THE PATH OF MOST RESISTANCE
THE LEGAL HISTORY OF BROWN V. BOARD OF EDUCATION AND ITS RIGID JOURNEY FROM TOPEKA, KANSAS TO CLEVELAND, OHIO

by

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The Path of Most Resistance
The Legal History of *Brown v. Board of Education* and its Rigid Journey from Topeka, Kansas to Cleveland, Ohio

Abstract

by

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This master’s thesis reevaluates the legal history of *Brown v. Board of Education* (1954) and its rigid journey from Topeka, Kansas to Cleveland, Ohio. At the beginning of this path lies the Jim Crow South, a land where *de jure* discrimination once thrived. The final destination is the progressive North, a region strongly shaped by *de facto* discrimination. As NAACP litigators led by Thurgood Marshall delivered passionate arguments before the U.S. Supreme Court, Chief Justice Earl Warren made an effort to desegregate public schools. However, despite the Court’s ruling of *de jure* segregation to be unconstitutional, Warren’s landmark decision could not prevent some Americans from the continued practice of racial discrimination. My assessment of *Reed v. Rhodes* outlines the end of this particular journey, one found along a path of most resistance.
Introduction

“To suppose that any form of government will secure liberty or happiness without any virtue in the people is a chimerical idea.” – James Madison

Following Brown v. Board of Education, “[for] ten years, virtually nothing happened…only 1.2 percent of black school children in the South attended school with Whites.”¹ Furthermore, just “ten years after the Brown decision, Northern urban and suburban schools [continued] to be as segregated as they were prior to WWII.”² These two assertions made by political scientist Gerald Rosenberg and sociologist Robert A. Dentler respectively, reflect the general consensus that Brown failed to desegregate schools. The landmark decision which declared de jure segregation in public education unconstitutional could not overcome the foundation for the passage of such laws, racial discrimination. In fact, the road to Brown, the opinion, and the case’s unfortunate aftermath had an influential impact on an array of scholars. Beginning in the 1970s, intellectuals from all realms contributed to the discussion of one of the Supreme Court’s most famous decisions. Here, I explore some of the most compelling publications that added to this discourse.


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v. Board of Education and the NAACP’s struggle to secure equality under law.

Beginning with an analysis of the Thirteenth, Fourteenth, and Fifteenth Amendments, Kluger argues that the passage of these congressional measures was not enough to protect the constitutional rights of newly emancipated African Americans. Furthermore, with the inclusion of the Supreme Court’s “separate but equal” doctrine in Plessy v. Ferguson, Kluger outlines African American’s failed attempts to obtain equality in their campaign to desegregate public transportation in the late nineteenth century.4

In addition to a struggling anti-lynching campaign led by the National Association for the Advancement of Colored People (NAACP) during the late nineteenth and early twentieth centuries, blacks searched for another route to ensure legal equality. As noted by Kluger, education proved to be not only the best approach, but also the most successful campaign.

Kluger is one of a few writers who present the Court’s role in Brown with great optimism. In fact, Chief Justice Earl Warren the author of Brown, is noted as a religious man with “exemplary dignity.”5 Kluger even dedicates a lengthy chapter to Warren entitled “Arrival of the Superchief.”6 Ultimately, Kluger retains a positive notion about the Court’s power as an institutional structure. According to Kluger, the Supreme Court serves as the primary means for African Americans to secure freedom, equality, and simple justice.

4 163 U.S. 537 (1896)
5 Kluger, p. 664
6 Ibid, p. 656
Even though Kluger’s neo-liberal approach – the notion that the Court can operate individually as a catalyst for social change – was heavily celebrated in the early years of Brown’s application, other academic scholars began to abandon such idealist expectations. By Brown’s fiftieth anniversary in 2004, when it became clear that the Supreme Court’s decision led to the prolonged desegregation process of American schools, one Harvard law professor in particular dismissed Kluger’s argument and delved into a new realm of interpretation – neo-institutionalism.7

Just ten years after Simple Justice, Mark Tushnet published The NAACP’s Legal Strategy Against Segregated Education, 1925-1950. In this piece, Tushnet criticizes a portion of Kluger’s work and begins the trend of downplaying the Supreme Court’s legitimacy as an institutional body.8 Tushnet argued that while the Court can be utilized as an avenue to seek reform, one could not expect the national judiciary to eliminate racial discrimination completely. More specifically, “the social process [of litigation and later reform] does not end when the court decides a case. It extends through the implementation or evasion of the court’s decisions, and includes the search for legislative alternatives to the outcome the court reached.”9 In agreement with some of America’s Founding Fathers, because the national judiciary does not possess the power of the purse (legislature’s monetary influence) or the sword (executive’s enforcement authority) it

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9 Tushnet, p. xiv
cannot enact social change solely. Assistance is needed from Congress and the executive branch. This is why Tushnet suggests, the Court alone cannot desegregate schools.

Through a broader application of the Court’s institutional limitations, Tushnet argues that the Supreme Court could not eliminate racial discrimination in America by finding *de jure* segregation in public education unconstitutional. Because litigation is a social process, changes in economics and politics need to support changes in racial policy. The NAACP’s litigation campaign and its success before the Court is only “one piece of the larger mosaic of the transformation of the country’s race relations.”

In 1991, Gerald Rosenberg offered another interpretation to the theories of neo-liberalism and neo-institutionalism. Due to his political science background, Rosenberg’s *The Hollow Hope: Can Courts Bring About Social Change* provides scholars with a more refined understanding of the Supreme Court’s governmental capabilities with respect to each theory’s effect on social reform. Through his objective approach, Rosenberg outlines a dual-layered theoretical framework. He notes that political scientists have traditionally examined the Court’s role throughout history in two fashions, “Dynamic” (neo-liberalism) and “Constrained” (neo-institutionalism).

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10 The Founding Fathers’ viewpoints about the strength and legitimacy of the Supreme Court can be found in *The Federalist Papers*. For an in depth discussion about the national judiciary, see Alexander Hamilton’s Federalist Paper No. 78.

11 Ibid, p. 163

A Dynamic Court view “suggests that it always makes sense for groups to litigate,” as the Court will provide the necessary remedies to enact social change.\textsuperscript{13} Because the justices are insulated from political pressures, “courts are in the strongest position to insist that unconstitutional conditions be remedied, even at significant financial cost.”\textsuperscript{14} Furthermore, with the Dynamic perspective, the Court can serve as a catalyst for social reform; “courts have important indirect effects, educating Americans and heightening their understanding of their constitutional duty.”\textsuperscript{15}

On the other hand, due to the limited nature of constitutional rights, the lack of judicial independence to develop appropriate policy, and the Court’s lack of power to enforce its rulings, the Constrained Court approach addressed by Rosenberg “[suggests] that courts can never be effective producers of significant social reform.” Rosenberg then applies both conflicting theories to the study of Brown and allows for scholars in all fields to choose sides.

Upon review of his work, a majority of scholars appeared to favor the neo-institutionalism theory highlighted by Rosenberg’s Constrained Court doctrine. Due to his publication, academia became even less interested in Kluger’s neo-liberalist approach and his praises of Chief Justice Earl Warren. Instead, the central focus was now the strength of the national judiciary as a governmental body.

Following The Hollow Hope, neo-institutionalism became more popular. Thirteen years after Rosenberg’s analysis, legal historian Michael J. Klarman published From Jim

\textsuperscript{13} Rosenberg, p. 9
\textsuperscript{14} Ibid, p. 22
\textsuperscript{15} Ibid, p. 25
Because of his historical training, Klarman adheres to an amended viewpoint of Rosenberg’s Constrained Court theory. Klarman claims that “because constitutional law [throughout time has been] generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times.”

He states that war and “long-term forces such as urbanization, industrialization, and better education fostered progressive racial change.” In other words, the Supreme Court as an institution is not a trendsetter. Rather, it serves as a national mirror, reflecting the growth, development, and emergence of America’s changes in race relations, society, and politics.

In lieu of this discourse – enhanced by scholars from various backgrounds – Klarman’s conclusion calls for a middle ground. For him, the Supreme Court’s role in *Brown* is neither catalytic nor unsuccessful. Klarman suggests that in order for intellectuals to develop an accurate perception of the Court’s authority, one should inspect both the direct and indirect consequences of the national judiciary’s rulings with respect to their social and political implications.

Finally, one of the most recent books to analyze *Brown* with a neo-institutionalism manner is Derrick Bell’s *Silent Covenants: Brown v. Board of Education*

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17 Klarman, p. 5

18 Ibid, p. 445

19 Ibid, pp. 6-7
and the Unfulfilled Hopes For Racial Reform.\textsuperscript{20} Published in 2004, the New York University law professor and former assistant counsel for the NAACP Legal Defense and Education Fund takes a more critical view of Rosenberg’s Constrained Court theory. In fact, Bell declares the Supreme Court’s role in \textit{Brown} to be an utter failure. After reflecting on his litigation experiences in \textit{Brown}, Bell asserts that social changes can only occur through the social destruction of \textit{de facto} racial discrimination. The judiciary can only handle matters of \textit{de jure} segregation:

\textit{Brown} teaches that advocates of racial justice should rely less on judicial decisions and more on tactics, actions, and even attitudes that challenge the continuing assumptions of white dominance. History as well as current events call for realism in our racial dealings. Traditional statements of freedom and justice for all, the usual fare on celebratory occasions, serve to mask continuing manifestations of inequality that beset and divide people along lines of color and class. These divisions have been exploited to enable an uneasy social stability, but at a cost that is not less onerous because it is all too obvious to blacks and all but invisible to a great many whites.\textsuperscript{21}

Furthermore, Bell declares that \textit{Brown} was nothing more than “a dramatic instance of a remedy that promised to correct deficiencies in justices far deeper than the Supreme Court was able to understand.”\textsuperscript{22}

Bell’s theory is the most controversial of its time because it refuses to treat any consequence of \textit{Brown} as triumphant. Throughout the book, Bell echoes Klarman by claiming that politics, economics, and social norms are what influence effective policy reform, not law. Notably, Bell differentiates between the Court’s treatment of “black

\textsuperscript{20} Bell, \textit{Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes For Racial Reform}

\textsuperscript{21} Bell, p. 9

\textsuperscript{22} Ibid, p. 10
“justice” and “white justice.” Primarily for him, Brown did not succeed is because its litigation campaign focused too much on the welfare of African Americans. Had Brown and other NAACP federal cases concentrated on a broader set of rights (i.e. “white rights” that would expand the constitutional liberties of all American citizens, regardless of their race) then justice could have prevailed.

Like Bell, Klarman, Rosenberg, Tushnet, Kluger, and others, I wish to add to this assorted discourse. Through an evaluation of the road to Brown, the formulation of its opinion, and its immediate aftermath, I address some of the same arguments made by these and other scholars – the institutional limitations on the Court and how it affects the promotion of social change. However, my assessment is different for two reasons. First, I argue that as opposed to Plessy v. Ferguson, the Civil Rights Cases of 1883 are the most critical to examine in this legal history. Last, I look at Brown’s winding path from Topeka, Kansas to Cleveland, Ohio.

I chose Cleveland because of my experiences with the aftermath of Brown in the “de-facto” North. Beginning on the landmark case’s forty-year anniversary, in 1994, I attended Adlai Stevenson Elementary School. As an all black institution – representative of the effects of white flight – my school was no stranger to overcrowding. In classrooms designed to hold twenty students comfortably, at times I shared desks and supplies with thirty peers. Due to an unjust reallocation of state funds, books found in the school’s library were often outdated and damaged. Inside, pages read that the Soviet Union still reigned and that President Ronald Reagan lived in the White House.

The school’s cafeteria did not have enough food for every student. Violence paraded the hallways as children engaged in a real life contest of “survival of the fittest.”
Given the racial makeup, some outsiders made judgments along stereotypical lines. Yet, in reality, we were innocent children placed into an unfortunate situation with few educational opportunities made available to escape.

Because of my experiences, I decided to examine Brown’s application in Cleveland. My thesis analyzes the particular effects of a local community’s reaction to the Warren Court’s 1954 opinion. I do so by analyzing Chief Judge Frank J. Battisti’s 1976 decision of Reed v. Rhodes.

Chapter I: “The Road to Brown” reevaluates the early legal history of African Americans. I argue that throughout their struggle to ensure their just constitutional rights, the Court limited its opinions to an examination of de jure segregation. This is shown through a concise assessment of African-American legal history from Prigg v. Pennsylvania to Plessy v. Ferguson.23

Chapter II: “The NAACP and its Decision to Challenge Public Education” examines the NAACP’s efforts during the early twentieth century to challenge Plessy’s “separate but equal” doctrine. Because of the growing importance of public education in America, the desired way to obtain racial equality emerged in the battle to desegregate schools. However, even with a unified belief to tackle such prejudices, prominent black intellectuals could not agree on which form of schooling would better educate the race.

Chapter III: “The Margold Report – Equalization versus Direct Attack” explains the two main litigation tactics implemented by the NAACP Legal Defense Team – “direct attack” versus “equalization.” Furthermore, I assess the story behind the NAACP’s decision to eliminate the equalization strategy and incorporate the direct attack

23 Prigg, 41 U.S. 539 (1842); Plessy, 163 U.S. 537 (1896)
approach solely. Clearly, because the Court did not address *de facto* discrimination (due to a following of precedent - the *Civil Rights Cases* of 1883), the NAACP’s shift to direct attack occurred as an effort to eliminate *de jure* segregation. The first notable victories of direct attack were *Sweatt v. Painter* and *McLaurin v. Oklahoma*.\(^\text{24}\)

Chapter IV: “Direct Attack as Applied to Elementary Schools” reviews the NAACP’s direct attack application in *Brown*. My evaluation of the Supreme Court’s oral arguments in *Brown* (1952-1953) provides an interesting outlook into the presentation and articulation of the NAACP’s effort to challenge *de jure* segregation directly. Normally, scholars will analyze the legal briefs submitted to the Court to critique arguments and strategies made by litigators. However, in this circumstance, considering the deep emotions surrounding racial discrimination in public education, the spoken word as opposed to the written one offers a more unique and immediate interpretation of the attorneys’ stances.

This section also reconsiders the label of judicial activism placed upon the Warren Court after *Brown*. In fact, due to his following of such Court’s institutional limitations, absolute activism – the desires to not only declare *de jure* segregation unconstitutional, but to also eliminate racial discrimination among the masses – did not occur.

Chapter V: “The Court Did Not Demand Integration,” gives a look into the resistance presented after *Brown*. Essentially, such opposition took advantage of the jurisprudential restrictions respected by the Court. Racial discrimination and personal bias are the driving forces for such segregation, yet the Court continued to regulate *de jure* matters.

\(^{24}\) *Sweatt*, 339 U.S. 629 (1950); *McLaurin*, 339 U.S. 637 (1950)
To conclude, in Chapter VI: “Topeka, Welcome to Cleveland,” I address Brown’s rigid application to the “de jure-free” North. Most notably, in progressive Cleveland, Ohio, Judge Frank J. Battisti evaluated the city’s post-World War II struggle to eliminate racial segregation in public education. In particular, the local federal case of Reed v. Rhodes highlights how additional de facto elements (factors that neither Warren nor Battisti addressed directly because of their adherence to the Civil Rights Cases of 1883) contributed to the struggle to desegregate Cleveland’s schools.⁵

⁵ Reed v. Rhodes, 422 F.Supp. 708 (1976)
Chapter I: The Road to Brown

*Brown v. Board of Education* represents just one chapter within the lengthy, complex, and detailed history of the African-American struggle to obtain racial equality through the courts. Over two centuries, the process of African-American litigation adopted several campaigns focusing on crucial social issues within the community. The notable of these concerns were slavery, public transportation, anti-lynching, and of course, education. Despite litigators’ strong efforts to challenge the constitutionality of each, none has proven to be more successful than the legal campaign to desegregate public schools. Before education however, one must begin with slavery. Two landmark Supreme Court cases capture the regulation of *de jure* segregation as opposed to *de facto* discrimination, a trend emphasized in the *Civil Rights Cases* of 1883 and continued in the story leading up to *Brown.*

During slavery, the federal government passed two notable Fugitive Slave Acts. They were in the years of 1793 and 1850, and each are featured in two landmark Supreme Court cases discussed below. The late eighteenth-century decree protected by Article IV, Section 2, Clause 3 of the U.S. Constitution stated that slaveholders had the right to recapture their self-emancipated slaves – their property – and return them back to their masters.26 The passages of this Act and its 1850 counterpart, addressed in detail later, reinforced the notion that black slaves were not American citizens. By referring to them as mere property, as opposed to human beings, these acts sustained the “badge of inferiority” placed upon African Americans. This status of inferiority placed upon blacks

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26 “No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.” Art. IV Sec. 2 Clause 3 is superseded by the Thirteenth Amendment.
inevitably led to a sense of white superiority. Such social standards – *de facto* discrimination – were not only reflected in law, they were the foundation for it.

One of the earliest judicial challenges to the Fugitive Slave Act of 1793 was *Prigg v. Pennsylvania*. In this lawsuit, the state of Pennsylvania enacted a law in 1826 which prohibited the removal of African Americans from the free state to enslave (or re-enslave) them. This attempt made by Pennsylvania not only sought to ensure that it remained a free state, but also challenged *de facto* discrimination.

In 1832, Margaret Morgan, a black woman – granted freedom by her master John Ashmore in Maryland – moved from the northern-Atlantic slave state to Pennsylvania. Upon the death of Ashmore, the former slave owner’s heirs wanted Morgan to return to the family plantation as a slave. Ashmore’s relatives sent slave catcher Edward Prigg to retrieve her in Pennsylvania. Once Prigg captured Morgan, a lower Pennsylvania tribunal convicted him for violating the 1826 anti-fugitive slave decree. Prigg appealed to the state’s supreme court and lost again. However, his final attempt before the U.S. Supreme Court proved to be victorious for him and white supremacy.

Despite the *de facto* discrimination factors present, the Supreme Court’s opinion written by Justice Joseph Story only involved the upholding of *de jure* matters. Shortly put, Story argued that because of the Supremacy Clause found in the U.S. Constitution, federal law trumps state legislation. Therefore, the Fugitive Slave Act of 1793 prevailed over Pennsylvania’s state acts.27

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27 “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Supremacy Clause, Article VI, Clause 2)
Prigg is the first of several cases where the Court adopted a central legal focus. Following the national judiciary’s protection of the 1793 Fugitive Act, Congress passed similar acts. With each one enacted, the badge of inferiority placed on blacks strengthened. Law helped to reaffirmed society’s notions of white supremacy and black inferiority. In fact, even free-born blacks were also in danger of being captured and enslaved. Any African American, whether emancipated or slaved was viewed as prospective property for white slave owners.

Undoubtedly, one of the most pivotal Supreme Court case concerning the rights of blacks and the Fugitive Slave Act of 1850 is Dred Scott v. Sanford. Scott was a slave who traveled frequently across state lines with his master. During one trip, both owner and slave entered Illinois, a place where slavery was forbidden by the Missouri Compromise of 1820. According to the well-established practice along the Mason-Dixon Line, Scott, now on free soil declared himself emancipated. When his master refused to liberate him, Scott sought justice in court. When the case reached America’s highest tribunal, Scott and thousands of blacks, free and enslaved suffered a tremendous defeat.

Again, through de jure segregation, the Court stressed African American’s constitutional equivalence with that of property. Writing for the majority, Chief Justice Roger B. Taney declared: “blacks [were] not intended to be included under the words ‘citizens’ in the Constitution and can therefore claim none of the rights and privileges

For more on the facts, history, and social aftermath of Prigg in the State of Pennsylvania, see Paul Finkleman’s “Sorting Out Prigg v. Pennsylvania,” Rutgers Law Journal Volume 24 Spr. 1993 (No. 3)

28 60 U.S. 393 (1857)
which that instrument provides for and secures of the United States”.  

Here is another instance where the Court’s analysis focused strictly on the text on the Constitution and the underlying principles of black legal inferiority found within the Fugitive Slave Act of 1850. This mid-nineteenth century decree replaced the Fugitive Slave Act of 1793 held under scrutiny in Prigg. Under the 1850 law, individuals who refused to turn over self-emancipated slaves were convicted of a felony and mandated for the recapture of runaway slaves to their respective masters. Additionally, Congress had the power to fine any person, such as Northern abolitionists who helped slaves escape from the South. As a result, African Americans across the nation, both free and enslaved were stripped of any possible or existing legal protection.

In light of continued debates over the Missouri Compromise, the Fugitive Slave Laws, and the unwillingness of U.S. presidents to deal with slavery directly, Dred Scott helped to foster a national fury. Subsequently, with all these social and legal factors combined, America’s bloodiest conflict emerged, the Civil War.

Despite a victory by the Union army, the later ratifications of the Thirteenth, Fourteenth and Fifteenth Amendments, and a brief gain of political and economic rights, blacks still maintained minimal legal protection and social liberties, if any at all.  

Because of the limited interpretation of constitutional liberties as suggested by Rosenberg’s Constrained Court theory, the Supreme Court continued to construct opinions that did not address de facto discrimination. Instead, the major emphasis was de

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jure. Indeed, legal historian Morton J. Horwitz argues that, “the Supreme Court almost from the beginning gave these [Reconstruction] amendments the narrowest and most unfavorable possible interpretation from the standpoint of protecting the former slaves.”

Horwitz’s assertion is defended by the Court’s post-Reconstruction decisions.

Now equipped with the newly passed Reconstruction amendments and the Northern influenced passage of the Civil Rights Act of 1875 by Congress, African Americans evaluated the rising social and political issues within their community. Following the campaign against fugitive slave laws, the focus shifted to de jure discrimination in the public sector. In other words, blacks began to challenge the growing Southern opposition to the equal sharing of public transportation, hotels, and entertainment facilities – each supported by the Civil Rights Act of 1875. Local black leaders in the South rallied together and tackled those in opposition of the 1875 law in the Courts. Again, the Supreme Court, as in Prigg and Dred Scott did not tackle on de facto discrimination. Rather, the Court placed emphasis on whether the Civil Rights Act of 1875 violated federal laws outlined in the U.S. Constitution. The Court’s ruling in the Civil Rights Cases of 1883 declares that it did.

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32 For more on the shift in litigation from slavery to public accommodations (most notably transportation), see Blair Murphy Kelley’s Right to Ride: Streetcar Boycotts and African American Citizenship in the Era of Plessy v. Ferguson (Chapel Hill: University of North Carolina Press, 2010)

33 109 U.S. 3 (1883)
Delivered by Justice Joseph P. Bradley, the national judiciary found the Civil Rights Act of 1875 in violation of the Tenth Amendment. To clarify, the Civil Rights Act of 1875 was a federal law that permitted states governments to enforce racial integration in public facilities. However, as mentioned through the Court’s interpretation of the Tenth Amendment, the federal government could not intervene in state government matters and therefore, tell the lower legislatures what they can and should do. According to the Court, Congress has the sole power to prohibit states from discriminating. Also, Congress should deal with federal issues of segregation solely and allow for the state government to address its own local matters. Moreover, in the Court’s review of law-related concerns, Justice Bradley noted that the national tribunal does not have the authority to oversee *de facto* discrimination.

Mirroring the belief of neo-institutionalists of the twentieth and twenty-first centuries, Bradley stated that the Court can only interpret matters of law. Unfortunately, such a narrowing responsibility exercised by the judiciary – to interpret the law – leads to future missed opportunities by the Court to regulate both *de jure* and *de facto* discrimination. I argue that both forms of discrimination are not only interrelated, but they are undeniably inseparable. In fact, *de jure* legislation cannot exist without preconceived notions of racial superiority and inferiority. Nevertheless, because of these

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34 “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. Amend. X

35 Klarman, pp. 50 and 72
judicial constraints placed and jurists adherence to them, most pronounced in the Civil Rights Cases of 1883, the Supreme Court only addressed law and its interpretation of it.\textsuperscript{36} Unlike my suggestion of the Civil Rights Cases, most historians find the most pertinent within the discussion of African American legal history to be \textit{Plessy v. Ferguson}.\textsuperscript{37} It marks a significant moment in which Jim Crow segregation is affirmed on the national stage. Furthermore, it is responsible for the “separate but equal” doctrine. Jim Crow refers to an era in the American South between 1877, noting the end of Reconstruction and 1954, the year of \textit{Brown} which rules that \textit{de jure} segregation in public education is unconstitutional. The “separate but equal” doctrine established in \textit{Plessy} not only reinforced notions of white supremacy. It expanded \textit{de jure} discrimination and provided additional protection to already existing forms of \textit{de facto} segregation. Most notably, as state and local governments passed Jim Crow laws in the fields of public transportation and education, proprietors in the private sector enjoyed approval from both \textit{de facto} supporters and \textit{de jure} legislators.\textsuperscript{38}

Less than forty years after Chief Justice Taney stripped free and enslaved blacks of American citizenship and twenty years after Justice Bradley stated that the judiciary

\textsuperscript{36} Due to the “Cases and Controversies” doctrine as interpreted through the Article III, Section 2, Clause of the U.S. Constitution, federal judges are not permitted to hear cases that do not present an actual controversy. Furthermore, federal jurists are expected to only examine issues that are brought before them during pleadings presented to the Court. In the \textit{Civil Rights Cases} of 1883, only matters of \textit{de jure} segregation were under judicial scrutiny. Therefore, the Court determined that it could not regulate \textit{de facto} discrimination, no matter how interrelated it was to law. As I argue, such a tradition has proven to be detrimental to the African-American community and its struggle to exercise its just constitutional rights. Such a mishap is expressed in the aftermath of \textit{Brown}.

\textsuperscript{37} 163 U.S. 537 (1896)

\textsuperscript{38} For more on the legal and social elements of the Jim Crow South, see Leon Litwack’s \textit{Trouble in Mind: Black Southerners in the Age of Jim Crow} (New York: Vintage Books, 1999)
cannot address de facto segregation, the Court rendered a verdict which was “quite as pernicious as the decision made by [the U.S. Supreme Court] in the Dred Scott case.”\footnote{Choper, p. 1199} In a 7-1 decision, Plessy’s majority writer, Justice Henry Brown established the infamous “separate by equal” doctrine. Homer A. Plessy, a man of one-eighth African blood, “attempted to ride in a railroad car reserved for whites. He was arrested and convicted of violating Louisiana’s 1890 segregation law,”\footnote{Bell, p. 12} and subsequently, challenged the constitutionality of the state’s statute. To add, Plessy’s racial makeup was no coincidence or surprise. This 1896 lawsuit is an example of a test case. Litigants on behalf of Homer Plessy wanted to test the strength of the recently ratified Reconstruction Amendments. Specifically, they wanted to examine the limits of the Fourteenth Amendment’s jurisprudential powers.

As expected by Plessy’s lawyers, the Court’s majority reviewed the Equal Protection Clause of the Fourteenth Amendment.\footnote{“No State shall … deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV} However, Justice Brown did not interpret the Amendment as one which protected the true administration of racial equality. Rather, the Court authorized the execution of separate but equal facilities, hence the “separate but equal” doctrine. The enactment of this doctrine led to the affirmation of de jure segregation in the American South.

On the other hand, one dissenting justice was not pleased with the “separate but equal” doctrine. Justice John Marshall Harlan wrote:
in view of the Constitution [via Fourteenth Amendment], in eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. … The law regards man as man, and takes no account of his surroundings of his color when his civil rights are guarantied by the supreme law of the land are involved.\footnote{163 U.S. 537, 559}

Justice Harlan’s perspective reveals implicitly how \textit{de facto} influenced \textit{de jure} discrimination. Yet, while the issue is not pleaded before the Court, Harlan’s opinion did not address \textit{de facto} segregation \textit{per se}.

It is also interesting to note that while the majority’s holding in the case pertains to public transportation only, the simple citation within \textit{Plessy} of an 1849 Massachusetts state decision helped to expand the “separate but equal” doctrine to all facets of society, most notably in public education. \textit{Roberts v. The City of Boston}, mentioned as \textit{dicta}, upheld the first reported incident of segregated schools in the United States.\footnote{5 Cush. (Mass.) 198 (1849)} Similar to the story of future plaintiff Linda Brown in \textit{Brown v. Board of Education}, the father of Sarah C. Roberts wanted his daughter to attend an all-white school closer to their home. The institution denied Roberts admission solely because of her race.\footnote{Ibid.}

Chief Justice Shaw of the Supreme Judicial Court of Massachusetts argued that the creation of separate schools for blacks and whites was constitutional. Furthermore, according to Shaw, such institutions maintained by law did not contribute to blacks’ feeling of inferiority, an element related to \textit{de facto} segregation:

\begin{quote}
It is urged, that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted
\end{quote}
prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law.\textsuperscript{45}

With \textit{Plessy} and the Court’s mentioning of \textit{Roberts} in passing, Jim Crow segregation was now the law of the American South. Ironically, during that same year “in which the Supreme Court rejected … Plessy’s argument that segregation stamped the colored race with a badge of inferiority, seventy-seven Negroes were lynched.”\textsuperscript{46}

To recapitulate, \textit{Plessy} affirmed the establishment of Jim Crow in the American South. Historian Charles A. Lofgren expands on three central issues in \textit{Plessy} that led to the further enhancement of \textit{de facto} discrimination across the former states:

The Louisiana proceedings had disclosed three elements which were central to the resolution of Plessy’s case. First, and to no one’s surprise, the outcome depended on judicial interpretation of the Thirteenth and Fourteenth Amendments. Second, application of the two Amendments involved ‘tests’ that took judges into the realm of ‘fact’ – and, in Plessy, almost immediately to ‘fact’ in the form of scientific and popular views of race. Third, current judicial conclusions about the empirical ‘truth’ of race and their implications for transportation rested in part on a series of prior race-related transportation cases involving mainly non-constitutional issues.\textsuperscript{47}

Lofgren’s viewpoints suggest that the foundation for Jim Crow rested in the socially “understood” truth that blacks were inferior to whites. In other words, racially dividing doctrines displayed by \textit{de jure} means were actually grounded in \textit{de facto} principles.

Given the difficult task to eliminate \textit{de jure} segregation through an attack on public transportation in \textit{Plessy}, African Americans looked for alternative means to achieve their just constitutional liberties. Reformers from across the country organized

\begin{footnotes}
\item[45] 5 Cush (Mass.) 198, 209
\item[46] Bell, p. 13
\item[47] Lofgren, p. 60
\end{footnotes}
with hopes of obtaining equality in other civic realms including politics, economics, and of course, education. Black philosopher and social activist W.E.B. Du Bois led the way in 1909 with the founding of the NAACP.
Chapter II: The NAACP and its Decision to Challenge Public Education

During the early years of Jim Crow, because the courts – according to the Civil Rights Cases of 1883 – could not regulate *de facto* discrimination, African-American leaders looked for ways to fight *de jure* segregation. As expected, such racially impacting laws were detrimental to the social, political, and economic welfare of African Americans. Due to *de jure*, blacks were limited to more forms of low-wage labor, disenfranchisement, and lower educational opportunities than their white counterparts. Given their minority status in American society, leaders recognized the important notion that blacks needed to realize that the “fight for complete elimination of segregation [should be] his ultimate goal.” Any less of an effort would not suffice.\(^48\)

To address these issues, a diverse group of social reformers including, W.E.B. Du Bois, Ida B. Wells, and Jane Addams founded the NAACP in 1909. The Association’s mission remains to “ensure the political, educational, social, and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination.” In the beginning, the NAACP tackled a multiplicity of concerns at once including anti-lynching, racial segregation in housing, economic welfare, and of course, education.\(^49\) Small victories were made in each realm through litigation, bureaucratic reform, and legislative lobbying. However, due to the increase in educational reform across the nation, most recognized in the 1920s by the Court, the NAACP understood the greater benefits

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\(^{49}\) For more information on the NAACP’s anti-lynching campaign in the courts and the leadership of Ida B. Wells, see Gilbert Jonas’ *Freedom’s Sword: The NAACP and the Struggle Against Racism in America, 1909-1969* (New York: Routledge Press, 2004)
involved in educational reform. Therefore, the Association began to focus primarily on public education. Nevertheless, despite the NAACP’s general decision to tackle racial disparities in education, historian Kevin K. Gaines outlines a “prominent debate among black intellectuals concerning over precisely what sort of education would be made available to blacks.”

In *Uplifting the Race: Black Leadership, Politics, and Culture in the Twentieth Century*, Gaines highlights both sides of the famous discourse. On one side, supporters of prominent black educator and philosopher, Booker T. Washington argued that industrial and agricultural education would not only benefit African Americans; it would also revitalize the South from the devastating effects of the Civil War. As stated in his autobiography, *Up From Slavery*, Washington believed that it “[was] necessary to convince the Southern white man that education, in case of the coloured man, [was] a necessary step in the progress and upbuilding, not merely of the Negro, but of the South.” Under Washington’s doctrine, blacks should gain their knowledge from an extensive study of land and industry. An education within this domain could translate into a source of practical service, economic influence, and of course, uplift.

On the other hand, Gaines notes, that some black intellectuals believed in the power of higher education. For example, W.E.B. Du Bois, “would become the most

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53 Gaines, 40
prominent of [Washington’s] opponents.” In fact, Du Bois was best known for challenging Washington through the written word. Supporters of Du Bois counteracted Washington’s theories on education. Du Bois accentuated that “the problem of education, then among Negroes must first all deal with the Talented Tenth”. This Talented Tenth, a small percentage of black elites would lead the forefront for equality through the acquisition of professional positions in law, science, history, religion, and philosophy. Additionally, through racial integration and a sound intellect, Du Bois believed that an understanding of “abstract knowledge”, unlike agricultural training could better advance the race. Nonetheless, access to an adequate education by any means whether collegiate or agricultural, could not be easily obtained without equal protection under the law.

Because of apparent deprivations in African-American educational opportunities, the NAACP shifted from an intellectual debate to a legal one. As a result, the newly founded NAACP Legal Defense Fund asked social scientist Nathan Margold to devise a plan to challenge racial segregation in schools successfully. Elements of his extensive research pertaining to the history and maintenance of public learning institutions in the American South tackled various forms of de jure discrimination. Furthermore, his strategies were later implemented by leading NAACP attorneys Charles Houston and Thurgood Marshall in the legal battle to find “separate but equal” unconstitutional.


56 Gaines, 40


Chapter III: The Margold Report – Equalization versus Direct Attack

In accordance with the growing importance of education in American society, the NAACP wanted to discover whether African Americans were gaining the same benefits as their white counterparts. Based off of a grant from the American Fund of Public Service, a young lawyer named Nathan Margold conducted a study analyzing the financial disparities present between white and black schools. Published in 1930, the results were disturbing, as there were large differences in funding across racial lines. In light of these figures, the NAACP assigned Margold to devise a legal plan which surveyed several avenues to improve upon African American education – regardless of whether it was Du Bois’ or Washington’s perspective.

The Margold report purposed two legal means: “equalization” and “direct attack.” Margold’s report proved to be essential to the NAACP’s fight to improve education for African Americans. Without a doubt, such reform would not just appear simply with patience; “civil rights are not self enforcing. Making them a reality requires individuals with the skill and determination to use the law’s majestic making by bringing cases that expose the great gulf between the high-mindedness of the Court and the injustices of everyday life.”

Even though the plan shined a new light onto the struggle to obtain adequate educational opportunities for African Americans, not all NAACP members were in favor this type of legal reform. In fact, in 1935, Du Bois published a controversial article entitled, “Does the Negro Need Separate Schools?” In this work, “Du Bois admitted that

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57 Johnson, p. 150

no general and inflexible rule [could] be laid down. [Nevertheless,] the Negro needs neither segregated schools nor mixed schools. What he needs is Education.”

Despite Du Bois’ views, the NAACP embraced Margold’s report and prepared to execute it.

Equalization, the first strategy sought a fair upholding of Plessy’s “separate but equal” doctrine. This argument was framed upon the past belief that the Court could not declare de jure segregation unconstitutional. Therefore, Margold hoped that by compelling the state and local governments to allocate funds equally, economic factors would eventually lead to the desegregation of schools; it would become too expensive to maintain racially separated schools. As Margold himself explained, despite the administration of dual-race schools, “both schools [belonged] to one and the same system, and the system [belonged] to the public.” Simply put, with the equalization method, economics – not law could result in integration.

Some of the earliest cases argued by the NAACP Legal Defense Fund employed the equalization technique. And, as expected, the Court conducted a narrow reading of the Equal Protection Clause of the Fourteenth Amendment. Leading this Defense Fund were “Charles Hamilton Houston, head counsel … William Hastie, the first African-American federally appointed judge, and Thurgood Marshall, who would become the

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60 McNeil, p. 141
first African-American Supreme Court justice…”⁶¹ The highlight of equalization stems from the 1938 case of *Missouri ex rel Gaines v. Canada.*⁶²

Lloyd Gaines, a black man who graduated from Lincoln University, a historically black institution wanted to attend law school. However, the university did not have one. For personal and professional reasons, Gaines applied the University of Missouri’s School of Law. Gaines’ application to attend the all-white institution was supported by Section 9622 of the Revised Statutes of Missouri, enacted in 1929. Given that Lincoln University’s professional schools were still in the planning stages, the provision allowed for Gaines to enroll into the University’s law school, given that he qualified academically.

During oral argument, the universities’ administration noted that Gaines was academically sound. Upon initial review of his application, the admissions officers noted Gaines as “an intelligent and gifted young man [who] graduated first in his high school class and was president of his college class.”⁶³ Yet, after learning about his race, the university denied him admission.⁶⁴ As a result, the state of Missouri, in violation of Section 9622 advised Gaines to attend a neighboring school in one of the four adjacent states: Kansas, Nebraska, Iowa, and Illinois where non-resident blacks were admitted. Gaines brought his suit to court under two challenges. First, in light of equalization, the

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⁶² 305 U.S. 337 (1938)


⁶⁴ Ibid., p. 109
state of Missouri did not apply the funds necessary to maintain separate but equal educational facilities in the state of Missouri. This was apparent by Lincoln University’s absence of a law school. Second, by the University of Missouri’s refusal to admit him, Gaines contested an infringement of his Fourteenth Amendment Equal Protection rights. Chief Justice Hughes agreed with Gaines. Yet, because of judiciary’s restrictions and the NAACP’s employment of equalization the Court only addressed matters of de jure segregation.

In the end, Chief Justice Hughes issued an injunction and declared that Missouri provide professional facilities for black law students that could compete with those found at white institutions. Unfortunately though, with Jim Crow still reigning in the South, legislatures and administrators in higher education found alternative means to override the NAACP’s equalization desire for a true and just enforcement of “separate but equal.”

Alston v. School Board of City of Norfolk is an example of those alternative de jure means to maintain white superiority in public education. Again, the NAACP litigation team employed the equalization strategy to ensure the fair allocation of funds among black and white school districts. Instead of the discussion of unequal facilities however, Alston involved teacher’s salaries and pensions.

Melvin O. Alston, a black teacher in Norfolk, Virginia and the Norfolk Teachers’ Association filed suit against the local school board. The administration paid white teachers at a higher rate than their black counterparts despite their same teaching experience and prior education. The NAACP under equalization wanted to ensure that all teachers be compensated equally. Similar to Gaines’ outcome, the U.S. Court of Appeals

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65 311 U.S. 693 (1940) cert. denied
for the Fourth Circuit engaged in a narrow legal interpretation of the Equal Protection Clause of the Fourteenth Amendment and ordered the upholding of a true practice of “separate but equal.” Even though the U.S. Supreme Court never heard the case, the NAACP appreciated the victory nonetheless.

To reiterate, the NAACP’s equalization strategy did not ask to integrate schools nor challenge the role that de facto discrimination played in the racial segregation of public education. Equalization only asked the Court for a fair employment of the “separate but equal” doctrine across racial lines. After a few years of litigation in the Courts, it appeared that despite several victories, an unjust enforcement of “separate but equal” continued to reappear. If the NAACP had continued with the equalization method, it could not have met its ultimate objective – to desegregate schools. This is because, when one de jure door closes, another one always opens. With this understanding that de jure could never fade away with the “separate but equal” still recognized by law, NAACP lawyers Charles Houston and Thurgood Marshall embraced Margold’s second strategy – direct attack.

The concept of “direct attack” means simply to attack racial segregation in public education directly. In other words, it sought to have de jure segregation declared unconstitutional by the Court. Before the employment of direct attack in Brown, the strategy needed to be tested and refined. In the early rounds, following the death of Charles Houston in 1950, the NAACP led by Thurgood Marshall applied direct attack higher education. More specifically, the plan was incorporated into cases involving law schools and graduate institutions.

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66 Patterson, p. 7.
The best pair of cases to examine the effectiveness of direct attack is *Sweatt v. Painter* and *McLaurin v. Oklahoma Regents*. With both decisions issued on the same day, each represents one instance of the NAACP’s achievement to find *de jure* segregation unconstitutional. Similar to Melvin Gaines’ story, Herman Sweatt applied to the University of Texas School of Law and was denied admission solely because of his race. According to the Texas state constitution, racially segregated public schools could be maintained at the primary, secondary, and collegiate levels. Sweatt filed a writ of mandamus to order the law school to admit him. However, instead of denying the writ, the Texas trial courts prolonged the case and allowed for the creation of a law school explicitly for black students. This is a remedy that the former equalization strategy would have advocated for. Yet, given that the NAACP was now using direct attack, Thurgood Marshall declared that “any African American who accepted the legitimacy of the [newly built black] university was a sellout.”

With that in mind, Sweatt appealed to the Supreme Court.

George McLaurin, a black man seeking to acquire his Master’s Degree in Education applied to the University of Oklahoma’s graduate program. Based solely on his race, he was denied admission. McLaurin protested an infringement upon his Fourteenth Amendment Equal Protection rights and won his case in the lower Oklahoma federal courts. However, these lower courts did not enact an injunction to ensure his enrollment into the university. Later on, McLaurin was able to attend, but needed to comply with a series of segregationist tactics which included separate seating in

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classrooms, libraries, and cafeterias. McLaurin appealed to the Supreme Court in order to integrate fully.

The Court led by Chief Justice Vinson found that in *Sweatt*, the opening of the all-black institution still did not meet the color-blind standards of “separate but equal” under law. In fact, the black law school did not possess the facilities or equipment comparable to the all-white University of Texas School of Law. Furthermore, in *McLaurin*, Vinson noted that the University of Oklahoma’s orders to separate McLaurin from his classmates also were in violation of the “separate but equal” doctrine. Ultimately, upon review of the ineffective aftermath of the NAACP’s equalization cases, Vinson asserted that separate was inherently unequal with respect to higher education.

Some historians note that the NAACP’s victories in *Sweatt* and *McLaurin* could be attributed to the presidencies of Franklin Delano Roosevelt and Harry S. Truman. During their administrations, twelve Supreme Court justices were appointed in which eleven of them consistently voted to challenge racial discrimination in public education. In fact, from 1932 to 1948, Roosevelt and Truman appointed federal judges “who [would] bring to the courts a present-day sense of the Constitution – judges who [would] retain in the courts the judicial functions of a court, and reject the legislative powers...

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68 For more on the history and aftermath of *Sweatt* in the State of Texas, see Amilcar Shabazz’s *Advancing Democracy: African Americans and the Struggle for Access and Equity in Education in Texas* (Chapel Hill: University of North Carolina Press, 2006)


70 Lavergne, p. 268
which the courts have today assumed.”  

Indeed, Roosevelt and Truman’s selections proved to be beneficial to the dismantling of *de jure* segregation in public education. Nevertheless, *Sweatt* and *McLaurin* did not represent the end of the struggle. With this dual success of direct attack at the professional and graduate schools levels, the NAACP sought to win its most crucial challenge, to find *de jure* segregation in primary and secondary education unconstitutional.  

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72 Lavergne, p. 20
Chapter IV: Direct Attack as Applied to Elementary Schools

In 1952, the Supreme Court led by Chief Justice Fred M. Vinson, granted a writ of certiorari for four state cases all involving segregated public schools: Brown, Briggs v. Elliot, Davis v. County School Board of Prince Edward County, and Gebhart v. Belton and Bulah. The Court also examined a federal case, Bolling v. Sharpe. After the sudden death of Fred M. Vinson in 1953, President Dwight D. Eisenhower’s newly appointed Chief Justice, Earl Warren presided over the cases, reviewed the past year’s oral arguments through transcripts, and sat before their re-arguments.

As noted previously, it is common practice for scholars to review the legal briefs drafted by attorneys in their thorough assessment of a particular case. However, given the deep racial tensions surrounding racial discrimination in public education, the examination of these oral arguments presents a unique and more immediate approach to the review of Brown. In this case, I find the spoken word – the attorneys’ witty and craftily articulated arguments - more intriguing to examine than the written prose. This analysis offers those not present in the courtroom in 1952 the opportunity to listen…

The first case in this class action suit is Brown v. Board of Education of Topeka, Kansas. Linda Brown, an African-American girl attended segregated elementary schools in the state of Kansas. By law, she was required to study at an all black school located a considerable distance from her place of residency. Her father, Oliver Brown, who filed suit, sought “to eliminate the segregation that required his daughter to attend an inferior school” and enroll her into an all-white school closer to home.73 His attempt to register


The law at issue empowered the Topeka Board of Education to operate segregated public elementary schools:

The Board of Education…may organize and maintain separate schools for the education of white and colored children, including the high schools in Kansas City, Kansas; no discrimination on account of color shall be made in high schools except as provided herein.\(^74\)

However, according to Kansas state law, “it [was] a violation for any state officer to use race as a factor in affording educational opportunities unless that authority is specifically, clearly and expressly granted by the legislature.”\(^75\) With the exception of the Kansas City School District, students like Topeka’s Linda Brown were obligated to attend segregated schools through the sixth grade. Thereafter, parents of school children could choose a high school without race as a primary basis of admission.

The case was brought to the Supreme Court on direct appeal from the District Court of Kansas. With that, the lower court denied Brown’s application for a permanent injunction which would restrain the enforcement of the Kansas statute. Prior rulings proclaimed that the state’s statute in question fell within the parameters of the Fourteenth Amendment and its scope of power.

NAACP counsel for Linda Brown, et al. (“Petitioners”), Robert L. Carter proclaimed to the Court that the mere text of the Kansas statute (not including the

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\(^75\) Ibid, p. 1
application of it) – on its face – violated the Equal Protection Clause of the Fourteenth Amendment. He argued that black students remained at a severe disadvantage under current segregationist policies. As a result, Petitioners were also the victims of crucial psychological damage. Arguably, the psychological damage mentioned here originated from *de facto* segregation which was reinforced by law. Such a “badge of inferiority” can be traced back to cases like *Prigg* and *Dred Scott*. Carter proclaimed before the justices that “[segregation] lowered their level of aspiration; that it instilled feelings of insecurity and inferiority with them, and that it retarded their mental and educational development…”

Carter also rejected the District Court’s assertion which claimed: “we are bound by [the decisions of] *Plessy v. Ferguson, Gong Lum v. Rice.*”  Given the legal history of African Americans, Carter’s introduction of *Gong Lum* here is interesting to consider. This case concluded that the exclusion of a Chinese student from a white school did not violate the Equal Protection Clause of the Fourteenth Amendment. Furthermore, *Gong Lum* expressed the expansion of *de jure* segregation and its accompanying badge of inferiority to other minority students. *Gong Lum* affirms the notion that if a child is not white, then he or she must be considered “colored.” Instead, counsel for Petitioner suggested that *McLaurin v. Oklahoma* and *Sweatt v. Painter* should stand as controlling precedents.  Again, *McLaurin* and *Sweatt* are cases that examine *de jure* segregation in higher education directly and declare it unconstitutional. Finally, Carter concluded that in

76 *Brown v. Board of Education*, Oral Arguments, December 9, 1952, p. 4

77 Ibid, p. 18; *Gong Lum v. Rice*, 275 U.S. 78 (1927)

addition to an Equal Protection violation, a Due Process violation – a desire to be liberated from racial oppression or the liberty to choose to escape law-enforced segregation – could be contested just as firmly: “I would say that there would be no real distinction between the two [Equal Protection and Due Process].”

On the other hand, counsel for the School Board, *et al.* (“Respondents”), Paul E. Wilson attempted to ensure the Court that the Kansas statute was constitutionally sound. In fact, according to counsel, the same act in question was previously contested and survived judicial review in the 1903 case of *Reynolds v. The School Board.* In this suit, Kansas’s highest tribunal upheld a state law that permitted segregated schools. Because of society’s affirmation of the Jim Crow principles within the community, the Kansas court did not find the statute in violation of the Equal Protection Clause of the Fourteenth Amendment. Unfortunately, during that period, separate but equal was the law.

Furthermore, according to Wilson, not only were educational facilities and materials administered equally, as required by law, additional services such as busing were available solely to Negro children; “that certainly was not an item which constituted one of discrimination against Negro students.” I find it interesting at this point to note the following. At this time when the NAACP employed the direct attack model, it appears that opposing counsel looked to the abandoned equalization model for guidance in their arguments. Throughout their presentation before the Court, counsel for the school

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80 66 Kan. 672 (1903)

administrators continued to assert that the separate racial institutions were in fact treated equally; a just practice of “separate but equal” was enforced.

To conclude his appearance before the Court, Wilson refused to acknowledge the results stemming from psychologist, Dr. Kenneth Clark’s “doll test” as sound evidence. This noted experiment tested the psychological effects of children attending racially segregated schools. More specifically, it examined notable personality effects on children such as confidence and sense of pride:

They showed Negro children in the three-to-seven-year-old range four identical dolls, two of them brown and two white, and to test the children’s awareness of their negritude, asked them to (1) “Give me the white doll,” (2) “Give me the colored doll” and (3) “Give me the Negro doll.” Three-quarters of the children correctly identified the dolls. Then came the emotionally loaded questions. The children were told: (1) “Give me the doll you like to play with’ or ‘the doll you like the best,” (2) “Give me the doll that is the nice doll,” (3) “Give me the doll that looks bad,” and (4) “Give me the doll that is a nice color.” The majority of the Negro children tested … indicated “an unmistakable preference for the white doll and a rejection of the brown doll.” That was true even of the three-year olds.82

Dr. Kenneth B. Clark’s doll test is essential to understand the methods used behind the NAACP’s direct attack upon de jure segregation. The NAACP argued that such psychological damage was the result of de jure discrimination and the “badge of inferiority” it placed upon African Americans. This is the same inferiority complex was expressed in Sweatt, McLaurin, Plessy, Prigg, and Dred Scott. Unfortunately, little attention or respect is given to Clark’s work, as a summary of his experiment is only footnoted in the Court’s opinion.

The second case to be studied is Briggs v. Elliot. Following in the footsteps of Linda Brown’s original suit, “thirty black parents from Clarendon County, South

82 Kluger, p. 317
Carolina, sued the school district to improve the educational conditions for their children.\(^{83}\) Their case was built on the claim that a series of statutes, originating from Article XIV, Section 7 of the South Carolina Constitution and Section 5377 of its respective codes were unconstitutional. The law read:

It shall be unlawful for pupils of one race to attend the schools provided by boards of trustees for persons of another race…Separate schools shall be provided for children of the white races— …and no child of either race shall ever be permitted to attend a school provided for children of the other race.\(^ {84}\)

The case stemmed from the U.S. District Court for the Eastern District of South Carolina on direct appeal. There, the lower court found the decree constitutional.

Counsel for Briggs, \textit{et al.} ("Petitioners") and NAACP legal advocate, Thurgood Marshall suggested that the South Carolina codes resulted in a denial of Equal Protection under the law. As confirmed in Dr. Clark’s “doll test”, Marshall argued that these statutes had a detrimental effect on Negro children: “…they have road blocks put up in their minds as a result of this segregation, so that the amount of education that they take in is much less than other students take in.”\(^ {85}\) Again, the attorneys for the NAACP highlighted this as a consequence of \textit{de jure} discrimination. Marshall sincerely believed that the Fourteenth Amendment prohibited not only \textit{de jure} segregation in public education, but also “all types of class and caste legislation.”\(^ {86}\)

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\(^{83}\) Ogletree, p. 4

\(^{84}\) \textit{Briggs v. Elliot}, Oral Arguments, December 9, 1952, p. 1

\(^{85}\) Ibid, p. 3

\(^{86}\) Davis, p. 171
Moreover, like Robert L. Carter during the *Brown v. Board* oral arguments, Marshall tried to sway the Court by using *McLaurin* and *Sweatt* as reliable precedents on point. It is quite clear that the litigators continued to remind the Court about the NAACP’s victories that were a result of the use of the direct attack method. An equalization approach in this case would not be as effective. Without such an argument, Marshall’s team of lawyers would have lacked sound contention in their direct challenge of racial segregation in public schools.

John W. Davis, counsel for Elliot, *et al.* (“Respondents”), highlighted three main points in his argument. First, in a resounding equalization fashion, he suggested that the state of South Carolina had complied fully with the lower court’s mandate:

…the [Respondents proceeded] at once to furnish [Petitioners] and other Negro pupils of said district educational facilities, equipment, curricula, and opportunities equal to those furnished white pupils.87

Second, Davis asserted that the South Carolina laws at issue: “do not offend the Fourteenth Amendment…or deny equal protection.”88 Finally, he stated the doll experiment’s results regarding “psychological damage” presented by Petitioners were inappropriate evidence for judicial examination. Respondents suggested that the tribunal is a place to analyze law, not psychology. Expressing the institutional limitations of the Court, Davis proclaimed that this form of scientific testimony should be a matter for Congress to examine, not the Supreme Court.

In retrospect, one can see why Davis sought to eliminate the NAACP’s psychological test and its effects on African-American children. By doing so, it appears

87 *Briggs v. Elliot*, Oral Arguments, December 9, 1952, p. 18

88 Ibid, p. 18

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that Davis desired a verdict that focused primarily on a strict constructionist reading of the law. Win or lose, this type of opinion based solely on *de jure* discrimination would make it difficult to apply *Brown* in future cases across the country. This is especially true in the North where *de facto* discrimination controlled. Fortunately for Davis, Warren did not choose to examine *de facto* discrimination. As outlined by the Court in the *Civil Rights Cases* of 1883, the national judiciary could not handle matters of *de facto* discrimination.

In a resumed argument before the Court, Davis further emphasized a strict interpretation of the “separate but equal” doctrine as protected by law. By doing so, he outlined the Fourteenth Amendment’s history of ratification. In a discussion before the Court with Justices Harold Burton and Felix Frankfurter, Davis acknowledged that when crafting the Equal Protection Clause of the Fourteenth Amendment, mixed race schools were not deemed a necessity. To confirm this, he guaranteed it could be shown that twenty-three of the thirty states which ratified the amendment “had, or immediately installed, separate schools for white and colored children under their public school systems.”89 In support of this assertion, Respondents’ counsel presented *Plessy* and *Cumming v. Richmond County Board of Education*, legal precedent with this same respective trend.90 *Cumming*, an 1899 case falling right in the middle of the Jim Crow era based its ruling purely on the interpretation of the text of the Fourteenth Amendment and applied *Plessy*’s “separate but equal” doctrine to public education for the first time.

Under the *Cumming* philosophy, because “separate but equal” is protected by law, the

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89 *Briggs v. Elliot*, Oral Arguments, December 10, 1952, p. 4

90 175 U.S. 528 (1899)
government’s desire to segregate public schools is okay. Also, Cumming supported the notion that black and white children could never learn in the same schoolhouse, as racial intermingling would present a threat to the stability and longevity of the white race.\(^9^1\)

While Brown and Briggs focused primarily on the admission of black students into all white institutions, the third case of Davis v. County School Board delved into the aspect of the state governments and their financial support of schools. In Davis, “plaintiffs charged that Virginia’s segregated school system violated the federal Constitution, or in the alternative, that the white community in Prince Edward County, Virginia, refused to spend sufficient money to upgrade the substandard black schools.”\(^9^2\)

Actually, throughout the South, black public schools were severely deprived monetarily. As already exposed by Nathan Margold in the 1920s, they were “not even remotely equal to their all-white counterparts … in [the] basic tangible criteria [of] dollars spent per pupil…”\(^9^3\)

When brought to court, Davis declared a series of Virginia laws (Section 140 of the Virginia Constitution and Section 22-221 of the Code of Virginia), which permitted the segregation of public schools based on race to be illegal. Parents of black children living in the County specifically noted that the “public high school maintained for Negroes was unequal to the public high schools maintained by white students in plant,


\(^9^2\) Ogletree, p. 5

\(^9^3\) Horwitz, p. 21
equipment, curricula, and other opportunities…”94 At the U.S. District Court for the Eastern District of Virginia, the Commonwealth’s laws in question were upheld.

During oral argument, the *de jure* practice of financial assistance continued to reappear. To begin, Spottswood W. Robinson III, counsel for Davis, *et al.* (“Petitioners”), declared the Virginia laws unconstitutional. This was based on their violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Furthermore, distinctions relating to alternative methods of *de jure* discrimination were made between *Davis, Brown, Gebhart v. Belton, and Bolling v. Sharpe* (each examined later). Unlike *Gebhart*, as noted by Robinson, the Virginia “case does not present the situation of a finding of inequality of physical facilities and curricula coupled with an injunction against the continuance of segregation in these circumstances.”95 Second, as opposed to *Brown*, “this case [Davis] does not present the situation of equal physical facilities and curricula coupled with a finding of injury resulting from the fact of segregation itself.”96 Finally, different from *Bolling*, “this case did not concede an equality of physical facilities and curricula.”97

To conclude his oral argument, Robinson implored the Court to reconsider the practice of *stare decisis* with respect to *de jure* segregation. *Stare decisis* a doctrine often exercised by the Court, promotes the adherence to a particular precedent when future

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94 *Davis v. County School Board of Prince Edward County*, Oral Arguments, December 10, 1952, p. 1

95 Ibid, p. 4

96 Ibid.

97 Ibid.
cases with similar issues are under examination. Simply, the NAACP’s direct attack method should be employed and the Court should overturn *Plessy*.

Counsel for the County School Board, *et al.* (“Respondents”), T. Justin Moore, sought the Court’s assistance to uphold the Virginia statutes. Moore addressed the justices adamantly, especially Justice Stanley Reed. In doing so, Moore proclaimed that Virginia’s segregated school systems have remained a strong facet in the state throughout the Jim Crow era for over 80 years; *what could be the problem with them now?* According to Moore, *stare decisis* needed to be implemented without any further question or hesitation. To counteract Robinson’s earlier points, Moore suggested that a fair application of separate but equal with respect to teachers’ salaries (in light of *Alston*), tax appropriations, and facility construction were undoubtedly equal; “[The Negroes] are getting much more than their share.”98 To clarify, Moore suggested in this case that the direct attack to eliminate *de jure* discrimination was unnecessary. Like John W. Davis suggested in Briggs’s oral argument, the Court should focus on a literal interpretation of the text of the law; “separate but equal” is constitutional under the Equal Protection Clause of the Fourteenth Amendment.

Co-counsel for Respondents, J. Lindsay Almond continued down the separate but equal path. Moreover, he argued that the Virginia laws were not constructed nor did they intend to give Negroes “a badge of inferiority, not to place the Negro man or the Negro child in the position where he could never rise to take his place in a free society, but the only way that we could have a free public school systems was on a separate basis.”99

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98 *Davis v. County School Board of Prince Edward County*, Oral Arguments, December 10, 1952, p. 25

99 Ibid, p. 34
understand better, Almond suggested that *de jure* segregation is not responsible for the establishment of black inferiority. 100 *De facto* segregation, an element the Courts could not address was actually the main reason for the development of white supremacy and black inferiority. Clearly, as a long history from *Prigg* to *Plessy* notes, Almond is incorrect. With a few more references to the history of the Fourteenth Amendment and its support of *de jure* segregation, counselors Almond and Moore concluded their arguments.

Next, the Court examined *Gebhart*, the last case to originate from state jurisdiction. In this Delaware lawsuit, “Ethel Louise Belton and the other black students living in a suburb of Wilmington, Delaware, had to commute eighteen miles to attend Howard High School”, an all black institution. 101 A related Delaware case, *Bulah v. Gebhart* “involved Sarah Bulah, a working mother, and her husband, Fred, a foreman at a paper mill, determined to get equal bus transportation for their daughter Shirley Barbara.” 102 Both families challenged the constitutionality of Article 10, Section 1 of the Constitution of the State of Delaware, which empowered the State Board of Education to direct and maintain separate schools among the races.

However, as opposed to the previous cases where school boards disallowed the entrance of black students into all-white institutions, Gebhart and Belton were able to attend integrated schools within the area. This was due to an injunction issued by the Delaware Supreme Court. The lower court’s order commanded white schools to admit

100 Horwitz, p. 27
101 Ogletree, p. 5
102 Ibid, p. 5
black children when their respective institutions did not abide the “separate but equal” doctrine. This practice is similar to the fact patterns addressed in Gaines. In other words, when African American schools did not meet the state’s standards (because of facilities or materials issued), the state tribunals could send black students to learn with whites. In opposition to this decision, leaders of the Delaware School Board appealed the U.S. Supreme Court.

During oral argument, counsel for Gebhart et al. (“Petitioners”), H. Albert Young wanted the Court’s primary focus to be “the fitness of the decree with respect to the immediacy” of the lower court’s issuing of an injunction. Simply put, as argued by Young, the courts should have given the districts an ample amount of time to uphold Plessy’s “separate but equal” doctrine and exercise equalization before enforcing integration legally.

In an effort to shy away from the direct attack approach presented by the NAACP, Young acknowledged the equalization tactics used in Missouri ex rel. Gaines v. Canada as reliable and controlling precedent. Again, Gaines states that states were legally required to uphold a firm application of “separate but equal” in higher education in light of the Fourteenth Amendment. Upon his brief and limited interpretation of Gaines, Young declared that Plessy and Cummings should be applied more heavily. Each case stemming from the Jim Crow era has a stronger foundation and interpretation of de jure segregation than Gaines.

104 Missouri ex rel Gaines, 305 U.S. 337 (1938); Sipuel, 332 U.S. 631 (1948)
NAACP Co-counsel for Belton and Bulah, et al. (“Respondents”), Louis L. Redding asked the Court to uphold the judgment of the Delaware State Supreme Court. In addition to its affirmation, Redding desired the Court, especially Justice Frankfurter, to consider the direct attack application in *Sweatt* and *McLaurin* and outright declare *de jure* segregation in secondary schooling unconstitutional. More specifically, Redding desired the Court to employ these two cases as controlling precedents and to “indicate that segregation in and of itself inflicts inequalities of educational opportunities…no matter what attempts to equalize facilities may be made.”

Likewise, co-counsel for Respondents, Jack Greenberg reiterated Redding’s wish for the Court to affirm the lower court’s ruling. To draw the justices’ attention away from the law for a brief moment and add an essence of pure humanity, Greenberg stated that when focusing on a child’s education, there should be a heightened level of immediacy; “…there is no evidence that [absolute] equality [through the “separate but equal” doctrine] would occur at any time in the future.” In this important statement, Greenberg acknowledges that the need to eliminate the *de jure* doctrine of *Plessy*’s “separate but equal.”

In conjunction to *Brown* which examined the constitutionality of laws that segregated public schools at the state level, the Supreme Court reviewed *Bolling*, one concerning the same issue in a federal jurisdiction. This “fifth case, involved a Washington D.C. parents group whose black children attempted to register for the all-white John Philip Sousa Junior High School” and were subsequently denied.

105 Ibid, p. 27
106 Ibid, p. 31
107 Ogletree, pp. 5-6
According to *Bolling, et al.* (“Petitioners”), the denial of admission, the primary complaint in this suit, and an 1862 act which prohibited the integration of public schools violated the Due Process Clause of the Fifth Amendment.¹⁰⁸ In this case, the Fifth Amendment is the central law tested because the Fourteenth Amendment, commonly applied in the previous four state cases cannot be assessed in the District of Columbia. The case appeared before the U.S. Court of Appeals for the D.C. Circuit, yet no judgment was rendered. Without a lower tribunal ruling, the Supreme Court depended solely upon the counselors’ arguments to establish a ruling. Again, these arguments would draw upon the NAACP’s desire to attack *de jure* segregation directly.

NAACP Co-Counsel for Petitioners, George E.C. Hayes quickly acknowledged the cases’ apparent absence of an apparent “separate but equal” violation for the District of Columbia upheld a fair application of the *de jure* practices. This case, unlike *Gehhart* did not involve the biased renovation of educational facilities according to race. Rather, the central complaint filed by Petitioners in *Bolling* deals strictly with a denial of admission based on race, a problem more related to the issues presented in *Sweatt* and *McLaurin.*¹⁰⁹

To answer a point raised by Justice Hugo Black regarding the importance of education and its unfortunate relationship with *de jure* measures, Hayes urged the Court to use *Meyer v. Nebraska, Bartels v. Iowa,* and *Pierce v. Society of Sisters.*¹¹⁰ Hayes contested that these were controlling precedents, as they “have been held by this Court to

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¹⁰⁸ “No person shall be deprived of life, liberty, or property, without due process of law.” U.S. Const. Amend. V


¹¹⁰ *Meyer,* 262 U.S. 390 (1923); *Bartels,* 262 U.S. 404 (1923); *Pierce,* 268 U.S. 510 (1925)
[contain] fundamental educational rights” with reference to Due Process.111 In fact, this series of cases from the 1920s originally helped to influence the NAACP to shift its focus from anti-lynching and disenfranchisement to education.

In Meyer, the Court found a Nebraska law prohibiting the teaching of foreign languages to school children unconstitutional. The statute in question violated the students’ Due Process rights as protected by the Fourteenth Amendment. Similarly, in Bartels, the Court overturned the conviction of an instructor who taught German to elementary school students. The teacher violated a state law prohibiting the teaching of the language in schools. Such a statute violated the Due Process Clause of the Fourteenth Amendment. Finally, in Pierce, the Court determined that the Oregon Compulsory Education Act which required attendance at public schools violated the Due Process Clause of the Fourteenth Amendment. Even though each case refers to the Fourteenth and not the more appropriate Fifth Amendment in Bolling, it nevertheless overturns matters of law. Also, Meyer, Bartels, and Pierce present the further possible notion that de jure policies case be attacked directly and declared unconstitutional successfully.

Before issues of liberty and racial discrimination are involved, Hayes notes that strict scrutiny should serve as the basis of the Court’s judicial examination, considering that the D.C. legislation “based on racism is immediately suspect.”112 In this case, the government would need to prove that a compelling interest influenced the enactment of segregated schools. Furthermore, it would have to show that the law implemented was “narrowly tailored” to achieve such a compelling interest. Finally, co-counsel for

111Bolling v. Sharpe, Oral Arguments, December 10, 1952, p. 6

112Bolling v. Sharpe, Oral Arguments, December 10, 1952, p. 8
Petitioner James M. Nabrit, Jr., acknowledged the unique responsibility the Supreme Court retains in this series of class action suits related to overturn \textit{Plessy}. He stated that “never in the history of this country have the individual liberties of the citizens been entrusted in the hands of the legislators [Congress or the Executive branch].”\textsuperscript{113} The courts have the power to protect constitutional rights, especially those of the historically oppressed.

Counsel for Sharpe, \textit{et al.} (“Respondents”), Milton D. Korman captured the Court’s attention when he tried to introduce the government’s compelling interest for segregating public schools. He illustrated a “positive” history behind the segregation of schools in the District of Columbia. To begin, he stated that slavery was abolished in the region in April 1862, three and a half years before the Thirteenth Amendment was ratified. Subsequently, a series of Congressional acts, involving civil rights and education were proposed to “aid in the elevation of the colored population…not to stamp them…with a badge of inferiority… [Congress was] trying to elevate these people”\textsuperscript{114} When asked by Justice Frankfurter about the District of Columbia’s efforts to strike down the dual school system and eliminate \textit{de jure} segregation in the region, Korman informed the Court of Congress’s failure to pass such legislation. The federal legislature’s refusal to do so was justified by Korman’s explanation of the benefits to the execution of the “separate but equal” doctrine in public schools:

\begin{quote}
We know that these things exist, and constitutionally, if there be a question as to which is better, to throw these people together into the schools and perhaps bring that hostile atmosphere, if it exists, into the schoolroom and harm the ability to learn of both races, or to give them
\end{quote}

\begin{flushright}
\textsuperscript{113} Ibid, p. 14
\end{flushright}

\begin{flushright}
\textsuperscript{114} Ibid, p. 22
\end{flushright}
completely adequate, separate, full educational opportunities on both sides, where they will be instructed on the white side by white teachers, who are sympathetic to them, and on the colored side by colored teachers, who are sympathetic to them, and where they will receive from the lips of their own people education in colored folklore, which is important to a people-if that is to be decided, who else shall decide it but the legislature, who decides things for each jurisdiction?\textsuperscript{115}

Furthermore, Korman acknowledged that \textit{de jure} discrimination could not be eliminated because \textit{Plessy} and Jim Crow were the law of the land. To conclude before the national judiciary, Korman ended his lengthy argument with a desire for the Court to reapply not only \textit{Plessy}, but also \textit{Dred Scott} because of their stronger interpretations of \textit{de jure} segregation.

After the unexpected death of Fred M. Vinson, all five cases were re-argued in December of 1953 before a new Chief Justice, Earl Warren.\textsuperscript{116} The basic elements of the original arguments were evaluated once more. However, a few new particulars related to \textit{de jure} segregation are imperative to acknowledge.

With respect to the history of the Fourteenth Amendment and its respective framers, the NAACP Legal Defense team urged the Court to re-examine the landmark rulings of the \textit{Slaughterhouse Cases} and \textit{Strauder v. West Virginia} carefully.\textsuperscript{117} These nineteenth-century decisions not only redefined the purposes of the Reconstruction Amendments. They also elaborated on the small litigation victories retained by African Americans just before and during the Jim Crow era. In the \textit{Slaughterhouse Cases}, the

\textsuperscript{115} Ibid, pp. 16-17

\textsuperscript{116} Even though Warren did not actually preside on the bench, the first set of oral arguments before the Court, he nevertheless had to study them via transcripts. He needed to complete this task, given that he would ultimately deliver the opinion.

\textsuperscript{117} \textit{Slaughterhouse}, 83 U.S. 36 (1873); \textit{Strauder}, 100 U.S. 303 (1880)
Court determined the scope of the Thirteenth, Fourteenth, and Fifteenth Amendments. While each amendment pertained to all people regardless of race, these Reconstruction amendments provided a heightened level of equal protection under the law for African Americans. Unfortunately, as later affirmed by *Plessy*, equal protection under the law could be interpreted as a literal interpretation of the “separate but equal” doctrine.

In *Strauder*, a case heard during the Jim Crow era the Court found a West Virginia statute that denied black’s the right to serve on the jury, a determined political right, in clear violation of the Equal Protection Clause of the Fourteenth Amendment. The Court made a distinction between what constitutes a political versus a social right and how it could be interpreted under the law. In light of *Brown*, the NAACP sought to expand the liberties expressed in *Slaughterhouse* and *Strauder* into the field of public education through its direct attack on *de jure* segregation itself.

On the other hand, School Board administrators, in defense of *de jure* segregation proclaimed that Section 5 of the Fourteenth Amendment did not compel Congress to maintain integrated public schools. Given this understanding, Congress and their respective state legislatures alluded to the Court’s duty to adhere to stare decisis and uphold *Plessy*’s “separate but equal” in public education. Three questions were left for the Court to ponder:

The first is whether or not this is a case where there should be a restraint of judicial power and the matter left to the legislative bodies. The second is whether or not, in the light of precedents, this is a case lasting over these hundred years where it would be an abuse of power in the light of that history…And the third branch is whether or not there is some idea here of

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118 “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” Section 5, U.S. Const. XIV
During these oral re-arguments, those in favor of school segregation tried to concentrate even more heavily on the *de jure* challenge and the desire to uphold a fair exercise of “separate but equal.”

The most pivotal moment during of the oral re-arguments lies within the introduction of J. Lee Rankin. He argued on behalf of the United States as *amicus curiae* during Briggs’s second hearing. Rankin, a member of the U.S. Justice Department was one of many *amicus curiae* present during the NAACP’s quest to dismantle racial segregation in public education. In fact, Presidents Roosevelt and Truman encouraged State attorneys like Rankin to urge the courts to overturn *Plessy’s* “separate but equal” doctrine entirely.\(^{120}\) Rankin’s argument before the Court sought to do just that.

The heart of Rankin’s presentation concerned the history behind the Fourteenth Amendment’s ratification and ultimately whether *de jure* segregation in public education was supported by the amendment’s founders. Rankin argued that because education was not explicitly stated in the amendment, it was difficult to know whether its framers projected the installation of mixed schools. Yet, one could not directly conclude that the absence of education meant for the establishment of segregated schools.

Furthermore, “when the question was presented about whether they should have mixed schools or separate schools, nothing was said about the effect of the Fourteenth Amendment, although it was provided in the Constitution that there could be no

\(^{119}\) *Briggs v. Elliot*, Oral Re-Arguments, December 8, 1953, p. 6

\(^{120}\) Sullivan, p. 380
distinction in the schools based upon race or color.”\textsuperscript{121} To reiterate his argument articulated before the Court, the text of Fourteenth Amendment does not necessarily condone the enforcement of segregated public schools.

To continue his delivery before the Court, Rankin noted that the use of \textit{Plessy} as controlling precedent made him quite uncomfortable. He said that the same issues in \textit{Briggs} and its sister cases were not dealt with in 1896, a suit which analyzed public transportation and utilities. Rankin, in conjunction with the NAACP legal defense team encouraged the Court to consider the violation of the Due Process \textit{and} Equal Protection Clauses of the Fourteenth Amendment: “We think that there are two clauses that are controlling. One is the equal protection of the laws and the other is the depriving of any person of life, liberty or property without due process; both of them. Congress deliberately put the words so that no state could deny them.”\textsuperscript{122}

After two years of detailed oral arguments, an examination of the Fourteenth Amendment’s ratification history, the employment of several of legal precedents, and the study of race-based psychological damage, Chief Justice Earl Warren delivered an opinion consisting of a mere \textit{thirteen paragraphs}. Given the complexities within this case and the NAACP’s attempt to overrule “separate but equal” in education completely, I cannot see how such a landmark opinion could be written so concisely. Even though the Supreme Court is not required to construct decisions as lengthy as those found at the District Court level, I still find Warren’s decision to be quite short.

\footnotesize{\textsuperscript{121} Ibid, p. 29}

\footnotesize{\textsuperscript{122} Ibid, p. 36}
In his brief decision, Warren focused squarely on three components. Each was related primarily to the NAACP’s direct attack on de jure segregation. First, he addressed the Equal Protection Clause of the Fourteenth Amendment as it related to de jure segregation. Second, Warren tackled education minimally, by reinforcing its importance, an understanding as previously stated, once recognized by the NAACP in the 1920s. Last, the Court made an implicit overruling of Plessy as applied to the field of public education. Again, his reference to Plessy could only address de jure segregation. As a result, “Plessy [and the social discrimination surrounding it] was not killed by Brown. [Rather, the Court] administrated to coup de grace to a badly wounded doctrine.”

To commence, Warren declared that the states’ school boards violated the Equal Protection Clause of the Fourteenth Amendment. This stems from his assertion, similar to one made by Chief Justice Vinson noted in Sweatt and McLaurin that separate can in fact never be equal under law:

> We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of [equal protection].

While Warren “did find that segregation was ‘inherently unequal’,” legal historians Brian J. Daugherty and Charles C. Bolton argue that “the grounds for [the] decision [later on] seemed to rest less with constitutional objections to segregation and more on the importance of education in formulating good citizenship and the negative social impact of

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124 347 U.S. 483, 495
segregation on African-American children.”¹²⁵ In other words, Daugherty and Bolton believe that Warren tried to expand his interpretation of *de jure* segregation and relate it to the detrimental effects it has on African Americans in education. This would be the time, I believe, that Warren should have expanded more on the results of the doll test. Unfortunately, because of the Court’s unwillingness to delve into the study of psychology, the analysis of Dr. Kenneth B. Clark’s work is referenced in a single footnote. The text of his decision then returns back to the central issue at hand, *de jure* segregation: “[the] Court’s own investigation convinces [the justices] that, although these sources [the framers’ motives behind the creation of the Fourteenth Amendment] cast some light, it is not enough to resolve the problem with which we are faced. At best they are inconclusive”.¹²⁶

Second, the institution of education, as explained by Daugherty and Bolton earlier is brought to the forefront. Simply, Warren labeled the concept as “perhaps the most important function of state and local governments.”¹²⁷ Continuing with his morally inspired explanation, Warren noted:

> Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is derived the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms.¹²⁸


¹²⁶ 347 U.S. 483, 489

¹²⁷ Ibid, p. 493.

¹²⁸ Ibid.
Yes, it is clear that Warren understood the value of an education. However, his opinion grounded in an analysis of *de jure* would not be enough of an attempt to rid some Americans from upholding standards of racial prejudices. *De facto* needed to be addressed. For instance, in the North, an area where *de jure* segregation did not exist, residential segregation prevented African Americans from exercising their liberty to choose where their children should attend school. Furthermore, Northern school administrators through the enactment of school choice policies that favored white families, helped to maintain such segregation in public education. I describe such an assessment later on in my discussion of the Cleveland, Ohio lawsuit of *Reed v. Rhodes*.

Abruptly, to conclude his assessment of education in America, Warren returned to *de jure* segregation. He arrived “then to the question [originally] presented: Does segregation of children in public schools solely on the basis of race…deprive the children of the minority group of equal educational opportunities? [The Court] believes that it does.”

To complete his decision, Warren overturned *Plessy* implicitly. I use the term “implicitly” because *Plessy*’s “separate but equal” clause dealt with public transportation only. Yet, due to *Plessy*’s affirmance of Jim Crow overall, the “separate but equal” doctrine was ultimately translated into public education. Because of this somewhat flimsy application of *Plessy* to *Brown*, Warren concluded “that in the field of public education, the [separate but equal] doctrine…has no place.” This is perhaps the most sound and straightforward portion of the Court’s decision. And, of course, it only concerns matters

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129 Ibid.

130 Ibid, p. 495
of *de jure* segregation. Law professor Jack Balkin interprets this section of the opinion by stating that the Court “substitutes one mantra for another: where ‘separate’ was once equal, ‘separate’ is now categorically unequal.”

Given that *Bolling*’s lawsuit falls within a federal jurisdiction, Warren needed to render a separate verdict. Unfortunately, like the concise opinion written for *Brown*, *Bolling*’s decision is just three paragraphs in length. Because the Fourteenth Amendment does not apply to the District of Columbia, a territory within federal jurisdiction, and the Fifth Amendment does not contain an Equal Protection Clause, the justices found comfort in the Due Process Clause of the Fifth. In order to clarify that both *Bolling* and *Brown*’s verdicts stem from the same legal foundation, Warren added the following segment:

…But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than “due process of law”, and therefore, we do not imply that the two are always interchangeable phrases. But as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.  

Ever since the Court’s ruling in *Bolling*, jurists have recognized the strong connection between the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth.

Now, with *Brown* and *Bolling* as law, *de jure* segregation in public education could no longer survive judicial scrutiny. The NAACP’s direct attack strategy survived

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132 347 U.S. 497, 499
another battle. However, the true test would be compelling Americans to adhere to the Warren Court’s landmark decision. Despite the perceived aura of judicial activism felt by many however, the Court was not as radical as it could have been. For instance, Earl Warren did not overturn the *Civil Rights Cases* of 1883 and therefore, continued the tradition of the judiciary’s decision to not regulate *de facto* segregation. As a result, the Court could not account for instances of outright defiance by Southern legislators or alternative means of disobedience employed in the North.
Chapter V: The Court Did Not Demand *Integration*

“Moral and civic virtue is law-bred – it depends on the external compulsion of law-enforced fear.” – Thucydides

One year later, in compliance with *Brown*, the Court also rendered a subsequent verdict, *Brown v. Board of Education II*. *Brown II* ordered for the integration of public schools, “with all deliberate speed.” Again, in conjunction with *Brown I*, the Court only addressed the constitutionality of *de jure* segregation. J. Harvey Wilkinson, author of *From Brown to Bakke: The Supreme Court and School Integration, 1954-1978* reveals his interpretation of the famous phrase. Specifically, he believes it serves as a reflection of Warren’s attempt to desegregate schools without possibly starting extreme unrest in the South:

In the grand tradition of politics, there was in that phrase something for everyone. “Speed” was promised for the long-denied Negro. And the South was permitted to “deliberate,” to more, as was its wont, in the fullness of time.\(^\text{\textsuperscript{133}}\)

After *Brown I*, the Court granted federal district court judges across the nation the authority to oversee the just execution of *Brown*. Lower court judges were supposed to support Warren and ensure the success of *Brown*. Essentially, these jurists “became supervisors or administrators of entire school systems performing quasi-legislative and administrative functions.”\(^\text{\textsuperscript{134}}\)

As lower court jurists assumed this responsibility, *Brown*’s ruling began to unravel uncontrollably. Opposition arose quickly, as legislators, mainly in the South

\(^{133}\) Wilkinson, p. 63

sought to override the Court’s ruling.\textsuperscript{135} A sound example of such outright defiance is found in the story of \textit{Cooper v. Aaron}.\textsuperscript{136} Following the Warren Court’s assertion that “separate but equal” in public education was unconstitutional in \textit{Brown I}, and that such desegregation such occur “with all deliberate speed” in \textit{Brown II}, Little Rock, Arkansas’s Superintendent of Schools prepared for a plan to integrate. In this plan, nine black students known as the “Little Rock Nine” were selected to commence the integration of the city’s high school. While the School Board made efforts to integrate, state legislators in opposition to the Supreme Court’s ruling designed a program to perpetuate segregated schools within the state.

In September 1957, the date when the “Little Rock Nine” were scheduled to begin their first year at Central High School, school authorities were met with drastic opposition by the Governor of Arkansas and frustrated white parents.\textsuperscript{137} To show his support of the Supreme Court, President Dwight D. Eisenhower sent the National Guard into Little Rock to ensure the proposed integration of Central High. Also, the Supreme Court answered back to such opposition. However, as in past cases dealing with racial discrimination in public education, the Court could only focus on the constitutional questions presented before it, \textit{de jure} segregation.

On September 12, 1958, in an unanimous opinion signed by all nine justices – Chief Justice Warren, Justices Hugo Black, Felix Frankfurter, William Douglas, Harold

\textsuperscript{135} Manning Marable, \textit{Race, Reform and Rebellion: The Second Reconstruction and Beyond} (Oxford: University Press of Mississippi, 2007), p. 39

\textsuperscript{136} 358 U.S. 1 (1958)

Burton, Tom Clark, William Brennan, and Charles Whittaker – the Supreme Court declared the opposition displayed by Little Rock’s governmental officials unconstitutional. Even though Little Rock legislators did not enact a concrete statute to oppose desegregation, their mere public defiance – under color of law – still constituted a form of de jure segregation. Furthermore, the Court highlighted the landmark decision of *Marbury v. Madison* to demonstrate that the Constitution and its interpretation of it represented the Supreme Law of the Land; no law or state-authorized action could override it.

As explained later through the Cleveland, Ohio lawsuit of *Reed v. Rhodes*, some Americans continued to look for alternative methods to override the Court’s de jure decision. One of these involved the great phenomenon of “white flight.” Because of dramatic shifts in white population from the cities to the suburbs, some school board administrations enacted mandatory busing programs to ensure racial integration. Again, the Supreme Court got involved and took a narrow approach based on de jure segregation.

138 Wilkinson, p. 92

139 5 U.S. (1 Cranch) 137 (1803)

140 Additional landmark cases following *Brown* include: *Green v. County Board of New Kent County* 391 U.S. 430 (1967) and *Alexander v. Holmes County Board of Education* 396 U.S. 1218 (1969). In *Green*, the Court determined that school board enacted “freedom of choice” plans were insufficient in the goal to desegregate school. In *Alexander*, the Court ruled that the Holmes County Bd. Of Ed. violated *Brown II* by not desegregating schools “with all deliberate speed.” For more information on the remedial aftermath of *Brown*, see J. Harvey Wilkinson’s *From Brown to Bakke: The Supreme Court and School Integration, 1954-1978* (New York: Oxford University Press, 1981)
One of the most important cases to study with respect to the busing issue in public education is Swann v. Charlotte-Mecklenburg Board of Education.\textsuperscript{141} A study of Swann sheds light on various factors that led to the success or failure to desegregate schools in the 1970s, especially those institutions in the North.\textsuperscript{142} While this North Carolina lawsuit examined elements of \textit{de jure}-ordered integration, such initial segregation experienced by the school district was actually the result of \textit{de facto} practices upheld by the community. Such \textit{de facto} discrimination was most visible in housing and the “white flight” phenomenon. These are the same factors found in Cleveland, Ohio.

As explained earlier, following \textit{Brown I} and \textit{Brown II}, several cities across the country struggled to integrate their public schools. As in Little Rock, Arkansas, those in opposition to \textit{Brown} in Charlotte interpreted the Court’s 1954 and 1955 quite literally. In their eyes, \textit{Brown} did not enforce integration; instead the Court prohibited law-ordered segregation. Such a narrow interpretation gave some American families the belief that they were free to escape forced integration if so desired. In fact, in the Charlotte-Mecklenburg school system, the desire to escape by a number of whites resulted in significant racial segregation in housing residencies and consequently in public schools.

By the late 1960s, in Charlotte-Mecklenburg district resided approximately fourteen-thousand black students who attended schools that were either one-hundred percent black or more than ninety-nine percent African American. The lower federal courts in North Carolina enforced a mandatory busing plan to bring those white children now located in the suburbs back into city to integrate. Local parents sued the school

\textsuperscript{141} 402 U.S. 1 (1971)

\textsuperscript{142} Davison M. Douglas, Reading, Writing and Race: The Desegregation of the Charlotte Schools (Chapel Hill: University of North Carolina, 1995). p.3
board claiming that their constitutional liberties were violated. The Supreme Court disagreed with the parents. In the spirit of Brown and its desire to not only prohibit segregation, but to also promote integration, Chief Justice Warren Burger found such law-enforced busing plans constitutional. Despite the fact that his opinion, like others ruled upon de jure standards, Burger revealed a detailed history of Charlotte schools, instances of white flight in the city, improvements in educational achievement, and community acceptance (or lack thereof) in the imposed busing plan.\footnote{Douglas, 3}

Subsequent incidents of de jure rebelliousness arose in the South and challenged the Court’s decisions outlined originally in Brown I and II. When the dismantling continued to occur, many feared for the safety and stability of Southern school districts. Surprisingly though, in the region where de jure segregation of public schools did not exist, Northern cities also experienced severe racial division. For some reason in the North, Brown failed.\footnote{John H. McCord, editor, With All Deliberate Speed: Civil Rights Theory and Reality, (University of Illinois Press: Urbana, 1969), p. 69} Why? Because of its reliance to the Civil Rights Cases of 1883, the Supreme Court could not oversee the practice of de facto segregation and therefore, attempt to eliminate racial discrimination in America altogether. By continuing to oversee de jure segregation only, the Court found it nearly impossible to regulate school districts that sought to uphold the racial divides initiated by de facto discrimination. For the purpose of this thesis, Brown’s long and winding path of most resistance makes its stop in Cleveland, Ohio.

\footnote{Douglas, 3}

Chapter VI: Topeka, Welcome to Cleveland

Founded in 1796, Cleveland, Ohio marks the end of my journey. Here is where the *de jure* decision of *Brown* meets the *de facto* metropolis on the Great Lakes. In order to understand Chief Judge Frank J. Battisti’s decision in *Reed v. Rhodes* better, a brief history of Cleveland and its experience during the Second Great Migration is provided.

From the mid-nineteenth century to post-World War II, Cleveland, Ohio was known for its strong industrial prominence in oil, steel, and automobile manufacturing. Due to vast job opportunities available, Cleveland became one of America’s largest cities. Actually, just before America’s entry into World War II, Cleveland had a population of 878,336 making it the sixth largest city in the nation.\(^{145}\) A description of the city’s industrial past is not just to note that Cleveland was a progressive and industrial city. The rise of industry is closely related to racial segregation in housing and consequently, public education.

After World War II, during the Second Great Migration, an influx of African Americans moved into the city for more reasons than “an aversion to the racial prejudices of white southerners.”\(^{146}\) Primarily, this increase in the black population was due to the search for employment in Cleveland’s heavy industrial setting. As time passed and the African-American demographic grew rapidly, whites began relocating to neighboring suburbs. Cleveland historians Carol Poh Miller and Robert A. Wheeler note this swift


change in racial populations through the story of Glenville, a small neighborhood within Cleveland:

Glenville, annexed to Cleveland in 1905, was a predominately Jewish neighborhood, many of whose residents had begun to move to Cleveland Heights when the first blacks moved there in the 1920s. Between 1940 and 1950, the black population in Glenville grew rapidly, from 1,069 to 20,517 … Glenville was 67 percent black by 1960, and 95 percent black by the mid-1960s. The same pattern would occur again and again as white neighborhoods became black and segregation took hold of the city’s East Side.\(^\text{147}\)

As shown by the twentieth-century history of Glenville, division among the races began through the further development of suburbs. And, inevitably, this racial tension present within the development of cities and their surrounding suburbs translated into public education.

While instances of white flight were responsible for the initial segregation within Cleveland’s school system, local judges would eventually discover that school board administrators were to blame for the maintenance of it. Unfortunately, through the eyes of Chief Judge Frank J. Battisti, the Court’s adherence to the Civil Rights Cases of 1883, Brown’s de jure focused ruling, and the massive resistance surrounding it are also present within through Reed v. Rhodes.

On December 12, 1973, Robert Anthony Reed, III, a parent of a child attending Cleveland Public Schools, desired a local application of Brown. Reed, the leading name in this class action case protested the constitutionality of the racial divide present within the district. Represented by the local NAACP Legal Defense Fund, Reed, et al. (“Plaintiffs”) filed suit against the Cleveland School Board and the Ohio State Board of

\(^{147}\) Poh and Wheeler, pp. 147-148
Education ("Defendants"). Chief Judge Frank J. Battisti presided over the legal dispute at the United States District Court for the Northern District of Ohio.148

After three years of expert testimony during trial, community outreach seminars, and deliberation, the District Court rendered a controversial verdict. In an eighty-nine-page opinion, one much longer than Warren’s 1954 appellate decision, Battisti had no choice but to enhance the concise opinion of Brown. Within a thorough history of Cleveland schools, Battisti exposed the de facto elements that contributed to the city’s racial segregation in schools. Unfortunately, unlike Chief Justice Warren in Brown, this was not a duty that Battisti could examine further through a possible overturning of the Civil Rights Cases. It was Battisti’s responsibility to respect to judgment of the nation’s highest tribunal.

Reed v. Rhodes is a sound example of how Northern district court judges applied an abridged version of Brown’s de jure rationale and then explored the affects of de facto discrimination, the root of the problem school segregation in Cleveland, Ohio. In other words, Reed “illustrates the complex issues that surface in a desegregation case, particularly when a Northern city is involved…”149

To begin, Battisti provided the District Court with a series of statistics. These figures, a consequence of Warren’s restrained decision accounted for the percentage of students that attended a one-race school within the Cleveland School District. As Battisti noted, a simple glance at these numbers reveals that “during at least the last 20 years,


patterns of racial isolation in the Cleveland public school system have become steadily more pronounced.\footnote{422 F. Supp. 708, 711}

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1940</td>
<td>88.37%</td>
</tr>
<tr>
<td>1950</td>
<td>74.09%</td>
</tr>
<tr>
<td>1955</td>
<td>71.55%</td>
</tr>
<tr>
<td>1960</td>
<td>79.09%</td>
</tr>
<tr>
<td>1970</td>
<td>86.07%</td>
</tr>
<tr>
<td>1975</td>
<td>88.21%</td>
</tr>
</tbody>
</table>

It is interesting to note that the lowest value, 71.55% was recorded a year after the Supreme Court delivered \textit{Brown I} and the same year it delivered \textit{Brown II}, 1955. This means that just over seventy percent of Cleveland children attended segregated schools. However, after Warren’s decision, the number of Cleveland students enrolled in segregated schools increased rapidly. This is due to Warren’s less-than-judicial-activist adherence to the \textit{Civil Rights Cases} of 1883. He examined only \textit{de jure} and not racial discrimination itself.

In fact, in 1975, the percentages were roughly equivalent to that of 1940; over eighty-eight percent of Cleveland schoolchildren attended segregated schools. Notice, 1940 is fourteen years \textit{before} the Court declared “separate but equal” unconstitutional. The equivalent rates marked in 1940 and 1975 support the notion that \textit{de facto} segregation played a significant role in the segregation of public schools. Note, no laws prohibiting mixed schools existed in neither 1940 nor 1975.

To emphasize his findings, Battisti examined the “percentage of black students attending regular schools which were one-race schools [between the years of] 1940 [and]
1974.”

Again, the District Court realized a “steady trend toward concentration of black students in segregated schools.”

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1940</td>
<td>51.03%</td>
</tr>
<tr>
<td>1950</td>
<td>58.08%</td>
</tr>
<tr>
<td>1955</td>
<td>57.72%</td>
</tr>
<tr>
<td>1960</td>
<td>76.03%</td>
</tr>
<tr>
<td>1970</td>
<td>90.00%</td>
</tr>
<tr>
<td>1975</td>
<td>91.75%</td>
</tr>
</tbody>
</table>

Similar to the first set of statistics presented by Battisti, the percentage of black Cleveland schoolchildren attending all-black institutions increased rapidly after *de jure* measures were declared unconstitutional in *Brown* from 57.72% to 91.75%. The North did not prohibit integration legally. Therefore, a possible answer for this increase is *de facto* segregation, something that because of an adherence to institutional limitations, the Court could not regulate in 1954. However, given these consistent findings, two imperative questions surfaced.

First, in light of *Brown*’s verdict, what caused for an increase in segregation? Second, “to what extent, if any, are the defendants in this case, public officials and public agencies, responsible for creating or for maintaining or both the segregated situation in the Cleveland public school?” Both queries led Battisti to two vital answers, the *Civil Rights Cases* of 1883 and therefore, Warren’s inability to account for *de facto* discrimination. To reiterate, *de facto* segregation “results from housing discrimination,

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151 Ibid
152 Ibid
153 Ibid, p. 712
income disparities, and other forms of racism [not written or enforced by law] that keep black citizens segregated and isolated.”

In *Reed*, residential housing grounded in *de facto* discrimination practices established the foundation for racial divide in the city. Nevertheless, despite Battisti’s limitations to address *de facto* segregation, a constitutional issue still presented itself. School board officials in approval of *de facto* segregation used their authority to continue the maintenance of one-race schools. In fact, “segregation of public schools in Northern cities [like Cleveland] was maintained and expanded, not by political demagogues, but by liberal legislators and mayors, by cosmopolitan public officials, and by our educated school board members.” In the end, Defendants realized the institutional limitations of the Court, took advantage of them, and discovered a way to stall the desegregation of Cleveland’s schools. Simply put, Defendants found a way to keep schools segregated through preexisting circumstances of *de facto* segregation. This constituted an outright constitutional violation. Accordingly, Defendants’ actions were then labeled *de jure* discrimination.

With these issues before the District Court, Chief Judge Battisti soon recognized that *Reed* could not rely solely on *Brown*. Different from the *Brown* cases (where applicable), no explicit statute influenced the segregation of public schools existed in Cleveland: “[at] the outset of it should be noted that the instant action does not involve a

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statutorily mandated dual school system that is segregated on the basis of race.”

Nevertheless, the same elements of de facto segregation were maintained by school administrators, which still constituted a matter of de jure discrimination. Because of this, Battisti asserted that unlike Southern schools who felt the wrath of Brown in the late 1950s and early 1960s directly, “[northern] school desegregation cases constituted a relatively recent development.” Cited prophylactically, Battisti places Brown within the first five pages of the opinion. The remainder of his lengthy opinion delves into other lines of precedent including Swann, examines additional non-legal factors more pertinent to the de facto measures at hand, and seeks to clean up the mess that Warren could not regulate in Brown.

To clarify, despite the apparent presence of de facto discrimination in Cleveland, Battisti needed to evaluate this case because it still concerned a matter of de jure segregation. The District Court wanted to determine if school administrators were responsible for maintaining a segregated school system. The reason why Battisti found it difficult to apply Brown fully is because Reed presents a complex form of de jure segregation. Brown’s is grounded in law; an actual statute served as the catalyst for dual-race schools in the Jim Crow South. However, laws permitting separate schools for blacks and whites did not exist in the North. Instead, de facto discrimination initiated the separation of black and white children. This explains Battisti’s reason for exposing circumstances of de facto discrimination. Nonetheless, given the reliance to such judicial restrictions (as originally outlined in the Civil Rights Cases of 1883), Battisti grounded

156 422 F. Supp. 708, 713

157 Ibid, p. 712
his ultimate decision in matters of *de jure* discrimination by a review of apparent constitutional violations.

In order to regulate such a complex issue, Battisti first explored the precedent on point of, *Oliver v. Michigan State Board of Education*\(^{158}\) which stems from the United States Court of Appeals for the Sixth Circuit. *Oliver*, another unfortunate consequence of Warren’s *de jure*-oriented opinion deals with the promotion of *de facto* discrimination by school board administrators. It established a standard of review that all courts within the jurisdiction were obligated to apply in *de facto* related lawsuits of this nature. Battisti outlined this level of scrutiny and its prongs before applying them to *Reed*:

> A finding of *de jure* segregation [which originates from matters of *de facto* discrimination] requires a showing of three elements: 1) action or in action by public officials, 2) with a segregative purpose, and 3) which actually results in increased or continued segregation in the public schools.\(^{159}\)

To clarify, in order for the actions of the defendants to be ruled unconstitutional, the District Court needed to discover segregative purpose that resulted in the Cleveland Public Schools continued enforcement of discrimination. Also, given the recent trend of *de facto* opposition from the North to Brown’s central ruling, “separate but equal” is unconstitutional, Battisti noted that district judges were ordered to treat these cases as a matter of *prima facie*.\(^{160}\) This growing dissent towards Brown “establishes, in other

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\(^{158}\) 508 F.2d 178 (6th Cir. 1974)

\(^{159}\) 422 F. Supp. 708, 713

\(^{160}\) *prima facie* – at first sight; on first appearance but subject to further evidence or information; sufficient to establish a fact or raise a presumption unless disproved or rebutted *Black’s Law Dictionary*, pp. 560-61
words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts those authorities the burden of [proof].”\textsuperscript{161}

The standard of review established by the Sixth Circuit in \textit{Oliver} required Rhodes, \textit{et al.} to assume the burden of proof. Therefore, Defendants, the school administrators were required to supply the District Court with an abundance of information to claim their innocence. These findings detailed the history of the Cleveland School District, since 1940. Among other results, data included the construction and demolition of buildings, changes in schools’ student population, and the development of surrounding residential neighborhoods. In conjunction with the creation of various schools district lines and “optional zones,” Battisti conducted a thorough inspection to detect whether defendants maintained a dual-race district with segregative purpose.\textsuperscript{162}

One recurring consequence of \textit{de facto} segregation found throughout Battisti’s opinion is overcrowded schools. The Defendants’ other maintenance of such \textit{de facto} discrimination is found through the implementation of optional zones. Even though Chief Justice Warren did not address these prospective issues (because of the \textit{Civil Rights Cases} of 1883), Battisti, a lower court judge gave his best effort – within his power – to do so.

Overcrowding, also known as over-enrollment pertains to a school’s rate of attendance. Throughout Battisti’s decision the presence of overcrowding is dictated in a

\textsuperscript{161} 422 F. Supp. 708, 714

\textsuperscript{162} The District Court chose to focus on elementary schools only because it “assumed that factors such as variations in curriculum [and enrollment] from school to school were not nearly as significant at the elementary level as the secondary level.” (422 F. Supp. 708, 717) With fewer factors scrutinize, Battisti could gather a truer sense of whether segregative intent was present in defendants’ actions.
specific fashion. Two figures are displayed after each elementary school is named, the number enrolled and the school’s maximum capacity value. Whenever the former exceeds the latter, the school is deemed overcrowded. For instance, if School X has an enrollment cap at nine hundred students and one thousand attend (1000/900), the institution is over-enrolled.

As Battisti suggested in his evaluation, predominately black schools suffered with overcrowding the most. For safety reasons, school administrators were obligated to reduce instances of over-enrollment. However, in light of the segregative intent Battisti eventually discovered behind school officials’ actions, two popular solutions were often implemented. The first included the building expansion. This option relates to the allocation of state funds – a matter of de jure segregation brought forth in the oral argument of Gebhart v. Belton and Bulah. To reiterate, H. Albert Young noted that racial stereotypes influenced the administrators’ decision to provide more money to the construction and renovation of predominately white schools as opposed to black ones.

Another resolution included the construction of new school buildings. This remedy helped reduce enrollment sizes within schools. In addition to the allocation of state funds, Battisti also searched for segregative intent in the school officials’ selection of new building locations. For instance, some new schools were built in the heart of one-race communities. Not only would the once overcrowded school remain heavily black, the newly constructed one would almost always open either predominately African-American or Caucasian. Battisti provided numerous examples of this practice within Reed to maintain the racial segregation created by de facto discrimination. However, for residential areas that were experiencing an increase of racial mixing, the employment of
optional zones provided an outlet for white families to relocate and therefore, re-segregate.

Optional zones, implemented by school administrators offered parents the choice to select which schools their children attended. Attorneys for Defendants insisted that white parents possessed the right to live in segregated neighborhoods. In other words, to satisfy standards of white supremacy Defendants supported such *de facto* discrimination in housing “under color of law.” As sociologist Robert A. Dentler explains, “northern school boards have frequently gerrymandered school districts and attendance zones within districts in order to preserve racial segregation [present in housing developments].”¹⁶³ In *Reed*, these invisible, yet empowering boundaries of choice were often implemented in two ways: 1) within black communities and 2) along the residential borders of white and black neighborhoods. The first instance, as shown by Battisti served as an avenue to not only assist with the reduction of overcrowding in black schools, but to contain black students in their respective area.

On the other hand, optional zones in the latter circumstance gave white parents living in integrated housing developments, the liberty to enroll their children into “whiter” schools. In a number of instances, whites uprooted racially mixed areas in droves, as “urban districts would lose a portion of their white populations to suburban areas and private schools…”¹⁶⁴ This phenomenon became known as “white flight.” Moreover, Battisti noticed that the location of optional zones and their time period of

¹⁶³ Dentler, p. 260

enactment by school officials were often influenced by segregative intent, more or less an affirmation of pre-existing *de facto* discrimination:

One additional comment is here required. Optional zones could operate in a segregative manner in at least two ways. The first, obvious, and probably more common effect would be to provide an escape valve for whites to avoid attending what was perceived at a "blacker" school. The second, and perhaps more subtle, segregative effect would be to encourage those black students who were attending a predominantly white school to exercise the option in favor of a more identifiably black school. *Thus, an optional zone from a "whiter" school to a "blacker" school, rather than being integrative, would instead increase the racial identity of the schools involved.*  

As integrated schools located along these voluntary boundaries became more black and overcrowded, these optional zones were finally terminated by school administrators. Hence, the maintenance of a dual-race school district that was originally segregated by *de facto* means.

Among Battisti’s review of seven areas within the Cleveland Municipal School District, four regions between 1955 and 1976 highlight the shortcomings of *Brown’s* opinion the most: Central Area, Beehive, Hough-Dunham, and the West Side. These areas display clear circumstances of the defendant’s segregative actions, in an effort to uphold pre-existing *de facto* practices. Furthermore, they also elaborate instances of *de facto* discrimination which could not be resolved by Chief Justice Earl Warren’s landmark opinion.

The first region surveyed by the District Court is the Central Area. Battisti noted that beginning in 1940, “the eight regular elementary schools in the system had black student enrollments in excess of 95 percent and all were in the Central Area, as

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165 422 F. Supp. 708, 752 (emphasis added)
designated by local school authorities.”\textsuperscript{166} He acknowledged that this large concentration of blacks emerged for two reasons. The first was due to the rise of minority employment after World War II, “particularly in the many industrial plants in this area.”\textsuperscript{167} In fact, blacks tended to settle down, work, and raise their families closer to the center of the city. Similar trends appeared across the North. One example is Washington, D.C. Following the end of the Civil War, blacks migrated to central areas with hopes of higher job opportunities and extra governmental protection from discrimination.\textsuperscript{168}

Moreover, Battisti also attributed the large black population in the Central Area as the result of \textit{de facto} discrimination present in local residential housing. In fact, “testimony at trial was to the effect that the real estate market in Cleveland was managed in such a way that black consumers were afforded the opportunity to bid for housing only in certain areas.”\textsuperscript{169} While these findings proved that racism was alive in Cleveland’s neighborhoods, the District Court needed more evidence to suggest segregative intent behind defendants’ desire to maintain it. The question presented itself: were Cleveland school officials making a deliberate effort to reinforce \textit{de facto} discrimination? Battisti’s answers rested in the examination of the elementary schools themselves.

For instance, in August 1967, a fire destroyed one of the leading black schools in the Central Area, Kinsman Elementary. The last available figures for Kinsman in 1964 rendered that the school suffered the risk of overcrowding (941 students enrolled/945

\textsuperscript{166} Ibid, p. 718

\textsuperscript{167} Ibid, p. 718


\textsuperscript{169} 422 F. Supp. 708., 719
maximum capacity). To add, one hundred percent of its students were African American. Given the disaster, the school board needed to relocate Kinsman students to neighboring schools within the district.\textsuperscript{170} During the administration’s survey of where to move the Kinsman students, residential segregation played an important role in the decision.

Upon review of the record, Battisti discovered that administrators chose to reassign Kinsman students to three neighboring schools, Grdina Elementary School (100% black, 1049 enrolled/1015 maximum), Chestnutt (100% black, 849 enrolled/875 maximum), and Dike (100% black, 638 enrolled/805 maximum). As the District Court asserts, “given full consideration to the emergency conditions, the court is compelled to view at least the reassignment of students to Dike as deliberately segregative,” for two reasons.\textsuperscript{171} First, in a suspect manner, Kinsman students were all relocated to schools with 100% of its population as black. Finally, even though defendants proclaimed that matters of convenience and safety influenced their school choices, Battisti noted that district officials “overlooked the distance from Kinsman to Dike … 8,100 feet.”\textsuperscript{172}

When other white schools were located within walking distance, Tod (1.68% black, 237/490) and Union (.98% black, 408/490), black students were instead sent to segregated schools much further away from their place of residency. These students underwent the same trials faced by Linda Brown, a elementary school student forced to attend an all-black schools located far away from her home. Because of the Court’s limited institutional power to enforce its opinion, the foundation for racial segregation in

\textsuperscript{170} Ibid, p. 728

\textsuperscript{171} Ibid.

\textsuperscript{172} Ibid, pp. 728-29
Cleveland’s public schools, *de facto* discrimination remained untouched by legal scrutiny.

With respect to Tod elementary, Battisti engaged in a more detailed look why Kinsman children were not sent there. According to the District Court, defendants argued that Tod could not accept new students for two reasons, 1) inadequate amount of classroom furniture to accommodate students and 2) the need to remodel several rooms.\(^{173}\) However, Battisti suggested that “such maintenance could have been accomplished within a month if school officials had any commitment to achieving integration where possible.”\(^{174}\) In conclusion, “the court [declared] that Tod was not considered on a site for reassignment of Kinsman students because it would have been inconsistent with the Board’s practice of maintaining Tod as a white school.”\(^{175}\) Records of Tod’s enrollment, especially after 1953 confirms this:

<table>
<thead>
<tr>
<th></th>
<th>enrollment/capacity</th>
<th>proportion black</th>
</tr>
</thead>
<tbody>
<tr>
<td>1953</td>
<td>251/490</td>
<td>28.7 %</td>
</tr>
<tr>
<td>1954</td>
<td>188/490</td>
<td>6.38%</td>
</tr>
<tr>
<td>1955</td>
<td>174/490</td>
<td>1.15%</td>
</tr>
<tr>
<td>1956</td>
<td>197/490</td>
<td>2.54%</td>
</tr>
<tr>
<td>1957</td>
<td>200/490</td>
<td>2.50%</td>
</tr>
<tr>
<td>1958</td>
<td>202/490</td>
<td>1.49%</td>
</tr>
<tr>
<td>1959</td>
<td>100/490</td>
<td>1.00%</td>
</tr>
<tr>
<td>1960</td>
<td>169/490</td>
<td>.59%</td>
</tr>
<tr>
<td>1961</td>
<td>185/490</td>
<td>0%</td>
</tr>
<tr>
<td>1962</td>
<td>213/490</td>
<td>0%</td>
</tr>
<tr>
<td>1963</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>1964</td>
<td>209/490</td>
<td>0%</td>
</tr>
<tr>
<td>1965</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>1966</td>
<td>n/a</td>
<td>n/a</td>
</tr>
</tbody>
</table>

\(^{173}\) Ibid, p. 729

\(^{174}\) Ibid.

\(^{175}\) Ibid.
To clarify, *de facto* discrimination in housing practices and the efforts made by administrators to maintain these segregated neighborhoods via public education explain for the decrease in black students at Tod Elementary. Arguably, because of the dramatic depreciation from 28.7% black to 0% black, the strongest reinforcement of such *de facto* ideals occurred between 1953 and 1961. This marks the same period in Cleveland history when white flight contributed to the overwhelming growth of suburbs. Tod’s racial population would drop dramatically from fairly integrated to absolutely segregated. With the exception of 1953, notice how this time period constitutes the post-*Brown* era, after *de jure* segregation in public schools is declared unconstitutional. There is only one explanation for this drastic depreciation of African-American students, *de facto* discrimination.

Upon an evaluation of additional schools within the Central Area, Battisti juxtaposed enrollment percentages of blacks according to their residential areas. For example, in 1958, there existed a clear-cut racial divide among residents of the Northern Central Area versus Southeastern Central Area. In the North, Case Elementary (17.19% black, 413/525) and Waring Elementary (14.35% black, 525/630) were both overwhelmingly white and under enrolled. Case and Waring reflected the racial makeup of Central Area’s north side. However, Carver Elementary, in the Southeast, like its residential population remained 100% black and severely overcrowded (813/590). Battisti noticed that such consistent trends were due to defendants’ cooperation with local

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176 Ibid, p. 732
housing developers: “school officials appear to have been willing partners in conduct
which delineated neighborhoods along racial lines. The assignment decisions of the
school officials were clearly one factor which contributed to such neighborhood
definition.”\textsuperscript{177} As Chief Judge Battisti ascertained, \textit{de facto} factors were essential in the
creation, maintenance, and realignment of segregated schools in Cleveland, Ohio.

During trial, plaintiffs also brought forth the history of student enrollments in the
Beehive area. Beehive is located in the southeast corner of the city of Cleveland. At the
time the District Court rendered the decision, Beehive contained six elementary schools:
Beehive, Gracemount, Williams, deSauze, Cranwood, and Moses Cleaveland.\textsuperscript{178}

In 1955, one year after the delivery of Warren’s incomplete decision in \textit{Brown} the
elementary schools in the Beehive area were already racially split. Given that no laws
prohibiting segregated schools existed, \textit{de facto} discrimination is to blame for this initial
divide. Gracemount – 5.8%, Williams – 0%, and Cranwood – 0% were white; Beehive –
53.9% and Brewer – 99.1% were black. Finally, Cleaveland – 35% fell into the middle
ground as the most integrated. However, by 1967, all of the institutions (with the
exception of Cranwood) became overwhelmingly black: Gracemount – 99.8%, Williams
– 99.4%, Beehive – 97.4, Brewer – 100%, and Cleaveland – 97.9\%.\textsuperscript{179} Battisti attributed
this dramatic change to four interrelated factors: residential segregation (white flight), the
implementation of optional zones, the construction of new schools, and the building
expansion of neighboring white schools.

\textsuperscript{177} Ibid.

\textsuperscript{178} Ibid, p. 733

\textsuperscript{179} Ibid, p. 738
With respect to new school construction, Battisti was more intrigued with the
school board’s choice of location. The district court judge explained this concern further
in an isolated circumstance in 1967, the opening of Emile B. deSauze Elementary school:

In 1967 the Emile B. deSauze school opened 93.4% black with an enrollment of
528 and a capacity of 840. Assuming deSauze was opened in 1966, it most
probably was planned around 1964, or at the very least, using 1964 data. The
following chart depicts the area-wide situation at that time.

<table>
<thead>
<tr>
<th>School</th>
<th>1964</th>
<th>enrollment/capacity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brewer</td>
<td>99.6%</td>
<td>482/560</td>
</tr>
<tr>
<td>Moses Cleaveland</td>
<td>85.8%</td>
<td>1086/1120</td>
</tr>
<tr>
<td>Gracemount</td>
<td>93.2%</td>
<td>610/945</td>
</tr>
<tr>
<td>Williams</td>
<td>39.4%</td>
<td>561/490</td>
</tr>
<tr>
<td>Beehive</td>
<td>83.9%</td>
<td>1048/1015</td>
</tr>
<tr>
<td>Cranwood</td>
<td>26.6%</td>
<td>267/175</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4054/4305</td>
</tr>
</tbody>
</table>

At the same time that Beehive went slightly overcapacity, the situation at
Cranwood was much more severe (’64: 26.6%; 267/175). If deSauze had been
placed in the vicinity of Oakdale and East 154th Streets, it could have absorbed
the overcrowding at Beehive, as well as the excess students from Cranwood. The
result would have been an integrated school, not a foreseeably and predominantly
black school.180

To reiterate, while the District Court did not suggest “that all construction activity in the
area was inappropriate … the court [concluded] that less construction was required and
[instead] could have resulted in more integration.”181

180 Ibid, pp. 741-42
181 Ibid, p. 740
In conjunction with the enforcement of temporary optional zones by Defendants, for over a decade, new construction based on the biased reallocation of funds continued to be placed in strategic positions across the School District for over a decade. The district court judge wrote: “it is indeed ironic that the absence of integrative alternatives was in large measure due to the prior segregative acts of the Board, which refused to make step-by-step boundary changes while these [areas] remained [with] a significant proportion of white students in the area schools.”

Until the ruling of Brown in 1954, the Hough-Dunham Area, “bounded by E. 55th Street on the east, E. 107th Street on the West, Superior Avenue in the North, and Euclid Avenue on the south,” was primarily a white neighborhood. Large homes and minimal public housing existed in this region. However, as Battisti addressed in his opinion, with an increase in population and the “transition from single family homes to small apartment buildings,” the school enrollment dynamics changed dramatically. The schools under inspection in this case were divided into two groups, the Hough “core” and the Dunham “satellite.” The “core” sector consisted of older elementary school buildings: Morgan, Orr, Martin, and Rapper. The “satellite” included Wade Park, Attucks, Ireland, and Rockefeller. Moreover, another institution, Bolton Elementary School usually stood alone, yet found itself closely related to the Hough “core.”

182 Ibid, p. 742
183 Ibid, p. 750
184 Ibid.
185 Ibid.
Immediately, Battisti took an interest in the school officials’ treatment of a neighboring school, Waring and its relationship to Hough’s growing trend of overcrowding. Similar to the circumstances presented in 

*Briggs v. Elliot* and *Gebhart v. Belton and Bulah*, in 1956, Waring, a school only with an 8.99% black population and under enrolled by fifty-three students, underwent some suspicious remodeling. Reallocations of funds needed to renovate overcrowding schools in the area were used to support the remodeling of this predominately white institution. Battisti recognized from the testimony that “only an assembly room and some new office space were added to the school’s physical plant.”

The District Court jurist found this action equivalent to an instance of segregative purpose:

> Waring (8.99%, -53) elementary school received an addition in 1956 that did not involve classrooms. Only an assembly room and some new office space were added to the school’s physical plant. This incident suggests that the board had a strange sense of priorities. At a time when the area schools were experiencing a rapid increase in black enrollment and at times were over enrolled by 500 or more students, the board chose to devote part of its limited construction budget "to improve facilities" at an under enrolled, over-whelmingly white school.

Battisti also addressed the apparent defiance of the defendants with the story of newly constructed, Wade Park Elementary School. Wade Park’s original building, made in 1898 was renovated in 1973. The new school, built next to its older building opened in 1975 with a 100% black student population. Battisti found this not only remarkable, but also quite arrogant, given that the incident took place “two years after the filing of this lawsuit.”

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186 Ibid, p. 754
187 Ibid.
188 Ibid, p. 762
Wade Park’s location also bothered Battisti. Positioned just south of East Madison Elementary (in 1973, 46.6% black, 513/490), and Hodge Elementary (in 1973, 35.4% black, 594/735), the three schools presented an excellent opportunity for the school board to integrate its students. Even though no concrete law prevented administrators from integrating the institutions, *de facto* components, most notably housing provided officials with an avenue to maintain racial segregation. Battisti noted that instead of the school board choosing to renovate Wade Park itself, “a single integrated school for approximately 1719 students should have been a prime objective. Instead, Wade Park was built to open forseeably 100% black, and to accommodate 612 pupils … This incident … is clearly an overt act of containment.”¹⁸⁹

The last area examined by the District Court is Cleveland’s West Side. As Battisti pointed out, “virtually all the blacks live on the east side. There [was], however, a small pocket of blacks on the west side – a vestige of the grouping of black laborer at a railroad depot in that area.”¹⁹⁰ Given this extreme circumstance of residential segregation present in the West Side, this region offers a superb example of how segregative intent influenced the school board’s decisions. Furthermore, it displays the unfortunate consequences of Warren’s less than absolute judicial activism.

The opening of Brooklawn Elementary (K-3) in 1957 caught the attention of Battisti primarily. Brooklawn sat along optional zones to neighboring schools Hawthorne, Agassiz, and Longmead, each with a predominately white student population.¹⁹¹

¹⁸⁹ Ibid.

¹⁹⁰ Ibid, p. 779

¹⁹¹ The exact figures for 1957 were not revealed by the District Court.
defendants argued that Brooklawn would help to reduce overcrowding in the area among the three schools mentioned previously. However, the District Court revealed otherwise.

In 1954, the planning year for Brooklawn’s opening, “Agassiz was slightly under capacity, Hawthorne was slightly over capacity, and Longmead was virtually at capacity.”192 With this information, Battisti could only believe that Brooklawn’s true purpose was to serve as the harbor for the West Side’s limited black student population:

Significant, too, is the fact that Brooklawn was constructed with a much smaller capacity than its neighboring schools. It was this smaller size that caused it to open 47.7% black in 1957 while no other schools in the area was more than 10% black. Under these circumstances, Brooklawn would have to be considered racially identifiable even though it might be considered "integrated" in a purely statistical sense.193

No law existed to authorize the construction of Brooklawn as a school of smaller capacity. Housing discrimination influenced this.

Furthermore, Battisti considered the location of Brooklawn as additional evidence for segregative intent. Again, in 1957, Cleveland’s West Side black population was “extremely small and highly concentrated.”194 The fact that Brooklawn “was construed virtually in the middle of that small [black] community and therefore, opened foreseeably more black than any of the surrounding schools,” is a clear demonstration of de facto discrimination’s presence in this region of black housing developments. Battisti called the practice a result of the defendants’ ability to overcome the de jure principle declared unconstitutional in Brown. Also, Brooklawn’s circumstances highlighted the

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192 Ibid, p. 781

193 Ibid, p. 782

194 Ibid.
administrators’ intent to racially impact, racially isolate, and blatantly contain black pupils; “such action can only be deemed deliberate.”

After his detailed analysis of the individual regions, Battisti highlighted supplementary means the School Board used to maintain segregated schools that were established originally through *de facto* means. Each measure escaped the *de jure* restraints issued in Warren’s 1954 opinion. Even though these additional factors were not addressed explicitly by NAACP attorneys in *Brown*, they represent an instance of judicial restraint demonstrated by Warren. He did not decide to overturn the *Civil Rights Cases* of 1883.

The first additional factor referred to by Battisti in his decision is “Relay Classes and Busing.” Relay classes according to Battisti, “commenced around 1955 and ran to 1961 [and] reflected an effort to get twice the mileage out of a school day by teaching one group of students in the morning and another in the afternoon.” While relay classes, like construction assisted in the reduction of overcrowding, they promoted inadequate environments of learning. The “instruction thus received by pupils not on relay classes and, in fact fell for short of the minimal education standards set out by law.” Battisti added that “the vast majority of the schools that employed relay classes had majority or predominately black student enrollments.”

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195 Ibid.
196 Ibid, pp. 782-83
197 Ibid, p. 783
198 Ibid.
Battisti also examined early forms of busing implemented within the district, a circumstance that the Court did not amend completely through Swann. As argued by defendants and affirmed by the District Court, “the objective of [busing] was twofold: easing the pressure on overcrowded schools until new construction was completed, and the elimination of ‘relay classes.’” Even though this did help to integrate some of schools, busing placed African Americans at a higher disadvantage than their white counterparts. In virtually all cases, where the board enacted busing, “the sending school was predominantly black, overcrowded, and implementing relay classes.” According to Battisti, this extra transportation placed a burden on black students and their families. On the other hand, “the receiving schools were [most often] underutilized and predominantly white.”

Furthermore, the District Court inspected a more bureaucratic measure to segregate schools, special transfers. Battisti defines special transfers as programs which:

[allowed] a student to attend a school other than the neighborhood school to which he or she is assigned. To be granted a special transfer, the parent or guardian of the child must complete an application for such transfer, setting for the reasons such a transfer is sought.

While this appeared as an opportunity made by the school district to promote free choice, not all applications were treated equally. Like those students in Sweatt, McLaurin, and Bolling v. Sharpe, a great number of blacks were denied admission to the school of their choice based solely upon their race.

199 Ibid, p. 782
200 Ibid, p. 783
201 Ibid
202 Ibid, p. 785
Battisti discovered in trial that upon submission of these requests, officials attempted to segregate the applications by race. According to the testimony of Cleveland’s Supervisor of the Division of Attendance, Abba Schwartz:

A handwritten “W” thus appeared on the applications which this unidentified school employee believed to be white. Examination of the applications suggests that this individual’s determination was frequently based on various indicia [residency, income, parents’ occupation, etc.] in the application which would strongly support the conclusion reached.\textsuperscript{203}

In many occasions, Battisti acknowledged “W” applications were assigned to predominately white schools located in white neighborhoods, as opposed to neighborhood schools with a higher African-American population in black residential areas. As the evidence also suggested, during 1965 and 1975, “261 white junior high school students and 572 white senior high school students were allowed to transfer from predominantly black ‘neighborhood’ schools to identifiably white schools.”\textsuperscript{204} The discriminatory enforcement of special transfers relates directly to the denial of admission to all-white schools of black students. Similar instances were argued before the Supreme Court in \textit{Brown} and \textit{Bolling v. Sharpe}.

In conjunction with special transfers for students, Battisti analyzed a similar program used for the assignment of faculty members. Teachers were often stationed at certain schools because of their race. For example, “in 1973, there were 17 elementary schools with a black student enrollment of 11.64 [percent] or less. All of these schools had either no black faculty from 1969-73 or did not receive their first black teacher

\textsuperscript{203} Ibid.

\textsuperscript{204} Ibid.
Likewise, “of the 30 elementary schools that were 100% black in 1973, 25 had at least 15 black faculty members.” The same values could be attributed to white schools.

Housing, the crux of Cleveland’s de facto segregation is a central factor that was not considered in Brown. Nevertheless, Battisti made an earnest effort to amend this discrimination and its effect on Cleveland Public Schools. During trial, counsel for plaintiffs suggested that “residential segregation was inextricably related to school segregation and the housing cases [heard by the U.S. Supreme Court] would be a valuable asset in evaluation the evidence to be presented in this case.” While plaintiffs argued that defendants were promoting residential segregation with their actions, defendant pleaded the opposite; “…these residential patterns are the result of outside forces beyond their control and that they merely put school ‘where the children are.’” Battisti did not accept the defendants’ argument.

Most definitely, Battisti could not apply Brown in this instance, as the 1954 case involved only matters of heavily grounded de jure school segregation initiated through the enactment of a law. As opposed to the South, where “there was only statutorily imposed segregation in the … [Battisti] had to decide whether a constitutional distinction existed between segregated conditions in the North …” Instead, the Supreme Court’s

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205 Ibid, p. 786
206 Ibid.
207 Ibid, p. 788
208 Ibid.
209 Combs, p. 36
1948 ruling of *Shelley v. Kraemer*\(^{210}\) provided some foundation needed for the District Court to review the facts at hand. *Shelley* pertained to the segregative acts enacted by the Federal Housing Administration (FHA) during the 1930s, a *de jure* matter of discrimination.

As Battisti noted, “the FHA manual actively recommended that restrictive covenants with regard to race be included in deeds. Such restrictive covenants were judicially enforced until such practice was declared unconstitutional [by the Supreme Court in *Shelley*].”\(^{211}\) Nevertheless, despite the Court’s ruling in *Shelley* based primarily upon *de jure* elements, local housing departments including the Cuyahoga Metropolitan Housing Authority (CMHA) continued to segregate mostly through *de facto* means. Furthermore, *Shelley* is another clear example of how the Court does not possess the authority to deal with *de facto* discrimination. Again, the national judiciary’s inability to address *de facto* segregation stems from the *Civil Rights Cases* of 1883. Even though *de jure* segregation in housing no longer existed after *Shelley*, the Court could not prevent some families from choosing to exercise their prejudices and relocate on their own terms.

Upon a further examination of rendered neighborhoods such as Hough-Dunham and the West Side, “it [was] clear that the presence of racially segregated public housing in conjunction with school board policies operated to spawn racially segregated schools.”\(^{212}\) According to Battisti, “there [could] be little doubt that this [resulted in the] natural, probable, foreseeable, and actual effect of the school board’s ‘neighborhood

\(^{210}\) 334 U.S. 1

\(^{211}\) 422 F. Supp. 708, 788.

\(^{212}\) Ibid, p. 789
school policy.”213 As historians have recognized, even though “[educators] are not politicians … on issues like school segregation they [were] expected to align themselves with the model sentiments of the civic clientele.”214

To conclude his discussion on housing, Battisti noted that if the neighborhoods in Cleveland were “naturally segregated” solely because of de facto principles alone, the school board’s alignment would be constitutional. Yet, once administrators begin to reinforce such de facto discrimination by de jure means (remember, the administrators are under color of law) through the manipulation of school district lines, the implementation of temporary optional zones, the assignment of teachers by race, and strategic expansion of schools in particular “race-based” areas, the School Boards practices become constitutionally suspect under the Fourteenth Amendment:

But as soon as school officials start to make changes in school site locations, school sizes, school renovations and additions, student attendance zones, assignment and transfer options, transportation of students, assignments of faculty and staff, etc., their actions become, in the words of [Supreme Court Associate] Justice Powell… `constitutionally suspect.' The fact that these decisions are asserted to have been in conformity with a `neighborhood school policy' does not save them from constitutional scrutiny.”215

In the final pages of Chief Judge Battisti’s opinion, he formally acknowledged segregative intent behind defendants’ actions: “…upon this analysis of the record, the significant involvement of the Cleveland Board of Education in the creation or maintenance of a segregated school system cannot be denied.”216 Battisti ruled in favor of

213 Ibid.
214 Dentler, p. 265
215 Ibid, p. 791
216 Ibid, p. 796
Plaintiffs and ultimately declared such practices, under the Equal Protection Clause of the Fourteenth Amendment. To reiterate, Battisti could not regulate the apparent *de facto* practices implemented in housing such as white flight. However, he could address the school administration’s approval and maintenance of such discrimination under law. Hence, Battisti’s final ruling that the Defendants were in violation in the Equal Protection Clause of the Fourteenth Amendment.

To conclude, Battisti ordered the defendants to propose new plans to integrate the school district:

> The plaintiffs, the Cleveland School Board and State Board of Education will formulate and submit to this court proposed plans for the desegregation of the Cleveland School System within ninety (90) days of the entry of this order. Within twenty (20) days of the entry of this order, counsel for the above parties will submit proposed instructions to the special master and suggestions as to both the structure and membership of the panel named to assist the special master. Supplemental orders with regard to the remedial stage of this proceeding will follow.217

In eighty-nine pages, Chief Judge Frank Battisti not only exposed the shortcomings of *Brown*. He also elaborated on the unfortunate circumstances that arose considering that the foundation for racial discrimination in public education was not regulated by national judiciary, *de facto* segregation. As a former student of the Cleveland Public Schools system (Adlai Stevenson Elementary, 1994-99), I can assure readers that racial discrimination, while less outright and apparent today, still thrives in the city. Even the brilliant work of Battisti could not override notions of racial prejudice and the critical power of the *Civil Rights Cases* of 1883. In the case of *Brown* and its journey from Topeka to Cleveland, I am one of many travelers.

217 Ibid, p. 797
Conclusion

Historians tend to view *Plessy v. Ferguson* as the most critical Supreme Court case affecting African-Americans’ struggle to obtain constitutional liberties. I argue the contrary. The *Civil Rights Cases* of 1883 are principal to this study.

Justice Joseph P. Bradley’s opinion in the *Civil Rights Cases* established a vital precedent grounded in a strict interpretation of the Fourteenth Amendment – regardless of its connection with *de jure* segregation, the Court cannot regulate matters of *de facto* discrimination. This judicial limitation still recognized as “good law,” places jurists into a historical vacuum. Specifically, it does not allow for judges to administer justice fairly, despite the occurrence of an ever-changing society. For instance, with respect to the desegregation of public schools, the *Civil Rights Cases* prevented Chief Justice Earl Warren and Chief Judge Frank Battisti from examining directly the true foundation for racial segregation in schools, *de facto* prejudice.

To begin, Warren’s decision in *Brown* grounded itself strictly on the constitutional question: *Is de jure segregation in public education protected by the Fifth and Fourteenth Amendments?* Sure, in 1954, the *de jure* query was an important one to explore. At the time, Jim Crow continued to dominate Southerners’ way of living. Furthermore, it enhanced racial division in the public sphere. In order for the desegregation process to begin in public education, as it did other realms such as President Harry S. Truman’s 1948 executive order for the integration of the Armed Forces, it was necessary to address the laws themselves, those which impeded blacks and whites from integrating. Justifiably, in light of *Brown’s* oral arguments and the changing
However, by the time of Reed, in 1976, Jim Crow – *de jure* segregation – no longer existed. In fact, as a product of the Civil Rights Movement, Congressional laws were enacted between *Brown* and Reed to provide African Americans and other minorities the opportunity to obtain their just constitutional rights. Two of these monumental pieces of legislation include the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Nevertheless, despite the imposition of laws in support of African Americans, racial divide continued to thrive in public education across the country. This circumstance cannot be blamed on *de jure* discrimination, for such did not exist. Rather, the foundation for continued segregation, especially in the North is due to *de facto* discrimination.

Unlike the Jim Crow South, laws which prohibited integrated schools were not enacted in the North. The creation and development of dual-race learning institutions, in particular within Cleveland, Ohio began during the post-WWII era. Because of the Second Great Migration of African Americans to the industrial city and the later growth of suburban residencies, the white flight phenomenon arose, leading to the segregation of Cleveland schools.

Even though his opinion in Reed recognized the dominating presence of *de facto* discrimination and its effect on public education, Battisti, federal district court judge could not base his central verdict on the social realities surrounding him completely. Battisti needed to discover, highlight, and rule upon incidents of segregative actions performed by state officials, aspects still recognized as *de jure* segregation. Because of
his judicial responsibility to adhere to the Supreme Court’s ruling in *Civil Rights Cases* and Warren’s decision to overturn them, Battisti’s final judgment became an exploration of *de jure* regulation. Essentially, it attempted to resolve a modern-day problem through an outdated historical lens.

Because of the *Civil Rights Cases*, school desegregation has failed. Such reliance upon on these nineteenth-century suits, not only hampered the integration process in Cleveland’s public schools but also across the country. Essentially, Battisti’s dependence on the Supreme Court’s judgment, resulted in an unsuccessful attempt to resolve a predominately *de facto* issue through the examination of *de jure* tactics. *De facto* segregation - maintained by ongoing beliefs of racial prejudice - not only serves as the catalyst for *de jure* discrimination but also explains why a racial divide in public education still exists today. In order to amend racial segregation in modern-day public education, policy and law need to tackle *de facto* directly. There are two possible avenues to do so.

First, American jurisprudence should abandon the “state action” requirement outlined by the *Civil Rights Cases* which would allow for the courts to monitor *de facto* discrimination. Second, law should review the interpretation of the *Slaughterhouse Cases* of 1873 and expand the federal protection of the Privileges or Immunities Clause of the Fourteenth Amendment to the state level. Through this expansion, American citizens may contest circumstances of *de facto* discrimination in court as a violation of their protected privilege to integrate racially. Such a renewal of this Privileges or Immunities Clause could ultimately revive the Equal Protection Clause of the Fourteenth Amendment and provide an additional legal foundation to tackle matters of *de facto* segregation. It may
also offer the legislative branch the resources to craft stronger and more effective acts concerning with the regulation of *de facto* discrimination.

The judicial system cannot regulate racial segregation in public education adequately so long as the *Civil Rights Cases* of 1883 remain intact. To stay connected with America’s ever-changing society and its perspective on race relations, the Court needs to overturn this decision and make an effort to monitor *de facto* discrimination. Otherwise, jurists will forever remain unequipped to tackle racial segregation in public education single-handedly.
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