. 8. If any provision of this act, or its application to any person or circumstances is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

Secretary of State, 1978 Washington Voters Pamphlet 6 (text of proposed statute).

3. Prior to the enactment of Initiative Measure 350, the Seattle School Board adopted a plan to desegregate Seattle public schools which required the mandatory busing of students. That plan became operative shortly before Initiative Measure 350 was passed. The implementation of the initiative would require the elimination of mandatory busing and the assignment of students to neighborhood schools. Because housing in Seattle is segregated, such a neighborhood school plan would result in racially imbalanced schools.

4. Seattle School Dist. No. 1 v. Washington, 473 F. Supp. 996 (W.D. Wash. 1979), *appeal docketed*, No. 79-4676 (9th Cir. Sept. 19, 1979).

5. *Id.* at 1012.

6. The term "neighborhood school concept" as used herein refers to a student assignment plan under which school authorities assign students to schools on a geographical basis, generally within walking distance of their homes.

7. *See* Brown v. Board of Educ., 347 U.S. 483 (1954), reviewing Brown v. Board of Educ., 98 F. Supp. 797 (D. Kan. 1951) (Topeka, Kansas), and companion cases: Briggs v. Elliott, 103 F.

school districts, where opposition to racial integration in education was pronounced.[8] The Supreme Court, beginning with its decision in *Brown v. Board of Education*,[9] has held that the maintenance of such school systems violates the equal protection clause of the fourteenth amendment.[10]

Unlike southern school segregation, racial imbalance in public schools in northern school districts was generally not required by state law.[11] Nevertheless, in many instances racial segregation in public schools outside the South was the result of a deliberate policy of discrimination by state officials.[12] The Supreme Court, in the first case before it to challenge nonstatutory public school segregation, chose not to extend its holding in *Brown* to apply to all school segregation.[13] Instead, the Court adopted a more limited approach and held that only segregation brought about intentionally by state officials violates the fourteenth amendment.[14] The Court thus established, for constitutional purposes, the existence of two distinct forms of segregation: de jure, which results from the intentionally discriminatory acts of state officials; and de facto, which occurs as a result of conduct which cannot be traced to public officials acting with discriminatory intent.[15] Whereas de jure segregation violates the

Supp. 920 (E.D.S.C. 1952) (Clarendon County, S.C.); Davis v. County School Bd., 103 F. Supp. 337 (E.D. Va. 1952) (Prince Edward County, Va.); and Gebhart v. Belton, 33 Del. Ch. 144, 91 A.2d 137 (1952) (New Castle County, Del.).

8. *See* Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Education*, 39 LAW & CONTEMP. PROB. 7, 11–16 (1975); J. WILKINSON, FROM BROWN TO BAKKE, THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 61–127 (1979).

9. 347 U.S. 483 (1954).

10. *Id.* at 493.

11. *See* SEGREGATION AND THE FOURTEENTH AMENDMENT IN THE STATES (B. Reams & P. Wilson, ed. 1975) (survey of state laws prior to the decision in *Brown v. Board of Educ.*). The survey indicates that at the time of the *Brown* decision, 17 of 37 states surveyed required or permitted segregated schools as a matter of state law. The 17 states comprised the Confederate South (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia), as well as Delaware, Kansas, Kentucky, Maryland, Missouri, and West Virginia. Eight states (California, Illinois, Indiana, Michigan, New York, Ohio, Pennsylvania, and Rhode Island) repealed statutory authority to segregate schools prior to 1953. The 12 remaining states surveyed had never required or permitted segregation in public schools as a matter of state law: Connecticut, Iowa, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Oregon, Vermont, and Wisconsin.

12. *E.g.*, Davis v. School Dist. of Pontiac, 309 F. Supp. 734, 744 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir.), *cert. denied*, 402 U.S. 913 (1971).

13. Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973) (Denver, Colorado). *See* Lawrence, *Segregation "Misunderstood": The Milliken Decision Revisited*, 12 U.S.F. L. REV. 15, 22 n. 29 (1977).

14. Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973).

15. "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate." *Id.* at 208 (emphasis in original).

With regard to the creation of racially segregated school districts in the United States, Justice Powell has indicated his view that:

fourteenth amendment and must be eliminated "root and branch,"[16] de facto segregation does not constitute a proper basis for finding a violation of the equal protection clause of the fourteenth amendment.[17]

Where it has been established that public school segregation violates the fourteenth amendment, school officials are under a constitutional duty to eliminate the illegal condition.[18] While school officials retain some flexibility in devising desegregation plans, the methods adopted must be effective in swiftly rectifying the violation.[19] In many circumstances this has required the imposition of some degree of mandatory busing of public school students.[20] Accordingly, every antibusing statute enacted within a school district containing de jure segregation has been struck down as improperly impeding the elimination of illegal segregation.[21] In the only such case to reach the United States Supreme Court, *North Carolina State*

The principal cause of racial and ethnic imbalance in urban public schools across the country—North and South—is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing—whether public or private—cannot be attributed to school authorities. Economic pressures and voluntary preferences are the primary determinants of residential patterns.

Austin Ind. School Dist. v. United States, 429 U.S. 990, 991 (1976) (mem.) (Powell, J., concurring). *See* Kanner, *From Denver to Dayton: The Development of a Theory of Equal Protection Remedies*, 72 Nw. L. Rev. 382 (1977).

The "magnet" effect, which assumes that segregated schools cause an increase in the segregation of the surrounding neighborhood, is a doubtful approximation of the reality of urban demographic patterns. Moreover, the presumption that a school board which has intentionally segregated students in one area has also caused all the segregation in the rest of the district is often incorrect. Demographic shifts which increase segregation often have no connection with the conduct of the school board. [*Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976)] recognized such random shifts over a period of one year; they could be much greater over a longer time span. Urban economic deterioration may result in a large loss of white population in a city; neighborhoods rise and fall as highways are constructed and as industrial and commercial patterns change.

Id. at 403–404 (footnotes omitted). *But see* Dimond, *School Segregation in the North: There is But One Constitution*, 7 Harv. C.R.-C.L. L. Rev. 1, 11 (1972) ("[I]t is only a half truth to suggest that school authorities are not responsible for housing patterns . . . .").

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

17. *See* notes 13–15 and accompanying text *supra*.

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

19. *Id.* at 439.

20. *See* North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971).

We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, "or for the purpose of creating a balance or ratio," will similarly hamper the ability of local authorities to effectively remedy constitutional violations. As noted in [Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)], *supra*, at 29, . . . bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it.

Id. at 46.

21. *See* North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971); Stell v. Board of Public Educ. for Savannah and Chatham County, 334 F. Supp. 909 (S.D. Ga. 1971); Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971); Alabama v. United States, 314 F.

Board of Education v. Swann,[22] the Court invalidated a North Carolina antibusing statute enacted after North Carolina schools were under a federal court order to desegregate.[23] The Supreme Court's invalidation of the North Carolina statute rested solely on the basis of that statute's interference with the elimination of de jure segregation.[24]

Whether an antibusing statute violates the constitution in a school district which has not been found to contain de jure segregation is a question left open by *Swann* and raised by the passage of Initiative Measure 350 in Washington.

II. THE COURT'S REASONING

A. *The Application of* Hunter v. Erickson

As its initial basis for holding Initiative Measure 350 unconstitutional, the district court in *Seattle* relied on the Supreme Court's decision in *Hunter v. Erickson*.[25] In *Hunter*, voters in Akron, Ohio, passed a city charter amendment requiring all ordinances pertaining to the regulation of real property transactions on the basis of "race, color, religion, national origin or ancestry" to be submitted to the voters of Akron for majority approval.[26] The Supreme Court found the amendment unconstitutional

Supp. 1319 (S.D. Ala. 1970); School Comm. of Springfield v. Board of Educ., 366 Mass. 315, 319 N.E.2d 427 (1974), *cert. denied*, 421 U.S. 947 (1975). *Cf.* San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937, 92 Cal. Rptr. 309, 479 P.2d 669, 670 (1971), *cert. denied*, 401 U.S. 1012 (1971) (Education Code providing that "no governing board of a school district shall require any student or pupil to be transported for any purpose or for any reason without the written permission of the parent or guardian," held constitutional on the ground that such provision only prohibits school districts from compelling students to use transportation provided by the school district without parental consent).

22. 402 U.S. 43 (1971).

23. *Id.* at 45–46.

24. The Court stated:

> The legislation before us flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools. The prohibition is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court in the *Swann* case. But more important the statute exploits an apparently neutral form to control school assignment plans by directing that they be "color blind"; that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education*, 347 U.S. 483 (1954) . . . . Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.

Id.

25. 393 U.S. 385 (1969). *See* 473 F. Supp. at 1012.

26. 393 U.S. at 387. The amendment to Akron City Charter § 137 provided:

> Any ordinance enacted by the Council of the City of Akron which regulates the use, sale,

because it procedurally disadvantaged "those who would benefit from the laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations."[27]

The *Seattle* court noted that *Hunter* had been applied by a federal district court in *Lee v. Nyquist*[28] to a New York antibusing statute that explicitly prohibited the assignment of students to any school "on account of race . . . or for the purpose of achieving equality in attendance . . . of persons of one or more particular races."[29] The *Lee* court found the New York statute impermissible under *Hunter* because it treated "educational matters involving racial criteria differently from other educational matters,"[30] and thus made it "more difficult to deal with racial imbalance in the public schools."[31]

From *Hunter* and *Lee,* the *Seattle* court extracted the principle that the fourteenth amendment prohibits mandatory student assignments to public schools for nonracial reasons unless such assignments are also permitted for racial reasons.[32] The district court concluded that Initiative Measure 350 falls within this prohibition by implicitly prohibiting mandatory student assignments only for racial purposes.[33]

B. The Existence of Discriminatory Intent

The *Seattle* court predicated its holding that Initiative Measure 350 is

---

advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.

Id.

27. *Id.* at 391.

28. 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd,* 402 U.S. 935 (1971).

29. *Id.* at 712. Section 3201(2) of the New York statute provided in pertinent part:

2. Except with the express approval of a board of education having jurisdiction, a majority of the members of such board having been elected, no student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of achieving equality in attendance or increased attendance or reduced attendance, at any school, of persons of one or more particular races, creeds, colors, or national origins; and no school district, school zone or attendance unit, by whatever name known, shall be established, reorganized or maintained for any such purpose, provided that nothing contained in this section shall prevent the assignment of a pupil in the manner requested or authorized by his parents or guardian . . . .

Id.

30. *Id.* at 719.

31. *Id.*

32. 473 F. Supp. at 1012.

33. *Id.* at 1013.

unconstitutional on the additional ground that the measure was passed with discriminatory intent on the part of Washington voters.[34] The court was admittedly unable to determine the subjective intent of the voters, for "the secret ballot raises an impenetrable barrier" to the ascertainment of the electorate's intent.[35] Nevertheless, it inferred that the intent behind the measure's enactment was discriminatory by applying the factors delineated by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.[36]

In *Arlington Heights*, the Supreme Court indicated that the following criteria are relevant in ascertaining discriminatory intent: disproportionate impact; procedural and substantive departures from the normal decision-making sequence; and legislative and administrative history of the challenged action.[37] In applying the *Arlington Heights* factors to Initiative Measure 350, the *Seattle* court found initially that implementation of the measure would have a disproportionate impact upon racial minorities because racially segregated schools are disproportionately harmful to minority students.[38] Additionally, the court considered the enactment of Initiative Measure 350 a marked departure from the procedural norm because a statewide initiative was used to repeal an administrative decision of a local school board.[39] Finally, the court reviewed the historical background of Initiative Measure 350 and decided that the "thought of a statewide initiative" was triggered by the Seattle School Board's adop-

34. *Id.* at 1016.

35. *Id.* at 1014.

36. 429 U.S. 252 (1977). The *Seattle* court also relied on Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), involving a challenge under the equal protection clause to the constitutionality of a Massachusetts law granting civil service employment preference to military veterans. 473 F. Supp. at 1014. The Supreme Court in *Feeney* held that the differential impact of the statute on women was insufficient to establish the discriminatory intent necessary to find a constitutional violation under *Washington v. Davis*, 426 U.S. 229 (1976), and *Arlington Heights*. 442 U.S. at 275–81.

37. 429 U.S. at 267–68.

38. 473 F. Supp. at 1015. The court did not, however, differentiate between de jure and de facto segregation in concluding that segregation is disproportionately harmful to minority students.

> It appears from the evidence that the overall education of students in a school system suffers when the schools of that system are racially imbalanced, that the greater the imbalance the greater the impairment and that there is a disproportionate impact upon the education of minority children when their schools are racially imbalanced.

Id.

39. *Id.* at 1016. The *Seattle* court stated:

> In the adoption of Initiative 350 there was a marked departure from the procedural norm in that an administrative decision of a subordinate local unit of government, the Seattle School Board, was overridden in a statewide initiative by voters, a great number of whom were entirely unaffected by that plan and who could not conceivably be affected by any plan for the mandatory assignment of students for racial balancing purposes.

Id. In contrast to the Supreme Court's analysis in *Arlington Heights*, the *Seattle* court failed to estab-

tion of a desegregation plan requiring mandatory busing.[40] These findings led the court to conclude that the Washington electorate intended to discriminate against minority students by enacting Initiative Measure 350.[41]

C. *The Over-Inclusiveness of Initiative Measure 350*

As a final basis for holding Initiative Measure 350 invalid, the *Seattle* court decided that the initiative would unconstitutionally restrict the ability of local school boards to eliminate de jure segregation if such segregation exists in Washington.[42] The court did not, however, make any findings of fact with regard to the existence of such segregation.[43]

III. ANALYSIS

The district court's opinion in *Seattle* is significant both in its extension of *Hunter v. Erickson* to antibusing statutes enacted within de facto segregated school districts[44] and in its finding that racially imbalanced schools have a disproportionate impact on minority students.[45] The application of *Hunter* may effectively foreclose further attempts to enact antibusing statutes in segregated school districts. Furthermore, the finding that minority students are disproportionately affected by segregated schools, without distinguishing between de jure and de facto segregation, raises questions over the continued vitality of this distinction.[46] With respect to both the extension of *Hunter* and the finding of disproportionate impact, however,

---

lish the materiality of the procedural departure to the question of intent. A procedural departure does not indicate *ipso facto* an intent to discriminate against minorities. With regard to the initiative process, it is arguable that the procedure of statewide voting is beneficial to minorities (at least where the substance of the initiative is not racially discriminatory) because it ensures their participation in the decision to adopt the proposed legislation. *Cf.* James v. Valtierra, 402 U.S. 137, 143 (1971) (referendum required for approval of low-income housing upheld as enabling people to have "a voice in decisions that will affect the future development of their own community."). *But see* Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978) (use of referenda and initiatives subjects minority interests to majoritarian biases); Comment, *Judicial Review of Laws Enacted by Popular Vote*, 55 WASH. L. REV. 175 (1979) (initiative legislation should be subject to heightened judicial scrutiny under the fourteenth amendment to guard minority rights).

40. 473 F. Supp. at 1016.

41. *Id.*

42. *Id.*

43. *See id.* at 998–1011.

44. *See* note 37 and accompanying text *supra*. *Hunter v. Erickson* was first applied to an antibusing statute in Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971). *See* notes 28–31 and accompanying text *supra*.

45. *See* note 38 and accompanying text *supra*.

46. *See* notes 57–60 and accompanying text *infra*.

analytical weaknesses in the district court's opinion suggest that the court's rationale may be modified on appeal.

The application of *Hunter* to Initiative Measure 350 poses several difficulties. In *Hunter,* the voters of Akron were attempting to inject the criterion of race into an otherwise neutral legislative process.[47] The voters of Washington, by passing Initiative Measure 350, were attempting to *remove* race as a factor in the assignment of students to public schools.[48] Furthermore, in *Hunter* the city charter amendment implicitly classified Akron citizens by race, and subjected minorities to a different, and more burdensome, procedure to enact legislation.[49] Initiative Measure 350, by contrast, would have *categorically* precluded consideration of race in student assignments to nonneighborhood schools, since it does not classify *students* according to race.[50]

In addition to the theoretical difficulties of applying *Hunter* to Initiative Measure 350, the practicality of the rule adopted by the *Seattle* court is also questionable. Initiative Measure 350 permits nonneighborhood student assignments only for reasons of safety and special education.[51] The

47. Under the city charter amendment adopted in Akron, the procedural means by which legislation became effective was determined by the pertinence of the legislation to the interests of racial minorities. If the proposed legislation furthered minority interests, a more difficult procedure to enact the legislation was required. 393 U.S. at 390.

48. "[Initiative Measure 350] was conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments." 473 F. Supp. at 1015.

49. The improper racial classification created by the charter amendment in *Hunter* resulted not from the differentiation between legislation pertaining to race and that which was race-neutral, but more precisely from the fact that the dichotomization of legislation served to classify Akron citizens by race. The Court stated:

> Section 137 thus drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends.
>
> . . .
>
> Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority.

393 U.S. at 390–91.

50. Initiative Measure 350 would remove consideration of a student's race in the decision to assign a student beyond neighborhood schools, but would permit student assignments for racial balancing purposes with regard to the two schools to which a student may be assigned. *See* note 2 *supra.* Furthermore, the measure permits school boards to desegregate through voluntary programs. *Id.* Though previous voluntary desegregation programs have been unsuccessful in some areas, *see, e.g.,* Green v. County School Board, 391 U.S. 430, 441 (1968), and Raney v. Board of Educ. of the Gould School Dist., 391 U.S. 443, 446 (1968), the Seattle School District implemented such a program in 1977 and termed the results "successful in promoting significant new student movement, much of which positively affected racial balance." Plaintiff's Memorandum at 8, Seattle School Dist. No. 1 v. Washington, 473 F. Supp. 996 (1979).

51. *See* note 2 *supra.*

Seattle court found it improper, under *Hunter*, to permit such nonneighborhood assignments while concomitantly prohibiting nonneighborhood student assignments for racial balancing purposes.[52] Under the analysis adopted by the court, *Hunter* can thus be complied with in either of two ways: by allowing students to be assigned to nonneighborhood schools for racial reasons; or by prohibiting *all* nonneighborhood student assignments. To the extent that the *Seattle* court's opinion encourages the latter position, it forecloses the use of busing for the legitimate purposes of facilitating safety and special education.

Unlike the district court's improper reliance on *Hunter*, the finding that Initiative Measure 350 was passed with discriminatory intent is within traditional equal protection analysis applicable to school desegregation cases.[53] Given the difficulty of obtaining direct evidence regarding the subjective intent of Washington voters in passing the initiative,[54] the court looked to the *Arlington Heights* factors[55] to discern the intent of the Washington electorate.[56] The *Seattle* court's application of those factors, however, and its resulting conclusion, render acceptance of its analysis doubtful.

According to the Supreme Court, the essential distinction between de jure and de facto segregation is the existence of an intent to discriminate.[57] Although the Court has approved of the application of its analysis in *Arlington Heights* to school desegregation cases,[58] it has rejected a finding of discriminatory intent from the maintenance of a racially imbalanced neighborhood school system.[59] If the distinction between de jure and de facto segregation is to remain viable, inferences of discriminatory

52. *See* note 31 and accompanying text *supra*.

53. *See generally* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Austin Independent School Dist. v. United States, 429 U.S. 990 (1976) (mem.).

54. *See* note 35 and accompanying text *supra*.

55. *See* note 37 and accompanying text *supra*.

56. 473 F. Supp. at 1014–16.

57. *See* note 15 and accompanying text *supra*.

58. *See* Metropolitan School Dist. of Perry Township, Marion County, Indiana v. Buckley, 429 U.S. 1068 (1977) (mem.); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 419 (1977); School Dist. of Omaha v. United States, 433 U.S. 667 (1977) (per curiam); Brennan v. Armstrong, 433 U.S. 672 (1977) (per curiam).

59. Austin Independent School Dist. v. United States, 429 U.S. 990 (1976) (mem.) (judgment vacated and case remanded for reconsideration in light of Washington v. Davis).

Cisneros v. Corpus Christi School Dist., 467 F.2d 142 (5th Cir. 1972), *cert. denied*, 413 U.S. 920 (1973), had been thought to support the proposition that a state may not impose a neighborhood school policy upon a residentially segregated school district. *See, eg.*, Opinion of the Justices, 363 Mass. 899, 298 N.E.2d 840, 845 (1973). In *Cisneros*, however, the court made no finding of discriminatory intent and stated:

> Discriminatory motive and purpose, while they may reinforce a finding of effective segregation, are not necessary ingredients of constitutional violations in the field of public education. We therefore hold that the racial and ethnic segregation that exists in the Corpus Christi school

intent from actions related to the maintenance of a neighborhood school

system is unconstitutional—not de facto, not de jure, but unconstitutional. 467 F.2d at 149.

In United States v. Texas Educ. Agency (Austin Independent School Dist.), 532 F.2d 380 (5th Cir. 1976), *vacated*, 429 U.S. 990 (1976) (mem.), the court attempted to reconcile its holding (neighborhood school system operated in a school district containing racially segregated housing pattern constitutes de jure segregation) with that in *Cisneros* by stating that *Cisneros* actually involved the use of a "foreseeable consequence" intent test. 532 F.2d at 388. The Supreme Court vacated the decision and remanded it for reconsideration in light of Washington v. Davis, 426 U.S. 229 (1976). Austin Independent School Dist. v. United States, 429 U.S. 990 (1976) (mem.). A number of commentators have taken the position that the Supreme Court thereby rejected the use of a foreseeable consequence intent test in school desegregation cases. *See* Note, 86 YALE L.J. 317, 332 (1976). *Cf.* Note, 28 CASE W. RES. L. REV. 119, 141 (1977) ("Possibly there is an implication that finding intent under the tort standard may not be adequate to find the unconstitutional intent."). On remand, however, the court of appeals interpreted the Supreme Court's disapproval of its prior decision to extend only to the inference of discriminatory intent from official actions taken to maintain a neighborhood school policy, not to the inference of discriminatory intent under the foreseeable consequence test:

> We are well aware that some official actions on which a plaintiff hinges an allegation of unconstitutional discrimination have historically been motivated by racially and ethnically neutral *bona fide* concerns, such as the desire to have children attend the school closest to their home, and no showing is made that those concerns were actually subordinate to, or a subterfuge for, unconstitutional discrimination. In those circumstances, that a discriminatory result was the natural and foreseeable consequence of the actions is insufficient to infuse the challenged acts with the type of discriminatory intent required by *Washington v. Davis* and *Arlington Heights*. . . . There is language in our *Austin II* opinion that official discriminatory intent adequate to support a finding of *de jure* segregation could be inferred solely from the school board's use of a neighborhood school policy for student assignment. To the extent that *Austin II* can be so read, it is inconsistent with *Washington v. Davis* and *Arlington Heights*. The Supreme Court recognized this ambiguity in vacating our decision and remanding the case to us.

United States v. Texas Educ. Agency (Austin Independent School Dist.), 564 F.2d 162, 168–69 (1977), *cert. denied*, 443 U.S. 915 (1978). The court then applied a foreseeable consequence intent test and found a discriminatory intent on the basis of actions unrelated to the operation of a racially neutral neighborhood school policy. *Id.* at 171–74 (school authorities "maintained the segregated identity of the schools through the use of dual-overlapping attendance zones, student assignment policies, teacher assignment policies, school site selection, and gerrymandering.").

The validity of a foreseeable consequence intent test to ascertain discriminatory intent in the field of public education has not been resolved by the Supreme Court. Although the Ninth Circuit Court of Appeals appears to have rejected the test, *see* Soria v. Oxnard School Dist. Bd. of Trustees, 488 F.2d 579, 585 (9th Cir. 1973), *cert. denied*, 416 U.S. 951 (1974) and Johnson v. San Francisco Unified School Dist., 500 F.2d 349, 351–52 (9th Cir. 1974), other circuits have adopted it. *See e.g.*, United States v. Texas Educ. Agency (Austin Independent School Dist.), 564 F.2d 162, 168 (1977), *cert. denied*, 443 U.S. 915 (1978); Oliver v. Michigan State Bd. of Educ., 508 F.2d 178 (6th Cir. 1974); Hart v. Community School Bd. of Educ., 512 F.2d 37 (2d Cir. 1975). The utility of the test has been questioned. *See* Note, 86 YALE L.J. 317 (1976):

> In fact, the interpretation of intent as foreseeability amounts to a proscription of all racial imbalance in public schools. Where any racial imbalance exists in a school district, the failure to adopt policies that alleviate the imbalance necessarily maintains and perpetuates the imbalance. Such a result is clearly natural and foreseeable. Thus any school authority that tolerates racially imbalanced schools would be held to have acted with segregative intent under the foreseeability test.
>
> Since the foreseeability test disapproves all racial imbalance, it destroys the distinction betwen [*sic*] de facto and de jure segregation—the distinction "segregative intent" was to have defined.

should not be permitted.[60] The *Seattle* court nonetheless inferred discriminatory intent on the part of the Washington electorate in enacting Initiative Measure 350 solely on the basis of such actions.

To ascertain the intent of Washington voters, the district court examined the *Arlington Heights* factors of disproportionate impact, procedural departure from the normal decision-making process, and historical background.[61] The court first determined that racially imbalanced schools disproportionately affect the education of minority students.[62] The court

---

Id. at 329–30.

There is language in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) that suggests the Court requires more than foreseeability:

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. See *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 179 (concurring opinion). It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of." its adverse effects upon an identifiable group.

442 U.S. at 279 (footnotes omitted).

60. De facto segregation, where it exists, occurs primarily, if not exclusively, as a result of student assignments to neighborhood schools. See Farley, *Residential Segregation and Its Implications for School Integration*, 39 LAW & CONTEMP. PROB. 164 (1975):

> The northern city districts . . . show a moderate relationship between residential and school segregation. Where neighborhoods are highly segregated, schools tend also to be highly segregated . . . . Those school districts where the degree of school segregation is much less than was predicted on the basis of their level of residential segregation are districts which put massive integration plans into operation, curtailing the extent to which the neighborhood school concept of pupil assignment was used.

Id. at 187. To infer discriminatory intent from the adoption or operation of a neighborhood school policy is thus tantamount to inferring discriminatory intent directly from the existence of de facto segregated schools.

61. *See* notes 38–41 and accompanying text *supra*.

62. *See* note 38 and accompanying text *supra*. The *Seattle* court cited no authority for its conclusion that racially imbalanced schools are, from the fact of segregation alone, disproportionately harmful to minority students. The existing authority on the subject is divided. *See, e.g.*, Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976), wherein the author states:

> One important ground for retaining the distinction between permissible and impermissible racial imbalance may well be the perception that some instances of racial imbalance do not impose significant harms. Where the racial imbalance produces no harm, or where remedying minimal harms would entail massive desegregation costs, a finding of a constitutional violation seems less justifiable.

Id. at 346 (footnotes omitted). *See also* Goodman, *De Facto School Segregation: A Constitutional And Empirical Analysis*, 60 CAL. L. REV. 275, 366 (1972) (contentions that de facto segregation adversely affects school children "depend on factual generalizations to which neither intuition nor empirical studies provide confident answers"). *But see* Weinberg, *The Relationship Between School Desegregation and Academic Achievement: A Review of the Research*, 39 LAW & CONTEMP. PROB. 241 (1975) (concluding that desegregation has a positive effect on minority achievement levels). *Cf.* Crain & Mahard, *Desegregation and Black Achievement: A Review of the Research*, 42 LAW & CONTEMP. PROB. 17, 24 (1978) (of 73 studies analyzed, 40 show a correlation between desegregation and improved academic performance by black students, while 12 studies indicate that desegregation has a negative effect on black achievement levels).

concluded that since implementation of Initiative Measure 350 would result in racially imbalanced schools,[63] the initiative necessarily had a disproportionate impact. According to the *Seattle* court, however, such a disproportionate impact is inherent in *all* de facto segregated school districts.[64]

The *Seattle* court also found that a procedural departure occurred because of the use of a statewide initiative to override an "administrative" decision of a local school board,[65] and that the initiative's historical background included a "series of lawsuits and a recall election, the objective of which was to prevent the racial balancing of Seattle schools by means of mandatory student assignments."[66] Neither finding, without more, establishes that a racially discriminatory intent was predominant over an intent to preserve a racially neutral neighborhood school policy.[67] Never-

---

At least one commentator has observed that a finding that racial imbalance is itself harmful to minority students could provide a basis for invalidating de facto segregation as violative of the fourteenth amendement. *See* Goodman, *De Facto Segregation: A Constitutional And Empirical Analysis*, 60 CAL. L. REV. 275 (1972):

> Though *Brown* left the legal issue of de facto segregation undecided, it may have gone far toward foreclosing a critical factual issue. In finding that "[s]eparated educational facilities are inherently unequal" and separation of the races in school "has a detrimental effect upon the colored children," the Court may have supplied the central empirical premise for the argument that de facto segregation amounts to a constitutional denial of equal educational opportunity. Although *Brown* dealt with state-imposed separation of Negro students solely because of their race, the same retarding and demoralizing effects upon black children might be found in a de facto segregated school in a Northern ghetto.

Id. at 278–79 (footnotes omitted).

63. 473 F. Supp. at 1015.

64. The court's finding that racially imbalanced schools result in a disproportionate impact on minority students was not confined to de jure segregated schools, but extended to all segregated schools. *See* note 38 *supra*. *See also*, 473 F. Supp. at 1001 (Finding of Fact 3.2): "The term 'racial imbalance' in a school is used to mean a disproportionately high minority enrollment in a particular school in relation to districtwide minority student population."

65. *See* note 39 and accompanying text *supra*. Although the court characterized the Seattle School Board's decision to implement a mandatory busing plan as an administrative decision, the question of whether students should be assigned to neighborhood schools appears to be a matter of legislative policy because it is of general concern to the state's citizens—particularly since the Board's adoption of the mandatory busing plan was an abandonment of the traditional neighborhood school policy in Seattle. *See* 473 F. Supp. at 1009 (Finding of Fact 7.28) ("It is clear from the location of school buildings and the attendance lines drawn around those buildings that the Seattle School District has traditionally adhered to a policy of the assignment of children to their neighborhood schools.").

66. 473 F. Supp. at 1015–16.

67. With respect to the finding of a procedural departure, the court failed to indicate the connection between the particular departure and proof of discriminatory intent. The court noted that:

> In the adoption of Initiative 350 there was a marked departure from the procedural norm in that an administrative decision of a subordinate local unit of government, the Seattle School Board, was overridden in a statewide initiative by voters, a great number of whom were entirely unaffected by that plan and who could not conceivably be affected by any plan for the mandatory assignment of students for racial balancing purposes.

theless, the district court inferred the existence of a racially discriminatory intent.[68] Not only does such an inference place directly into question the continued vitality of the neighborhood school concept, but, to the extent that de facto segregation in public schools is attributable to the assignment of students to neighborhood schools, it destroys the distinction between de jure and de facto segregation.

IV. CONCLUSION

The district court's opinion in *Seattle School District No. 1 v. Washington* is fundamentally unsound in its application of *Hunter v. Erickson* to the prohibition of busing for racial balancing purposes and in its infer-

473 F. Supp. at 1016. The court did not offer any explanation for its assumption that persons within Washington who would be unaffected by the Seattle School Board's mandatory busing plan would thereby be likely to be motivated by a racially discriminatory purpose in voting for the initiative. The court even noted in Finding of Fact 7.30 that "[m]any parents and voters who support neighborhood schools do so in a sincere belief in the value of neighborhood schools irrespective of the racial distribution of the students attending those schools." 473 F. Supp. at 1009. Nevertheless, the court apparently assumed that any procedural departure *ipso facto* manifests a discriminatory intent.

In finding that the historical background of Initiative Measure 350 supported an inference of discriminatory intent, the *Seattle* court relied on the fact that a series of lawsuits and a recall election preceded the initiative. *See* note 39 and accompanying text *supra*. Yet, the court did not find that the lawsuits or election were themselves a result of a racially discriminatory intent. In its Finding of Fact 6.1, the court found that ten lawsuits were filed in the eight-year period prior to the enactment of Initiative Measure 350. 473 F. Supp. at 1005–06. Four of the suits sought *increased* integration in Seattle schools. Two actions sought to have the neighborhood school policy declared a matter of right. One suit concerned the recall of school board members who had voted in favor of mandatory busing. Finally, three actions challenged the Seattle School Board's adoption in 1978 of a mandatory busing plan. The latter actions were brought by members of Citizens for Voluntary Integration Committee (CiVIC), the organization that proposed Initiative Measure 350. The district court found that CiVIC acted "legally and responsibly in its advocacy of Initiative 350" and that it did not direct "its appeals to the racial biases of the voters." 473 F. Supp. at 1009. Nevertheless, without explaining the relevance of such private actions to the question of intent, the court inferred from the fact of the lawsuits that the Washington electorate must have been motivated by a discriminatory intent in its adoption of Initiative Measure 350.

68. In other school desegregation cases in which a discriminatory intent has been inferred, courts have based the inference on official actions, which, independent of the neighborhood school policy, manifested a racially discriminatory intent. For example, in Arthur v. Nyquist, 573 F.2d 134 (2d Cir. 1978), the court focused on specific actions that produced an increase in segregation over what would have occurred under the neutral operation of the neighborhood school plan. In explaining its finding of discriminatory intent, the court relied on the following evidence:

(1) The redistricting of a high school attendance zone to exclude whites and produce a virtually all black student population;

(2) The operation of a foreign language transfer program which was used to manipulate the racial composition of a high school by permitting white students to transfer to predominately white schools;

(3) The drawing of an attendance zone for a new school which resulted in a 99% black student body;

(4) The use of "optional areas" to permit white students to attend predominately white schools;

(5) The use of racially discriminatory admission policies of vocational schools;

ence of discriminatory intent solely from the decision to maintain a neighborhood school policy. *Hunter v. Erickson's* prohibition against restructuring the political process to create a procedural barrier to minority interests is irrelevant to the decision of a state's citizens to maintain a traditional neighborhood school policy. Furthermore, to infer discriminatory intent solely from such a decision erodes the distinction between de facto and de jure segregation. If that distinction is to remain viable, the *Seattle* court's decision should be remanded with instructions to determine intent on the basis of actions independent of the neighborhood school policy.

Dan M. Albertson

---

(6) The recruitment and assignment of staff members on a racially biased basis.

573 F.2d at 144. Similarly, in Reed v. Rhodes, 607 F.2d 714 (6th Cir. 1979), the court, in the face of a school board's claim that segregation resulted from a racially neutral neighborhood school policy, based its finding of discriminatory intent on the following evidence:

(1) Segregation of faculty;

(2) Site selection and construction of new schools;

(3) School board cooperation in segregated housing;

(4) Segregation of black students within predominately white schools;

(5) Use of optional zones, boundary changes, special transfers, private rental facilities and portable classrooms.

607 F.2d at 723–34. *See also* United States v. School Dist. of Omaha, 565 F.2d 127, 128 (8th Cir. 1977) (discriminatory intent found, notwithstanding neighborhood school system, because of segregated faculty assignment, student transfer policy that permitted 30% of white students assigned to predominately black elementary schools to transfer to white schools, use of optional attendance zones to manipulate racial balance, school construction resulting in segregated student population, and acquiescence in deterioration of a predominately black high school); United States v. Texas Educ. Agency (Austin Independent School Dist.), 564 F.2d 162 (1977), *cert. denied*, 443 U.S. 915 (1978) (note 59 *supra*); Note, 44 GEO. WASH. L. REV. 775 (1976):

> In those cases where the evidence has established that a school board deviated from its neighborhood school plan and the pattern of deviations could only be explained as having been prompted by racial considerations, any resulting segregation has been deemed impermissible de jure segregation. For example, evidence of the gerrymandering of attendance zone lines and the initiation of transfer policies to facilitate individual segregative choices is frequently produced at trial to demonstrate that deviations from neighborhood plans were designed to create or perpetuate segregated schools.

Id. at 777 (footnotes omitted).