Loyola of Los Angeles Law Review

Volume 12 | Number 2 Article 10

3-1-1979

Ninth Circuit Review—The History of School Desegregation in the Ninth Circuit

David S. Ettinger

THE HISTORY OF SCHOOL DESEGREGATION IN THE NINTH CIRCUIT

I. INTRODUCTION

May 17 marks the twenty-fifth anniversary of the Supreme Court's decision in *Brown v. Board of Education*,[1] a case that continues to have an enormous impact on American society. The changes it has engendered have not occurred quietly or without public awareness. Court-ordered desegregation of America's public schools has taken a variety of forms in the quarter century since *Brown*, from the invalidation of statutes imposing segregation to the mandatory busing of school children.

This note traces the development of school desegregation law in the federal courts of the Ninth Circuit. The cases are viewed against the background of the Supreme Court decisions that have attempted to guide the inferior courts. There has often been no guidance on important issues. When there has been guidance, the Ninth Circuit courts have occasionally ignored it.

II. THE "SEPARATE BUT EQUAL" ERA

The first school segregation case to reach the federal courts in the Ninth Circuit was *Wong Him v. Callahan*.[2] The plaintiff was a student "of Chinese parentage" seeking admission to a San Francisco grammar school. He had been excluded under a California law which allowed the establishment of separate schools for "Chinese or Mongolian children" and which restricted those children to the separate schools.[3] This

1. 347 U.S. 483 (1954).

2. 119 F. 381 (N.D. Cal. 1902).

3. The statute was enacted in 1885 (1885 Cal. Stats., ch. 117, p. 100), and it was not repealed until 1947 (1947 Cal. Stats., ch. 737, p. 1792), only seven years before *Brown*. Before its repeal, the statute was amended to allow separate schools for Indian (1893 Cal. Stats., ch. 193, p. 253) and Japanese (1921 Cal. Stats., ch. 685, p. 1160) children. In 1928, a commentator found, however, that the law was "not generally enforced." 16 CALIF. L. REV. 346, 347 (1928). At the time of the *Wong Him* case, the statute read:

> Every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district, and the Board of School Trustees, or City Board of Education, have power to admit adults and children not residing in the district, whenever good reasons exist therefor. Trustees shall have the power to exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Mongolian or Chinese descent. *When such separate schools are*

law was challenged as a violation of the plaintiff's right to equal protection of the law under the fourteenth amendment to the United States Constitution.[4] The plaintiff, making an argument which was not to be adopted by the United States Supreme Court for another fifty-two years, urged that the operation of separate schools was per se discriminatory. Such discrimination, it was further claimed, "is arbitrary, and the result of hatred for the Chinese race."[5]

After finding that the intent of the legislature was irrelevant to the validity of the statute, the district court refused to invalidate the law:

> [I]t is well settled that the state has the right to provide separate schools for the children of different races, and such action is not forbidden by the fourteenth amendment to the constitution, provided the schools so established make no discrimination in the educational facilities which they afford.[6]

Since the complaint had not contained any allegations of inequalities between the separate schools, the court found that the complaint stated no claim for which relief could be granted.

It is odd that *Wong Him*, a classic espousal of the "separate but equal" doctrine, does not cite *Plessy v. Ferguson*[7] as an authority. Decided only six years earlier, *Plessy* was the first comment by the Supreme Court on whether the fourteenth amendment prohibits a state from separating the races when the separate facilities provided by the state are equal in quality. *Plessy* had approved this segregation tactic. And while *Plessy* dealt with a Louisiana statute mandating separate railway cars for blacks and whites, it was noted in *Plessy* that "[t]he most common instance of [racial separation] is connected with the establishment of separate schools for white and colored children."[8]

Like the plaintiff in *Wong Him*, Homer Plessy argued that the maintenance of separate facilities was in and of itself discriminatory and

---

established, Indian, Chinese, or Mongolian children must not be admitted into any other school; provided, that in cities and towns in which the kindergarten has been adopted, or may hereafter be adopted, as part of the public primary schools, children may be admitted to such kindergarten classes at the age of four years.

(emphasis added)

This law was held constitutional by the California Supreme Court in Piper v. Big Pine School Dist., 193 Cal. 664, 671 (1924).

4. The fourteenth amendment states, in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. 119 F. at 382.

6. *Id.*

7. 163 U.S. 537 (1896).

8. *Id.* at 544.

thus a violation of the equal protection clause of the fourteenth amendment. The Court disagreed:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[9]

While *Wong Him* does not mention *Plessy*, both spring from the same family of school segregation cases. The case that initially approved the operation of separate schools, and one that was relied upon in both *Wong Him* and *Plessy*, was *Roberts v. City of Boston*.[10] There, the Massachusetts Supreme Court rejected the argument of Charles Sumner, the plaintiff's attorney, that the maintenance of separate schools in Boston for black and white children "tends to create a feeling of degradation in the blacks, and of prejudice and uncharitableness in the whites."[11]

Also cited in both *Wong Him* and *Plessy* is *Ward v. Flood*,[12] the California equivalent of *Roberts*. Moreover, although *Roberts* was decided prior to the enactment of the fourteenth amendment,[13] *Ward*, a post fourteenth amendment case, found *Roberts*, persuasive and quoted from it at length while holding that a California statute establishing separate schools for blacks[14] did not violate the fourteenth amendment. The *Ward* court, in a passage expressing a philosophy which would be repeated in *Wong Him*, stated:

> [I]n the circumstances that the races are separated in the public schools,

---

9. *Id.* at 551. An eloquent dissent was filed by Mr. Justice Harlan. In it he stated:

> We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.

Id. at 562 (Harlan, J., dissenting).

10. 59 Mass. (5 Cush.) 198 (1849).

11. *Id.* at 204.

12. 48 Cal. 36 (1874).

13. The fourteenth amendment was added to the Constitution in 1868.

14. The Common Schools Law was amended four years before *Ward* to read, in part:

> Sec. 53. Every school, unless otherwise provided by special law, shall be open for the admission of all white children, between five and twenty-one years of age . . . .
> Sec. 56. The education of children of African descent, and Indian children, shall be provided for in separate schools.

1870 Cal. Stats., ch. 556, 838-39.

Ten years after its enactment, the law creating separate schools for blacks and Indians was repealed. Code Amendments of 1880, ch. 44, p. 47. But, only five years later, separate schools were again authorized, this time for Chinese and Mongolian students. *See* note 3 *supra*.

> there is certainly to be found no violation of the constitutional rights of the one race more than of the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense.[15]

Wong Him v. Callahan was the first school segregation case in the Ninth Circuit and one of the earliest federal cases on the subject. It did not blaze new trails. Rather, it reflected the judicial sentiment prevailing at that time—a dual school system was not per se discriminatory against non-white children, and the intent of the legislature in establishing such a system, even if based on racial hatred, was irrelevant. Although it broke no new ground, *Wong Him* was cited with approval by the Supreme Court in 1927 when that Court expressly affirmed the right of a state to establish racially segregated schools.[16] *Wong Him* was still cited as an authority for the "separate but equal" doctrine as late as 1950.[17]

III. PRE-*BROWN* INDEPENDENCE IN THE NINTH CIRCUIT

If the *Wong Him* court adhered to the doctrine of stare decisis in reaching its decision, the second Ninth Circuit district judge to examine segregated schools felt no such constraint. In *Mendez v. Westminister School District*,[18] a federal court held for the first time that the maintenance of separate schools violated the fourteenth amendment.[19] Although there had been some significant changes in the Supreme Court's segregation philosophy since the decision in *Wong Him* forty-four years earlier,[20] the *Mendez* decision received national attention and in what was seen as its far-reaching and unique holding.[21]

---

15. 48 Cal. at 52.

16. *See* Gong Lum v. Rice, 275 U.S. 78, 86 (1927).

17. *See* Carr v. Corning, 182 F.2d 14, 17 n.6 (D.C. Cir. 1950).

18. 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947). In the report of the appellate opinion in *Mendez*, the defendant's name is spelled "Westminster."

19. *Id.* at 549.

20. The Supreme Court had become more strict with the requirement that equal facilities had to be provided if separate schools were to be maintained. *See* Missouri *ex. rel.* Gaines v. Canada, 305 U.S. 337 (1938); Leflar & Davis, *Segregation in the Public Schools — 1953*, 67 HARV. L. REV. 377, 393 (1954).

21. *See* Note, 30 MINN. L. REV. 646, 646 (1946) (*Mendez* "extends the scope of the equal protection clause of the fourteenth amendment further than any previous decision from the federal courts involving educational discrimination."); Note, *Segregation in Public Schools — A Violation of "Equal Protection of the Laws,"* 56 YALE L.J. 1059, 1060 (1947) (*Mendez* "questioned the basic assumption of the *Plessy* case and may portend a complete reversal of the doctrine."); *see also* Note, *Segregation in Schools as a Violation of the XIVth Amendment*, 47 COLUM. L. REV. 325 (1947); 60 HARV. L. REV. 1156 (1947); 42 ILLINOIS L. REV. 545 (1947); 23 NOTRE DAME L. REV. 403 (1948).

Mendez was a class action by students of Mexican descent against four school systems in Orange County, California. The four systems, by official action or by custom, maintained separate schools for non-English-speaking students for the alleged purpose of improving their English skills to the point where they would be able to attend the English-speaking schools. At the outset, the court noted that the facilities, curricula, and quality of teachers in the non-English schools were "identical and in some respects superior to those in the other schools."[22] If the court had followed the long, uninterrupted line of "separate but equal" federal cases, this fact alone would have justified a dismissal of the complaint. However, this finding was used only to frame the issue in the case—whether the maintenance of separate schools, despite the equality of measurable assets, denied the equal protection of the laws to the non-English-speaking students.

To take jurisdiction over the case, the court set for itself, and satisfied two requirements. First, there had to be alleged a violation of constitutional right. As authority for the proposition that a federal court could intervene in the management of a state's public schools, *Mendez* cited *Cumming v. Board of Education*,[23] an early Supreme Court "separate but equal" case that had held such interference impermissible "except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."[24] As additional authority on this point, the court cited four other "separate but equal" cases, including *Wong Him* and *Ward*, all of which had reached conclusions on the ultimate constitutional issue contrary to that reached in *Mendez*. The second prerequisite to an exercise of jurisdiction was that the actions of the school boards be held to be those of the state. The court concluded that a school board that has been authorized by the state to act should be considered to be acting as the state.

In ruling that the actions of the school boards were illegal, the court held that the segregation of Mexican children in separate educational institutions violated California state law,[25] since the pertinent statute permitted the establishment of separate schools only for certain other minority groups.[26] Second, and of far greater historical significance, the court held that the mere existence of segregated schools, regardless of the comparability of the facilities, constituted a violation of the fed-

22. 64 F. Supp. at 546.
23. 175 U.S. 528 (1899).
24. 64 F. Supp. at 546 (citing *Cummings*, 175 U.S. at 545).
25. *Id.* at 547.
26. *See* note 3 *supra*.

eral constitution.[27]

As noted earlier, the *Mendez* court had no case law on which to base its second holding. Instead, it used many of the arguments that had been made by unsuccessful plaintiffs in the ninety-seven years since *Roberts v. City of Boston.*[28] The *Mendez* court found that "[a] paramount requisite in the American system of public education is social equality."[29] Such social equality did not exist in Orange County because "the methods of segregation . . . foster[ed] antagonisms in the children and suggest[ed] inferiority among them where none exist[ed]."[30] The court, for these reasons, issued an injunction against the defendant school districts halting the operation of segregated schools.[31]

The district court opinion placed the Ninth Circuit Court of Appeals in a difficult position. In reviewing the lower court holding, the circuit court in *Westminister School District v. Mendez*,[32] passed on the issue of school segregation for the first time. The seven judges who heard the case were being asked to affirm a district court judge who had disregarded a half-century of United States Supreme Court cases.[33] The court of appeals was not ready to go quite that far, but it apparently did not want to expressly endorse the "separate but equal" doctrine by reversing the lower court.

Arguments for both sides in the case attempted to draw the appellate court into basing its decision on an examination of the "separate but equal" doctrine. The school districts claimed that their system of operating equal segregated schools had been validated by *Plessy* and its progeny.[34] On the same "separate but equal" battleground, but in the opposite trench, were two amicus curiae briefs that urged the court to follow the lead of the district court judge in breaking from past case law.[35]

The court, however, refused to enter the *Plessy* debate. The Supreme Court cases were deemed not to be controlling. They were distinguished by the fact that those cases had all approved of state *statutes* that mandated separate facilities, while the segregation in *Mendez* was

27. 64 F. Supp. at 549.

28. *See* notes 10-11 *supra* and accompanying text.

29. 64 F. Supp. at 549.

30. *Id.*

31. *Id.* at 551.

32. 161 F.2d 774 (9th Cir. 1947). *See* note 18 *supra.*

33. Many national interest groups filed amicus curiae briefs in support of a complete affirmance. One such brief was co-authored by now Justice Thurgood Marshall, then of the NAACP. *Id.* at 775.

34. *Id.*

35. *Id.* at 780.

not based on any state law but solely on actions of the local school districts.[36] The court likewise rejected the invitation by the amicus briefs to be as independent as the lower court had been. The appellate court extolled the virtues of judicial restraint:

> [J]udges must ever be on their guard lest they rationalize outright legislation under the too free use of the power to interpret. We are not tempted by the siren who calls to us that the sometimes slow and tedious ways of democratic legislation is no longer respected in a progressive society.[37]

The court did affirm the *Mendez* decision, but it did so only on the state law grounds expressed in the district court opinion.[38] Since the California legislature had enacted statutes authorizing the segregation in schools of certain minority groups, the court reasoned, the legislature had intended to prohibit the segregation of any groups not mentioned in the statute.[39] The court thus concluded that the actions of the school districts in unlawfully discriminating against Mexicans were in violation of the due process and equal protection clauses[40] of the fourteenth amendment. It seems clear that had the segregation practices at issue been expressly authorized by state statute, the court of appeals would have reached a different result.[41]

Gonzales v. Sheely[42] presented facts similar to those in *Mendez*. All children of Mexican or Latin descent in Tolleson Elementary School District were required to attend a school separate from the white children. However, *Gonzales* was distinguishable from *Mendez* in two significant ways. First, the judge found a "substantial inequality in the accommodations" of the separate schools.[43] Second, Arizona law per-

36. *Id.*

37. *Id.*

38. *Id.* at 780-81. *See* notes 25-26 *supra* and accompanying text.

39. 161 F.2d at 780.

40. *Id.* at 781.

41. At least one of the seven appellate judges apparently was dissatisfied with the limited holding. Judge Denman, in a concurring opinion, spoke out strongly against the "vicious principle" advocated by the school districts:

> [T]he descendants of an ancient Mesopotamian nation, whose facial characteristics still survived in the inspiring beauty of Brandeis and Cardozo — the descendants of the nationals of Palestine, among whose people later began our so-called Christian civilization, as well could be segregated and Hitler's anti-semitism have a long start in the country which gave its youth to aid in its destruction.

Id. at 783 (Denman, J., concurring). In addition, Judge Denman saw possible criminal violations in the actions of the school districts and directed "the attention of the senior judge of the Southern District of California and the foremen of its grand juries . . . to the facts here disclosed." *Id.*

42. 96 F. Supp. 1004 (D. Ariz. 1951).

43. *Id.* at 1007.

mitted such segregation.[44]

The judge in *Gonzales* cited only two cases in his decision and, purposefully or not, misapplied both of them. In finding that "[s]egregation of school children in separate school buildings because of racial or national origin . . . constitutes a denial of the equal protection of the laws,"[45] the judge ruled that the court of appeals opinion in *Mendez* was controlling.[46] He cited the court of appeals' opinion in *Mendez* as authority but, in actuality, the *Gonzales* judge followed the *district court* decision of *Mendez* in finding that the segregation "foster[ed] antagonisms in the children and suggest[ed] inferiority among them."[47] Had *Gonzales* reached the court of appeals, the case might have been affirmed by virtue of the finding of unequal separate schools. On the other hand, the court of appeals might have held as well that the maintenance of separate schools was valid since authorized by Arizona law. Such a holding would have been consistent with the court's ruling in *Mendez*.

Additionally, the judge in *Gonzales* cited *McLaurin v. Oklahoma State Regents*,[48] a Supreme Court case decided less than a year earlier, to support his holding that segregated schools are per se unconstitutional. *McLaurin*, however, does not stand for that proposition. Instead, it is one of the few pre-*Brown* Supreme Court decisions that stressed the need for equal educational opportunities, although it did not overrule the "separate but equal" doctrine of *Plessy*.[49]

The district court opinions in *Mendez* and *Gonzales* were the only federal cases decided before 1954 to hold that separate schools are per se unequal. Although the Ninth Circuit Court of Appeals refused to take such a radical stand, its limited affirmance of *Mendez* nevertheless

44. Although no mention is made in the case of the status of Arizona law concerning segregation, a statute in effect at the time permitted, though did not require, segregated schools. ARIZ. CODE ANN. § 54-430 (1939). *See* Leflar & Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377, 378 n.3 (1954). Laws authorizing and even mandating segregated schools were upheld and enforced by the Arizona courts. *See* Harrison v. Riddle, 44 Ariz. 331, 36 P.2d 984 (1934); Burnside v. Douglas School Dist., 33 Ariz. 1, 261 P. 629 (1927); Dameron v. Bayless, 14 Ariz. 180, 126 P. 273 (1912). Even now, an Arizona statute allows a school board of trustees to "[m]ake such segregation of groups of pupils as it deems advisable." ARIZ. REV. STAT. § 15-442(B)(3) (West Supp. 1978).

45. 96 F. Supp. at 1008.

46. *Id.* at 1005.

47. *Id.* at 1007. *See* note 30 *supra* and accompanying text.

48. 339 U.S. 637 (1950) (black student admitted to state supported graduate school had to be given same treatment as students of other races).

49. *See also* Sweatt v. Painter, 339 U.S. 629 (1950); Fisher v. Hurst, 333 U.S. 147 (1948); Sipuel v. Board of Regents, 332 U.S. 631 (1948).

represented a significant departure from traditional judicial philosophy.

IV. THE IMMEDIATE REACTION TO *BROWN*

Three years after the district court's opinion in *Gonzales*, Chief Justice Earl Warren spoke for a unanimous Supreme Court in *Brown v. Board of Education*.[50] Echoing the arguments of the unsuccessful plaintiffs in *Roberts*, *Ward*, and *Wong Him*, as well as Justice Harlan's dissent in *Plessy* and the district court opinions in *Mendez* and *Gonzales*, the Court held that "[s]eparate educational facilities are inherently unequal."[51] The segregation of certain students "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[52]

Although the *Brown* Court noted that "segregation has long been a nationwide problem, not merely one of sectional concern,"[53] the decision had its greatest immediate impact in the South. Most of the initial post-*Brown* litigation occurred in the Fifth Circuit[54] and involved school districts that were segregated under state constitutions and statutes.[55] By comparison, only one school segregation case was decided in the Ninth Circuit during the first fifteen years following *Brown*—*Romero v. Weakley*.[56]

Romero was a class action by black and Spanish-surnamed students against two school districts and the Superintendent of Schools of Imperial County, California. The plaintiffs alleged that the defendants, in drawing the boundary lines for elementary school districts, had created a system of segregated schools. The decision by District Judge Hall was quite similar to the decisions being handed down at that time by the obstructionist judges of the Fifth Circuit.[57] In denying injunctive relief, he distinguished both *Brown* and the Ninth Circuit's opinion in

50. 347 U.S. 483 (1954).

51. *Id.* at 495.

52. *Id.* at 494.

53. *Id.* at 491 n.6.

54. The Fifth Circuit includes Texas, Louisiana, Mississippi, Alabama, Georgia, Canal Zone and Florida. *See* 28 U.S.C. § 41 (1976).

55. *See* Read, *Judicial Evolution Of The Law Of School Integration Since Brown v. Board of Education*, 39 LAW & CONTEMP. PROB. 7 (1975). For a discussion of recent Fifth Circuit school desegregation cases, see Note, *School Desegregation In The Fifth Circuit: The Achievement of "Unitary" School Systems Through Some Not So Unitary Remedies*, 7 CUM. L. REV. 273 (1976).

56. 131 F. Supp. 818 (S.D. Cal.), *rev'd*, 226 F.2d 399 (9th Cir. 1955).

57. *See, e.g.*, Briggs v. Elliott, 132 F. Supp. 776 (E.D.S.C. 1955), which was decided two

Mendez. *Brown* was found not to be controlling because it involved state *laws* that required segregation, while the *Romero* plaintiffs complained of "[o]nly a general course of conduct" by school officials.[58] *Mendez* was distinguished because it, unlike *Romero*, involved a "specific identified order" of the school district.[59]

The *Romero* court's refusal to grant an injunction was based on its view that a decision on the issue would be improper until the plaintiffs had presented their case to the California courts: "[T]he federal courts should approach with caution, and avoid if possible, a decision on constitutional questions involving local social issues and policies, when the result would be to tend to destroy the historic powers of the several states."[60] The court also felt justified in denying relief on the grounds that it could not frame and enforce "an effective decree in equity without setting [itself] up as a continuous and perpetual supervisory school board."[61]

In reversing the lower court decision, the court of appeals found that Judge Hall had "clearly erred" in avoiding the constitutional issue raised by the plaintiffs.[62] The district court had no discretion to refuse to consider the complaint:

> One of the obvious purposes of the creation of right to litigate these civil rights in a federal court is to enable a member of a minority group claiming race or color discrimination to choose either a court presided over by a federal judge appointed by the President of the United States or a state court, presided over by an elected judge.[63]

The court of appeals also refuted Judge Hall's contention that there could be no effective decree in equity. The court quoted language from the second *Brown* opinion,[64] which was issued three weeks after the district court decision in *Romero*. *Brown II* instructed district courts to "retain jurisdiction" of a case during the transition to a constitutionally acceptable school system.[65] In remedying a constitutional violation, a

---

months after *Romero*: "The Constitution . . . does not require integration. It merely forbids discrimination." *Id.* at 777.

58. 131 F. Supp. at 822-23.

59. *Id.* at 823.

60. *Id.* at 832.

61. *Id.* at 822.

62. Romero v. Weakley, 226 F.2d 399, 401 (9th Cir. 1955). The opinion was written by Chief Judge William Denman who had written the strong concurring opinion in *Mendez*. *See* note 41 *supra*.

63. 226 F.2d at 400.

64. Brown v. Board of Educ., 349 U.S. 294 (1955). *Brown II* is best known for its command that school segregation be ended "with all deliberate speed." *Id.* at 301.

65. *Id.*

district court could consider a "revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis."[66]

The performance of the Ninth Circuit courts between 1948 and 1955 was consistent, in a peculiar way, with respect to school desegregation. The three district judges who were faced with the issue all displayed a tendency to ignore precedent in their decisions. The court of appeals, in the two decisions it issued, had to bring the cases back into line with the then-current case law. The district court decisions in *Mendez* and *Gonzales* foresaw the shift in the law and, in moving in that direction, tended to disregard precedents to the contrary. The district court decision in *Romero* also conflicted with precedent; however, it was decided after the law had been changed, and it attempted to place an obstacle in the path of school desegregation. The court of appeals refused to allow the district court to impede the implementation of *Brown*.[67]

The Ninth Circuit was not involved in the school desegregation controversy during the most active period of the civil rights movement. In the South, desegregation of public schools was impeded by obstructionist judges. In the Ninth Circuit, it was stalled by a lack of cases.

V. AN INCREASE IN LITIGATION

While *Brown* spurred desegregation litigation in the southern circuits, the catalyst in the Ninth Circuit was the Supreme Court's decision in *Green v. County School Board*.[68] *Green* was the Supreme Court's response to the southern school districts that had been exercising too much deliberation and too little speed in ending segregation. Ten years after *Brown I*, the defendant school board was still maintaining a segregated school system, despite the fact that the county's population was fifty percent black and there was no residential segregation. Finally, following the filing of the suit and the passage of the 1964 Civil Rights Act, the school board adopted a "freedom-of-choice" plan that allowed students to choose which of the two previously segregated schools they wanted to attend. Not surprisingly, no white students

66. 226 F.2d at 402 (quoting 349 U.S. at 300-01) (emphasis omitted).

67. The reaction against *Brown* in the Ninth Circuit was slight compared with the threats of mob violence and the opposition of some inferior courts and state officials in the South. The Supreme Court, however, stood firm. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 16 (1958) ("[L]aw and order are not here to be preserved by depriving the Negro children of their constitutional rights.").

68. 391 U.S. 430 (1968).

elected to change schools and only fifteen percent of the black students transferred to the formerly all-white school.

The Supreme Court found the school board's actions to be inadequate. The Court held that under *Brown II*, school boards were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[69] Inasmuch as thirteen years had passed since the imposition of that duty, the time for deliberateness was gone, and the board was instructed to develop a plan "that promises realistically to work, and promises realistically to work *now*."[70] In rejecting the school board's "freedom-of-choice" plan, the Court declared:

> [T]he school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board. The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.[71]

Although the *Green* decision was aimed at ending Southern intransigence, it resulted in a resumption of desegregation litigation in the Ninth Circuit. One year after *Green*, the Ninth Circuit decided *Brice v. Landis*,[72] the first school desegregation case to be reported in the circuit in fourteen years. *Brice* was a suit by parents of students challenging the validity of a desegregation plan designed by the Pittsburg (California) Unified School District. The plan called for the closing of an elementary school that had a 99% black enrollment and the busing of the school's pupils to three other schools that had black enrollments of between 3.6% and 7.7%.

The parents claimed that the closing of an adequate school and the busing of only black children were themselves discriminatory actions because the burden of desegregation was being borne by only one race. District Judge Sweigert agreed and enjoined the school district from selling or leasing the school that was to have been closed. The school board's busing plan would have resulted in the same implication of racial inferiority that the Supreme Court found objectionable in *Brown*. Under the plan,

---

69. *Id.* at 437-38.
70. *Id.* at 439 (emphasis in original).
71. *Id.* at 441-42 (footnote omitted).
72. 314 F. Supp. 974 (N.D. Cal. 1969). *See* 5 HARV. C.R.-C.L. L. REV. 488 (1970).

> [t]he minority children are placed in the position of what may be described as second-class pupils. White pupils, realizing that they are permitted to attend their own neighborhood schools as usual, may come to regard themselves as "natives" and to resent the negro children bussed into the white schools every school day as intruding "foreigners." It is in this respect that such a plan, when not reasonably required under the circumstances, becomes substantially discriminating in itself. This undesirable result will not be nearly so likely if the white children themselves realize that some of their number are also required to play the same role at negro neighborhood schools.[73]

After adopting the plaintiff's arguments, the *Brice* court cited *Green* as authority for two holdings: 1) federal district courts have the power to reject desegregation plans;[74] and 2) because of the availability of alternative plans, the school district's plan was "not a good faith, reasonably adequate implementation of the constitutional principles involved."[75]

The decision in *Brice v. Landis* was based on a liberal interpretation of the Supreme Court's desegregation opinions. The busing plan rejected in *Brice* could have been accepted as comporting with the *Brown* and *Green* decisions. Read together, *Brown* and *Green* required that school boards develop plans that would realistically and quickly work to eliminate dual school systems. The school board's plan in *Brice* seems to have satisfied the *Green* requirement of immediate effectiveness. The *Brice* court extended *Green* and *Brown*, however, by holding that the *method* of achieving an integrated system could itself create a feeling of inferiority and hence be invalid, even though it would effectively create a nonsegregated school system. *Brice* is a logical extension of *Green* in that it follows the spirit of the *Brown* decisions, but the ruling could as easily have gone the other way.[76]

At about the same time that *Brice* was being decided in the Northern District of California, *Spangler v. Pasadena City Board of Education*[77]

---

73. 314 F. Supp. at 978. It is interesting to note that Judge Sweigert combined black and Spanish-surnamed students into one "minority" classification in describing the ethnic population of the school district. *Id.* at 975. This particular issue was not decided by the Supreme Court until four years later in Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). The Court there held that black and Spanish-surnamed students could indeed be combined to determine whether a school had too high a concentration of minority students. *Id.* at 195-98.

74. 314 F. Supp. at 977.

75. *Id.* at 978.

76. *See* Norwalk CORE v. Norwalk Bd. of Educ., 298 F. Supp. 213 (D. Conn. 1969), *aff'd*, 423 F.2d 121 (2d Cir. 1970), where a case involving facts similar to those in *Brice* yielded a different holding.

77. 311 F. Supp. 501 (C.D. Cal. 1970).

was before the Central District Court. Unlike *Brice*, which was not reviewed by a higher court, *Spangler* includes three reported district court opinions,[78] six at the circuit court of appeals level,[79] and one Supreme Court decision.[80] It is both the best known and the most litigated school desegregation case in the Ninth Circuit. Also, since *Brice* dealt only with the validity of an integration plan, *Spangler* was the first case in the circuit after 1955 to deal with the question of what constitutes an unconstitutionally segregated school system. This fact was significant because, at the time of the original district court decision in *Spangler*, the Supreme Court had dealt only with southern school systems which had been segregated by state law.

The segregation existing in 1970 in the Pasadena Unified School District may have had a tenuous connection to California's segregation laws,[81] but its primary sources were other, nonstatutory factors. The equal protection clause of the fourteenth amendment, however, prohibits only that segregation which is the result of some form of state action.[82] In the South, the enactment of statutes mandating segregation satisfied the state action requirement. In the Ninth Circuit, beginning with *Mendez* in 1946, the acts of the school boards, which were authorized to act by state law, constituted the state action.

The school board had acted consistently over the years in creating and maintaining a segregated system of schooling at all levels.[83] This was accomplished by assigning students to various schools according to race,[84] by segregating and discriminating against black teachers and administrators,[85] by selectively building or renovating schools in the

78. *Id.*; 375 F. Supp. 1304 (C.D. Cal. 1974), *aff'd*, 519 F.2d 430 (9th Cir. 1975), *vacated and remanded*, 427 U.S. 424 (1976); 384 F. Supp. 846 (C.D. Cal. 1974), *remanded*, 537 F.2d 1031 (9th Cir. 1976).

79. 415 F.2d 1242 (9th Cir. 1969); 427 F.2d 1352 (9th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); 519 F.2d 430 (9th Cir. 1975), *vacated and remanded*, 427 U.S. 424 (1976); 537 F.2d 1031 (9th Cir. 1976); 549 F.2d 733 (9th Cir. 1977); 552 F.2d 1326 (9th Cir. 1977).

80. 427 U.S. 424 (1976).

81. *See* note 14 *supra*.

82. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 435-36 (1976); note 92 *infra* and accompanying text.

83. The suit was brought originally as a class action to desegregate only the three public high schools in Pasadena. The United States intervened and filed a complaint against the entire Pasadena school system. Judge Real granted a motion to strike all of the United States' complaint except that portion dealing with the three high schools. The Ninth Circuit court of appeals reversed, *see Spangler v. Pasadena City Bd. of Educ.*, 415 F.2d 1242 (9th Cir. 1969), and allowed the suit to continue against the entire school system.

84. 311 F. Supp. at 507-08.

85. *Id.* at 513-17. Judge Real found that a discriminatory hiring policy had an adverse effect on the students: "Black students need to see that equal opportunities for black teachers exist in order to believe that equal opportunities for black students exist." *Id.* at 517.

district,[86] and by ignoring state court decisions that called for integration.[87]

Because the Supreme Court had yet to decide what was state action in a "northern" situation, Judge Real had no formula or standard with which to work in deciding *Spangler*. Perhaps to avoid being reversed by a higher court, the judge based his ruling, that the school board would be required to desegregate Pasadena's schools, on a number of legal theories. The strictest requirement for finding a constitutional violation, and the one that the Supreme Court has since adopted, is that the segregation be caused by action of the school board and that the school board act with the *intent* to cause segregation. Judge Real's finding that the assignments of students were racially motivated satisfied this requirement.

But portions of Judge Real's opinion suggest that the mere existence of segregation regardless of its origin, coupled with a failure of the school board to act to desegregate, would be a constitutional violation.[88] This standard currently enjoys the support of only a small minority on the Supreme Court.[89]

Judge Real was forced to rely on a variety of legal theories because the Supreme Court had yet to instruct lower courts how to deal with school systems that were not segregated because of state law. By the time *Spangler* returned to the district court four years later,[90] the

86. *Id.* at 517-19.

87. The California Supreme Court in 1963 held that the Pasadena schools had to be integrated, even if the school board was not responsible for the segregation: "The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools *regardless of its cause*." Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 881, 382 P.2d 878, 882, 31 Cal. Rptr. 606, 610 (1963) (emphasis added).

The failure of the school board to comply with the California court's orders prompted the filing of the federal action. 311 F. Supp. at 511.

88. Judge Real wrote: "The chief significance of *Brown* is its holding that racially segregated public education is detrimental to school children. . . . Under the Fourteenth Amendment a public school body has an obligation to act affirmatively to promote integration, consistent with the principles of educational soundness and administrative feasibility." 311 F. Supp. at 521. Judge Real also held that the school board had the duty to undo school segregation caused by housing discrimination: "School boards may not build upon residential segregation, when that segregation is the result of either private or state enforced discrimination. . . . Defendants have a duty to attempt to overcome the effects of residential segregation on student assignments." *Id.* at 522. This holding, that a school board must take affirmative action to integrate regardless of the cause of the segregation, is the view taken by the California Supreme Court, (*see* Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963), and note 137 *infra*) but has since been rejected by the U.S. Supreme Court. *See* text accompanying note 113 *infra*.

89. *See* note 113 *infra*.

90. The *Spangler* case reached the court of appeals immediately after Judge Real's ruling,

Supreme Court had spoken on the issue of "northern" segregation.

VI. DE JURE AND DE FACTO SEGREGATION

The most important school desegregation issue currently under consideration in the Ninth Circuit is, without doubt, the distinction between de jure and de facto segregation. It is now clear that the Supreme Court considers a racially imbalanced school system caused by racially "neutral" factors, such as residential patterns, to be de facto segregation and not a constitutional violation. Only segregation caused by intentional state action (de jure segregation) justifies the imposition of the duty to integrate. This was not clear, however, at the time of the first *Spangler* decision. But, one year after *Spangler*, the Supreme Court, in *Swann v. Charlotte-Mecklenburg Board of Education*,[91] first discussed the de facto-de jure issue. The Court there stated that the only unconsitutional segregation, hence the only segregation that has to be remedied, is segregation caused by state action. "The objective today," Chief Justice Burger wrote, "remains to eliminate from the public schools all vestiges of *state-imposed* segregation."[92]

In the Ninth Circuit district courts, the immediate reaction to *Swann* was confused and far from consistent. Three separate cases were decided shortly after *Swann*, and each involved a different understanding of the de jure-de facto distinction.

Soria v. Oxnard School District Board of Trustees[93] did not find the "state-imposed segregation" requirement in *Swann* to be of great significance. Instead, Judge Pregerson read *Brown* literally and cited Judge Real in *Spangler* with approval. *Brown* had held that separate

---

but only a procedural matter was decided. The Ninth Circuit affirmed Judge Real's decision not to allow intervention by Pasadena parents who objected to the desegregation ruling and the school board's acceptance of it. *See Spangler v. Pasadena City Bd. of Educ.*, 427 F.2d 1352 (9th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971).

91. 402 U.S. 1 (1971). *Swann* was anxiously awaited as a decision that would specify the powers and obligations of the federal district courts in implementing the *Brown* mandate. The Court noted that the lower courts had been forced "to improvise and experiment without detailed or specific guidelines." *Id.* at 6.

92. *Id.* at 15 (emphasis added). The *Swann* opinion was limited to the facts of the case, so the question of the constitutionality of segregation caused by state action *other* than school board discrimination was left open:

> Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

Id. at 23.

93. 328 F. Supp. 155 (C.D. Cal. 1971), *vacated*, 488 F.2d 579 (9th Cir. 1973), *cert. denied*, 416 U.S. 951 (1974).

schools are "inherently unequal" and violative of the equal protection clause of the fourteenth amendment. Thus, the district judge reasoned, the mere fact that Oxnard's elementary schools were segregated meant that the school district had the affirmative duty to provide a "racially balanced school system."[94] Even though the cause of the segregation was irrelevant to Judge Pregerson's ruling, and even though he claimed his ruling was not in conflict with *Swann*, he did acknowledge that other courts might require a finding of state causation. In case such a finding was required, Judge Pregerson noted that there were "sufficient 'de jure overtones' established by the agreed-upon findings of fact . . . to entitle plaintiffs to relief."[95]

The de facto-de jure distinction was treated with equal deference in *Johnson v. San Francisco Unified School District*.[96] There, Judge Weigel noted that the distinction "may turn out to be insignificant."[97] Judge Weigel had delayed action in the case while waiting for the *Swann* decision.[98] In response to *Swann*, he ordered the school district to desegregate only after finding that "[f]or a long period of time there has been and there now is *de jure* segregation in the San Francisco public elementary schools."[99] However, since *Swann* did not define "state-imposed segregation," Judge Weigel has been free to adopt a very broad definition:

> In the context of segregation, it means no more nor less than that the school authorities have exercised powers given them by law in a manner which creates or continues or increases substantial racial imbalance in the schools. It is this governmental action, *regardless of the motivation* for it, which violates the Fourteenth Amendment.[100]

Thus, under *Johnson*, it is unconstitutional to simply "continue" segregation that already exists. The original cause of the segregation still need not have been state-imposed.[101]

---

94. *Id.* at 157.

95. *Id.*

96. 339 F. Supp. 1315 (N.D. Cal. 1971), *vacated*, 500 F.2d 349 (9th Cir. 1974).

97. *Id.* at 1319 n.8.

98. *Id.* at 1325.

99. *Id.* at 1323.

100. *Id.* at 1319 (emphasis added).

101. Parents of Chinese-American children attempted to stay the district court's integration order, but their attempt was rejected by the Ninth Circuit and by Mr. Justice Douglas sitting as Circuit Justice in Guey Heung Lee v. Johnson, 404 U.S. 1215 (1971).

Judge Weigel explained the importance of acceptance of the integration plan:

> The Judgment and Decree now to be entered is of less consequence than the spirit of community response. In the end, that response may well be decisive in determining whether San Francisco is to be divided into hostile racial camps, breeding greater violence in the streets, or is to become a more unified city demonstrating its historic capacity for diversity without disunity.

The third post-*Swann* decision was *Gomperts v. Chase*.[102] *Gomperts*, like *Johnson*, required a finding of de jure segregation, however, *Gomperts* narrowly defined the de jure concept. Judge Schnacke found that "[t]he schools of the district are clearly racially imbalanced,"[103] and that "[t]he school district has, for many years, recognized the racial imbalance."[104] This would have been sufficient, under the *Johnson* definition, to impose a duty on the school district to desegregate. But Judge Schnacke employed a different definition of de jure segregation. Such segregation must have "been planned, encouraged, fostered, designed, or in some way created by law or by administrative action under the color of law."[105] Judge Schnacke further explained what a plaintiff had to show to obtain relief: "It is only when a board of education embarks on a course which is *motivated by purposeful desire* to perpetuate and maintain racially segregated schools that the constitutional rights of those affected have been violated."[106]

The *Gomperts* and *Johnson* decisions were clear signals that the Supreme Court had more explaining to do on the issue of de jure segregation. They were two cases with similar facts, decided in the same judicial district only ten days apart, and both involved the issue of de jure segregation. Yet, they yielded opposite results. The differentiating factor was the definition of de jure segregation. The main difference between the two definitions was the issue of segregative intent. Judge Weigel in *Johnson* claimed that "regardless of the motivation," any action by a school board that led to segregation was unconstitutional. Judge Schnacke in *Gomperts*, on the other hand, felt that such action by a school board was unconstitutional only if "motivated by purposeful desire" to segregate.

---

339 F. Supp. at 1323.

102. 329 F. Supp. 1192 (N.D. Cal. 1971). For some reason, *Swann* was never cited in *Gomperts*, but its influence is apparent.

103. *Id.* at 1193.

104. *Id.* at 1194.

105. *Id.* at 1195. Judge Schnacke went on to say that *Brown* did not prohibit "the maintenance of racially imbalanced schools, as the product of neighborhood mix or otherwise, where that imbalance exists under laws or school board activity which is racially neutral." *Id.*

106. *Id.* at 1196 (emphasis added). Judge Schnacke denied the plaintiffs an injunction that would have halted the implementation of a watered-down school district integration plan. The Ninth Circuit also denied the injunction, as did Mr. Justice Douglas acting as Circuit Justice. 404 U.S. 1237 (1971). Douglas cited as his reason for denying the injunction the fact that the case came before him only three days before the schools were scheduled to open. He said that he would have issued the injunction if it were a case of "classical *de jure* school segregation," but noted that "the precise contours of *de jure* segregation have not been drawn by the Court." *Id.* at 1238.

Except for ruling on two procedural matters in *Spangler*, the Ninth Circuit Court of Appeals had not decided a school desegregation case since 1955. All of the interpretation of the recent Supreme Court cases on the issue of what was a constitutional violation had been left to the district courts in the Ninth Circuit. In 1972, however, the court of appeals evaluated the segregated condition of the Las Vegas elementary schools in *Kelly v. Guinn*.[107]

In *Kelly*, the Clark County School District appealed a district court ruling that the school district had an affirmative duty to integrate its elementary schools. The school district claimed that, under *Swann*, it should be required to integrate only if it had caused the racial imbalance. It then maintained that the racial imbalance resulted not from any discriminatory acts by the school district, but because the children were assigned to the schools nearest their homes and the county was residentially segregated.

Kelly held that *Swann* did indeed require a finding of de jure segregation before a school district could be ordered to integrate.[108] This finding was clearly contrary to the district court rulings in *Spangler* and *Soria* that the cause of the segregation was irrelevant in determining whether a constitutional violation existed. On the issue that distinguished *Johnson* from *Gomperts*, *i.e.*, whether de jure segregation meant that the school district must have *intended* to segregate its schools, *Kelly* was less clear.

The court affirmed the district court's holding that the Clark County elementary schools were unconstitutionally segregated. Its affirmance was based on the fact that the school district had "used its power to aggravate segregation in elementary schools."[109] This finding was neutral on the issue of the school district's intent since its power could have been used either intentionally or unintentionally to aggravate segregation. The *Kelly* court did hold, however, that "the school district's *purpose* in constructing, renovating, and abandoning schools was to limit integration at the elementary level."[110] Although the court thus found evidence of discriminatory motivation, it nevertheless based its finding of a constitutional violation on grounds that did not include a requirement that segregative intent be present.

107. 456 F.2d 100 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973). This case and Gonzales v. Sheely, 96 F. Supp. 1004 (D. Ariz. 1951), are the only Ninth Circuit school desegregation cases to deal with school systems outside California.

108. 456 F.2d at 105.

109. *Id.* at 108.

110. *Id.* (emphasis added).

VII. DE JURE SEGREGATION DEFINED

The requirement of de jure segregation, which caused confusion in the Ninth Circuit from the time of its announcement in *Swann*, was clarified by the Supreme Court in *Keyes v. School District No. 1*.[111] Since it was the first "northern" school desegregation case (*i.e.*, the first case in which the school system had not been segregated by state law), *Keyes* was more specific in defining de jure segregation. The Court sided with the *Gomperts*[112] decision in ruling that it was unconstitutional for a school system to be segregated only if the school board had a segregative motivation in maintaining such a system: "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* is *purpose* or *intent* to segregate."[113]

Keyes had an immediate impact in the Ninth Circuit. The *Soria*[114] case, which had been decided by the district court immediately after *Swann*,[115] was reviewed by the Ninth Circuit Court of Appeals a few months after the *Keyes* decision.[116] The district court had held that, regardless of the cause of the segregation, Oxnard's elementary schools had to be integrated. It made the alternative finding that there were "de jure overtones" in the segregation which created a constitutional violation. The court of appeals, relying on *Keyes*, rejected the district court's rationale and remanded the case for a ruling on the issue of segregative intent. Despite finding "a pattern of racial and ethnic dis-

111. 413 U.S. 189 (1973). In addition to its ruling on de jure segregation, *Keyes* held that black and Spanish-surnamed students could be combined into one "minority" category, *see* note 73 *supra*, and that de jure segregation in a "meaningful portion" of the school district creates a presumption that the entire school system is unconstitutionally segregated. 413 U.S. at 208. However, only the definition of de jure segregation has been a significant factor in Ninth Circuit cases.

112. *See* notes 102-06 *supra*.

113. 413 U.S. at 208 (original emphasis) (footnote omitted). Mr. Justice Powell wrote a separate opinion in which he argued that the de jure requirement should be abolished:

> Unwilling and footdragging as the process was in most places, substantial progress toward achieving integration has been made in Southern States. No comparable progress has been made in many nonsouthern cities with large minority populations primarily because of the *de facto/de jure* distinction nurtured by the courts and accepted complacently by many of the same voices which denounced the evils of segregated schools in the South. But if our national concern is for those who attend such schools, rather than for perpetuating a legalism rooted in history rather than present reality, we must recognize that the evil of operating separate schools is no less in Denver than in Atlanta.

Id. at 218-19 (footnotes omitted).

114. *See* notes 93-95 *supra* and accompanying text.

115. *See id.*.

116. 488 F.2d 579 (9th Cir. 1973), *cert. denied*, 416 U.S. 951 (1974).

proportion within Oxnard's elementary schools,"[117] the *Soria* court held that the finding of "de jure overtones" was "inconclusive and vague on the question of the School Board's segregative intent."[118]

In 1974, the *Spangler* case returned to Judge Real's courtroom.[119] Four years earlier, when it had been held that Pasadena's schools were unconstitutionally segregated, the de jure-de facto issue had not yet crystalized.[120] Judge Real, at that time, had stated that a school board had the duty to desegregate if its system was racially imbalanced. He had ruled not only that the segregative intent of a school board was irrelevant, but also that it made no difference whether the segregation was even caused by a school board's actions.[121] In 1974, although it was not directly at issue, Judge Real reiterated this position and challenged the *Swann* and *Keyes* de jure rulings:

> There appears to be, in logic, no distinction between de jure and de facto segregation for our purposes. "De jure" and "de facto" are only adjectives that give some attempted "legal" distinction to the aims of [*Brown I* and *Brown II*] that "*segregation*" denies equal educational opportunity.[122]

The issue in the 1974 *Spangler* case was whether the district court retained the authority to enforce its order of 1970. That order had included a desegregation plan and an injunction prohibiting the board of education from maintaining any school in which a majority of the students belonged to any minority group. Judge Real found that "compliance was literal for only the first academic year" and that, since then, five schools had violated the "no majority of any minority injunction."[123] The judge denied the requested relief from the 1970 court order, stating that to dissolve the injunction would "surely be to sign the death warrant of the [desegregation plan] and its objectives."[124]

---

117. *Id.* at 580.

118. *Id.* at 586. The court of appeals opinion stated: "Nor has the state of California or the city of Oxnard ever maintained a 'dual school system.'" *Id.* at 580. This statement is incorrect. As late as 1947, California laws allowed segregated schools. *See* notes 3 & 14 *supra*. These laws are hardly difficult to discover; they were discussed in Guey Heung Lee v. Johnson, 404 U.S. 1215, 1215 (1971) and in Romero v. Weakley, 131 F. Supp. 818, 835-36 (S.D. Cal. 1955).

119. 375 F. Supp. 1304 (C.D. Cal. 1974), *aff'd*, 519 F.2d 430 (9th Cir. 1975), *vacated and remanded*, 427 U.S. 424 (1976).

120. *See* notes 77-90 *supra* and accompanying text.

121. *See* note 88 *supra*.

122. 375 F. Supp. at 1307 n.10 (citations omitted).

123. *Id.* at 1306.

124. *Id.* at 1309. Later that year, Judge Real held the board of education in contempt of court for failure to comply fully with the order. 384 F. Supp. 846 (C.D. Cal. 1974), *remanded*, 537 F.2d 1031 (9th Cir. 1976).

De jure segregation was the issue when the Ninth Circuit Court of Appeals reviewed the *Johnson* case.[125] *Johnson* was one of three district court cases decided immediately after *Swann* established the requirement that "state-imposed segregation" be found. The definition of de jure adopted by Judge Weigel ignored the intent behind the school board's actions.[126] The court of appeals held this definition improper in light of *Keyes* and the Ninth Circuit's interpretation of *Keyes* in *Soria*. The case was remanded for a ruling as to whether "the school authorities had intentionally discriminated against minority students by practicing a deliberate policy of racial segregation."[127]

The requirement that segregative intent be found created a heavy burden for plaintiffs in federal school desegregation cases, but proof of such an intent is not impossible. In *Ybarra v. City of San Jose*,[128] the Ninth Circuit reversed the dismissal of a complaint alleging unconstitutional school desegregation caused by the combination of a discriminatory administration of zoning ordinances and a "neighborhood school policy."

The *Ybarra* court ruled that a "neighborhood school policy" could not automatically bar all relief.[129] The court also held that the intentionally segregative actions the plaintiff was required to prove need not necessarily be those of school authorities, but might be "the acts of other state agencies."[130] Thus, a school board might be charged with an affirmative duty to integrate if the state intentionally causes segregated residential areas, notwithstanding the board's complete innocence with respect to segregative acts.[131]

In 1976, the *Spangler* case became the first Ninth Circuit school de-

125. 500 F.2d 349 (9th Cir. 1974), *vacating*, 339 F. Supp. 1315 (N.D. Cal. 1971). *See* notes 96-101 *supra* and accompanying text.

126. *See* text accompanying note 100 *supra*.

127. 500 F.2d at 351 (quoting *Soria*, 488 F.2d at 585). As in *Soria*, *see* note 118 *supra*, the Ninth Circuit ignored past California segregative statutes: "The schools of the District have never been subject to a statutorily imposed 'dual school system' separating blacks from whites." 500 F.2d at 350.

128. 503 F.2d 1041 (9th Cir. 1974).

129. *Id.* at 1043.

130. *Id.* The court said that "relief *might* be granted," as opposed to "*should* be granted," if other state agencies had intentionally caused segregated schools. This particular question has not been expressly decided by either the Supreme Court or the Ninth Circuit.

131. One year later the school authorities were sued in Diaz v. San Jose Unified School Dist., 412 F. Supp. 310 (N.D. Cal. 1976). In that case, the same judge who had dismissed the complaint in *Ybarra* denied relief to the plaintiffs. Although he found "marked racial imbalance" in San Jose's schools and felt that the imbalance was "perpetuated" by state action, he held that there was no constitutional violation because the school district "never acted with segregative intent." *Id.* at 329, 335.

segregation case to be reviewed by the Supreme Court. Instead of dealing with the question of segregative intent, which had been the primary legal issue in the circuit, the Court in *Pasadena City Board of Education v. Spangler*[132] defined the scope of a district court's jurisdiction once a constitutional violation is found. Judge Real had denied relief from his earlier desegregation order and injunction prohibiting the maintenance of any schools with a majority of any minority.[133] The court of appeals, by a two-to-one vote, had affirmed.[134]

The Supreme Court reversed, holding that the implementation of the desegregation plan and the compliance with the court order for one year had "established a racially neutral system of student assignment."[135] This ended the de jure segregation complained of in the original action. Since the constitutional violation had been remedied, the Court reasoned, the district court's jurisdiction had expired. Any subsequent racial imbalance had to be evaluated as a new case, with the plaintiffs having a renewed burden of showing intentional segregation by the school board *after* the original violation had been remedied:

> Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.[136]

VIII. CONCLUSION

The history of school desegregation in the Ninth Circuit defies generalization. In its first case, the circuit faithfully followed the established "separate but equal" doctrine, while in its last the court was reversed by the Supreme Court for exceeding its power to order integration. The district court in *Mendez* declared segregated schools unconstitutional eight years before *Brown*, while the district judge in *Romero* refused to integrate a segregated school system one year after *Brown*.

Although the circuit's school desegregation cases, taken together, form no discernible pattern, the recent cases send a clear message. By strictly adhering to Supreme Court guidelines, the Ninth Circuit is virtually assured of not having to hear any new school desegregation cases. Plaintiffs challenging the maintenance of segregated schools in

132. 427 U.S. 424 (1976).
133. *See* notes 123-24 *supra* and accompanying text.
134. 519 F.2d 430 (9th Cir. 1975), *vacated and remanded*, 427 U.S. 424 (1976).
135. 427 U.S. at 434.
136. *Id.* at 436 (quoting *Swann*, 402 U.S. at 31-32).

California, where all but two of the Ninth Circuit cases have originated, will not bear the burden of proving intentional segregation on the part of a school board; the only showing required by the California Supreme Court is that the schools are segregated.[137] While a violation of the federal constitution can only be proved with elusive evidence of a state of mind, a state constitutional violation can be established by school enrollment statistics. The difference is one of philosophy. The United States Supreme Court does not believe a school board should be forced to undo that which it did not intentionally do. The California Supreme Court, however, focuses on the evil of segregation and imposes upon school boards the duty to eliminate it from the school system, regardless of its cause.

David S. Ettinger

137. *See* note 87 *supra*. The California Supreme Court reaffirmed its *Jackson* decision in Crawford v. Board of Educ., 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976): "[I]n this state school boards do bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin." *Id.* at 290.