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A Clerk's-Eye View of Keyes v. School District No. 1

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A CLERK'S-EYE VIEW OF *KEYES V. SCHOOL DISTRICT NO. 1*

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ABSTRACT

After describing the political, intellectual, and doctrinal background to *Keyes v. School District No. 1*, this Keynote Address narrates some aspects of the way the deliberations in *Keyes* proceeded inside the Court. For the Justices, *Keyes* was less a case about the standard for determining when a Northern school board engaged in de jure segregation than it was a case about using busing to remedy segregation anywhere in the country. It suggests that when understood against its background, *Keyes* played an important role in first expanding, and then—because of the reaction to it—narrowing the scope of desegregation efforts North and South.

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INTRODUCTION

I am going to give what I call a clerk's-eye view of *Keyes v. School District No. 1*.[1] And I want to say something at the very beginning, which I'll return to at the end. Sitting through this morning's panels, which I found extremely interesting, I realized that the kinds of things that I'm going to be talking about are, in many ways, of merely historical interest, with apologies to Professor Patricia Limerick on this. That is, the contemporary issues are quite different from the ones that concerned the U.S. Supreme Court internally in the deliberations over *Keyes*. And even the things that we saw coming up after *Keyes* have either faded away or been transformed in important ways. That is not to say that

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1. 413 U.S. 189 (1973).

Keyes is an unimportant decision. Even today, I think Professor Myron Orfield's comments on how *Keyes* could be used in inner-suburb cases remain true. But it was a different kind of case from what it would be now.

I was a clerk during the 1972–1973 Term. That's a long time ago, and my memory has faded about some details. I'll say a bit about supplementing my memory in a moment. In addition, I was working for Justice Thurgood Marshall, and of course there was no question in our chambers about what he was going to do. So, it was not, for the Justice's three law clerks, an important case—for us as the drones who did some of the work in the chambers. The most important work was deciding the damn things, but we didn't have anything to do with that. After that, we had things to do. Further, the work style in the office was that the only written things that the clerks prepared for the Justice were the memoranda written when the application for review came in. When the Court heard argument in cases granted during the preceding Term, we would not have even written the certiorari memos. We didn't write bench memoranda on the cases that the Court had granted argument in. In short, we didn't write the certiorari memorandum on *Keyes* and didn't write any other preliminary memos. Just as a footnote to this, the reason we didn't write bench memoranda is that the Justice was very good at assimilating very quickly from reading the briefs what the arguments were that he cared about, and it wasn't going to help him for us to go through the arguments in detail. He used the certiorari memo just before oral argument in the case at issue to trigger his recollection of the relevant arguments. That's a part of the context of my recollections.

Some of what I have to say is confirmed, in its broad outlines, by what I've read about the Court's deliberations in the recently published biography of Justice Brennan[2] and in *The Brethren*,[3] which actually has a reasonably extensive discussion of it. I do want to say something about the discussion in *The Brethren*, which had some bearing on a clerk's-eye view of the problem. The authors' sources were primarily law clerks, and there are two characteristics of law clerks worth mentioning. One is, they're young compared to the Justices, and inexperienced. And they're not grown-ups. I include myself in that category: I wasn't a grown-up then, either. And the Justices are grown-ups. And, secondly, the law clerks are only there for a year. As a result, they don't have a time-based perspective on the interactions of the Justices. In *The Brethren*, the law clerks' inexperience in the world led whoever it was who talked to the book's authors about this case to miss some of the psychological dynamics of what was going on with Justice Blackmun, which I'll talk about in

2. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION (2010).
3. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

a moment. They say everybody was worried about what Justice Blackmun was going to end up doing. I don't think that Justice Brennan, the author of the opinion, worried for a minute about what Justice Blackmun would end up doing because he knew the kind of person Justice Blackmun was better than the law clerks did.

The Brethren describes Chief Justice Warren Burger's efforts to manipulate the timing of the outcome in *Keyes* and consolidate it with *Bradley v. School Board*,[4] a case involving Richmond, Virginia, that was coming to the Court. Woodward and Armstrong say that the Chief Justice thought he could win *Bradley*, from his point of view, more easily. At one point, they say Chief Justice Burger had overplayed his hand. I'm pretty sure that by the time that *Keyes* was being discussed, most of the Justices had figured out that Chief Justice Burger was an inept Machiavellian. He was trying to manipulate the Court, but they all knew he was terrible at it. And so, I don't think they took anything that he did that had a more or less transparently political motivation at all seriously. That's the structure of where my thinking comes from.

I. THE POLITICAL STRAND: THE POLITICS OF BUSING

It was hard for me to figure out how to tell the story of the deliberations because three elements are very closely intertwined, and for narrative purposes, I have to pull them out of the story. And in talking about one of the strands, I have to say some things about the other strands. The first strand is what I call political. From the point of view of what was going on inside the Court, *Keyes* was not a case about the standard for determining whether a constitutional violation had occurred (what I'll talk about later as the violation problem). It wasn't a case about the violation; it was a case about remedies (that is, it was a case about busing). President Richard Nixon had made four appointments to the Court. We now know that President Nixon didn't care about very many things when he was picking Justices. He had one or two items that were litmus test issues. They were litmus test issues for him because—and this is important in thinking about the Court as a whole today—he wanted to make sure that his Court appointments would strengthen the Republican Party going forward. And so, he wanted to ensure that Republican Party strategy was a combination of the Southern strategy, pulling Southern whites away from the Democratic Party and into the Republican Party, and a Northern ethnic-working class strategy, which had the same goal, to pull that constituency away from the Democratic Party and into the Republican Party. Well, what issues would be litmus tests for that? It turns out

4. 338 F. Supp. 67 (E.D. Va. 1972), *rev'd*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided court*, 412 U.S. 92 (1973).

that there are only a couple, and busing was one of them. So, the four appointees were there, in some sense, because of the busing issue.[5]

The year before, the Court had gone through a big struggle over *Swann v. Charlotte-Mecklenburg Board of Education*[6] involving the Charlotte school district in which the only issue was whether busing would be validated as a remedy.[7] And after a great deal of pulling and hauling inside the Court, mostly overcoming Chief Justice Burger's ineptness in trying to pursue President Nixon's strategy, the Court did validate busing as a remedy. But the issue politically didn't go away and outside the Court, there were large controversies about busing in Boston and in Detroit. With Detroit and Richmond as well, there was a looming question about how extensive busing would be. The legal issue was whether a Court, finding a violation in one district, could order other neighboring districts into the remedy. Justice Lewis Powell was going to be recused in the Richmond case because he'd been chair of the Richmond and Virginia school boards. All of these cases were part of the Court's mental universe when thinking about *Keyes*. Professor Orfield mentioned Davison Douglas's book called *Jim Crow Moves North*, which deals with Northern segregation issues up to 1954.[8] But it's a good label for what was going on in the Court. The cases challenging segregation in the North nationalized the issue of busing and thus, at some level, played into President Nixon's strategy of pulling white Northerners away from the Democratic Party. *Keyes* was the first non-Southern school desegregation case that the Court had confronted, so all of these issues about the national scope of the issue and the extent of busing were part of the background that the Court was considering.

II. THE INTELLECTUAL STRAND: DESEGREGATION OR INTEGRATION?

The second strand is something that I call an intellectual strand, although it's blended with a doctrinal one. This label isn't great, but the intellectual question was whether the constitutional issue was an issue about desegregation or integration. Doctrinally, since *Brown v. Board of Education* (*Brown I*)[9] nineteen years earlier, the issue had always been about desegregation. One of the central lines that arose immediately after *Brown* was written by Judge John Parker in the decision after the remand of the South Carolina case, *Briggs v. Elliott*,[10] in which he said, quite

5. For President Nixon's nomination strategy, see KEVIN J. MCMAHON, NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES 81 (2011).

6. 402 U.S. 1 (1971).

7. *Id.* at 30.

8. DAVISON M. DOUGLAS, JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954 (2005).

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

10. 132 F. Supp. 776 (E.D.S.C. 1955).

accurately, that all that the Court had required was desegregation.[11] It did not require integration. That was doctrinally true. But culturally, at least by 1970 and probably earlier, the issue in these cases had been understood or assimilated as an issue of integration. And there was some doctrinal support for that. The difference between desegregation and integration has to do with the remedy—what you have to do after you find a constitutional violation. If the constitutional issue was desegregation, all you have to do, at least as it was then understood, is eliminate the use of race as a reason for making school assignment decisions. If the constitutional issue was integration, then what you have to do is make sure that there are schools that are, as the terminology became, not racially identifiable.

There was doctrinal support for the idea that the constitutional issue was integration, although I'm not now sure whether this is something that I'm now imposing on what was going on or something that was understood at the time. But the doctrinal support is that the remedy issue and the remedy decision in *Brown v. Board of Education* (*Brown II*)[12] allowed for "all deliberate speed."[13] As Marshall, a litigator, said at the time, if all you care about is eliminating race as a basis for decision making, you can do that in six months. There'd be some administrative problems, but it's easy enough to get rid of that sort of stuff. Use neighborhood school districts, neighborhood boundaries, and even use freedom of choice. Just don't take race into account. That's easy. You don't need deliberate speed to do that. So, the deliberate speed formulation implicitly recognized that there was something more than removing race as a basis for assignment. And then, in 1968, *Green v. County School Board*[14] said, the goal is to achieve schools that are just schools (that is, schools that are not racially identifiable).[15] This was, again, in the context of a Southern, previously de jure segregated school. You could say, well, this was just a remedy problem for express desegregation, but the remedy looks like integration. And so, I think by the 1970s, it was culturally believed that what school desegregation cases were about was achieving integrated public schools.

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11. *Id.* at 777 ("Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals.").

12. 349 U.S. 294 (1955).

13. *Id.* at 301.

14. 391 U.S. 430 (1968).

15. *Id.* at 442 ("The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." (internal citation omitted)).

III. THE DOCTRINAL STRAND: DE JURE OR DE FACTO?

The final, pure doctrinal element was whether there was a constitutional violation only when segregation occurred de jure—by law—or whether there could be a constitutional violation when schools were racially identifiable de facto. Again, the doctrine, at least as it had emerged, was that only de jure segregation was a constitutional violation. The origin of that is the line in *Brown I*, the violation decision, which says segregation by law is likely to work damage to the hearts and minds of schoolchildren in a way unlikely ever to be undone.[16] It does say segregation "by law," but the connection between the law part and the damage to the hearts and minds was never really made in the Court's work. And it was plausible to think that it was the fact of segregation, not the fact of segregation by law, that did the damage that was articulated as one of the Court's concerns.

Now back to politics. The de jure–de facto line generated resentment in the South, and this was clearly on Justice Powell's mind during *Keyes*. White Southerners said, Why are you making us go through all of this trauma when you folks in the North have schools that are just as segregated de facto as ours and you don't have to do anything about it? This distinction between de facto and de jure segregation doesn't make sense—white Southerners may have been right about that—and we really resent having the costs of your social engineering, as it was put, imposed on us when you're not imposing those same costs on yourself. And then, of course, culturally, again, integration was seen as the goal. That's the background.

IV. NARRATIVE: THE STORY OF *KEYES* INSIDE THE COURT

Now, here's the story of *Keyes* as I recall it and as supplemented by additional material. *Keyes* was not one of the major Northern cases like *Kerrigan v. Morgan*[17] from Boston or *Milliken v. Bradley*[18] from Detroit. From inside the Court—I hate to say this to an audience in Denver—it was like, a desegregation case from New Rochelle, New York. *Keyes* happened to be the Northern desegregation case that got to the Court. The real places of concern were Detroit and Boston. The issues in *Keyes* were, Was there a constitutional violation and, if so, what would the remedy be? The issue of whether there was a violation was relatively easy within the Court. It ended up being decided 7–1 that there was a violation. Getting there was a little complicated, but from the very be-

16. *Brown I*, 347 U.S. 483, 494 (1954) ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

17. 421 U.S. 963 (1975), *denying cert. to* 509 F.2d 580 (1st Cir. 1974), *aff'g sub nom.* Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974).

18. 418 U.S. 717 (1974), *rev'g and remanding* 484 F.2d 215 (6th Cir. 1973), *aff'g in part, vacating in part* 345 F. Supp. 914 (E.D. Mich. 1972).

ginning, there were four votes to find a constitutional violation.[19] As he was, in the early years at least, in many important cases, Justice Blackmun was slow to come around. Justice Brennan got the assignment and drafted an opinion finding a constitutional violation. Justice Blackmun reacted to that by saying, I'm a little nervous about this. It seems to be a little too broad and some of your language seems to be a little too strong. The important point is that once he said that, there were five votes. That is, he hadn't formally said he was going to join Justice Brennan's opinion, but in the Court, when you say, I'm concerned about your opinion in the following ways, you're saying, just tinker with it. Do something, and I'll end up joining you. There was a discussion of *Plyler v. Doe*[20] this morning. Justice Brennan wrote that. Justice Powell was the fifth vote in *Plyler*. Exactly the same kind of thing happened in *Plyler*. Justice Brennan wrote a very strong opinion. Justice Powell said, well, I sort of like the outcome that you reach, but I'm very concerned about what you say in Parts II and III of the opinion. And Justice Brennan said, outcomes are what matter. I'll take out Part II. And he just took it out. And Justice Powell said, I appreciate what you've done on Part II; I'm still concerned about Part III. And Justice Brennan said, okay with me. He took out Part III. And Justice Powell then said, fine. So, once you do that sort of thing, at least when you're dealing with Justice Brennan, the game's over. And so, although Blackmun was slow to come around, everybody knew relatively early that there was going to be a finding of a violation.

For reasons I'll get to in just a moment, Justice Powell, also early on, got committed to the proposition that there was a constitutional violation, so that was six votes. Chief Justice Burger didn't like the outcome, but he couldn't figure out what to do, basically. Justice Powell had taken the laboring oar, and once Justice Powell's approach hadn't worked, Chief Justice Burger just collapsed and concurred in the result without saying anything. So, the violation issue was relatively easy. The litigants presented the remedy issue in this way: If you found intentional segregatory actions with respect to some part of the district, was it permissible to include other parts of the district in the remedy? That was the legal issue. But that's not how it was thought of inside the Court at the start. The issue of remedy inside the Court was how much busing could you require in grossly aggregated terms, not Park Hill versus whatever. It wasn't thought of in such narrow terms because it was understood as a busing case.

With respect to that, the central fact inside the Court was Justice Powell's opinion. He circulated an opinion that said two things. First, let's eliminate the de facto–de jure distinction. It doesn't make any sense.

19. Justice White recused himself from *Keyes* because of his ties to Denver.
20. 457 U.S. 202 (1982).

He said, in effect, I'm a Southerner, and Southerners don't like it. Justice Powell articulated all the kinds of things that I've said about the Southern resentment of the de facto–de jure distinction. Now I'll bring Justice Douglas in. He had long said—at least since *Shelley v. Kraemer*[21]—that de facto–de jure kinds of distinctions don't make sense. What you care about is the underlying social reality. If there are segregatory outcomes, you don't care where they come from; the Constitution says you can't have them. That was his longstanding position. And so, when Justice Powell circulated his opinion, Justice Douglas said, sure, sounds good to me. But Justice Douglas overlooked the other part of Justice Powell's opinion. Justice Powell said, in Part I, let's eliminate the de jure–de facto distinction. But there's a trade-off. If we do that, what we have to do is limit remedies quite sharply and, in particular, get rid of busing as a remedy. So, we'll extend *Brown* across the country and make it easy to find constitutional violations everywhere, but in exchange for doing that, you people who have been pushing for desegregation should give up on busing as a remedy. It wasn't entirely clear, I think, what remedies he would have allowed in light of *Green*; that is, he didn't seem to be challenging the proposition that the goal was to achieve schools that were just schools. How you would actually achieve that without busing remedies wasn't clear. But it was clear that he wouldn't allow busing.

What then happened was this. You have Justice Douglas saying, fine, I'll go along with the first part of your opinion, not saying anything about the second part. Justices Brennan and Marshall saw the threat on the remedies side. At some level, both of them were sympathetic with the argument that the de jure–de facto distinction was artificial. And so, what they were looking for was a solution on the violation side that would let the Court get at large swaths of Northern segregation, which in their hearts they knew was de facto, without having to buy Justice Powell's tradeoff. So, what Justice Brennan needed to do, was to articulate a rule for finding a de jure violation that would be applicable to essentially every Northern school district where there were racially identifiable schools. That was his problem.

And his solution was the rule in *Keyes*: deliberate segregatory actions with respect to a significant portion of the district (the "significant" was the concession that he made to Justice Blackmun) would trigger a requirement of district-wide desegregation, or at least an authorization for district judges to order district-wide remedies. So, if you found deliberate segregatory actions with respect to a significant portion of the district, you had found de jure segregation of the district as a whole. That's the doctrinal formulation that Justice Brennan came up with. And he was confident that the courts could find such actions pretty much everywhere

21. 334 U.S. 1 (1948).

in the North. And I suppose he must have been confident that district judges in the North would make such findings.

One footnote here, I think, is probably relevant. I was a law clerk for a judge on the U.S. Court of Appeals for Sixth Circuit in Detroit, George Edwards. He was a great guy who had been a rising political star in the Michigan Democratic Party until 1948, when he, as housing commissioner in Detroit, ordered the desegregation of the city's public housing, which destroyed his political career. So he went on to be a federal judge. *Bradley v. Milliken*,[22] the Detroit case, was going on while I was clerking in Detroit for Judge Edwards and, of course, Judge Edwards paid a lot of attention to it. The case had been assigned to a very conservative district judge named Stephen Roth. As the case came in and as the facts were presented to him, Judge Roth found himself, contrary to his initial inclinations, saying, you know, they really did set out to segregate the schools in Detroit. The authorities really did say it. So, Judge Roth, as Judge Edwards put it, had a conversion experience. This guy who was really conservative entered an extremely sweeping remedial order. Supreme Court Justices know the lower court judges. My guess is that Justice Brennan knew that, in Richmond, a very liberal district judge created this extensive remedy. In Detroit, a very conservative judge issued the same kind of remedial order. Justice Brennan may have been confident that district judges all over the country would find the kind of things that *Keyes* authorized them to find and then, having found them, would issue fairly extensive remedial orders. And that turned out to be true. Again, Professor Orfield mentioned *Columbus Board of Education v. Penick*[23] and *Dayton Board of Education v. Brinkman*,[24] also Sixth Circuit cases, which is probably not irrelevant. Those cases were not outside the normal bounds of what Northern school districts had done. And so, it turned out to be true that the *Keyes* violation formula licensed district judges to find constitutional violations in every Northern school district where segregation was challenged and then to order fairly extensive remedies. The outcome of that was that the line between de facto and de jure segregation was further blurred because it didn't do any work anymore. The definition of de jure had become so broad that, for all practical purposes, everywhere you observed de facto segregation, you could find its origins in law under the *Keyes* approach.

The problem with that is it goes back to Justice Powell's trade-off. He said, okay, let's get rid of the line between de jure and de facto, but if we do that, we're going to have to do something on the remedies side.

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22. 345 F. Supp. 914 (E.D. Mich. 1972), *aff'd in part, vacated in part*, 484 F.2d 215 (6th Cir. 1973), *rev'd and remanded*, 418 U.S. 717 (1974).

23. 439 U.S. 1348 (1978), *rev'g* 583 F.2d 787 (6th Cir. 1978), *aff'g in part, remanding in part* 429 F. Supp. 229 (S.D. Ohio 1977).

24. 433 U.S. 406 (1977), *vacating and remanding sub. nom* Brinkman v. Gilligan 539 F.2d 1084 (6th Cir. 1976).

For all practical purposes, *Keyes* got rid of the line between de facto and de jure and didn't do anything on the remedies side, or rather, the remedies that *Keyes* authorized district judges to order were to be those used in previous de jure cases. And what that did was to exacerbate the political problems. Resistance to busing remedies, which were the remedies licensed under *Keyes*, intensified in the North. In addition, and now I'm approaching the conclusion, *Bradley* and *Milliken* were pending. The district judges had ordered inter-district remedies, the consolidation of central city and suburban districts for purposes of desegregation. Judge Roth, whose case I was most familiar with because I had clerked in Detroit, essentially created pie-shaped districts spreading out from the center of Detroit into the suburbs. There was, of course, enormous resistance to that in the suburbs. Many people had moved to the suburbs precisely to avoid having their children attend schools with substantial minority populations. So, there was enormous resistance to the remedies in Detroit and Richmond. The extension of *Keyes* to everywhere in the North exacerbated the phenomenon of white flight—white parents moving out of the city so as to avoid sending their kids to schools with substantial minority populations. The Court divided 4–4 in *Bradley*, the Richmond case, with Justice Powell recused. The effect in Richmond was to eliminate the inter-district remedy, but the real fact was once the Court divided 4–4 on that, everybody knew that as soon as Justice Powell could vote in *Milliken*, he was going to vote against the inter-district remedy. And indeed that's what happened. So, that's the story of *Keyes* from inside the Court.

CONCLUSION

I want to conclude by coming back to something that I mentioned at the beginning of my remarks. The issues that I've just gone through—resistance to within-district remedies, white flight, and denial of inter-district remedies—have now themselves been displaced in interesting kinds of ways. The closest thing that is similar to *Keyes* is the phenomenon that my former colleague, Sheryll Cashin, has written about, which is the development of racially diverse inner suburbs. For all practical purposes, you can't implement any corporeal strategies within core cities, the parts of the city that are racially identifiable. You just don't accomplish anything. What's happened is that minority families have moved to inner suburbs, and the *Keyes* kinds of issues replicate themselves in the inner suburbs. But when that happens, the inner suburbs suffer white flight to the outer suburbs. And so, the *Keyes* issues are promising, I think, in inner suburban areas but are likely to face the same kinds of difficulties of the transformation of those inner suburbs into racially identifiable minority suburbs within a relatively short period of time.

The reason I say that *Keyes* inside the Court may be of merely historical interest is that the issues of achieving an integrated society that

remain important, can't, at least as a constitutional matter, be addressed within the courts. In *Swann*, Chief Justice Burger famously said, one vehicle, the school bus, can only carry so much baggage.[25] Inside the Court, Justice Potter Stewart in effect said in *Milliken*, this is where I get off the bus. And that's basically true about achieving integration. Schools are important social institutions, but they can't any longer, if they ever could, drive the process of integration.

25. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22–23 (1971) ("The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. *One vehicle can carry only a limited amount of baggage.* It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination." (emphasis added)).