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## How I Rode the Bus to Become a Professor at the University of Denver Sturm College of Law; Reflections on Keyes's Legacy for the Metropolitan, Post-Racial, and Multiracial Twenty-First Century

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FOREWORD: HOW I RODE THE BUS TO BECOME  
A PROFESSOR AT THE UNIVERSITY OF DENVER  
STURM COLLEGE OF LAW; REFLECTIONS ON *KEYES*'S  
LEGACY FOR THE METROPOLITAN, POST-RACIAL, AND  
MULTIRACIAL TWENTY-FIRST CENTURY

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ABSTRACT

This Essay serves as the foreword to the *Denver University Law Review* 2013 Symposium: *Forty Years Since Keyes v. School District No. 1: Equality of Educational Opportunity and the Legal Construction of Metropolitan America*. Through the lens of Professor Romero's experiences being born, raised, bused, and ultimately returning home to work and raise his family in the Denver area, he examines *Keyes* and its enduring legacy. The Essay accordingly identifies the metropolitan revolution and subsequent tensions between color-blindness and the multiracial transformation of the United States as a framework to understand the case in relation to the ongoing struggle for equality of opportunity. Romero argues that *Keyes* merits further reflection and study as lawyers and policy makers look for solutions to dismantle continued patterns of segregation and inequality in the twenty-first century United States.

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## I. INTRODUCTION

I was born in Denver, Colorado, nearly a month to the day after the United States Supreme Court released its opinion in *Keyes v. School District No. 1*.<sup>1</sup> Argued in 1972 and decided on June 21, 1973, the case and the Court's resolution of the issues raised by the existence of segregated schools in the Denver public school system threatened to expand dramatically the nature of federally ordered court desegregation that had begun nearly twenty years earlier with the *Brown v. Board of Education* (*Brown I*)<sup>2</sup> decision. What made *Keyes* especially important was the fact that this was the first school segregation case heard by the Court that did not involve a school district located in what Americans considered the American South.

As a matter of law and fact, what did it practically mean to have a fact pattern that did not involve a Southern locale? First, unlike every school desegregation case heard and decided by the Court since *Brown*, there was not the existence of a state constitutional provision, executive enactment, legislative statute, explicit school board policy, or jurisprudence in the history of the state that mandated the separation of the races in either segregated classrooms or schools. Rather, since Colorado achieved statehood in 1876, the state constitution had specifically prohibited the use of race in the assignment of students to its public schools.<sup>3</sup> As early as 1926, the Colorado Supreme Court declared that this consti-

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1. 413 U.S. 189 (1973). Two of the most comprehensive histories of the origins and aftermath of *Keyes* remain Frederick D. Watson, *Removing the Barricades from the Northern Schoolhouse Door: School Desegregation in Denver* (1993) (unpublished Ph.D. dissertation, University of Colorado at Boulder) (on file with author), and Sharon Ruth Brown-Bailey, *Journey Full Circle: A Historical Analysis of Keyes v. School District No. 1* (1998) (unpublished Ph.D. dissertation, University of Colorado at Denver) (on file with author). Equally valuable for its socio-legal insights is Rachel F. Moran, *Foreword—The Lessons of Keyes: How Do You Translate "The American Dream"?*, 1 LA RAZA L.J. 195 (1986), as well as the entire Volume 1, Issue 3 of *La Raza Law Journal*, which focused on the bilingual education aspects of *Keyes*.

2. 347 U.S. 483 (1954).

3. COLO. CONST. art. IX, § 8 ("[N]or shall any distinction or classification of pupils be made on account of race or color . . ."). I explore some of the debates regarding racial classification of students in the years around the 1876 ratification of the Colorado constitution in Tom I. Romero, II, "Of Greater Value than the Gold of Our Mountains": *The Right to Education in Colorado's Nineteenth-Century Constitution*, 83 U. COLO. L. REV. 781, 823–24, 832–33, 839–40 (2012).

tutional prohibition applied even to extra-curricular activities sanctioned by a school board.<sup>4</sup> In this case, the Denver Public School Board of Education had the district's superintendent promulgate the following "separate but equal" policy:

As a result of certain unpleasant incidents which have occurred within the past two or three years between the colored and [W]hite pupils, the board of education has approved the recommendation that in the future separate social functions be provided for the two races.

The inauguration of this policy means that opportunity will be given to colored pupils to request that provision be made for their social activities. All such requests should be granted, if consistent with the general policies of the school, applicable to all students alike, and if the number of pupils making the request is sufficient to warrant the undertaking.<sup>5</sup>

Subsequently, based on this policy, Black students attending Morey Junior High School were denied the ability to participate in the school's swimming classes or to use the pool altogether, whereas those at the Manual Training School were threatened by the principal with expulsion if they attended the "White" entertainment and dances hosted by the school.<sup>6</sup>

Despite the fact that the Colorado Supreme Court struck down the policy as a violation of state constitutional law, the behavior of the school board revealed deep racial fault lines that existed in the district. The Constitution of the State of Colorado prohibited segregation in all the activities of its schools. Nevertheless, school administrators were likely under tremendous pressure to keep schools and all related activities as homogenous and non-integrated as possible.<sup>7</sup> Especially as non-White families and students moved out of Denver's highly segregated neighborhoods and encroached on formerly all-White areas when the city exploded in population after World War II, the school board's yearly manipulation of attendance boundaries, its uneven deployment of temporary buildings to "Black" schools, and disparate patterns of teacher train-

4. *Jones v. Newlon*, 253 P. 386, 388 (Colo. 1927). An overview of the larger legal as well as political history impacting equality of educational opportunity in Denver and Colorado is found in "Appendix: History of *Keyes* and Public Education in Colorado." See *infra* Part VI.

5. *Newlon*, 253 P. at 387.

6. *Id.* at 387–88.

7. During the 1920s, the Ku Klux Klan had a major influence in Denver and Colorado. See generally KENNETH T. JACKSON, *THE KU KLUX KLAN IN THE CITY: 1915–1930*, at 215–31 (1967); ROBERT ALAN GOLDBERG, *HOODED EMPIRE: THE KU KLUX KLAN IN COLORADO* 163 (1981); James H. Davis, *Colorado Under the Klan*, 42 *COLO. MAG.* 93 (1965); Gerald Lynn Marriner, *Klan Politics in Colorado*, 15 *J.W.* 76 (1976). During the 1930s, anti-immigrant sentiment in Denver and in Colorado was heavily directed towards Mexican Americans. See generally Tom I. Romero, II, "A War to Keep Alien Labor out of Colorado": The "Mexican Menace" and the Historical Origins of Local and State Anti-immigration Initiatives, in *ILLEGALS IN THE BACKYARD: STATE AND LOCAL REGULATION OF IMMIGRATION POLICY passim* (G. Jack Chin & Carissa Hessick eds., forthcoming 2014).

ing, school resources, and vocational as opposed to college-preparatory curricula all indicated the many ways that the Denver school board worked to maintain separate and often unequal schools in the years leading up to the filing of the *Keyes* suit in 1969.<sup>8</sup> Although the school board attempted to address this situation by adopting school board member Rachel Noel's integration resolution in 1968, its immediate rescission by a newly elected school board in the spring of 1969 suggested the level of racial animus at play.<sup>9</sup>

Second, when eight "Negro," "Hispano," and "Anglo" families filed suit against the Denver public school board and its administration on June 19, 1969, for unconstitutionally perpetuating a policy of segregation,<sup>10</sup> they entered uncharted waters of the nation's post-*Brown* school desegregation jurisprudence. At the time the plaintiffs filed their case, there were no reported school desegregation cases that specifically involved representatives from all of these groups.<sup>11</sup> Indeed, Denver was not fully analogous to Northern cities like New Rochelle, Midwestern urban areas such as Gary, or many other metropolitan areas outside of the South because the color line and related inequalities did not cut across the familiar Black-White racial binary.<sup>12</sup> As a result, the Justices were confronted with the challenge of determining how to measure racial segregation and inequity in a public school system where the city's largest and most impoverished group were Mexican Americans, many of whom questioned whether a *Brown*-type busing remedy would adequately address decades of discrimination suffered by young men and women of the community.<sup>13</sup>

In evaluating these issues at the trial court level, Judge William E. Doyle recognized that a firm legal definition of "segregation" would be hard to achieve in the case.<sup>14</sup> Having grown up in a neighborhood that had emerged by the 1960s as a major Mexican American enclave,<sup>15</sup>

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8. Tom I. Romero, II, *Our Selma Is Here: The Political and Legal Struggle for Educational Equality in Denver, Colorado, and Multiracial Conundrums in American Jurisprudence*, 3 SEATTLE J. SOC. JUST. 73, 80-88 (2004).

9. *Id.* at 89-90.

10. *Keyes v. Sch. Dist. No. 1*, 313 F. Supp. 61, 63 (D. Colo. 1970).

11. The only other case involving all three groups that was filed during the same time period was *Cisneros v. Corpus Christi Independent School District*, 324 F. Supp. 599, 604 (S.D. Tex. 1970). That case, arising in Texas, involved a district that was largely "Mexican-American" but also included "Anglos" and a small number of "Negro" students. *Id.* at 608 n.37.

12. Tom I. Romero, II, Kelo, Parents and the Spatialization of Color(blindness) in the Ber-  
man-Brown Metropolitan Heterotopia, 2008 UTAH L. REV. 947, 985-1004 [hereinafter Romero,  
*Spatialization of Color(blindness)*]. The "color line" is "not a physical description of Whiteness and  
non-Whiteness. Rather, it is a legal and extra-legal category that has been used to extend or deny  
countless resources, rewards, and benefits" to create, maintain, or reinforce social, as well as spatial,  
inequalities. Tom I. Romero, II, *¿La Raza Latina? Multiracial Ambivalence, Color Denial, and the  
Emergence of a Tri-ethnic Jurisprudence at the End of the Twentieth Century*, 37 N.M. L. REV. 245,  
250 (2007) [hereinafter Romero, *¿La Raza Latina?*].

13. Romero, *supra* note 8, at 90-97.

14. *Keyes*, 313 F. Supp. at 96.

15. See Romero, *supra* note 8, at 107 n.262.

Judge Doyle pointed out that any attempt to place Latina/os and Blacks "all in one category and utilize the total number as establishing the segregated character of the school . . . is often an oversimplification . . . and [to] lump them into a single minority category . . . remains a problem and a question."<sup>16</sup> Although conceding that Latina/o and Black families shared experiences of economic and cultural deprivation and discrimination, Judge Doyle reasoned that "Hispanos have a wholly different origin, and the problems applicable to them are often different."<sup>17</sup> School board isolation, neglect, and indifference, rather than active manipulation of attendance boundaries and provisions for facilities, typified for Judge Doyle the constitutional violation against Latina/o (and to a lesser extent, Black) students attending their segregated neighborhood schools. Whatever the source of segregation and inequality, Judge Doyle in 1970 found the Denver Public Schools in violation of the constitution.<sup>18</sup> In conjunction with the untold number of threats that the plaintiffs, their lawyers, and Judge Doyle received—culminating in the bombing of Denver public school buses after the decision—Denver suddenly emerged as a highly contested and volatile battleground in the nationwide effort to desegregate the nation's schools.

When the school district appealed Judge Doyle's opinion to the U.S. Circuit Court of Appeals for the Tenth Circuit, the court literally carved up both the decision and the district in assessing the constitutional violation. While finding that there was indeed an unconstitutional pattern and practice of racial assignment on the part of the school board for the northeast Denver Park Hill schools, the Tenth Circuit indicated that the assignment of students to segregated schools in other parts of the district was done on a race-neutral basis.<sup>19</sup> In so doing, the Tenth Circuit created the anomalous situation where Fourteenth Amendment remedies applied in a part of the school district that was largely Black but were inapplicable to highly segregated Latina/o schools in another part of town.<sup>20</sup>

The Supreme Court's resolution of such issues in *Keyes* made it poised to "become the *Brown* case for the rest of the country outside the South."<sup>21</sup> The *New York Times* declared that the case would likely determine whether schools are to be not just color-blind but racially mixed, and "[i]n all-probability the *Keyes* decision will tell us whether the Court intends to launch a major attack on school segregation" across the United States.<sup>22</sup> Whereas racial segregation was undeniably pervasive through-

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16. *Keyes*, 313 F. Supp. at 69.

17. *Id.*

18. *Id.* at 83.

19. *Keyes v. Sch. Dist. No. 1*, 445 F.2d 990, 1005 (10th Cir. 1971).

20. *Id.* at 1004–07.

21. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 260 (1979).

22. Christopher Jencks, *Busing—The Supreme Court Goes North*, N.Y. TIMES MAG., Nov. 19, 1972, at 8.

out the nation's exploding metropolises, its cause and thereby its consequence, as the Denver experience demonstrated, became much harder for courts to define. For this reason, Justice Powell, in his concurring and dissenting opinion in the Court's resolution of the case, indicated that *Keyes* provided an opportunity to "formulate constitutional principles of national rather than merely regional application."<sup>23</sup>

Tellingly, finding such constitutional principles would be much easier in theory than in practice. For the first time since it had rendered its decision in *Brown I*, the Supreme Court could not find unanimous consensus in its school desegregation jurisprudence. Although seven Justices concurred in the result, only Justices Thurgood Marshall, Harry Blackmun, and Potter Stewart joined Justice William Brennan's controlling opinion. Chief Justice Warren Burger concurred in the result remanding back to the district court; Justice William O. Douglas wrote a separate concurrence; Justice Lewis Powell concurred in the result but dissented in the reasoning; and Justice William Rehnquist became the first Supreme Court Justice to dissent in a school integration case.<sup>24</sup>

Indeed, the splits on the *Keyes* Court were a harbinger of a new and ultimately tumultuous era in the legal, social, and political history of the United States. Along with cases such as *San Antonio Independent School District v. Rodriguez*,<sup>25</sup> *Lau v. Nichols*,<sup>26</sup> and *Milliken v. Bradley*,<sup>27</sup> the *Keyes* decision was the beginning of the end of an era of robust federal judicial involvement to ensure that students had access to equality of educational opportunity. Whereas the *Brown* decision in 1954 suggested how expansive the Fourteenth Amendment could be in dismantling White supremacy in the United States, *Keyes* and subsequent cases provided debilitating limits. Thus, it is not merely coincidence that at the same time that federal Judge Richard Matsch declared that the Denver Public Schools had achieved a unitary school system in 1995, the Su-

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23. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 219 (1973) (Powell, J., concurring in part and dissenting in part).

24. A compelling account about some of the inner workings of the Court is provided by the symposium keynote Mark Tushnet, *A Clerk's Eye View of Keyes v. School District No. 1*, 90 DENV. U. L. REV. 1139, 1144-48 (2013). At the time *Keyes* was being heard by the Supreme Court, Professor Tushnet was a law clerk to Justice Thurgood Marshall. A live version of the keynote address, including questions and answers, can be viewed at Mark Tushnet, William Nelson Cromwell Professor of Law, Harvard Law Sch., Keynote Address at the Denver University Law Review Symposium: Forty Years Since *Keyes v. School District No. 1*; Equality of Educational Opportunity and the Legal Construction of Modern Metropolitan America (Feb. 1, 2013), available at <http://mediaserv.law.du.edu/flashvideo/specialevents/2013-Law-Review-Symposium/2013-Law-Review-Symposium.htm>.

25. 411 U.S. 1, 55 (1973) (holding that the inequitable local school finance schemes did not violate the Equal Protection Clause of the Fourteenth Amendment).

26. 414 U.S. 563, 565, 569 (1974) (finding that the failure to provide bilingual education programs was a violation of Title VI of the Federal Civil Rights Act of 1964), *abrogated by Alexander v. Sandoval*, 532 U.S. 275 (2001).

27. 418 U.S. 717, 718 (1974) (holding that a multi-district remedy involving school districts in which no de jure violation had been found was an unconstitutional Fourteenth Amendment desegregation remedy).

preme Court in *Missouri v. Jenkins*,<sup>28</sup> in an opinion authored by *Keyes* dissenter Justice Rehnquist, all but indicated the end of federally supervised court-ordered desegregation.<sup>29</sup> *Jenkins* made absolutely clear that unless a plaintiff could prove the existence of a direct and deliberate discriminatory act on the part of a state official or school board to cause segregated schools, their continued existence as a result of demographic changes, White flight out of the district, or other unknown or unknowable factors<sup>30</sup> indicated the end of *Brown*'s promise that separate schools are inherently, and by implication, unconstitutionally unequal.

Two important legal principles thus emerged from the *Keyes* opinion rendered by the Court in 1973 that harkened to the difficulties litigants would have in school desegregation cases moving forward. First, unless a plaintiff could prove the existence of a state law or deliberate policy of racial segregation, patterns of school segregation exacerbated by race-“neutral” land use, local government, housing, transit, and other public policies and private practices could not be easily reached by the Court’s equal protection jurisprudence. Importantly, the Court seriously contemplated arriving at the conclusion that segregated schools, whether caused by legal or nonlegal means, were per se unconstitutional.<sup>31</sup> Disagreements between Justice Brennan and Justice Powell over an appropriate remedy resulted instead in what emerged as an ironclad compromise.<sup>32</sup> Simply stated, the Court’s opinion made it evident that de jure

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28. 515 U.S. 70 (1995).

29. *Id.* at 100–03.

30. *Id.* at 91–101; see also DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 114–29 (2004) (describing social and legal retrenchment from the *Brown* decision).

31. While Justice Brennan was tasked with writing the *Keyes* opinion, “it appeared [to him] that a majority of the Court was committed to the view that the distinction should be maintained.” Memorandum from William J. Brennan, Jr. to the Conference (Apr. 3, 1973) (on file with the Library of Congress, Manuscript Division, Papers of Harry Blackmun, Box 154, FF 6) [hereinafter Brennan Memorandum]. His initial impression, however, seemed to be premature because Justices Powell, Blackmun, Douglas, and likely Marshall may have joined a Brennan opinion that eliminated the distinction. See Memorandum from Harry A. Blackmun to William Brennan (May 30, 1973) (on file with the Library of Congress, Manuscript Division, Papers of Harry Blackmun, Box 154, FF 6); Memorandum from Harry A. Blackmun to William Brennan (Jan. 9, 1973) (on file with the Library of Congress, Manuscript Division, Papers of Harry Blackmun, Box 154, FF 6).

32. The issue between Justices Brennan and Powell centered on whether the existence of a segregated school would then create an “affirmative duty to desegregate.” Brennan Memorandum, *supra* note 31. Whereas Justice Brennan suggested that creating such an affirmative duty would create symmetry between Southern integration cases as *Brown v. Board of Education* (*Brown II*), 349 U.S. 294, 301 (1955), *Green v. County School Board*, 391 U.S. 430 (1968), and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), Justice Powell’s remedy would require greater deference to the interests of school boards and parents to have their “children attend schools within a reasonable vicinity of home.” *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 240 (1973); Brennan Memorandum, *supra* note 31. While Justice Powell’s concurrence in *Keyes* is perhaps one of the most powerful statements about the incongruence and unworkability of the de facto–de jure distinction, his remedy to any segregated school boards indicated for many that it would be a “substantial retreat from [the Court’s] commitment of the past twenty years to eliminate all vestiges of state-imposed segregation in the public schools.” Brennan Memorandum, *supra* note 31. To be sure, draft circulations of Justice Powell’s opinion sparked what one clerk described as a “general sense of outrage and hostility” among a majority of the clerks about the implications of this deference. Letter from James



segregation could be remedied by the Fourteenth Amendment, whereas de facto segregation could not. Although this created difficulties in multi-district metropolitan areas, the Court nevertheless created an important caveat. If de jure segregation was found in only one part of the school district, as it existed in the attendance boundary manipulation of the Black schools in the northeast part of Denver, the presumption of segregative intent would apply to the entire district, even if there was no evidence of direct and deliberate acts to segregate schools, as was the case in the Latina/o schools of west and northwest Denver.<sup>33</sup>

Second, the *Keyes* opinion recognized that racial discrimination in the United States was not divided exclusively along White and Black lines. Noting that cities like Denver were multiracial and not biracial in their demographic orientation,<sup>34</sup> the Court indicated the many ways that discrimination against Latina/os and other non-White groups resulted in racial discrimination whose origins were different from that experienced by the Black students who had been at the center of school desegregation litigation since *Brown* in 1954. In a United States that was experiencing a dramatic shift in immigration from Latin America and Asia, *Keyes* highlighted an emerging multiracial order.<sup>35</sup> The provision of bilingual education, the explosion of English-only laws, and the rise and subsequent attacks on multicultural and race- and ethnic-centered curricula in the *Keyes* case after 1973 as well as throughout the United States<sup>36</sup> all indicated the much more complicated battleground on which the integration of public schools as well as equal opportunity in employment, housing, and politics would be fought.

This Essay serves as the foreword to the *Denver University Law Review* 2013 Symposium: *Forty Years Since Keyes v. School District No. 1: Equality of Educational Opportunity and the Legal Construction of Modern Metropolitan America*. Over two-and-a-half days, the Law Review, in collaboration with the Tenth Judicial Circuit Historical Society, the Sturm College of Law's Office of the Dean, the Associate Dean of Institutional Diversity and Inclusiveness, the Constitutional Rights and Remedies Program, and the University of Denver's Morgridge College of Education, brought together original participants in the case, policy makers, school administrators as well as educators, community activists, and distinguished legal, social science, education, and humanities schol-

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W. Ziglar, Law Clerk, to Harry Blackmun 1 (Apr. 4, 1973) (on file with the Library of Congress, Manuscript Division, Papers of Harry Blackmun, Box 154, FF 7).

33. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 196–203 (1973).

34. *Id.* at 195.

35. See Rubén G. Rumbaut, *Origins and Destinies: Immigration to the United States Since World War II*, 9 SOC. F. 583, 600–03 (1994).

36. For a general overview of the legal as well as political issues involved, see Romero, *¿La Raza Latina?*, *supra* note 12, at 269–302.

ars to examine *Keyes's* impact today.<sup>37</sup> As Craig Barnes and Bob Connerly, two of the original co-counsel to the plaintiffs, and Jane Michaels, a clerk to Judge Doyle during the case's formative years, suggest in their memoirs about *Keyes*, the litigation profoundly impacted Denverites of all creeds and colors, and its contested memory continues to resonate to this very day.<sup>38</sup>

As Justice Hobbs, another former Doyle clerk recounts, struggles over civil and human rights have long animated Colorado's legal as well as political community. Highlighting the particularly unpopular positions taken by Governor Ralph Carr in his criticism of Japanese internment during World War II and the desegregation opinions of Judge Doyle, Justice Hobbs reminds us how leaders of the state's bar have repeatedly emerged (at great personal cost to themselves) to advocate for justice and equality.<sup>39</sup> For this reason, the symposium was enthusiastically sponsored by the city's legal community, including Brownstein Hyatt Farber Schreck, LLP, Davis Graham & Stubbs LLP, Holland & Hart LLP, Sherman & Howard L.L.C., and Faegre Baker Daniels LLP, as well as the Sam Cary Scholarship Endowment Fund, the Asian Pacific American Bar Association of Colorado, the Colorado Asian Pacific American Bar Foundation, and the Colorado Hispanic Bar Association. In addition, the

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37. For the symposium program, see DENV. U. L. REV., FORTY YEARS SINCE *KEYES v. SCHOOL DISTRICT NO. 1: EQUALITY OF EDUCATIONAL OPPORTUNITY AND THE LEGAL CONSTRUCTION OF MODERN METROPOLITAN AMERICA* (Jan. 31–Feb. 2, 2013), available at [http://www.denverlawreview.org/storage/2012\\_keyes\\_symposium/KeyesProgram\\_FNL.pdf](http://www.denverlawreview.org/storage/2012_keyes_symposium/KeyesProgram_FNL.pdf).

38. Craig Barnes, *A Personal Memoir of Plaintiffs' Co-counsel in Keyes v. School District No. 1*, 90 DENV. U. L. REV. 1059, 1066–68 (2013); Robert T. Connerly, *Keyes v. School District No. 1: A Personal Remembrance of Things Past and Present*, 90 DENV. U. L. REV. 1083, 1088–89 (2013); Jane Michaels, *Personal Memoir: Indelible Memories of My Clerkship with Judge William E. Doyle*, 90 DENV. U. L. REV. 1115, 1119 (2013).

39. Gregory J. Hobbs, Jr., *Personal Memoir: Judge William E. Doyle and Governor Ralph L. Carr; Peers for Equal Justice*, 90 DENV. U. L. REV. 1121, 1127–28 (2013). The opening panel of the live symposium included not only Barnes, Michaels, and Justice Hobbs, but several others who were involved either in the *Keyes* litigation or the larger battle for equality of educational opportunity and civil rights in Denver during the 1960s and 1970s. See Panel I: Remembering *Keyes* from Those Who Lived It at *Denver University Law Review Symposium: Forty Years Since Keyes v. School District No. 1: Equality of Educational Opportunity and the Legal Construction of Modern Metropolitan America* (Jan. 31, 2013), available at <http://mediaserv.law.du.edu/flashvideo/specialevents/2013-Law-Review-Symposium/2013-Law-Review-Symposium.htm> (presenting a retrospective roundtable on *Keyes* by those who experienced, lived, and litigated the case in the Denver metropolitan area). Moderated by Dr. Tom I. Romero II, Hughes–Rudd Research Professor and Associate Professor of Law, University of Denver Sturm College of Law, the panel included Craig S. Barnes, Author, Playwright, Radio Talk Show Host, and Founder, We Are People Here!; Edgar Benton, Senior Counsel, Holme Roberts & Owen LLP (retired); Hubert A. Farbes Jr., Shareholder, Brownstein Hyatt Farber Schreck, LLP; Nita J. Gonzales, President and Chief Executive Officer, Escuela Tlatelolco Centro de Estudios; Honorable Norman D. Haglund, Judge, Colorado District Court, Second Judicial District; Honorable Gregory J. Hobbs Jr., Associate Justice, Colorado Supreme Court; Edwin S. Kahn, Of Counsel, Lass Moses & Ramp, LLC; Jane Michaels, Partner, Holland & Hart LLP; Edmond (Buddy) F. Noel Jr., Attorney at Law, The Noel Law Office, LLC; Victor Quinn, Of Counsel, Waggener & Foster LLP; and Lawrence W. Treece, Shareholder, Brownstein Hyatt Farber Schreck, LLP. See DENV. U. L. REV., FORTY YEARS SINCE *KEYES v. SCHOOL DISTRICT NO. 1: EQUALITY OF EDUCATIONAL OPPORTUNITY AND THE LEGAL CONSTRUCTION OF MODERN METROPOLITAN AMERICA* 9 (Jan. 31–Feb. 2, 2013), [http://www.denverlawreview.org/storage/2012\\_keyes\\_symposium/KeyesProgram\\_FNL.pdf](http://www.denverlawreview.org/storage/2012_keyes_symposium/KeyesProgram_FNL.pdf).

Denver Foundation, Mr. Gregory J. Kerwin, and Mrs. Esther Shaoul supported the inter-disciplinary and wide-ranging live symposium that took place at the U.S. Court of Appeals for the Tenth Circuit in the Byron White U.S. Courthouse and at the University of Denver Sturm College of Law.

As both the live symposium as well as the symposium articles printed here attest, *Keyes* remains important for serious and thoughtful study as well as for legal application, although it failed miserably to become a more robust and wide-ranging *Brown* for the rest of America. Through the lens of my own experiences being born, raised, and ultimately returning home to work and raise my family in the Denver area, I explore three ways to understand *Keyes* and its enduring legacy today. Part II of this Essay examines the many ways that *Keyes* pointed to an America in which the majority of inhabitants lived not only in urban areas but also in amorphous, sprawling metropolitan regions that lacked unifying hubs of culture, community, or local government. As this Part surveys, a broad and diverse array of local, state, and federal government actions catalyzed a metropolitan revolution that continues to this very day.

This metropolitanization of the United States has had enormous consequences for racial relations that I explore in Parts III and IV of this Essay. On the one hand, decentralization and fragmentation created opportunities for social mobility and achieving the American dream for unprecedented numbers of Americans, especially those who understood themselves as White and not subject to the racial sins of the past. By commuting in private automobiles that bypassed “blighted” neighborhoods and dying cities on federally financed expressways, and working and shopping in largely homogenous suburban communities, suburbanites evaded altogether the social mix and inequalities of their sprawling metropolitan regions. Part III details the many ways that the metropolitan revolution helped many Americans to believe that their cities were—as many believed Denver to be—one of relative social harmony where racial problems were a thing of the past. On the other hand, the fragmentation and isolation of metropolitan America obscured the extent that the nation was being fundamentally transformed by immigration from Latin America, Asia, and Africa, and the subsequent multiracial identities that emerged to claim space and place in these very same metropolitan regions. As Part IV examines, a robust multi-color line, as in *Keyes*, had emerged to sweep away the spatial and racial certainties so clear in *Brown* and in every other Supreme Court desegregation case until 1973. It is a legacy that continues to this day.

I have lived my entire life with the *Keyes* case. I was bused in metropolitan Denver as part of the school desegregation order. As a self-identified Chicano kid, I encountered and shared classroom, playground, and afterschool space (for a brief time) with Black, White, Asian, and American Indian children. We laughed. We fought. We cried and be-

came lifelong friends, sometimes bitter enemies, and often forgotten acquaintances. We ultimately came to live in separate spaces until I went to college and graduate school. Today, as a law professor, I work in a partially integrated workplace in a largely homogenous school, while living in a relatively homogenous new-urbanist neighborhood bounded on all sides by racial and class diversity. *Keyes* is not merely my story but is reflective of countless others who have come of age during the last forty years. The case and the United States it refracts then and now tells us much of the possibilities and limitations of the metropolitan, post-racial, and multiracial order in which a majority of us now live.

## II. THE METROPOLITAN REVOLUTION

Five years after I was born, I stepped onto my first school bus. For about an hour each day, I was transported from my northwest Denver neighborhood to a school about fifteen miles to the south. When I was eight, my parents moved south to a new housing subdivision not far from the school to which I was being bused. I was still being bused, but the commute was much shorter. As a result of the annexation and deannexation battles that were being waged by the City and County of Denver and its suburban neighbors,<sup>40</sup> my still-new neighborhood was legally declared part of the suburban county. Ironically, I was still bused, not to a Denver public school subject to the *Keyes* desegregation decree, but to another school farther away in the suburban school district. I still spent a good deal of time on a bus, but one that took me from my neighborhood in an unincorporated part of the county north approximately ten miles to an economically and racially homogenous school in an incorporated part of the county just to the west of the City and County of Denver.

By the time the Supreme Court rendered its *Keyes* decision in 1973, the United States was in the midst of a rapid, profound, and destabilizing revolution in how a majority of people lived.<sup>41</sup> Whereas in the years immediately before the *Brown* decision the United States was an "urban nation, dominated by clearly defined urban places with an anatomy familiar and comprehensible," by the 1970 and 1980s it had become sprawling, decentered, and—spatially as well as culturally—fragmented metropolitan regions.<sup>42</sup> As urban historian Jon Teaford documents, "[T]he core of each of these urban places was a single central business district, the undisputed focus of the metropolitan area. . . . Metropolitan Americans not only perceived a single dominant focus for urban life, but

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40. See Franklin J. James & Christopher B. Gerboth, *A Camp Divided: Annexation Battles, the Poundstone Amendment, and Their Impact on Metropolitan Denver, 1941–1988*, 5 COLO. HIST. 129, 132–34 (2001).

41. See generally JON C. TEAFORD, *THE METROPOLITAN REVOLUTION: THE RISE OF POST-URBAN AMERICA passim* (2006).

42. *Id.* at 1.

also shared common space” in their use of public transit, parks, or the downtown department store.<sup>43</sup> Moreover, there was

a common vested interest in urban governmental institutions. Although there were upper-middle-class suburban municipalities, the largest central cities still comprised a full range of neighborhoods from skid row to elite. The central city-government and central-city school administrators had to accommodate a socially and culturally diverse constituency, one that included all elements of the metropolitan social mix. Even residents of independent suburban municipalities [spent] much of their lives within [city] boundaries. Their safety while shopping or working depended on central-city police and fire-fighting forces; the viability of their businesses depended on central-city tax rates and regulations.<sup>44</sup>

By the 1970s and 1980s, the way the majority of people lived, worked, played, and *learned* in the United States had fundamentally changed.<sup>45</sup> The “single-focus metropolises had disappeared” as “[m]etropolitan areas sprawled over hundreds of square miles without a distinguishable common center or clear-cut edges.”<sup>46</sup>

In the period from *Brown I* in 1954 to *Keyes* in 1973, most of the nation’s urban centers were losing population to suburbs and “independent” municipalities that, at first, formed a perimeter around center cities.<sup>47</sup> Indeed, “[i]n 1970, for the first time in the history of the world, a nation-state [the United States] counted more suburbanites than city dwellers or farmers.”<sup>48</sup> The suburbanization of the United States was not just the logical extension of densely concentrated city-dwellers moving to low-density suburban lots. Driving much of this change was the fact that many Americans were moving from one region of the country to another as postwar economic growth spurred demand for capital and labor to sprawling metropolitan areas in the Rocky Mountain West, Southeast, and Pacific Coast.<sup>49</sup> As one commentator noted as early as 1949, “[A]pproximately seventy million people are not living in the houses which they occupied in 1940. Twelve million have changed their

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43. *Id.* at 2.

44. *Id.* at 2–3.

45. BROOKINGS INST. METRO. POLICY PROGRAM, STATE OF METROPOLITAN AMERICA: ON THE FRONT LINES OF DEMOGRAPHIC TRANSFORMATION 16–18 (2010) [hereinafter BROOKINGS INST.], [http://www.brookings.edu/~media/research/files/reports/2010/5/09%20metro%20america/metro\\_america\\_report.pdf](http://www.brookings.edu/~media/research/files/reports/2010/5/09%20metro%20america/metro_america_report.pdf).

46. TEAFORD, *supra* note 41, at 4–5.

47. KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 284 (1985).

48. *Id.* at 283–84.

49. For a broad historiographical examination of these trends as well as their influence on social, political, and economic life, see generally SUNBELT RISING: THE POLITICS OF PLACE, SPACE, AND REGION (Michelle Nickerson & Darren Dochuk eds., 2011) [hereinafter SUNBELT RISING], and David R. Goldfield, *The Rise of the Sunbelt: Urbanization and Industrialization*, in A COMPANION TO THE AMERICAN SOUTH 472, 472–93 (John B. Boles ed., 2002).

state of residence; this is probably the largest population movement in history.<sup>50</sup> Such trends would continue until the end of the twentieth century,<sup>51</sup> thereby creating unprecedented opportunities to live in a sprawling and fractured metropolitan landscape.

At the center of this profound transformation in urban geography were federal, state, and local laws and policies meant to encourage suburban settlement. The contributions of federal housing and highway policy to meteoric suburban growth, for instance, are well-documented.<sup>52</sup> Equally important was the use of local government and land use laws to completely isolate and contain the perceived blight, decay, and danger of the centrally located city.<sup>53</sup> By fully deploying such powers at all levels of government, suburban policy makers pitted themselves in direct competition with the central city for the people and resources of the growing metropolitan landscape.

Demonstrative of the metropolitan revolution, the Denver experience underlying *Keyes* reveals trends never envisaged by the Court in its *Brown* body of equality of educational opportunity jurisprudence. Nearly twenty years before the *Keyes* case was filed, the City and County of Denver and its school districts were the unquestioned dominant center of urban and social activity for the metropolitan area. To maintain its position, the city and its school district had aggressively annexed from the suburban periphery to grow from 66.8 square miles in 1950 to 111 square miles in 1970.<sup>54</sup> In this same period, a host of newly incorporated cities, including Bow Mar, Commerce City, Greenwood Village, Lakewood, and Wheat Ridge came to surround the corporate limits of the City and County of Denver.<sup>55</sup>

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50. Edwin A. Cottrell, *Problems of Local Governmental Reorganization*, 2 W. POL. Q. 599, 600 (1949).

51. DAVID K. IHRKE & CAROL S. FABER, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, GEOGRAPHICAL MOBILITY: 2005 TO 2010, at 2 (2012), <http://www.census.gov/prod/2012pubs/p20-567.pdf>. The housing crisis and ensuing deep recession of the first decade of the twenty-first century, however, "slowed migration considerably, so that the share of Americans changing residence in 2007–2009 was lower than at any point in postwar history." BROOKINGS INST., *supra* note 45, at 37.

52. The literature in this area is vast. For representative works, see OWEN D. GUTFREUND, TWENTIETH-CENTURY SPRAWL: HIGHWAYS AND THE RESHAPING OF THE AMERICAN LANDSCAPE *passim* (2004); ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940–1960 *passim* (2d ed. 1998); ROBERT O. SELF, AMERICAN BABYLON: RACE AND THE STRUGGLE FOR POSTWAR OAKLAND *passim* (2003); THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 19 (1996); and Arnold R. Hirsch, *Searching for a "Sound Negro Policy": A Racial Agenda for the Housing Acts of 1949 and 1954*, 11 HOUS. POL'Y DEBATE 393 *passim* (2000).

53. I explore the issues as well as cite to some of the more influential and well-known literature in Romero, *Spatialization of Color(blindness)*, *supra* note 12, at 963–67.

54. GUTFREUND, *supra* note 52, at 94.

55. U.S. NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, NATIONAL REGISTER OF HISTORIC PLACES MULTIPLE PROPERTY DOCUMENTATION FORM: HISTORIC RESIDENTIAL SUBDIVISIONS OF METROPOLITAN DENVER, 1940–1965, at 215–16 (2010) (on file at Stephen H. Hart Research Library, Colorado History Museum).

As in other metropolitan areas throughout the nation, suburban growth was fueled by federal and state highway policies that created the I-70 and I-25 high-speed freeways, while dramatically expanding the state roads and U.S. highways that served the exploding subdivisions in Denver's suburban periphery built by favorable Federal Housing Administration loans and less onerous zoning restrictions.<sup>56</sup> The impact of such federal and state action was stunning. "Whereas in 1950, 74 percent of Denver area residents lived in the city, this had dropped to 42 percent by 1970" in a "metropolitan area that [now] sprawled over four thousand square miles."<sup>57</sup>

During the 1950s, however, the City and County of Denver was in a particularly powerful position to dictate the terms and conditions by which metropolitan growth could occur. Particularly through its ownership of the water infrastructure and a vast majority of the concomitant water rights that could be used in the near-desert conditions of metropolitan Denver, the city through the Denver Water Board (DWB) "held great power in shaping and implementing Denver[']s growth] policy."<sup>58</sup> Denver thus held a tremendous asset over its neighbors in the 1950s that made the center city an object of both desire and derision.<sup>59</sup>

Not surprisingly, most developers in the suburban periphery (and the residents they attracted to their developments) desired to become part of Denver's water system. This could happen in one of two ways: developers could create a water-use service district that could contract with the DWB for the delivery of water and the building and maintenance of infrastructure; or developers could convince the city to annex the development into its corporate boundaries, thus obligating the DWB to provide water to its new citizens.<sup>60</sup> This system only worked if there was enough water for all of the area's growth. In the early 1950s, however, Denverites faced the most severe drought in the history of Colorado.<sup>61</sup> Ac-

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56. See GUTFREUND, *supra* note 52, at 87–127.

57. *Id.* at 94.

58. James & Gerboth, *supra* note 40, at 144. As this study documents, however, the DWB had long maintained that the management and growth of Denver's water infrastructure should not dictate development growth. Nevertheless, as a unit of the City and County of Denver, its policies were often undifferentiated by outsiders from the policies of other units of city government that were often at odds with one another. *Id.*

59. See PATRICIA NELSON LIMERICK & JASON L. HANSON, A DITCH IN TIME: THE CITY, THE WEST, AND WATER 135–39 (2012); James & Gerboth, *supra* note 40, at 143–44.

60. In 1918, the City and County of Denver purchased the Denver Union Water Company, thereby creating the Denver Water Board. LIMERICK & HANSON, *supra* note 59, at 86. The 1918 amendments to the charter for the City and County of Denver mandated that the DWB supply the "[C]ity and [C]ounty of Denver and its inhabitants with water for all uses and purposes." Any leases to supply water outside those limits must be "subject to the future needs and requirements of the City and County and its inhabitants." *Id.* at 135–37 (quoting Charter of the City and County of Denver, art. XIX, §§ 296, 297B (Jan. 1, 1927)). One revealing example of a suburban developer pleading with Denver to annex its development into the city because of its water is found in MAXINE KURTZ, INVISIBLE CAGE: A MEMOIR 60 (2006).

61. BLACK & VEATCH, REPORT ON WATER RATES FOR THE DENVER BOARD OF WATER COMMISSIONERS 1 (1958) (on file with author). A lack of snow and rain in Colorado in the early

cordingly, the drought put pressure on water resources already strained by the area's rapid growth.<sup>62</sup>

In response to the drought, the DWB instituted several measures designed to conserve water and to meet the demands of its many users.<sup>63</sup> Most controversial was the DWB's decision in 1951 to create a "blue line" around the metropolitan area. The DWB determined that, absent the development of other resources, it would be able to serve only an area of about 114 square miles.<sup>64</sup> The DWB's blue line explicitly constrained water supplies in suburban Denver throughout the 1950s.<sup>65</sup> Until 1960, when the DWB rescinded the blue line, the DWB refused to sell water to suburban water distributors who wished to open new taps. This action forced existing suburban water works that resold Denver water to update distribution facilities, while denying water service to areas that were not close to city limits. The DWB also decided to increase its rates for those suburbanites living inside of the blue line but not for Denver residents. Such policies put the City and County of Denver at tremendous odds with its suburban neighbors.<sup>66</sup>

The blue line established the physical outline for Denver's municipal and suburban growth during the 1950s. Its application by the DWB thus had two important consequences for the social and political geography of the Denver area. First, according to the DWB itself, it "forced the development of small, independent and sometimes marginal new water systems outside [the City and County of Denver's] limits. This step accelerated and accentuated the fragmentation of the metropolitan area."<sup>67</sup> Unable to receive adequate water and unable to annex into Denver, suburbanites created their own municipal corporations to compete with the

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1950s, in conjunction with above-average temperatures, pushed water levels to all-time lows. Denver's drought "extended over a 5-year period, namely 1952 to 1956 inclusive, and in 1954 the annual precipitation totaled 6.27 inches, which was the lowest precipitation of record in the 85 years of the Denver weather station." *Id.* In a normal year, the Denver area receives 13.74 inches of rain. *Id.* at 2.

62. While Denver's population increased 43% from 1945 to 1954, its water demands increased 64%. ALVORD, BURDICK & HOWSON, LLC, REPORT ON FUTURE WATER SUPPLY: DENVER MUNICIPAL WATER WORKS 2 (1955) (on file with author). Between 1946 and 1954, more people had been added to the Denver water system than in the entire twenty-eight-year period since the City and County of Denver acquired the system in 1918. *Id.* Water consumption grew as much from 1939 to 1954, "as in the entire sixty-five-year period from its inception in 1872 to the year 1938." *Id.*

63. During the summer of 1954, for instance, the DWB promulgated regulations that restricted the outside use of water to certain hours and certain days of the week. George Gibson, Comment, *The Power of the Denver Water Board to Enact Penalty Regulations*, 31 *DICTA* 349, 349 (1954). For the first time in its history, the DWB penalized users if it discovered a "use of water contrary to the rules and regulations of the Board." *Id.* If employees of the DWB found a citizen not complying with the water schedule, the DWB issued a warning for the first violation and then imposed a "special charge" of five dollars for the second violation, \$25 for the third, and \$100 for all subsequent violations. *Id.*

64. LIMERICK & HANSON, *supra* note 59, at 135.

65. *Id.* at 135-41.

66. *See id.* at 135-41; James & Gerboth, *supra* note 40, at 144.

67. DENVER WATER DEP'T, METROPOLITAN WATER REQUIREMENTS AND RESOURCES, 1975-2010, at 10 (1975).



City and County of Denver for people, political power, and resources.<sup>68</sup> Second, and related, it pitted the suburbs against the increasingly heterogeneous City and County of Denver. Though the DWB would rescind the blue line in 1962 when a new water supply came into operation, the metropolitan landscape fractured because Denver was viewed by its suddenly large suburban communities with mistrust, envy, and frustration at precisely the same time that the issue of school integration was inexorably tied to the city's own growth.<sup>69</sup>

In other more subtle ways, Denver's suburbs began to distinguish themselves from the core city. Take, for example, Greenwood Village, which was incorporated just to the South of the City and County of Denver in 1950.<sup>70</sup> By including the term "village" in its name, founders expressed "their desire, and that of the residents, to permanently preserve the rural atmosphere" of their community.<sup>71</sup> The subsequent master zoning plan that the city council adopted (and was in effect into the 1960s) provided for either one-acre or forty-acre lots for residential development.<sup>72</sup> Clearly seeing its future as distinct from the City and County of Denver, Greenwood Village, like so many other suburbs throughout the United States, used local government and land use law to seal itself from the center city. Not long after incorporation, however, most of these sub-

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68. In the 1950s, the combined population of the three counties surrounding the Denver area "burgeoned by 144 percent[, while] Denver's population grew by only 24 percent during the entire twenty-year period of 1950-70." James & Gerboth, *supra* note 40, at 137; see also LIMERICK & HANSON, *supra* note 59, at 137 (noting that by 1962, at least twenty-six special water districts and thirty-three water sanitation districts formed around Denver's periphery).

69. James & Gerboth, *supra* note 40, at 146; see also J. Gordon Milliken, *Water Management Issues in the Denver, Colorado, Urban Area*, in *WATER AND ARID LANDS OF THE WESTERN UNITED STATES* 333, 344-45 (Mohamed T. El-Ashry & Diana C. Gibbons eds., 1988) (emphasizing the fragmentation of the metropolitan supply system and its destructive political impact between Denver and its suburban neighbors).

70. CITY OF GREENWOOD VILLAGE MASTER PLAN, at x (1982).

71. *Id.*

72. *Id.* In contrast, an average residential lot in the city is less than a quarter acre. Many of the issues I explore here in Part II were addressed in the live symposium panel entitled "The Role of Land Use in Shaping the Cities in Which Families and Children Live, Learn, Work and Play." See Panel 2: The Role of Land Use in Shaping the Cities in Which Families and Children Live, Learn, Work, and Play at the Denver University Law Review Symposium: Forty Years Since *Keyes v. School District No. 1*; Equality of Educational Opportunity and the Legal Construction of Modern Metropolitan America (Feb. 1, 2013), available at <http://mediaserv.law.du.edu/flashvideo/specialevents/2013-Law-Review-Symposium/2013-Law-Review-Symposium.htm> (exploring the role that land use and related bodies of law play in shaping opportunity and access to employment, housing, and ultimately education in the urban and suburban areas of metropolitan cities throughout the United States). Moderated by Federico Cheever, Senior Associate Dean and Professor of Law, University of Denver Sturm College of Law, the panel included Susan D. Daggett, Executive Director, Rocky Mountain Land Use Institute, University of Denver Sturm College of Law; Dr. Andrew Goetz, Professor and Chair, Department of Geography and the Environment, University of Denver; Dr. Patricia N. Limerick, Professor of History and Faculty Director and Chair of the Board of the Center of the American West, University of Colorado at Boulder; and Dr. Tom I. Romero II, Hughes-Rudd Research Professor and Associate Professor of Law, University of Denver Sturm College of Law. See DENV. U. L. REV., FORTY YEARS SINCE *KEYES V. SCHOOL DISTRICT NO. 1: EQUALITY OF EDUCATIONAL OPPORTUNITY AND THE LEGAL CONSTRUCTION OF MODERN METROPOLITAN AMERICA* 10 (Jan. 31-Feb. 2, 2013), available at [http://www.denverlawreview.org/storage/2012\\_keyes\\_symposium/KeyesProgram\\_FNL.pdf](http://www.denverlawreview.org/storage/2012_keyes_symposium/KeyesProgram_FNL.pdf).

urbs were not content to remain isolated enclaves or gated communities. Rather, many saw themselves as major players in their own right in the newly constituted and decentered metropolitan landscape. And in becoming major players in the solicitation of both people and resources to their communities, suburbs communicated subtle, but nonetheless powerful, messages about who would and would not be welcomed.

### III. THE RISE OF THE POST-RACIAL COLOR-BLIND METROPOLIS

Until I was eight years old, I was bused to a Denver public school with roughly equal numbers of African American children from northeast Denver, Chicana/o children from northwest Denver, and White children from southwest Denver. In the classroom, on the playground, in before- and after-school care, and on the bus that most of us rode every day, race played a daily and organizing role in each of our lives. It was during this time that I learned racial epithets, both as terms of endearment and as vicious name-calling, for each group. It was also during this time that I formed deep and long-lasting relationships with kids who came to love the chili verde my mother made at home. We played the Atari and Commodore 64, built tree houses and went fishing, and rode our bikes through subdivisions that littered the landscape. During summer break, I would ride the public bus to visit friends on the opposite side of town. There, I was introduced to the Sugarhill Gang and Grandmaster Flash, street fairs, and cruising.

When my neighborhood was de-annexed from the City and County of Denver, I was still bused because my fairly new neighborhood subdivision did not yet have a school. Indeed, I rode a bus in this suburban school district until I was sixteen years of age. Unlike the Denver Public Schools, this district had very few Chicana/o children and even fewer African Americans. It was not uncommon for us to be called names. "Beaner," "spick," and "Mexican piece of shit" were all taunts that were directed at me until the time I graduated from high school. Even though such name-calling happened in isolated circumstances, it nevertheless marked me as different. When I was old enough to drive, I was repeatedly stopped by the police and often cited for some moving violation. My White friends, on the other hand, might be pulled over for speeding but would almost always get a warning. I learned very quickly from such experiences that I had a race, but most of my classmates and friends, at least in their own eyes, did not.

The changes wrought by the metropolitan revolution had a profound impact on the way that race came to be experienced in the United States. Especially important was the way that new suburban residential and commercial developments in metropolitan areas like Denver seemed a universe away from the "urban crises" tearing apart cities like Boston, Chicago, Cleveland, Detroit, Newark, and New York, or from the massive resistance to the civil rights movement gripping the former states of

the Confederacy. To be sure, the vision of most urban and metropolitan planners, architects, and policy makers in the second half of the twentieth century centered around “grand schemes to revitalize the nation’s cities. Artists’ renderings of slick glass and steel skyscrapers set in sunny plazas appeared in metropolitan newspapers and city planning reports, and nurtured hopes of a golden future.”<sup>73</sup>

It was a metropolitan future, importantly, that was meant to be post-racial.<sup>74</sup> One revealing sense of this is captured in a 1959 *New York Times Magazine* article authored by Columbia University Professor Allan Nevins. In his article assessing the metropolitan revolution gripping the nation, Nevins narrated a fictional conversation among many of the luminaries of American history about what the United States would look like in 1970.<sup>75</sup> For many of Nevins’s characters, urban decay and suburbanization posed a troubling theme.

“If I ever saw a nation headed for trouble,” squeaked [Nevin’s imaginary] Horace Greeley, “it is that republic of mine. . . . How can a nation so top-heavy with city dwellers keep its stability? When I said ‘Go West,’ I meant go to farming. Instead, they have gone to Los Angeles, the largest city in the most populous state.”<sup>76</sup>

Sounding an equally despondent tone, Nevins’s Benjamin Franklin lamented:

I’ll tell you *my* idea of the greatest shortcoming of the United States in the last decade or so. . . . What disturbs me is the failure to keep up with urban and suburban growth in town planning, in housing, in roads and parks, and above all, in schools.<sup>77</sup>

Two of Nevins’s historical characters, however, challenged such naysaying. Nevins’s Henry Ford, for instance, boasted that “[t]he whole trend has been just what I predicted in [the] Model T days, away from the cities and into the suburbs. . . . Out of those 210 million [predicted to live in the United States in 1970], we’ve got a good third in [these] . . . *subtopias*.”<sup>78</sup> Perhaps adding substance to this point, Nevins’s Booker T. Washington interjected:

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73. Jon C. Teaford, *Urban Renewal and Its Aftermath*, 11 HOUSING POL’Y DEBATE 443, 443 (2000). Like many cities across the United States, Denver was similarly intoxicated by the dreams and visions of postwar planners. See MAXINE KURTZ & RALPH W. CONANT, CITY OF DESTINY: DENVER IN THE MAKING 39–70 (2008).

74. For a comprehensive overview of postracialism as a concept, see generally Sumi Cho, *Post-racialism*, 94 IOWA L. REV. 1589 *passim* (2009).

75. See Allan Nevins, *The U.S. in 1970—Three Forecasts*, N. Y. TIMES MAG., May 17, 1959, at 25.

76. *Id.*

77. *Id.* (internal quotation marks omitted).

78. *Id.* (emphasis added) (internal quotation marks omitted).

What strikes me most . . . is the remarkable rise in the homogeneity of the population. . . . [T]he line between countryman and city man [is] completely blurred. . . .

But the great gain is the Negro's. So many have moved into the North and *West*, so many have gotten into industry on the same assembly lines with [W]hites, so many have pushed into business and lately even the professions, that *the color line begins to blur, too*.<sup>79</sup>

Just as Allan Nevins's fictional Booker T. Washington hoped that the metropolitan revolution would begin to eradicate and thereby eliminate racial differences in the United States, so too did many others believe that the United States was well on the way towards becoming a post-racial society.

The large-scale rejection of the racial genocide perpetuated by Nazi Germany, the Cold War battle for the hearts and minds of the developing world, decisions such as *Brown*, and grand legislative enactments such as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968 were all indicators for some that racial thinking and discrimination on the basis of race or color were well on their way to becoming relics of an ugly racial past.<sup>80</sup> Once formal barriers were removed, so the thinking went, all Americans would be free to act in a color-blind way.<sup>81</sup> Post-racialism and color-blindness thus became the same side of the same coin that would fund the metropolitan future. Consumption and meritocratic individualism, not race, would be the only organizing principle determining where one lived, worked, played, raised families, and sent one's children to school. And to the extent that communities in fact emerged as racially concentrated, this would be the product of "de facto" personal and individual preference, and not the product of any overt state-based project.

Lost in the certainty of what these momentous events signified was the fact that the metropolitan revolution had embedded deep racial fault lines in the fragmented and decentered metropolitan landscape. One's own decisions about where to live, build a home, raise a family, and send one's children to school were not made in isolation. Rather, these cumulative decisions were intricately connected to federal, state, and local housing, municipal and county government, and land use laws and policies that exacerbated and, in many cases, created enduring patterns of racial residential segregation.<sup>82</sup> The aggregate effect of such behavior

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79. *Id.* (emphasis added) (internal quotation marks omitted).

80. See generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* *passim* (2002); NANCY MCLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* *passim* (2008); Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 *passim* (1980).

81. For a very succinct description of this process, see Mario L. Barnes, *Racial Paradox in a Law and Society Odyssey*, 44 LAW & SOC'Y REV. 469, 480 (2010).

82. Romero, *Spatialization of Color(blindness)*, *supra* note 12, at 968–83.

was to create not a post-racial or color-blind metropolitan landscape but one of profound racial design. According to one critic, “[n]ew municipal buildings, new roads and highways, urban renewal, and public playgrounds and parks . . . seem[] to present means by which a segregation-minded community can improve [its] municipal facilities, while achieving the intended elimination of Negroes in certain areas.”<sup>83</sup>

The sprawl and fracturing of metropolitan America reinforced color-blindness and color-consciousness in troubling ways. While middle-class, almost exclusively White Americans settled in the exploding suburbs across the nation, this emerging “silent majority” denied, almost without fail, that a suburban, consumption-oriented, middle-class lifestyle “depended upon government programs that provided massive subsidies for suburban sprawl and efficient implementation of residential segregation.”<sup>84</sup> Indeed, federal, state, and local government law and policy made a “racially exclusive version of the American Dream affordable for [W]hite suburban families,” while those same policies kept many communities of color confined to “compact ghetto[s] . . . on the other side of downtown.”<sup>85</sup> Because the legal remedy of busing to achieve racial integration provided a powerful challenge to this vision as well as to the spatial order upon which it was sustained, suburbanites, policy makers, and jurists worked with great fervor to contain and thereby deny the deep racial divides of the metropolitan landscape.<sup>86</sup> To be sure, the emergence of the *de facto*–*de jure* distinction in so-called Northern desegregation litigation and a court’s color-blindness to land use, real estate, and

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83. Joseph A. Milchen, Note, *Unconstitutional Racial Classification and De Facto Segregation*, 63 MICH. L. REV. 913, 922 (1964); see also STEPHEN W. BENDER, *TIERRA Y LIBERTAD: LAND, LIBERTY, AND LATINO HOUSING* 59–93 (2010) (exploring covert forms of land use planning and local government law to exclude Latina/os from neighborhoods and suburbs); DAVID M.P. FREUND, *COLORADO PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA passim* (2010) (examining national and local race-neutral policies that cordoned off sprawling suburbs from central cities to create a form of color-blind racial apartheid in the United States); Charles S. Aiken, *Race as a Factor in Municipal Underbunding*, 77 ANNALS ASS’N AM. GEOGRAPHERS 564, 565 (1987) (documenting the resistance of White-dominated suburban and exurban municipal governments to annex Black communities beyond the municipalities’ corporate boundaries).

84. MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH I* (2006).

85. *Id.* Working in conjunction with state policy were the exploitative and predatory actions of the real estate industry, which used contract selling, steering, red-lining, and questionable financing practices to create, maintain, and expand segregated neighborhoods. See generally BERYL SATTER, *FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA passim* (2009).

86. It should therefore come as no surprise that “millions of [W]hite homeowners . . . rejected race-conscious liberalism as an unconstitutional exercise in social engineering and an unprecedented violation of free-market meritocracy.” LASSITER, *supra* note 84, at 2. Historian Becky Nicolaides documents how municipalities such as South Gate in the Los Angeles metropolitan area acted in their own highly racialized self-interest, especially as school integration threatened to pierce the corporate boundaries of the city. BECKY M. NICOLAIDES, *MY BLUE HEAVEN: LIFE AND POLITICS IN THE WORKING-CLASS SUBURBS OF LOS ANGELES, 1920–1965*, at 272–327 (2002); see also Daniel Martinez HoSang, *Racial Liberalism and the Rise of the Sunbelt West: The Defeat of Fair Housing on the 1964 California Ballot*, in *SUNBELT RISING*, *supra* note 49, at 188, 188–213 (examining politics behind a successful change to the California constitution that made racial discrimination in housing a constitutionally protected practice).

other local government decisions<sup>87</sup> exemplified how law worked to rationalize segregation and inequality in the post-racial metropolitan America.

*Keyes* powerfully reflects these trends and changes. One of the great assumptions of so-called Northern school desegregation suits was that the state or local governments in those locales never engaged in formal projects of racial discrimination or segregation. Especially in the urban and metropolitan West, cities such as Denver were viewed as relative racial utopias.<sup>88</sup> Nevertheless, the urban and metropolitan racial landscape revealed the many ways that communities of color were marked, isolated, and contained by the state. Until 1957, for instance, it was the public policy of the State of Colorado to enforce racially restrictive covenants.<sup>89</sup> Developers used such racial covenants both within and outside the jurisdictional boundaries of the City and County of Denver until the late 1940s, and they appeared in greatest concentration in Denver's exploding suburban counties.<sup>90</sup> Although the Supreme Court confirmed Judge Doyle's finding that the manipulation of attendance boundaries and other acts by the school board created a presumption of de jure segregation throughout the entire Denver public school district (the largest in the state at that time), subsequent reticence by the school board to fully desegregate the entire school district as well as further jurisprudence in the case indicated the limited scope of the remedy to integrate Denver's schools.<sup>91</sup>

Perhaps the greatest barrier preventing implementation of the *Keyes* decision and the precision by which a color-blind but nonetheless racialized metropolitan landscape was realized occurred as an extension of the water, annexation, and land use politics described in Part II. Whereas the City and County of Denver aggressively sought to grow through annexation of its suburban periphery into the 1960s and 1970s, it nonetheless

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87. Romero, *Spatialization of Color(blindness)*, *supra* note 12, at 974–97.

88. See, e.g., WOODWARD & ARMSTRONG, *supra* note 21, at 260 (noting that Denver was “a city of relative racial harmony”).

89. Capitol Fed. Sav. & Loan Ass'n v. Smith, 316 P.2d 252, 255 (Colo. 1957). During the 1940s, for instance, African Americans and Latina/os were concentrated in the Denver metropolitan area to a grand total of eight census tracts all within the urban core of the City and County of Denver. U.S. NAT'L PARK SERV., *supra* note 55, at 11.

90. U.S. NAT'L PARK SERV., *supra* note 55, at 86–88, 178–84. Some of Denver's largest and most influential homebuilders deployed racially restrictive covenants. A typical covenant was one like that promulgated by Frank Burns, one of Denver's largest homebuilders in the postwar period that contained a restriction such as “[o]nly persons of the Caucasian race shall own, use or occupy any dwelling or residence erected upon said lots or tracts.” DECLARATION OF PROTECTIVE COVENANTS, BURNS BRENTWOOD SUBDIVISION FILING NO. 2 IN THE CITY AND COUNTY OF DENVER I (1949) (on file with author).

91. See Moran, *supra* note 1, at 195–96, 202–12; Rachel F. Moran, *Untoward Consequences: The Ironic Legacy of Keyes v. School District No. 1*, 90 DENV. U. L. REV. 1209, 1215–17 (2013); Romero, *¿La Raza Latina?*, *supra* note 12, at 266–69 (exploring how limitations on *Keyes*'s integration plan greatly limited the remedy available to Mexican American litigants in the case); Brown-Bailey, *supra* note 1, at 99–180 (examining the Denver school board's reluctance to adopt, and the eventual dismantling of, the court-ordered desegregation remedy).

was a city that had much greater numbers of non-Whites than did its suburban neighbors.<sup>92</sup> It was evident, moreover, that as soon as the related issues of integration of schools and civil rights emerged on a large-scale in Denver, suburbanites—through their municipal governments and school boards—moved aggressively to block the growth of the City and County of Denver and of the Denver Public Schools.<sup>93</sup>

The City of Greenwood Village and its companion Cherry Creek School District provide a telling case study. The city was founded in 1950 to preserve its “rural” character, and during the 1960s and 1970s it pursued an aggressive annexation policy to stop Denver from growing to the southeast of the metropolitan area. As a result, Greenwood Village almost doubled in size, supporting not the rural, agrarian lifestyle promoted in its 1950s plan but instead becoming a bastion of the ubiquitous suburban subdivisions of ranch, tri-level, and modernist single-family homes supported by strip malls and the commercial potential of the emerging Denver Tech Center.<sup>94</sup> At the same, the Cherry Creek School District supported such annexations because it feared losing students and the revenue they brought to the school district’s bottom line.<sup>95</sup> Fearing that the city would be brought into the integration “issue” as a result of Judge Doyle’s “forced busing,” Greenwood Village and its former Mayor and then-State Representative Freda Poundstone drafted changes to the Colorado constitution that not only severely restricted the ability of the City and County of Denver to grow through annexation but also prevented school districts from busing to achieve racial balance.<sup>96</sup>

Touted by its supporters as a measure to deprive the City and County of Denver of power over the metropolitan area, the state constitutional amendment greatly limited the ability of the city to acquire land through annexation and use this process as well as busing to end metropolitan educational segregation.<sup>97</sup> One editorial written shortly after the changes to the Colorado constitution lamented:

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92. See CTR. ON URBAN & METRO. POLICY, THE BROOKINGS INSTITUTION, LIVING CITIES: THE NATIONAL COMMUNITY DEVELOPMENT INITIATIVE, DENVER IN FOCUS; A PROFILE FROM CENSUS 2000, at 15–22 (2003).

93. James & Gerboth, *supra* note 40, at 150–54.

94. For examples of housing trends in the Denver area during this time period, see Ken Schroepfel, *Denver's Single-Family Homes by Decade: 1960s*, DENVERURBANISM, <http://denverurbanism.com/2012/06/denvers-single-family-homes-by-decade-1960s.html> (last visited May 3, 2013).

95. See CHERRY CREEK SCH. DIST., ANNEXATION FACTS AND QUESTIONS RELATED TO CHERRY CREEK SCHOOL DISTRICT (Mar. 10, 1967) (on file with author); James & Gerboth, *supra* note 40, at 153.

96. See COLO. CONST. art. XIV, § 3, art. XX, § 1 (1974); see also COLO. CONST. art. IX, § 8 (1974). A general analysis of these various constitutional provisions can be found in DALE A. OESTERLE & RICHARD B. COLLINS, THE COLORADO STATE CONSTITUTION 223–25, 311–12, 399–401 (2011).

97. See STEPHEN J. LEONARD & THOMAS J. NOEL, DENVER: MINING CAMP TO METROPOLIS 379 (1990).

It is, I think, right to suppose that the primary reason for the easy passage of the Poundstone Amendment was the suburbs' fear of busing. If, in other words, there is to be a ghetto, and busing is to relieve the pressures and injustice of the ghetto, let it all be within the City and County—and school district—of Denver.<sup>98</sup>

According to one later study, the Amendment allowed "Colorado voters permanently [to] split Denver from its suburbs in the 1974 election. Suburbanites decided that remaining separate from the city would permit them to maintain *racially* and economically segregated communities and schools, and to thereby evade the social and economic problems of the central city."<sup>99</sup>

It is taken as a truism that the "forced busing" decisions in cases like *Keyes* led to White suburban flight and were a significant factor in the metropolitization of America. Those trends, however, were evident long before *Keyes* found its way into court and, instead, masked more pernicious and harder-to-define forces contributing to inequality and segregation in the newly dominant metropolitan areas that came to define the United States by 1970. Busing was not the beginning but the end of a massive restructuring of the racial geography of urban and suburban America. Powerful economic and cultural incentives—including "new housing markets subsidized by the federal government[,] low taxes underwritten by relocating industry,"<sup>100</sup> and the containment of public housing, urban renewal, and busing orders to center cities<sup>101</sup>—created a metropolitan landscape that separated racially homogenous communities across vast geographic space. The "ascendance of color-blind ideology . . . depended upon the establishment of structural mechanisms of exclusion that did not require individual racism by suburban beneficiaries in order to sustain [W]hite class privilege and maintain barriers of disadvantage facing urban minority communities."<sup>102</sup> This ideology, in turn,

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98. James & Gerboth, *supra* note 40, at 158 n.87 (quoting John Bromley, Editorial, DENVER POST, 1974). James and Gerboth's study noted that Freda Poundstone, the author of the Amendment, "intentionally stoked suburban fears by raising the specter of court-ordered busing on a metropolitan scale." *Id.*

99. *Id.* at 163 (emphasis added). According to Professor Limerick, the "Poundstone Amendment also carried the consequence, unintended by its proponents, of excluding unannexed suburban areas from the Denver Water Board's core area of service." LIMERICK & HANSON, *supra* note 59, at 193. In contrast to postwar patterns across the United States in which center cities were invariably weakened by suburban gains, the City and County of Denver's "significant holdings in water rights [as well as its] vast infrastructure that would be impossible to duplicate, the city held assets that the suburbs could not match." *Id.*; see also Bennett Bear Creek Farm Water & Sanitation Dist. v. City & Cnty. of Denver, 928 P.2d 1254, 1271–73 (Colo. 1996) (assessing impact of Poundstone Amendment in upholding the broad authority of the DWB to increase the water rates it charged its suburban users in disproportion to the lower rates that it charged city residents). I explore some national examples about the politics of race and water development in Tom I. Romero, II, *The Color of Water: Observations of a Brown Buffalo on Water Law and Policy in Ten Stanzas*, 15 U. DENV. WATER L. REV. 329, 355–58 (2012).

100. SELF, *supra* note 52, at 16.

101. Romero, *Spatialization of Color(blindness)*, *supra* note 12, at 967, 1009–12.

102. LASSITER, *supra* note 84, at 4.



“rationalized segregation” while conflating “[W]hiteness and property ownership with upward social mobility.”<sup>103</sup> Because metropolitan areas like Denver were not seemingly burdened with the sins of the biracial South, color-blindness made racial difference for the majority of those living in insulated, insular, and unconnected suburban communities a relic of the past. Yet this was a past whose biracial premises could neither contain nor account for the multiracial present that would shape future battles in metropolitan America.

#### IV. FROM A “TRI-ETHNIC” TO A MULTIRACIAL METROPOLITAN LANDSCAPE

I graduated from high school in a suburban school district very different from the “tri-ethnic” Denver Public Schools in which I started my primary education. One of a very few self-identified Chicanos in my high school, I was deeply influenced by my own family’s experiences in the larger history of Mexican Americans in the United States.<sup>104</sup> Such experiences impacted me in a profound way and drove my decision to go to college at the University of Denver and to graduate school at the University of Michigan. First, as an undergraduate student in Denver and later in Michigan, I had an unprecedented opportunity to study, explore, and make my own contribution towards curricula that are multiracial in scope and orientation.

Moreover, not long after I entered law school, I discovered that I was part of the University of Michigan Law School first-year class that Barbara Grutter wanted to join. During my 1L year, lawyers for the Center for Individual Rights filed *Grutter v. Bollinger*,<sup>105</sup> and Grutter and her legal team successfully subpoenaed my admissions file at the law school. Most striking was the litigation’s fixation on my self-identified membership in a “minority” group. Rather than asking the trial court to subpoena the admissions files of all students, the litigation intentionally targeted only certain “minority” students and assessed our admissions vis-à-vis Grutter and other rejected White applicants based solely on this fact.<sup>106</sup>

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103. SELF, *supra* note 52, at 16; see also JAMES RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 3 (2010) (arguing that the suburban urban divide “has been the fault line of public education . . . doing more than anything else to define and shape the educational opportunities of [racially isolated] public school students”).

104. Justice Brennan noted the tri-ethnic distinctiveness of Denver in *Keyes v. School District No. 1*, 413 U.S. 189, 197 (1973). I explore the significance of the term “tri-ethnic” as well as the shifting language of racial and color categorization in relation to my own life experiences in Romero, *¿La Raza Latina?*, *supra* note 12, at 245–48, 257–69.

105. 539 U.S. 306, 343 (2003) (holding that a law school admissions process that considered race as one factor among many did not violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because the program was narrowly tailored to serve the compelling interest of attaining a diverse student body).

106. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 836–40 (E.D. Mich. 2001) (assessing the data presented by the plaintiffs).

This litigation strategy mirrored a common tendency to lump members of all "minority" groups together despite being racialized in very different ways. In what may have been the most representative example of this process during my time in law school, one of my fellow law students declared the following in a public forum held by two Michigan lawmakers opposing the university's admissions program: "[M]aybe they're really not my equal. Do I want to be in a study group with this person? I just don't know anything about them anymore."<sup>107</sup>

*Grutter*, like much of the anti-affirmative action litigation that both preceded the case and has come after, tends to lump "non-Whites" together as the "unqualified" and "undeserving" "them."<sup>108</sup> The fixation on so-called preferences given to all students of color, however, has obscured what was perhaps Judge Doyle and later Justice Brennan's most thoughtful observation in the *Keyes* litigation: Though of *different* origins, the consequence of the discrimination experienced by non-White students in the United States was and is often the same.<sup>109</sup> Thirty years after *Keyes*, Justice O'Connor's oft-quoted observation in *Grutter* that "race *unfortunately* still matters" in the United States<sup>110</sup> represented a statement that was certainly true but nonetheless incomplete. Just as profound changes in urban and suburban form transformed completely the nature of race relations in the United States, so too did demographic shifts from Latin America and the Pacific alter the nation's color lines, thus complicating how and in what ways race actually does matter beyond the Black and White binary.<sup>111</sup> Whereas color-blind post-racialism

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107. Jon Swartz, Remarks at the Public Forum in Shelby Township, Mich. (Sept. 30, 1997), quoted in Trevor W. Coleman, Editorial, *Stereotypical Thinking Mars the Debate on Affirmative Action*, DETROIT FREE PRESS, Oct. 2, 1997, at 14A. Another person at the rally, who was described as a "soft-spoken" and "congenial" woman, made the following troubling statement in denouncing affirmative action: "Even during the days of slavery, the [White] indentured servant had it much more difficult than [did] the slaves. . . . Indentured servants had to work during pregnancy. The slave had the time off because the slave carried the master's baby. So there were preferences for [B]lack even back then!" Rebecca Paquette, Remarks at the Public Forum in Shelby Township, Mich. (Sept. 30, 1997), quoted in Coleman, *supra*.

108. The legal battleground over the contemporary use of affirmative action policies in higher education began with the Supreme Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and continues to this very day in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), vacating and remanding 631 F.3d 213 (5th Cir. 2011).

109. *Keyes*, 413 U.S. at 197.

110. *Grutter*, 539 U.S. at 333 (emphasis added).

111. See generally MARK BRILLIANT, *THE COLOR OF AMERICA HAS CHANGED: HOW RACIAL DIVERSITY SHAPED CIVIL RIGHTS REFORM IN CALIFORNIA, 1941–1978 passim* (2010). Professor Brilliant participated in the symposium to discuss his current research on the transition from school busing to school finance litigation in the 1970s and 1980s as part of the larger context of current school finance litigation in Colorado. See Mark Brilliant, Associate Professor, Department of History, University of California Berkeley, Panel 6: K–12 Public Education Today: The Legacy of *Keyes* and the Promise of *Lobato* in the Metropolitan Community at the Denver University Law Review Symposium: Forty Years Since *Keyes v. School District No. 1*; Equality of Educational Opportunity and the Legal Construction of Modern Metropolitan America (Feb. 2, 2013), available at <http://mediaserv.law.du.edu/flashvideo/specialevents/2013-Law-Review-Symposium/2013-Law-Review-Symposium.htm>. Moderated by Dr. Joyce Sterling, Professor of Law, University of Denver Sturm College of Law, the panel included Dr. Mark Brilliant, Associate Professor, Department of History, University of California Berkeley; Kathleen J. Gebhardt, Founder and Executive Director,

established a firm foothold in the metropolitan landscape, so too did multiracialism find a place to challenge and contest racial segregation, exclusion, alienation, and isolation. Different in form and in kind from the biracial desegregation struggles of the mid-twentieth century, the emergence of multiracialism has inaugurated a new phase in the metropolitan revolution.

From its inception, *Keyes* was a misnomer in that national commentators labeled it as a Northern case.<sup>112</sup> Both Judge Doyle and Justice Brennan's recognition that Denver was tri-ethnic revealed a multiracial sensibility that, at the time, made it a case that more accurately reflected demographic realities in the metropolitan American West,<sup>113</sup> but that would soon be the reality of metropolitan growth and settlement in an increasingly multiracial urban and suburban United States. Nevertheless, as Professor Michael Olivas details in his article, a biracial sensibility in the design and construction of the *Keyes* case, especially the lack of Latina/o counsel in the formative stages of the litigation, contributed to major shortcomings for the remedy that would be available to the Chicana/o students whose interests were not always the same as those of Black students.<sup>114</sup> The legacy of this failure on the Denver Public Schools is explored by Dean Rachel Moran, highlighting the ongoing legal commitment to bilingual education that emerged out of *Keyes* when Latina/o lawyers became involved in representing the distinct needs and interests of the Hispanic educators.<sup>115</sup>

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Children's Voices, Inc.; Taylor Lobato, Named Plaintiff in *Lobato v. State of Colorado*; and Terry R. Miller, Associate, Davis Graham & Stubbs LLP. See DENV. U. L. REV., FORTY YEARS SINCE *KEYES* V. SCHOOL DISTRICT NO. 1: EQUALITY OF EDUCATIONAL OPPORTUNITY AND THE LEGAL CONSTRUCTION OF MODERN METROPOLITAN AMERICA 12 (Jan. 31–Feb. 2, 2013), available at [http://www.denverlawreview.org/storage/2012\\_keyes\\_symposium/KeyesProgram.FNL.pdf](http://www.denverlawreview.org/storage/2012_keyes_symposium/KeyesProgram.FNL.pdf). For a discussion of the transition from school busing to school finance litigation in the context of "America's new Gilded Age," see Mark Brilliant, *From Integrating Students to Redistributing Dollars: The Eclipse of School Desegregation by School Finance Equalization in 1970s California*, 7 CAL. LEGAL HIST. 229, 229 (2012). For more information on school finance litigation in Colorado, see Romero, *supra* note 3, at 789–91, and *Lobato Case Primer*, EDNEWS COLO., <http://www.ednewscolorado.org/lobato-case-primer> (last visited May 3, 2013).

112. See, e.g., Jencks, *supra* note 22, at 9.

113. See BRILLIANT, *supra* note 111, at 4–5; Shana Bernstein, *From the Southwest to the Nation: Interracial Civil Rights Activism in Los Angeles*, in SUNBELT RISING, *supra* note 49, at 141, 142–44; see also Romero, *Spatialization of Color(blindness)*, *supra* note 12, at 986, 1003–05. More typical of the biracial Northern cases are those described in DAVISON M. DOUGLAS, JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954 (2005). By the 1980s, Denver was not just tri-ethnic, but truly multiracial as Asian immigrants from Cambodia, Laos, and Vietnam became a sizeable portion of the Denver public school population. Moran, *supra* note 1, at 201.

114. Michael A. Olivas, *From a "Legal Organization of Militants" into a "Law Firm for the Latino Community": MALDEF and the Purposive Cases of Keyes, Rodriguez, and Plyler*, 90 DENV. U. L. REV. 1151, 1153–56 (2013).

115. Moran, *supra* note 91, at 1219–22. Symposium presenter Professor Catherine Horn explored the patterns and consequences of resegregation after the *Keyes* desegregation order was lifted in 1995 in CATHERINE L. HORN & MICHAEL KURLAENDER, CIVIL RIGHTS PROJECT, THE END OF *KEYES*—RESEGREGATION TRENDS AND ACHIEVEMENTS IN DENVER PUBLIC SCHOOLS 7–10 (2006).

The tri-ethnic and multiracial character of the urban school district and appropriate remedies to counter segregation, however, obscured a much more powerful and profound trend across the entire metropolitan area: the multiracial integration of the suburbs at the turn of the twenty-first century. Spearheaded first by Latina/os and Asians and Pacific Islanders and then by African Americans as well as by African immigrants and their children, communities of color began settling in large numbers in those same suburban communities that had effectively excluded them during the second half of the twentieth century. Importantly, many of those same trends that had pulled Whites into the suburbs continued to pull them into new developments in the exurban periphery, while communities of color moved to the older but affordable housing stock of the suburbs built between the 1950s and 1980s.<sup>116</sup> As a recent study by Myron Orfield and Thomas Luce document:

[r]acially diverse suburbs are growing faster than their predominantly [W]hite counterparts. Diverse suburban neighborhoods now outnumber those in their central cities by more than two to one. [Forty-four] percent of suburban residents in the 50 largest U.S. metropolitan areas live in racially integrated communities, which are defined as places between 20 and 60 percent non-[W]hite.<sup>117</sup>

Although suburbs maintain a solid White majority, their diversity is multiracial because more African Americans, Latina/os, and Asians live in suburbs than in core cities.<sup>118</sup> The consequence of this shift is that “[t]he historically sharp racial and ethnic divisions between cities and suburbs in Metropolitan America are more blurred than ever.”<sup>119</sup>

Moreover, unlike the homogenous race- and class-based suburban ethos that dominated metropolitan life during the busing era,<sup>120</sup> increasingly multiracial suburbs are socially diverse and rarely color-blind in their politics. During the presidential election of 2012, for instance, Latina/os in Denver’s suburban ring helped give Barack Obama a convincing victory in the battleground state of Colorado.<sup>121</sup> Animated by “racial”

116. WILLIAM H. FREY, METRO. POLICY PROGRAM, BROOKINGS INST., MELTING POT CITIES AND SUBURBS: RACIAL AND ETHNIC CHANGE IN METRO AMERICA IN THE 2000s, at 10–11 (2011).

117. MYRON ORFIELD & THOMAS LUCE, INST. ON METRO. OPPORTUNITY, UNIV. OF MINN. LAW SCH., AMERICA’S RACIALLY DIVERSE SUBURBS: OPPORTUNITIES AND CHALLENGES 2 (2012).

118. BROOKINGS INST., *supra* note 45, at 51, 60–62.

119. FREY, *supra* note 116, at 13.

120. See generally LASSITER, *supra* note 84 (describing suburban politics in the Sunbelt South); LISA MCGIRR, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT (2001) (describing the development of suburban philosophy through the lens of Orange County); NICOLAIDES, *supra* note 86 (describing life and politics in Los Angeles’s city of South Gate in 1920–1965).

121. MARK HUGO LOPEZ & PAUL TAYLOR, PEW HISPANIC CTR., LATINO VOTERS IN THE 2012 ELECTION 4–5 (2012). In addition, Orfield and Luce note that multiracial suburbs show greater diversity in political affiliation as their residents “are more likely than [are residents of] other types of suburbs to switch parties from one election to another and, as a result, can often decide the balance of state legislatures and the Congress, or determine the outcome of gubernatorial and presidential elections.” ORFIELD & LUCE, *supra* note 117, at 11.

issues that impacted the Latina/o community directly, such as immigration, the presidential election revealed the changing multiracial contours of the American metropolitan landscape.

This metropolitan landscape, however, continues to be plagued by the history described in this Essay. The persistent patterns of unequal growth, racial isolation, economic discrimination, and social, as well as political, inequality that once defined the urban versus suburban divide are evident in varying degrees in the nation's multiracial suburbs.<sup>122</sup> As Professor John A. Powell so eloquently states: "We cannot simply assume that the suburbs will be the location of opportunity or that the central city will be the location of decline. The operative divide, then, is not city versus suburb but *opportunity* versus isolation."<sup>123</sup>

Ironically, in the new multiracial metropolitan America, "suburbs represent some of the nation's greatest hopes and its gravest challenges."<sup>124</sup> Satisfactory responses to those challenges, as Dean Kevin Johnson details in his essay on the struggle for undocumented Latina/o students, need to account for the very different life experiences and legal barriers encountered by multiracial students and their families.<sup>125</sup> In addition to *Keyes*'s recognition about the multiracial reality of the United States, the case still stands as a powerful equal protection tool to achieve integration wherever segregation exists. As Professor Orfield noted during the live symposium, *Keyes* provides lawyers with some of their best and strongest tools to legally challenge "funny," "gerrymandered," and altogether "odd" patterns of suburban school inequality.<sup>126</sup> This is because *Keyes* gives courts the discretion to infer "segregative intent" broadly. According to the Court:

[w]hat is or is not a segregated school will necessarily depend on the facts of each particular case. In addition to the racial and ethnic com-

122. Accounts of this are documented extensively in BENDER, *supra* note 83, at 64–70 (examining various ways suburbs have excluded undocumented Latina/o immigrants); MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* 28–29, 49–64 (2002); ORFIELD & LUCE, *supra* note 117, at 25–34; and Camille Z. Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOC. 167, 175–76, 197 (2003) ("Patterns of suburban segregation mirror those of the larger metropolitan area of which they are a part . . .").

123. John A. Powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUS. & CMTY. DEV. L. 188, 217 (2003) (emphasis added).

124. ORFIELD & LUCE, *supra* note 117, at 2. Many of the opportunities of the integration of metropolitan areas on public education are explored in RYAN, *supra* note 103, at 281–85.

125. Kevin R. Johnson, *The Keyes to the Nation's Educational Future: The Latina/o Struggle for Educational Equity*, 90 DENV. U. L. REV. 1231, 1247–49 (2013).

126. Myron Orfield, Dir., Inst. on Metro. Opportunity & Professor of Law, Univ. of Minn. Law Sch., Panel 3: De Facto Segregation and the Neighborhoods and Communities in Which Children Are Raised at the Denver University Law Review Symposium: Forty Years Since *Keyes v. School District No. 1*; Equality of Educational Opportunity and the Legal Construction of Modern Metropolitan America (Feb. 1, 2013), available at <http://mediaserv.law.du.edu/flashvideo/specialevents/2013-Law-Review-Symposium/2013-Law-Review-Symposium.htm>; see also Myron Orfield, *Choice, Equal Protection, and Metropolitan Integration: The Hope of the Minneapolis Desegregation Settlement*, 24 LAW & INEQ. 269, 275 (2006) (describing the legal challenges to school inequality in Minnesota).

position of a school's student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school, must be taken into consideration.<sup>127</sup>

Furthermore, *Keyes* demonstrates the power of pursuing a multiracial litigation strategy where the interests of various racial groups are pursued along different legal paths. Once the Mexican American Legal Defense and Educational Fund entered the litigation, for instance, the linguistic and cultural interests of the Latina/o and other foreign-language students from Cambodia, Laos, and Vietnam resulted in a Language Rights Consent Decree enforceable under the Equal Educational Opportunity Act.<sup>128</sup> As Dean Moran points out, "Of all the outcomes in the litigation, the commitment to bilingual education has proven the most durable, largely because its implementation does not depend on conditions of integration in the schools."<sup>129</sup>

*Keyes* thus remains powerful law for the multiracial twenty-first century because it forces us to consider the undeniable impact of complicated social and demographic factors "beyond the particular schools that are the subjects of those actions."<sup>130</sup> From the issues of school financing found in a state constitution's education clause<sup>131</sup> to the ongoing battles to diversify higher education through affirmative action or legislating

127. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 196 (1973); see also *id.* at 198–202 (listing all of the collective acts of the Denver Public Schools Board of Education that served as evidence of segregative intent).

128. *Keyes v. Sch. Dist. No. 1*, No. C-1499 (D. Colo. Aug. 17, 1984); see also Keith Baker, *Selecting Students for Bilingual Education Under the Keyes Agreement*, 1 LA RAZA L. J. 330, 338–40 (1986); Peter Roos, *Implementation of the Federal Bilingual Education Mandate: The Keyes Case as a Paradigm*, 1 LA RAZA L. J. 257, 262–63, 265–68 (1986).

129. Moran, *supra* note 91, at 1212.

130. *Keyes*, 413 U.S. at 203 (emphasis added).

131. See, e.g., *Lobato v. State*, No. 05CV4794 (Colo. Dist. Ct. Denver Cnty. Dec. 9, 2011), *rev'd*, No. 12SA25, 2013 WL 2349302 (Colo. May 28, 2013). The live symposium explored the issue of school financing the future of school administration through the lens of educators and policy makers. See Panel 5: An Evaluation of Metropolitan K–12 Public Education Through the Lenses of Educators, Administrators, and Policy Makers at the Denver University Law Review Symposium: Forty Years Since *Keyes v. School District No. 1*; Equality of Educational Opportunity and the Legal Construction of Modern Metropolitan America (Feb. 1, 2013), available at <http://mediaserv.law.du.edu/flashvideo/specialevents/2013-Law-Review-Symposium/2013-Law-Review-Symposium.htm> (discussing the role and impact of *Keyes* specifically and law and policy generally in meeting the demands of students and parents in providing equal and excellent education). Moderated by Dr. Gregory M. Anderson, Dean and Associate Professor, University of Denver Morgridge College of Education, the panel included Amie Baca-Oehlert, Vice President, Colorado Education Association; Dr. Sharon R. Brown-Bailey, Chair, Black Round Table Education Committee; John L. Barry, Superintendent, Aurora Public Schools; Senator Michael F. Bennet, State of Colorado, U.S. Senate; Elaine Gantz Berman, Member, Colorado State Board of Education; Tom Boasberg, Superintendent, Denver Public Schools; Dr. Elizabeth Celia-Fagen, Superintendent, Douglas County School District; and Senator Michael Johnston, Senate District 33, Colorado State Senate. See DENV. U. L. REV., FORTY YEARS SINCE *KEYES V. SCHOOL DISTRICT NO. 1*: EQUALITY OF EDUCATIONAL OPPORTUNITY AND THE LEGAL CONSTRUCTION OF MODERN METROPOLITAN AMERICA 11 (Jan. 31–Feb. 2, 2013), available at [http://www.denverlawreview.org/storage/2012\\_keyes\\_symposium/KeyesProgram\\_FNL.pdf](http://www.denverlawreview.org/storage/2012_keyes_symposium/KeyesProgram_FNL.pdf).

into law the hopes of the “DREAMers,”<sup>132</sup> inequality of educational opportunity (whatever its form) resonates deeply throughout the United States.<sup>133</sup> In the final printed essay to this symposium, Dean Phoebe

132. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013), *vacating and remanding* 631 F.3d 213 (5th Cir. 2011). The live symposium assessed many of these issues impacting higher education, including affirmative action and equality of educational opportunity for non-traditional as well as undocumented students. See Panel 7: Public Education Tomorrow; Opportunities for Young Adults After High School at the Denver University Law Review Symposium: Forty Years Since *Keyes v. School District No. 1*; Equality of Educational Opportunity and the Legal Construction of Modern Metropolitan America (Feb. 2, 2013), available at <http://mediaserv.law.du.edu/flashvideo/specialevents/2013-Law-Review-Symposium/2013-Law-Review-Symposium.htm> (assessing how and in what ways law and policy implicate the right to education and equality in the life cycle of young adults considering higher education, advanced degrees, and vocational training in the science, technology, engineering, and mathematics (STEM)-oriented economy and metropolitan areas of the twenty-first century). Moderated by Dr. Tom I. Romero II, Hughes–Rudd Research Professor and Associate Professor of Law, University of Denver Sturm College of Law, Associate Dean of Institutional Diversity and Inclusiveness and Associate Professor of Law, University of Denver Sturm College of Law, the panel included Devon W. Carbado, Professor of Law, UCLA School of Law; Lia Epperson, Director, S.J.D. Program and Associate Professor of Law, American University Washington College of Law; Dr. Hava Gordon, Director, Gender & Women’s Studies and Associate Professor, Department of Sociology and Criminology, University of Denver; Dr. Catherine Horn, Associate Professor, Department of Educational Psychology, University of Houston; Dr. Arthur C. Jones, Associate Dean for Inclusive Excellence and Clinical Professor of Culture and Psychology, University of Denver–Colorado Women’s College; and Dr. Stephen M. Jordan, President, Metropolitan State University of Denver. See DENV. U. L. REV., FORTY YEARS SINCE *KEYES V. SCHOOL DISTRICT NO. 1: EQUALITY OF EDUCATIONAL OPPORTUNITY AND THE LEGAL CONSTRUCTION OF MODERN METROPOLITAN AMERICA* 13 (Jan. 31–Feb. 2, 2013), available at [http://www.denverlawreview.org/storage/2012\\_keyes\\_symposium/KeyesProgram\\_FNL.pdf](http://www.denverlawreview.org/storage/2012_keyes_symposium/KeyesProgram_FNL.pdf); *Keyes Symposium Program Addendum*, DENV. U. L. REV. (Feb. 1–2, 2013), [http://www.denverlawreview.org/storage/2012\\_keyes\\_symposium/Keyes%20Program%20Addendum.pdf](http://www.denverlawreview.org/storage/2012_keyes_symposium/Keyes%20Program%20Addendum.pdf). Dean Johnson also provides a detailed overview of the “DREAMers” and related legislation as well as policy challenges in Johnson, *supra* note 125, at 1244–46.

133. The scope of these issues, as well as the possibilities of student engagement in challenging racial segregation and educational inequality, is explored in the live symposium’s panels entitled “De Facto Segregation and the Neighborhoods and Communities in Which Children Are Raised” and “Law and the Schools Our Children Attend.” See Panel 3: De Facto Segregation and the Neighborhoods and Communities in Which Children Are Raised at the Denver University Law Review Symposium: Forty Years Since *Keyes v. School District No. 1*; Equality of Educational Opportunity and the Legal Construction of Modern Metropolitan America (Feb. 1, 2013), available at <http://mediaserv.law.du.edu/flashvideo/specialevents/2013-Law-Review-Symposium/2013-Law-Review-Symposium.htm> (examining issues of de facto segregation and a tri-ethnic student body in relation to the role of social, legal, and other forms of segregation in shaping the neighborhoods, peer groups, and identities of the children attending public schools); Panel 4: Law and the Schools Our Children Attend at the Denver University Law Review Symposium: Forty Years Since *Keyes v. School District No. 1*; Equality of Educational Opportunity and the Legal Construction of Modern Metropolitan America (Feb. 1, 2013), available at <http://mediaserv.law.du.edu/flashvideo/specialevents/2013-Law-Review-Symposium/2013-Law-Review-Symposium.htm> (examining the many ways that equality of educational opportunity law in the years and decades after *Keyes* profoundly shaped the educational rights of children in a multiracial and multicultural metropolitan United States). Moderated by Patience Crowder, Director, Community Economic Development Clinic and Assistant Professor of Law, University of Denver Sturm College of Law, Panel 3 included Kevin R. Johnson, Dean and Mabie–Apallas Professor of Public Interest Law and Chicana/o Studies, University of California Davis School of Law; Dr. Daryl J. Macda, Chair and Associate Professor, Department of Ethnic Studies, University of Colorado at Boulder; Dr. Lisa M. Martinez, Associate Professor, Department of Sociology and Criminology, University of Denver; and Myron Orfield, Director, Institute on Metropolitan Opportunity and Professor of Law, University of Minnesota Law School. See DENV. U. L. REV., FORTY YEARS SINCE *KEYES V. SCHOOL DISTRICT NO. 1: EQUALITY OF EDUCATIONAL OPPORTUNITY AND THE LEGAL CONSTRUCTION OF MODERN METROPOLITAN AMERICA* 10–11 (Jan. 31–Feb. 2, 2013), available at

Haddon cautions against the dangers of the “colorblind” path taken by the jurisprudence of the Supreme Court in its most recent affirmative action and school integration litigation.<sup>134</sup> To be sure, just as Dean Haddon recalls the leadership and courage of her aunt, Rachel Noel, to integrate Denver Public Schools back in the 1960s, the *Keyes* case that came out of the rescission of the Noel Resolution reminds us to be bold in our own vision. As the *Keyes* symposium in both its live and printed form makes evident, a multiracial America demands that we have the courage to refuse to turn a blind eye to the realities of our twenty-first century metropolitan landscape rooted in a very present past.

## V. CONCLUSION

There is no question that I have been impacted and influenced by the *Keyes* case. From being bused as a student in the Denver Public Schools to my own scholarly endeavors in the history of equality of educational opportunity in Denver, the case has profoundly shaped my life. Forty years after the United States Supreme Court rendered its decision in *Keyes*, however, the case seems to have faded in obscurity for many. From my own vantage point as a law professor, the case has become, at best, a footnote in constitutional jurisprudence. At worst, *Keyes* has been relegated as inconsequential relative to those school desegregation battles litigated in seemingly more important cities such as Boston and Detroit.<sup>135</sup> As the live and print symposia have demonstrated, this understanding of *Keyes* is greatly limited. Though never living up to its promise to become a Northern—or perhaps more accurately, Western—*Brown v. Board of Education*, the case nevertheless revealed powerful and im-

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[http://www.denverlawreview.org/storage/2012\\_keyes\\_symposium/KeyesProgram\\_FNL.pdf](http://www.denverlawreview.org/storage/2012_keyes_symposium/KeyesProgram_FNL.pdf). Moderated by Nancy Leong, Assistant Professor of Law, University of Denver Sturm College of Law, Panel 4 included Phoebe A. Haddon, Dean and Professor of Law, University of Maryland Francis King Carey School of Law; Rachel F. Moran, Dean and Michael J. Connell Distinguished Professor of Law, UCLA School of Law; Dr. Michael A. Olivas, William B. Bates Distinguished Chair of Law and Director, Institute of Higher Education Law & Governance, University of Houston Law Center.; and Dr. Kate Willink, Assistant Professor, Department of Human Communication Studies, University of Denver. See DENV. U. L. REV., FORTY YEARS SINCE *KEYES V. SCHOOL DISTRICT NO. 1: EQUALITY OF EDUCATIONAL OPPORTUNITY AND THE LEGAL CONSTRUCTION OF MODERN METROPOLITAN AMERICA* 11 (Jan. 31–Feb. 2, 2013), available at [http://www.denverlawreview.org/storage/2012\\_keyes\\_symposium/KeyesProgram\\_FNL.pdf](http://www.denverlawreview.org/storage/2012_keyes_symposium/KeyesProgram_FNL.pdf).

134. Phoebe A. Haddon, *Has the Roberts Court Plurality's Colorblind Rhetoric Finally Broken Brown's Promise?*, 90 DENV. U. L. REV. 1251, 1263–71 (2013) (examining the *Fisher* case and *Parents Involved* opinion).

135. See Tushnet, *supra* note 24, at 1144. It is interesting to note that plaintiff's counsel in the 1974 Boston desegregation lawsuit, *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974), credited *Keyes* for “definitively set[ting] the specifications for judicial scrutiny of northern school systems.” Roger I. Abrams, *Not One Judge's Opinion: Morgan v. Hennigan and the Boston Schools*, 45 HARV. EDUC. REV. 5, 6–7 (1975). The *Keyes* “blueprint” forged in the Denver context legitimized cases that had been successfully litigated in Topeka, New Rochelle, Washington, South Holland, Pasadena, Detroit, Pontiac, Las Vegas, Minneapolis, Indianapolis, Kalamazoo, Brooklyn, Dayton and other cities of various sizes across the nation. *Id.* What made Denver seemingly distinct at the time from almost all these other cities, however, was its “tri-ethnic” demography and related color lines. For this reason, Denver represented much better than did Boston or Detroit the multiracial, metropolitan nation that the United States would become.



portant insights into the nature of inequality and discrimination in a rapidly changing metropolitan America. To be sure, the core social, as well as legal, insights of the *Keyes* case continue to serve lawyers battling multiracial segregation wherever it exists in the metropolitan landscape.

When the first parents, educators, and policy makers in Denver began to advocate for integrated schools and multicultural curricula in the 1950s, their efforts signified the extent to which the search for excellent public schools was intricately connected to the fate and fortune of a city and metropolitan region that collectively imagined itself as the future of the United States. As in many cities throughout the nation, Denver's rapid metropolitan growth in the years and decades after World War II exposed the anxieties of urban and suburban residents to leave the racial and ethnic antagonisms and economic uncertainty of the past behind.

While cities across the nation "burned" during the urban crises of the second half of the twentieth century, Denverites reflected a powerful belief of many that their city and region were fundamentally free from racial discord. *Keyes* revealed the fallacy of this position and, in so doing, created an undeniable imprint in the collective memory of all those who have come to live and settle in the Denver metropolitan area. As students, parents, educators, policy makers, and residents continue to seek the elusive goal of equality of educational opportunity, *Keyes* resonates powerfully beyond its Denver fact pattern. The case, its history, and its consequence have much to tell us about the current experience of every twenty-first-century American multiracial metropolis.

#### VI. APPENDIX: HISTORY OF *KEYES* AND PUBLIC EDUCATION IN COLORADO

Year	Event
1859	First school established in Denver that included American Indians, Mexican Americans, and "Missourians." <sup>136</sup>
1862	First public school district in Colorado was established with the creation of what later became the Denver Public Schools. <sup>137</sup>
1866	Territorial law was passed that mandated separate schools for "Colored" students. <sup>138</sup>

136. Romero, *supra* note 3, at 795–96.

137. *Id.* at 796.

138. Act of Feb. 9, 1866, 1866 Colo. Sess. Laws 83 ("The secretary shall keep a separate list of all colored persons in the district, between the ages of five (5) and twenty-one (21) years, . . . and shall report the same to the president, who shall issue warrants on the treasurer in favor of such colored persons . . . for educational purposes.").

Year	Event
1876	Ratification of the Colorado constitution, which included article IX, sections 2 and 8, providing for, among other provisions, "a thorough and uniform system of free public schools" as well as the prohibition of "race or color" "distinction[s] or classification[s]" in public schools. <sup>139</sup>
1927	In <i>Jones v. Newlon</i> , <sup>140</sup> the Colorado Supreme Court held that the Denver public school board's decision to segregate "colored" and White pupils at social functions violated the education clause of the Colorado constitution. <sup>141</sup>
1953	City-Schools Project was inaugurated to address the high delinquency and dropout rates among the Denver public school district's Mexican American students. <sup>142</sup>
1956	The so-called Denver Experiment, a multicultural and inclusive curriculum developed by the Denver Public Schools, received national recognition for its innovation. <sup>143</sup> At same time, the Denver public school board redrew neighborhood school-attendance zones, exacerbating deep and enduring patterns of racial segregation in the city. African American parents petitioned Denver Public Schools Superintendent Kenneth Oberholtzer to address the inferior curriculum, dilapidated facilities, and underperformance of students in schools located in their racially segregated Five Points neighborhood. Litigation was contemplated but not pursued. <sup>144</sup> As one lawyer noted, "[T]his is a subtle type of discrimination that is difficult to put your finger on, but we know it exists." <sup>145</sup>
1968	After years of inaction, the Denver public school board adopted school board member Rachel Noel's resolution to integrate Denver Public Schools and charged its superintendent, Robert Gilberts, with implementing the plan. <sup>146</sup>
1969	Chicana/o students walked out of West High School to protest racial discrimination directed against Mexican American students. Around the same time, two anti-integration candidates, James Perrell and Frank Southworth, were overwhelmingly elected to the Denver Public Schools Board of Education and immediately compelled rescission of the Noel Resolution. <sup>147</sup> Wilfred Keyes and other parents and students filed suit against Denver Public Schools for maintaining a segregated school system. <sup>148</sup>

139. COLO. CONST. art. IX, §§ 2, 8.

140. 253 P. 386 (Colo. 1927).

141. *Id.* at 388.

142. Romero, *supra* note 8, at 78.

143. Tom I. Romero, II, *Imagine a Great City: Law and the Making of a Multiracial Metropolitan Denver* 213, 217–18 (June 19, 2013) (unpublished manuscript) (on file with author).

144. Romero, *supra* note 8, at 81–83, 85.

145. Romero, *supra* note 8, at 85 (quoting *ACLU Holds Off on Race Suit*, DENVER POST, Oct. 30, 1956, at 15) (internal quotation marks omitted).

146. *Id.* at 89.

147. *Id.* at 92–93, 95–96, 98.

Year	Event
1970	Twenty-three Denver public school buses were destroyed and fifteen were damaged by dynamite. The home of federal district court Judge William Doyle, who was overseeing the <i>Keyes</i> case, was firebombed. <sup>149</sup>
1973	In <i>Keyes v. School District No. 1</i> , the United States Supreme Court found that the Denver Public Schools had maintained a separate and segregated school system that had to be dismantled "root and branch." <sup>150</sup>
1974	Colorado voters passed the Poundstone Amendment and the "anti-busing" clause to the state constitution, effectively preventing a metropolitan-wide solution to the segregation of the Denver Public Schools. <sup>151</sup> Mexican American Legal Defense and Educational Fund intervened as a plaintiff in the case to represent Chicana/o students, parents, and educators. <sup>152</sup>
1975	The district-wide Cárdenas Plan ordered by Judge Doyle, which in addition to busing included bilingual education and ethnic studies programs, was found to be unconstitutional by the U.S. Court of Appeals for the Tenth Circuit. <sup>153</sup>
1976	Plaintiffs and Denver Public Schools agreed to a comprehensive remedial plan that Judge Doyle approved as a consent decree. <sup>154</sup>
1981	The Denver Public Schools introduced the Total Access Plan, which was supposed to achieve racial integration by attracting students from throughout the district to twenty-four magnet school programs. <sup>155</sup> In May 1982, Judge Richard Matsch rejected the plan as similar to the "freedom of choice" plan that many school districts had used to avoid desegregation. <sup>156</sup>
1982	In <i>Lujan v. Colorado State Board of Education</i> , <sup>157</sup> the Colorado Supreme Court found that the public school finance system in the state did not violate the equal protection provisions of the state constitution. <sup>158</sup>
1983	Federico Peña, the first Mexican American mayor of Denver, was elected. <sup>159</sup>

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148. *Id.* at 96.

149. *Id.* at 111.

150. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 213 (1973) (quoting *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 438 (1968)) (internal quotation marks omitted).

151. COLO. CONST. art. XIV, § 3, art. XX, § 1 (1974). For an analysis of the racialized busing politics behind the Poundstone Amendment, see James & Gerboth, *supra* note 40, at 158–61.

152. Romero, *¿La Raza Latina?*, *supra* note 12, at 266–67.

153. *Keyes v. Sch. Dist. No. 1*, 521 F.2d 465, 482 (10th Cir. 1975); see also Romero, *supra* note 8, at 116–18 (analyzing the legal development of the Cárdenas Plan).

154. *Keyes v. Cong. of Hispanic Educators*, 902 F. Supp. 1274, 1279 (D. Colo. 1995).

155. *Keyes v. Sch. Dist. No. 1*, 540 F. Supp. 399, 401 (D. Colo. 1982).

156. *Id.* at 403.

157. 649 P.2d 1005 (Colo. 1982).

158. *Id.* at 1025.

159. LEONARD & NOEL, *supra* note 97, at 404.

Year	Event
1984	Denver Public Schools entered into the Language Rights Consent Decree with Latina/o interveners that "detail[ed] the procedures for identifying the students eligible for enrollment in the Denver bilingual education program." <sup>160</sup>
1991	Mayor Peña was succeeded by Wellington Webb, the first African American mayor of Denver. <sup>161</sup>
1992	The Tax Payers Bill of Rights (TABOR) was added to the state constitution, whose effect was to reduce state revenue available to school districts. <sup>162</sup>
1995	Judge Matsch granted a motion to terminate the district court's jurisdiction and return full governance to the school board. According to Judge Matsch:  The Denver now before this court is very different from what it was when this lawsuit began. . . . Black and Hispanic men and women are in the city council, the school board, the state legislature, and other political positions. Business and professional leadership is multiracial. People of color are not bystanders. They are active players in the political, economic, social and cultural life of the community. Their influence has contributed to the enactment of legislation which will affect the future of public education. <sup>163</sup>  The 1984 Language Rights Consent Decree, however, was removed from the action and remains in force until the present day. <sup>164</sup>
2000	Section 17 was added to the education clause of the Colorado constitution, increasing per-pupil funding by at least the rate of inflation for K-12 public schools as well as for special-purposed educational programs. <sup>165</sup>
2006	Anthony Lobato filed suit against the State of Colorado for its failure to provide a "thorough and uniform" education for his children as required by article IX. <sup>166</sup>

160. *Keyes v. Sch. Dist. No. 1*, No C-1499 (D. Colo. Aug 17, 1984); Baker, *supra* note 128, at 330.

161. WELLINGTON WEBB & CINDY BROVSKY, *WELLINGTON WEBB: THE MAN, THE MAYOR, AND THE MAKING OF MODERN DENVER* 247 (2007).

162. COLO. CONST. art. X, § 20(7)(b), (c).

163. *Keyes v. Cong. of Hispanic Educators*, 902 F. Supp. 1274, 1307 (D. Colo. 1995).

164. *Id.* at 1308.

165. COLO. CONST. art. IX, § 17(1).

166. *Lobato v. State*, No. 05CV4794, 2006 WL 4037485, at \*2 (Colo. Dist. Ct. Denver Cnty. Mar. 2, 2006) (internal quotation marks omitted), *aff'd*, 216 P.3d 29 (Colo. App. 2008), *rev'd*, 218 P.3d 358 (Colo. 2009).

Year	Event
2011	A Colorado state district court in Denver ruled in favor of Lobato and twenty-one additional families and school districts, finding that the school finance system and the education system were not rationally related to one another under article IX of the state constitution. <sup>167</sup>
2013	Oral arguments in <i>Lobato v. State of Colorado</i> were heard by the Colorado Supreme Court. <sup>168</sup> In late May, a 4–2 majority of the court overturned the ruling of the state district court and found that Colorado’s current school finance system is constitutional. <sup>169</sup>

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167. *Lobato v. State*, No. 05CV4794, at \*182 (Colo. Dist. Denver Cnty. Dec. 9, 2011), *rev'd*, 304 P.3d 1132 (Colo. 2013).

168. Oral arguments before the Colorado Supreme Court on the *Lobato* case can be seen at *Lobato et. al. v. The State of Colorado*, 12SA25, YOUTUBE (MAR. 7, 2013), [http://www.youtube.com/watch?v=ls4\\_pjqDdZg](http://www.youtube.com/watch?v=ls4_pjqDdZg).

169. *Lobato*, 304 P.3d at 1136.