UNTOWARD CONSEQUENCES: THE IRONIC LEGACY OF *KEYES V. SCHOOL DISTRICT NO. 1*

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ABSTRACT

The *Keyes* case began with high hopes that desegregation would lead to educational equity for black and Latino students in the Denver Public Schools. The lawsuit made history by successfully using circumstantial evidence to establish intentional discrimination and bring court-ordered busing to a school system outside the South. In the intervening years, that initial success became laden with irony. Because Denver was a tri-ethnic community of whites, blacks, and Latinos, the litigation revealed the complexities of pursuing reform in a school district not defined by a history of black–white relations.

The courts had to decide whether Latinos would count as white when measuring racial balance in the Denver schools. This approach was rejected, but as the demographics of the school district shifted, Latino students came to dominate the schools. Whatever the formal classification scheme, the children available to introduce diversity into predominantly black schools were mainly Latino. Similarly, the case highlighted tensions between desegregation and bilingual education when special programs depended on concentrating English language learners in particular schools. The courts made clear that bilingual education was not a substitute for desegregation, but when Denver school officials sought to terminate the desegregation decree, they signed a consent agreement to provide language programs as evidence of good faith. Long after Denver's public schools reverted to being racially and ethnically identifiable, these programs persisted. In effect, bilingual education was used to mitigate the impact of educational isolation that followed the close of the desegregation decree.

The *Keyes* litigation was protracted and the aims ambitious, but in the end, the plaintiffs' lofty goals were not realized. In general, graduation rates and achievement test scores for black and Latino students in the Denver schools still lag behind those of white peers. A series of re-

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forms—from merit pay for teachers to new charter schools—have failed to close the gap. So far, colorblind political initiatives seem as ineffectual as color-conscious judicial interventions when tackling intractable educational inequalities.

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INTRODUCTION

Now that I am dean of the UCLA School of Law, I regularly meet with our alumni. Recently, I was in Washington, D.C., for one such meeting. An alumna was describing some of the federal government's efforts to bring arts and culture to America's elementary and secondary schools, and in the course of that conversation, she mentioned a turnaround school in Denver: the Noel Middle School.[1] I paused for a moment as my past life as a scholar and my current life as a dean collided. While a faculty member, I had done extensive research on *Keyes v. School District No. 1*,[2] a lawsuit demanding educational equity for all students in the Denver Public Schools. A key architect of the effort was Rachel B. Noel, the first black member of the Denver school board.[3] She had pursued integration in the political and judicial arenas as an avenue to enhanced educational achievement and improved relations among blacks, whites, and Latinos in the district. So, I could not help but be struck by the fact that her quest for excellence and better intergroup understanding had been memorialized by attaching her name to a low-performing, segregated school.[4] This was the first irony, but it would not be the last as I embarked on a retrospective of the *Keyes* case for this symposium.

When I reviewed the history of *Keyes* and its aftermath, I saw time and again how the principles that underlay the case had been subverted, often in ways that produced results antithetical to the reform agenda that motivated advocates like Rachel Noel. Here, I will briefly recount the events leading up to the lawsuit, its journey through the courts, and the key objectives that advocates hoped to attain by suing the district. I will then conclude by showing how ironic, even tragic, the outcomes of the

1. RACHEL B. NOEL MIDDLE SCH., noel.dpsk12.org/ (last visited Apr. 26, 2013).
2. 413 U.S. 189 (1973).
3. Rachel F. Moran, *Getting a Foot in the Door: The Hispanic Push for Equal Educational Opportunity in Denver*, 2 KAN. J.L. & PUB. POL'Y 35, 37 (1992).
4. *See The Tragic Legacy of Rachel B. Noel*, OOMS WITH A VIEW (Feb. 8, 2013), http://oomswithaview.org/2013/02/08/the-tragic-legacy-of-rachel-b-noel/.

litigation have been. From the outset, the central focus of the litigation was integration. Though politically unpopular, the judicial mandate was unambiguous. Rejecting the trial court's initial, limited desegregation decree, the United States Supreme Court ordered district-wide relief. Afterwards, when the trial judge sought to preserve some identifiably Latino schools that could serve special linguistic and cultural needs, the federal court of appeals made clear that bilingual education was not a substitute for integration. Nearly a decade later, the school district cemented its commitment to bilingual programs as a way to hasten a declaration that the Denver public school system was unitary and therefore no longer subject to judicial oversight under the desegregation order. Once again, bilingual education was offered up as a substitute for desegregation, though it took another decade for the busing decree to come to an end. Because the language decree remains in place, bilingual programs have persisted long after the Denver Public Schools reverted to segregated conditions. Neither desegregation nor the language decree has solved the problems confronting English language learners, who continue to struggle academically and are among the lowest performing students in the district.

The lawsuit also rejected any assertion that Latinos could count as white when desegregating the schools. Latinos were analogized to blacks based on their shared histories of discrimination and similar shortfalls in achieving academic success. The desegregation order therefore could not treat a predominantly black and Latino school as integrated. Yet, due to white flight and a substantial influx of Latino families, Latinos increasingly became the only group available to integrate predominantly black schools. Today, schools with black and Latino student bodies are commonplace in Denver.

The *Keyes* litigation largely ignored the concerns of Latinos who rejected an emphasis on race and instead insisted that economic barriers were the principal obstacle to full inclusion and high achievement for their children. Like other pupils in the Denver Public Schools, Latinos now find themselves in intensified conditions of economic isolation, reflecting in part the white and middle-class flight to the suburbs that took place in the wake of the *Keyes* desegregation order. Again, because this type of economic segregation was missing from the lawsuit's framework, there has been little effort to consider what pernicious consequences class segregation may have. Even so, there is evidence that this isolation correlates with depressed academic performance in the Denver schools, and at the national level, research suggests that class integration can have beneficial effects on the educational attainment of low-income students.[5]

5. Richard D. Kahlenberg, *From All Walks of Life: New Hope for School Integration*, AM. EDUC., Winter 2012–2013, at 2, 4–6.

Though *Keyes* privileged racial concerns above other obstacles to achieving equal educational opportunity, today the school district is primarily pursuing "colorblind" reforms that focus on school governance: professional development, merit pay, and new charter, alternative, and innovation schools. Shortly after the district was declared unitary, a local African-American attorney filed a lawsuit alleging educational malpractice in the Denver schools. Initially framed in racial terms, the case eventually evolved into a call for structural reforms like vouchers. Nowadays, the rhetoric of school reform emphasizes changes that will benefit all children. Though achievement gaps persist, overall performance is so depressed that every student is seen as a potential beneficiary of initiatives to improve the teaching force and expand schooling options.

In short, irony upon irony may be the *Keyes* case's lasting legacy. Today, despite decades of struggle, the public schools remain racially identifiable, and economic segregation arguably has worsened. 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. So far, the next generation of school governance reforms has not been able to combat conditions of separation and stratification. Sadly, colorblind political solutions have proven no more effective than color-conscious judicial remedies.

I. A BRIEF HISTORY OF THE *KEYES* CASE

The *Keyes* case has its roots in demographic change that took place in Denver in the wake of World War II. Blacks who had served in the military and been stationed in the city chose to remain there.[6] They were relatively well educated, affluent, and upwardly mobile, but housing segregation forced them to cluster in the northeast section of Denver.[7] The public schools in the area soon became overcrowded, which in turn led to growing dissatisfaction among ambitious African-American parents. Blacks began to press for reforms that would rectify overcrowded conditions, high dropout rates, and low achievement. Reflecting broader national trends, African Americans in Denver linked educational equity to school integration.[8]

In response, the Denver school board appointed two blue-ribbon panels to review the situation and make suitable recommendations. The panels proposed a voluntary enrollment plan and resolutions to integrate elementary and secondary schools in certain predominantly African-

6. CARL ABBOTT ET AL., COLORADO: A HISTORY OF THE CENTENNIAL STATE 300, 302 (1982). *See generally* STEPHEN J. LEONARD & THOMAS J. NOEL, DENVER: MINING CAMP TO METROPOLIS 368, 375–76 (1990).

7. ABBOTT ET AL., *supra* note 6, at 299, 302; LEONARD & NOEL, *supra* note 6, at 374–76.

8. Rachel F. Moran, *Courts and the Construction of Racial and Ethnic Identity: Public Law Litigation in the Denver Schools*, *in* LEGAL CULTURE AND THE LEGAL PROFESSION 153, 157 (Lawrence M. Friedman & Harry N. Scheiber eds., 1996).

American and white areas of Denver.[9] The voluntary enrollment plan allowed parents to register their children in schools outside of their neighborhood if spaces were available and students at the new school were predominantly of a different race.[10] This plan met with little resistance, but when the board adopted resolutions to integrate some black and white schools through busing, there was significant backlash. Normally, school board meetings were a sedate and sleepy affair, but after passage of the resolutions, there was a huge public turnout with discussion dominated by emotional pleas for rescission as well as angry threats of a lawsuit, recalls, and reprisal at the polls.[11]

The Denver electorate did, in fact, express its dissatisfaction at the ballot box. After a contentious school board election, the voters selected anti-busing candidates by a 2–1 margin.[12] These new board members promptly rescinded the integration resolutions, and shortly thereafter, the National Association for the Advancement of Colored People's Legal Defense Fund (NAACP LDF) filed suit on behalf of a class of black, Latino, and white students.[13] Rachel Noel had been a principal architect of the resolutions, and as the school board deliberated about the rescission, she became convinced that it would be necessary to go to court with the NAACP LDF's help. She saw the lawsuit as a way to vindicate integration as the means to achieving equal educational opportunity.[14]

Initially, the attorneys in the case considered using *Keyes* as a vehicle to attack de facto as well as de jure segregation in the schools.[15] Before the Denver suit, the NAACP LDF had focused on Southern school districts with legally mandated (that is, de jure) segregation. In the North and West, however, there were less likely to be formal laws requiring that students attend schools based on their race. Instead, a neighborhood school policy produced de facto segregation because racially identifiable schools resulted from segregated housing patterns.[16] To attack de facto segregation as a constitutional violation would have been a bold move. After all, the United States Supreme Court's jurisprudence since the

9. *Id.*; *see also* ADVISORY COUNCIL ON EQUAL. OF EDUC. OPPORTUNITY IN THE DENVER PUB. SCH., FINAL REPORT AND RECOMMENDATIONS TO THE BOARD OF EDUCATION, SCHOOL DISTRICT NUMBER ONE, DENVER, COLORADO 15–16 (1967); SPECIAL STUDY COMM. ON EQUAL. OF EDUC. OPPORTUNITY IN THE DENVER PUB. SCH., REPORT AND RECOMMENDATIONS TO THE BOARD OF EDUCATION, SCHOOL DISTRICT NUMBER ONE, DENVER, COLORADO 1–2 (1964).

10. LEONARD & NOEL, *supra* note 6, at 373–78; Interview with Gordon Greiner, Partner, Holland & Hart LLP, in Denver, Colo. (Sept. 17, 1991).

11. *School Board Takes Historic Step*, DENVER POST, Feb. 2, 1969, at G3.

12. Charles Carter, *Perrill, Southworth Win; City Pay Raises Okayed*, DENVER POST, May 21, 1969, at 1, 23.

13. Charles Carter, *Forced Busing Plan Killed: "Voluntary" Program OK'd—New Board Votes 4–3 for Changes*, DENVER POST, Mar. 19, 1967, at 3.

14. Interview with Rachel Noel, Former Member, Denver Pub. Sch. Bd. of Educ., in Denver, Colo. (Oct. 8, 1991).

15. Moran, *supra* note 8, at 158.

16. Moran, *supra* note 3, at 35.

landmark 1954 decision in *Brown v. Board of Education*[17] had consistently turned on openly discriminatory state and local laws, not just a disparate set of racial results.[18] Were the NAACP LDF to attack de facto segregation and prevail, every school district in the country would be required to integrate, even in the absence of past intentional wrongdoing by school officials. The judiciary could potentially wind up overseeing school systems throughout the country, and the accusation that the courts were acting as "super school boards" would then have some genuine force.[19]

In the end, the NAACP LDF decided to adopt a less dramatic strategy, instead relying on circumstantial evidence (as opposed to formal statutes, rules, or regulations) to establish that the Denver school board had made decisions about attendance boundaries, sites for school construction, and teacher assignments based on discriminatory motives. In particular, the plaintiffs showed that attendance zones, sites for new schools, and teacher assignments were heavily influenced by the racial make-up of neighborhoods.[20] Attendance zones shifted block by block as African Americans moved into a residential area. Schools were built at the center of black or white neighborhoods rather than at the periphery, where integration might take place in transitional areas. White teachers were assigned to predominantly white schools, while black teachers were assigned to predominantly black ones.[21] Based on this evidence, the plaintiffs argued that the school board had manipulated the neighborhood school policy to perpetuate segregation. After seeing the statistical findings put together by the plaintiffs, Judge William Doyle, the federal district court judge who presided over the trial, remarked that "this [case] has been a revelation to me."[22]

Relying on the plaintiffs' showing, the judge ordered desegregation of black schools concentrated in northeast Denver and nearby white schools. This order left predominantly Latino schools in other parts of the city largely untouched, a decision that reflected local politics.[23] The plaintiff class in *Keyes* nominally included whites and Latinos as well as blacks, but in truth, Latinos and whites alike were generally unsupportive of the integration efforts, and Latinos preferred that that their children attend neighborhood schools that would be responsive to distinct linguis-

17. 347 U.S. 483 (1954).

18. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1970); Green v. Cnty. Sch. Bd., 391 U.S. 430 (1968).

19. *See* BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 140–42 (1996) (describing the internal debate over the de jure–de facto distinction when the United States Supreme Court reviewed the *Keyes* case and the attendant concerns about the remedial implications of ballasting the distinction).

20. Moran, *supra* note 3, at 35.

21. Moran, *supra* note 8, at 158.

22. *Id.* (quoting Transcript of Record at 765, Keyes v. Sch. Dist. No. 1, 313 F. Supp. 61 (D. Colo. 1970) (No. C-1499))

23. *Keyes*, 313 F. Supp. at 83–84.

tic and cultural needs.[24] Moreover, blacks and Latinos had not forged political coalitions in support of an integrationist agenda, school reform, or municipal reform.[25] As Dr. Richard Koeppe, a former superintendent of the Denver Public Schools, observed: "[T]he Hispanic community lives over here and does their thing, and the black community lives over here. . . ."[26] Given these realities, Judge Doyle crafted his initial order to vindicate an integrationist ideal without unduly disrupting intergroup relations in the tri-ethnic district.

All of Judge Doyle's efforts to calibrate the order in a politically palatable way were upset on appeal. Convinced that the district court could not legitimately find discriminatory intent based on the circumstantial case before it, the school board appealed the decision.[27] Instead of prevailing, the board found itself subject to a far more onerous remedial order. Although the U.S. Court of Appeals for the Tenth Circuit adopted an approach even narrower than that crafted by Judge Doyle, the United States Supreme Court ultimately ordered district-wide relief.[28] In an opinion by Justice William Brennan, the majority of the Court concluded that the plaintiff's showing of discriminatory motive in one area of the district created a presumption that the entire school system was affected.[29] As a consequence, the desegregation remedy had to cover the whole district and not just the subset of schools identified by either Judge Doyle or the Tenth Circuit.[30]

On remand, it became clear that every neighborhood in Denver would be required to participate in the desegregation effort.[31] At this point, the Latino community, which had previously expressed doubts about the utility of integration as a cure for educational inequity, became actively engaged in the case.[32] Many members of the Latino community had longstanding roots in Denver. Latinos on average were less well educated and less affluent than the blacks who had arrived in the city after World War II.[33] Before the lawsuit, in the late 1960s and early 1970s,

24. Moran, *supra* note 8, at 158–59.

25. James J. Fishman & Lawrence Strauss, *Endless Journey: Integration and the Provision of Equal Educational Opportunity in Denver Public Schools; A Study of* Keyes v. School District No. 1, 32 HOW. L.J. 627, 634 (1989).

26. Interview with Dr. Richard Koeppe, Former Superintendent, Denver Pub. Sch., in Denver, Colo. (Oct. 7, 1991).

27. Moran, *supra* note 8, at 159.

28. Keyes v. Sch. Dist. No. 1, 445 F.2d 990 (10th Cir. 1971), *modified and remanded*, 413 U.S. 189 (1973).

29. *Keyes*, 413 U.S. at 201–03.

30. *Id.* at 204–13.

31. Keyes v. Sch. Dist. No. 1, 368 F. Supp. 207, 208–10 (D. Colo. 1973).

32. Motion to Intervene as Parties Plaintiffs at 3, Keyes v. Sch. Dist. No. 1, 521 F.2d 465 (10th Cir. 1975) (No. C-1499), *available at* http://www.clearinghouse.net/chDocs/not_public/SD-CO-0001-0001.pdf; Moran, *supra* note 8, at 160.

33. ABBOTT ET AL., *supra* note 6, at 302–03; LEONARD & NOEL, *supra* note 6, at 389–90; Jessica Pearson & Jeffrey Pearson, *The Denver Case:* Keyes v. School District No. 1, *in* LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION 168, 169 (Howard I. Kalodner & James J. Fishman eds., 1978).

Latino activists led by a charismatic ex-boxer named Corky Gonzales had espoused an ethnic pride agenda that rejected desegregation,[34] and moderate and conservative Latinos also expressed their opposition to desegregation. As Bernard Valdez, a member of the school board, put it: "I felt all along that desegregation was not going to improve education, because I just couldn't see how it would. . . . I thought it might improve the human relations aspect . . . when children get to know each other and things of that nature. But my mind never changed. I always maintained that the busing and the mixing of children didn't do anything for the educational achievement of children."[35]

Regardless of political ideology, then, Latinos showed little interest in school integration. When it became clear that a busing decree would include predominantly Latino schools, the Congress of Hispanic Educators, a group of Latino teachers and school administrators, intervened to exempt some schools so that they could promote bilingual and cultural education.[36] Although Judge Doyle was sympathetic and granted a limited number of exceptions,[37] the Tenth Circuit was not favorably disposed and made clear that "[b]ilingual education . . . is not a substitute for desegregation."[38] On remand, the trial court made the busing order comprehensive.

When the decree was implemented, many white and middle-class families sought refuge in the suburbs. However, there was a problem. Historically, the Denver school system could annex contiguous areas by a majority vote of its own population.[39] The voters in the annexed area had no voice in the process. The Poundstone Amendment quickly eliminated this obstacle to white flight. The new provision required that both Denverites and residents of the neighborhood to be annexed approve the consolidation.[40] With white flight now a viable option, families increasingly chose to leave the city.[41] Nolan Winsett, a leader of Citizens Association for Neighborhood Schools, an organization that vigorously opposed busing, described the exodus this way:

> [A]s it turns out, all we did was to stage an action with the federal court ruling right over us, allowing the populace sufficient time to be orderly, quietly evacuated. And did they evacuate! They hit the coun-

34. Calvin Trillin, *U.S. Journal: Denver*, NEW YORKER, May 31, 1969, at 85, 88; Moran, *supra* note 3, at 38.

35. Interview with Bernard Valdez, Former Member, Denver Pub. Sch. Bd. of Educ., in Denver, Colo. (Oct. 1, 1991).

36. *See supra* note 32 and accompanying text.

37. Keyes v. Sch. Dist. No. 1, 380 F. Supp. 673, 692, 696 (D. Colo. 1974).

38. Keyes v. Sch. Dist. No. 1, 521 F.2d 465, 480 (10th Cir. 1975).

39. DALE A. OESTERLE & RICHARD B. COLLINS, THE COLORADO STATE CONSTITUTION: A REFERENCE GUIDE 391 (2002).

40. *Id.*

41. CHUNGMEI LEE, HARVARD C.R. PROJECT, DENVER PUBLIC SCHOOLS: RESEGREGATION, LATINO STYLE 3 (2006); Moran, *supra* note 8, at 164.

> ty lines so fast, north, south, east and west, that it absolutely blew the minds of developers.[42]

In the 1980s and 1990s, the school district began to argue that it was no longer possible to achieve meaningful desegregation because of demographic shifts in Denver neighborhoods. School officials contended that the district court should declare that the lingering effects of segregation had been cured and that the district therefore was unitary. This would mean that the busing order would draw to a close and that judicial oversight would come to an end.[43] By this time, Judge Richard P. Matsch was in charge of the case.[44] In demonstrating the district's bona fides and good faith, school officials relied on evidence of a strong commitment to bilingual and bicultural programs. This conciliatory tone was designed to show that any animus was a thing of the past and that current board members could be relied upon to be fair and impartial decision makers in matters of race and ethnicity.[45] These efforts led to an order addressing the necessary elements of a bilingual program in August 1984.[46] The order emphasized transitional bilingual education programs that use a child's native language as a bridge to learning English, rather than immersion programs that rely on comprehensive exposure to English with little use of the native language.[47] Interestingly, the agreement was reached at a point when the national commitment to using a child's native language was waning.[48] So, the initiative seemed to grow out of a desire to end court-ordered desegregation, rather than as a response to growing demands for special bilingual programs.[49]

Although efforts to end the busing order did not at first succeed, the school district was finally declared unitary in September 1995.[50] Because of ongoing demographic shifts in the Denver Public Schools, many believed that busing was an increasingly costly remedy with steadily declining benefits. The court's desegregation order simply could not over-

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42. Interview with Nolan Winsett, Former President, Citizens Ass'n for Neighborhood Sch., in Denver, Colo. (Oct. 1, 1991).

43. *See* Keyes v. Sch. Dist. No. 1, 895 F.2d 659, 661–62 (10th Cir. 1990); Moran, *supra* note 8, at 160–61.

44. Judge Doyle had been appointed to the Tenth Circuit in 1971 but continued to preside over the *Keyes* case. He assumed senior status in 1984 and died in 1986. U.S. JUDICIAL CONFERENCE COMM. ON THE BICENTENNIAL OF THE CONSTITUTION OF THE U.S., THE FEDERAL COURTS OF THE TENTH CIRCUIT: A HISTORY 415, 460 (1992); *In Memoriam to the Honorable William E. Doyle, 1911–1986*, 64 DENV. U. L. REV. 101, 102 (1987).

45. Moran, *supra* note 8, at 160; Fishman & Strauss, *supra* note 25, at 702–03.

46. *See* DENVER PUB. SCH., REPORT TO THE BOARD OF EDUCATION: A PROGRAM FOR LIMITED ENGLISH PROFICIENT STUDENTS 14–27 (1984), *available at* http://www.clearinghouse.net/chDocs/public/ED-CO-0001-0017.pdf.

47. *Id.*; Moran, *supra* note 3, at 39.

48. Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CALIF. L. REV. 321, 330–33 (1987); Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CALIF. L. REV. 1249, 1298–1314 (1988).

49. Moran, *supra* note 3, at 39.

50. Keyes v. Cong. of Hispanic Educators, 902 F. Supp. 1274, 1307–08 (D. Colo. 1995), *appeal dismissed*, 119 F.3d 1437 (10th Cir. 1997).

come the fact that whites had become a distinct minority in the district. Many educators worried that busing damaged their ability to engage parents in the life of the schools. Teachers and administrators also believed that compliance with the decree diverted the school district from other reform initiatives that might enhance the quality of the educational experience.[51]

With people of color in the majority, there was a growing sense that the political process was an appropriate outlet for pursuing school reforms. As Judge Matsch noted: "The Denver now before this court is very different from what it was when this lawsuit began. . . . People of color are not bystanders. They are active players in the political, economic, social and cultural life of the community. . . . There is little danger that they will permit the public schools to deny them full participation."[52] As evidence of the viability of political solutions, officials were implementing collaborative decision making to create enhanced opportunities for participation in school governance for parents and community members.[53] With the end of busing, Denver's public schools could once again be neighborhood schools.

Although neighborhood schools would likely revert to being racially and ethnically identifiable, leading politicians did not necessarily view this as a problem. After years of living under the *Keyes* desegregation order, local leaders believed that prejudice in Denver had declined significantly.[54] As a result, they treated choices to live in segregated neighborhoods as the product of legitimate personal choice rather than of racism. For example, Assistant City Attorney Stan Sharoff described the views of Wellington Webb, Denver's first black mayor, as follows:

> [E]ven in situations where the price of the housing stock is not a factor, the Mayor chooses to live in a black area of Denver. He doesn't want to live in southeast Denver where the majority of people are Anglo. . . . [The Mayor and other prominent black officials] can afford to live in other areas, but [they] like living in the black community. And this is true with Hispanic people, too, according to the people I've talked to. So, we don't expect a random distribution [of racial and ethnic groups across neighborhoods]. We expect people to live in areas where they want to live. . . . [Concentration of Hispanics in west Denver is] consistent with what the Mayor believes are peo-

51. Patrick James McQuillan & Kerry Suzanne Englert, *The Return to Neighborhood Schools, Concentrated Poverty, and Educational Opportunity: An Agenda for Reform*, 28 HASTINGS CONST. L.Q. 739, 742–45 (2001).

52. *Keyes*, 902 F. Supp. at 1307.

53. JUDY BRAY & ALEX MEDLER, DENVER'S PUBLIC SCHOOLS: REFORMS, CHALLENGES, AND THE FUTURE 5 (2009).

54. Moran, *supra* note 8, at 167.

> ple's voluntary choices, that it isn't the forces of discrimination that are dictating where Hispanics live.[55]

As a result, the emerging multiracial coalition of politicians in Denver was not necessarily committed to preserving *Keyes*'s legacy or pursuing an agenda that focused on race and ethnicity as the basis for school reform.

The school district had supported bilingual programs as a means to advance its claim that the busing decree should end, but the strength of the commitment to language programs was tested at the time that the district was finally declared unitary. When the court entered the unitariness order in 1995, the school district filed a motion to modify the August 1984 language rights order. The Congress of Hispanic Educators responded, and the United States also participated in the status conferences that ensued. The parties agreed to a new English Language Acquisition Program (ELAP) over the objections of Padres Unidos, a group of parents of Denver students.[56] ELAP set forth a detailed blueprint for the identification and assessment of English language learners, the models of instruction, the notification and consent of parents to the placement of English language learners, and the evaluation and exit of students from the programs.[57] Under ELAP, schools would offer English as a Second Language programs except where there were 60 or more Spanish-speaking students in an elementary school, 75 or more in a middle school, or 200 or more in a high school who desired a program that made use of the native language as a bridge to learning English.[58] The judge closed the case as an administrative matter, retaining jurisdiction to receive monitoring reports and to review any resulting compliance issues.[59]

II. THE IRONIES OF THE *KEYES* CASE

Now that the school district has been unitary for over seventeen years, it is possible to reflect on the successes and failures of the lawsuit. The litigation did not achieve its integrationist vision for the Denver schools. Even while the decree was in place, demographic shifts put this goal largely out of reach, and afterwards, the reversion to a neighborhood school policy intensified segregation.[60] During the *Keyes* litigation and in

55. Interview with Stan Sharoff, Former Ass't City Att'y, Denver City Attorney's Off., in Denver, Colo. (Oct. 10, 1991).

56. Mike Fagan, *Case Profile: Cong. of Hispanic Educators v. Sch. Dist. No. 1*, U. MICH. L. SCH. C.R. LITIG. CLEARINGHOUSE (June 17, 2008), http://www.clearinghouse.net/detail.php?id=9480.

57. Order Approving English Acquisition Program, No. 95-M-2313 (D. Colo. June 16, 1999), *available at* http://www.clearinghouse.net/chDocs/public/ED-CO-0001-0007.pdf.

58. *Id.* at 27, 34, 41.

59. Fagan, supra note 56.

60. LEE, *supra* note 41, at 18; *see also* CATHERINE L. HORN & MICHAL KURLAENDER, HARVARD C.R. PROJECT, THE END OF *KEYES*—RESEGREGATION AND ACHIEVEMENT IN DENVER PUBLIC SCHOOLS 7–9 (2006).

the years following, the proportion of white students in the school system steadily declined, while the proportion of Latino students rose substantially. In 1967, shortly before the *Keyes* case was filed, the Denver Public Schools had a student body that was 66% white, 14% black, and 20% Latino.[61] In 1994, the year before the district was declared unitary, whites accounted for 29% of the school population; blacks, 21%; Latinos, 45%; and Asians, 4%.[62] By 2003, whites represented only 20% of the student body; blacks, 19%; Latinos, 57%; and Asians, 3%.[63] As these data suggest, white flight was only part of the story of Denver's transformation; a significant and continuing influx of Latino students was another important element of the changes in enrollments.[64] Even so, these demographic shifts cannot completely account for the increased school segregation that occurred in the wake of the unitariness decision. The return to a neighborhood school policy also played a part. Whites became less integrated with non-white students, and many schools also became more identifiable as black or Latino schools.[65] Latino students grew especially isolated in the Denver schools; by 2003, the average Latino attended a school with a student body that was 71% Latino, even though Latinos made up only 57% of the overall school district population.[66]

In addition, these demographic changes correlated with an intensification of socioeconomic isolation. White flight drained the district of middle-class families, and newly arrived Latino families tended to be less affluent.[67] As a result, schools with low white enrollments were increasingly segregated by socioeconomic status: the fewer the number of white students in a school, the larger the percentage of students eligible for free and reduced lunches.[68] Socioeconomic segregation in turn correlated with academic achievement: the smaller the number of white students in a school, the more depressed the overall scores on standardized achievement tests.[69] The impact of these new patterns of socioeconomic isolation had differential effects on racial and ethnic subgroups. Achievement scores for white students were not affected by shifts in white enrollments after the end of busing. For black and Latino students, however, average achievement scores increased in schools with gains in white enrollments, while average scores declined in schools with sub-

61. LEE, *supra* note 41, at 10.
62. *Id.*
63. *Id.*
64. *Id.* at 9.
65. *Id.* at 12–13.
66. *Id.* at 10.
67. *See* BRAY & MEDLER, *supra* note 53, at 4.
68. HORN & KURLAENDER, *supra* note 60, at 11–12.
69. *See id.* at 16, 19.

stantial decreases in white enrollments, although the pattern was not entirely consistent.[70]

The *Keyes* case in general was not a panacea for problems of poor academic performance in the Denver schools. By all measures, academic achievement in the Denver schools remains depressed. According to a study by the U.S. Department of Education done in 2004–2005, the city's average high school graduation rates ranked in the bottom third in the nation.[71] Denver's rates also fell notably below those of comparable school districts like Aurora, Greeley, and Pueblo, each of which has similar student demographics.[72] Latino students in Denver fared especially poorly. In 2008, the overall graduation rate was 48.6%, but for Latinos the rate was 40.5%, while for blacks it was 55.7%, and for whites, it was 61.0%.[73] (For comparison purposes, the statewide graduation rate was 73.9%, while for Latinos it was 55.6%; for blacks, 64.1%; and for whites, 81.6%.[74]) Denver lags behind much of the state on standardized achievement tests, too. Overall, in 2008, fewer than half of the students in the Denver Public Schools were proficient in reading for grades 3 through 10, and only one-third were proficient in math.[75] Once again, there was an achievement gap with whites outperforming their black and Latino peers.[76] And, when a child failed to score at the proficient level, the odds were very low that he or she would catch up later.[77] These poor results on achievement tests translated into negative evaluations of Denver's public schools: nearly two-thirds ranked in the low or unsatisfactory categories in Colorado's school accountability reports in 2008. In fact, five of twelve unsatisfactory schools in the state were located in Denver.[78]

The most lasting legacy of the case may therefore be the ongoing commitment to bilingual programs. The language decree remains in place and may have insulated the city from some of the state politics surrounding bilingual education. Although Colorado passed an official English initiative in 1988, the decree remained in force.[79] Later, in 1988, 2000, and 2002 when California, Arizona, and Massachusetts respectively adopted popular measures that mandated structured English immersion for English language learners, Colorado went a different way. In 2002,

70. *Id.* at 23.
71. BRAY & MEDLER, *supra* note 53, at 10.
72. *Id.* at 9–10.
73. A+ DENVER ET AL., START WITH THE FACTS: STRENGTHENING DENVER PUBLIC SCHOOLS' EDUCATION PIPELINE 16 (2011).
74. BRAY & MEDLER, *supra* note 53, at 11.
75. *Id.* at 13–14.
76. *Id.* at 14–15.
77. *Id.* at 17.
78. *Id.* at 18.
79. Robert D. King, *Should English Be the Law?*, ATLANTIC, Apr. 1997, at 55, 56.

Colorado voters rejected such a ballot initiative by a narrow margin.[80] It seems quite possible that the fact that most English language learners in the state reside in Denver may have played a role in the outcome. After all, the initiative would have had no impact on those students because it could not override a federal court order. As a result, much of the force of the measure was undermined.

That said, it is not clear that the bilingual program's goals of remedying barriers to educational access and attainment have been realized. After the Denver school district was declared unitary, English language acquisition programs were clustered in schools marked by poverty as well as by racial and ethnic isolation. According to data collected in the 1997–1998 and 1998–1999 academic years, the five high schools with programs for English language learners served student bodies with the highest percentages eligible for free and reduced lunches, the highest rates of student turnover, the lowest rates of attendance, the highest dropout rates, and the lowest levels of academic achievement.[81] Years after implementation of the 1999 decree, English language learners still have some of the lowest achievement scores in the district. In the period from 2003 to 2008, only one in seven of these students scored at a proficient level in reading, and fewer than 20% were proficient in math.[82] Yet, a 2008 update found that no reports on the court-ordered English Language Acquisition Program had been filed since 2005, suggesting that monitoring had become perfunctory, if it took place at all.[83]

In sum, the Denver Public Schools today are plagued by patterns of segregation and low achievement, the very kind of patterns that prompted the *Keyes* case. In addition, the divide may be more entrenched than ever because of a declining proportion of white students, newly intensified socioeconomic isolation, and a growing population of Latino students from low-income backgrounds. With court-ordered desegregation largely a thing of the past, the critical question is what the Denver Public Schools will do for an encore when it comes to educational reform.

III. AFTER *KEYES*: THE FUTURE OF EDUCATIONAL EQUITY IN DENVER

If *Keyes* relied on race-based reforms in the courts, the Denver school district increasingly has turned to race-neutral political remedies. At first, there was some interest in seeking further judicial intervention. Shortly after the unitariness decision, an African-American lawyer named Joe Rogers filed suit in state court, alleging breach of contract and educational malpractice by the Denver Public Schools.[84] Originally, the

80. Kathy Escamilla et al., *Breaking the Code: Colorado's Defeat of the Anti-bilingual Education Initiative (Amendment 31)*, 27 BILINGUAL RES. J. 357, 358 (2003).

81. McQuillan & Englert, *supra* note 51, at 748–51.

82. BRAY & MEDLER, *supra* note 53, at 13, 15.

83. Fagan, *supra* note 56.

84. David Hill & Tom Travis, *Class Action*, 9 TCHR. MAG. 20, 20, 23, 25–26 (1998).

case was a class action brought on behalf of black parents and their children, but later the case was expanded to include whites and Latinos.[85] The lawsuit demanded a number of remedies, including the use of standardized testing to measure student progress and to prepare report cards on school performance; increased use of charter schools and alternative schools; elimination of the practice of transferring low-performing teachers to other schools in the district; and implementation of a voucher system.[86] The call for vouchers was highly controversial, but one of Rogers's supporters explained: "Vouchers will allow parents to take their children out of a very bad system. Some will choose to stay incarcerated—and maybe the system serves their purposes. But others are trying desperately to find something better."[87] In the wake of decades of court oversight, a stronger indictment of the Denver schools could hardly be imagined. Ironically, the imagery of escape echoed the rhetoric of white flight—busing would undermine the schools, and so parents had to flee a failing system. Those left behind were portrayed as little more than captives.

Despite the claim that judicial intervention was essential to free trapped children from underperforming schools, the state courts declined to get involved.[88] In rejecting the case, state jurists agreed with Judge Matsch that the political process could now be trusted to effect school reforms. The trial court found that the "concern and frustration with the quality of the Denver Public Schools, while understandable, is not properly a matter for resolution through the court system."[89] The court of appeals added:

> Plaintiffs cannot hold a public school district to the implementation of its educational objectives in a judicial setting. This matter is of a political nature, inasmuch as the school district is a political entity and, therefore, such policy issues should be addressed at the ballot box, not presented as a judicially enforceable contract claim.[90]

In 2001, two academic commentators, Patrick James McQuillan and Suzanne Englert, called on public officials to address conditions of concentrated poverty in the Denver school system. Acknowledging that courts were less committed to racial integration than previously had been the case, the authors suggested that advocates press for a fundamental right to education that would recognize that schools serving less affluent students require enhanced funding to provide an equal educational op-

85. *Id.*
86. *Id.* at 26.
87. *Id.* at 26 (quoting Tom Tancredo, former U.S. Representative and U.S. Department of Education appointee)
88. Denver Parents Ass'n v. Denver Bd. of Educ., 10 P.3d 662, 663 (Colo. Ct. App. 2000).
89. *Id.* at 664.
90. *Id.* at 665.

portunity.[91] McQuillan and Englert cautioned, however, that "we realize that redistributing resources will be difficult, in part, because the communities served by the neediest schools (i.e., low-income, minority populations) have historically been the most politically uninvolved and disenfranchised."[92] Their analysis called into question the viability of the political process as an avenue for reform for low-income families. For disadvantaged students and their parents, poverty might be a significant obstacle to advocacy, even if non-whites were a numerical majority in the school district.

McQuillan and Englert therefore directed their arguments at the judiciary. Their approach did not depend on socioeconomic integration but instead presumed that concentrated poverty would persist in the schools. Even so, each school would offer at least an adequate education, if not an equal educational opportunity. In fact, the State of Colorado has continued to struggle with problems of school finance reform in the years since the Denver district was declared unitary. Most recently, in *Lobato v. State*,[93] a Colorado district court concluded that the state's system of school finance had become irrational and arbitrary because of a failure to augment per-pupil funding to keep up with the rising costs of education.[94] Some of those costs related to shifting demographics that required schools to serve students with greater needs due to poverty, language, and disability.[95] The district court ordered that the Colorado legislature take steps in the 2012 legislative term to rectify the failure to provide an adequate education to all Colorado public school students.[96] The State appealed the decision, and the Colorado Supreme Court subsequently overturned the district court decision, finding that the school finance system was rationally related to the constitutional mandate that education be "thorough and uniform" and that solutions to underfunding lay with the state legislature.[97]

Another way to attack conditions of concentrated poverty in the Denver schools would be to pursue a program of socioeconomic integration. As court-ordered desegregation draws to a close in school districts around the nation, there has been a growing interest in alternative approaches to overcome isolation based on race and poverty.[98] The focus on socioeconomic plans intensified when the United States Supreme

91. McQuillan & Englert, *supra* note 51, at 757–59.
92. *Id.* at 760.
93. No. 2005-CV-4794 (Colo. Dist. Ct. Dec. 9, 2011).
94. *Id.* at 181.
95. *Id.*
96. *Id.* at 182–83.
97. State v. Lobato, 304 P.3d 1132, 1138–44 (Colo. 2013).
98. *See* THE FUTURE OF SCHOOL INTEGRATION: SOCIOECONOMIC DIVERSITY AS AN EDUCATION REFORM STRATEGY *passim* (Richard D. Kahlenberg ed., 2012) (analyzing experiences with socioeconomic integration plans in eighty school districts serving approximately four million students).

Court struck down voluntary integration programs that relied on race in *Parents Involved in Community Schools v. Seattle School District No. 1*.[99] Efforts to promote socioeconomic integration have not gained much traction in the Denver Public Schools, even as the isolation of students from low-income families has deepened. Such plans would have to be adopted by the school board, rather than pursued through a lawsuit. Because socioeconomic status is not a protected constitutional category, no student can assert a right to go to school with people from varied class backgrounds. At the same time, however, legislatures and agencies enjoy considerable leeway in addressing socioeconomic differences; there are no significant constitutional obstacles to implementing socioeconomic integration plans.[100] Even so, there seems to be little political appetite for another experiment with busing in Denver. *Keyes* remains an abject reminder that disgruntled parents with resources at their disposal can vote with their feet when they disagree with a proposed reform. The desegregation order prompted not just white flight, but middle-class flight, and based on experiences in other districts, school officials may be justifiably concerned that even more affluent families will flee if their children are required to attend socioeconomically integrated schools.[101]

Denver officials have largely resigned themselves to the reality that public schools will remain segregated by race, ethnicity, and class. As a result, administrators have focused on enhancing the quality of the educational experience, primarily through reforms that focus on school management and governance. These movements have been couched in universal terms—as a way to improve achievement for all students—rather than as a response to the needs of particular student subgroups.[102] None of the major efforts is framed in the language of civil rights, and indeed, the rhetoric of reform is largely "colorblind." There are three key initiatives underway: the Denver Plan, ProComp, and a New Schools, Performance and Innovation initiative.[103] The school board adopted the Denver Plan in 2006 to improve instruction and to cultivate a climate of achievement.[104] This effort reflects nationwide interest in holding schools accountable based on rigorous achievement testing. The Denver Plan uses measures of student performance on standardized tests to create a scorecard for every school, which in turn serves as the basis for evalua-

99. 551 U.S. 701 (2007); *see also* Kahlenberg, *supra* note 5, at 7, 11 (noting trend and describing experience of Louisville, Kentucky school district when its voluntary plan was found unconstitutional in *Parents Involved*).

100. Richard D. Kahlenberg, *Socioeconomic School Integration*, POVERTY & RACE, Sept./Oct. 2001, at 1, 3.

101. Kahlenberg, *supra* note 5, at 10–11 (describing controversy that erupted in Wake County, North Carolina public schools when an influx of low-income Latino students complicated implementation of a socioeconomic integration plan).

102. BRAY & MEDLER, *supra* note 53, at 2 ("Each child has just one childhood.").

103. *Id.* at 20–21.

104. *Id.* at 22.

tion and decision making.[105] In addition, the plan uses professional development opportunities to enhance the ability of teachers to deliver high-quality instruction and to foster leadership skills among principals and assistant principals.[106] Finally, the plan seeks to promote collaborations with parents, adult mentors, and community organizations to offer a safe, orderly, and enriched environment in every school. Initial results indicated that the plan had achieved some success in improving student achievement, but much work remained to be done.[107] In 2010, the plan was revamped and strengthened to address low overall rates of proficiency in the district and an ongoing racial achievement gap.[108]

With the adoption of ProComp, the Denver Public Schools became an acknowledged leader in the use of performance pay for teachers.[109] In nearly all school systems around the country, teachers receive salaries that reflect their level of education and years of experience, even though neither of these factors correlates with student learning.[110] The ProComp program was the product of a long and careful collaboration. From 1999 to 2003, the school district and the Denver Classroom Teachers Association cooperated in piloting a pay-for-performance plan at sixteen public schools. Under the plan, teachers worked with principals to set objectives that would be the basis for determining their compensation.[111] A study of the experiment found that it had produced promising results for elevating teachers' expectations and students' performance. In particular, researchers determined that the more ambitious the teacher's goals, the greater the improvement in student achievement.[112] In 2003–2004, a joint task force of the Denver Public Schools and the Denver Classroom Teachers Association recommended that the pilot plan be expanded. Existing teachers would have the option to join ProComp and be paid based on performance or to remain under the traditional system of compensation. All new hires after 2006–2007 would be included in ProComp.[113] By 2008, almost two-thirds of the teachers in the district were part of the pay-for-performance system, and in 2011, 80% were participating.[114] To finance the new approach, Denver voters approved a tax that would gen-

105. *Id.* at 22–23.
106. *Id.* at 23.
107. *Id.*
108. DENVER PUB. SCH., 2010 DENVER PLAN: STRATEGIC VISION AND ACTION PLAN, 5 (2010).
109. EDWARD W. WILEY ET AL., DENVER PUB. SCH., DENVER PROCOMP: AN OUTCOMES EVALUATION OF DENVER'S ALTERNATIVE TEACHER COMPENSATION SYSTEM: 2010 REPORT 11–12 (2010); *see also* BRAY & MEDLER, *supra* note 53, at 24.
110. BRAY & MEDLER, *supra* note 53, at 24; WILEY ET AL., *supra* note 109, at 10.
111. BRAY & MEDLER, *supra* note 53, at 24–25.
112. CMTY. TRAINING & ASSISTANCE CTR., CATALYST FOR CHANGE: PAY FOR PERFORMANCE IN DENVER; FINAL REPORT 5 (2004).
113. BRAY & MEDLER, *supra* note 53, at 25.
114. *Id.*; *see also* Yesenia Robles, *DPS Teacher-Pay System Likely Boosting Student Success*, DENVER POST, Oct. 19, 2011, at B1.

erate an additional $25 million per year for teacher compensation.[115] Initial results based on a 2008 study suggested that there was at most a modest and not entirely consistent correlation with improved student test scores.[116] A later study released in 2011 concluded that ProComp had produced some success in boosting test scores and assisting with teacher retention in the school district.[117]

Various obstacles may limit the impact of this pay-for-performance reform. For one thing, Denver—like many other districts in the state—remains reluctant to weed out bad teachers by labeling them "unsatisfactory."[118] In addition, the pension system may constrain the resources available to reward new teachers early in their careers as a way to reduce attrition.[119] In 2009, even with the adoption of ProComp, about half of all teachers in the Denver schools left the profession within five years of starting their jobs.[120] In order to provide additional incentives for new teachers to stay in the district, the Denver Public Schools worked with the University of Denver and Denver-based Janus Capital Group to create the Denver Teacher Residency Program. Modeled on a medical residency, the program allows up to 100 individuals to teach while obtaining a master's degree in education.[121] In the first year, the participants are assigned to work with a master teacher in one of five elementary schools. After that, each teacher begins working full-time in the district, and if the teacher remains for five years, the tuition for the master's degree is fully reimbursed.[122] The program remains too new to evaluate the results with any confidence, but it is yet another innovation aimed at improving education for all students in the school system.

The final major area of reform is the New Schools, Performance and Innovation initiative, which the board adopted in 2007.[123] This effort builds on a statewide commitment to school choice. Colorado was one of the first to pass a charter school law, which provides public funding for start-up schools that enjoy considerable autonomy in selecting teachers, developing a curriculum, and managing the delivery of services.[124] Denver had already witnessed a steady growth in the number of charter schools and in their enrollments before the board adopted the 2007 plan. In 2000, fewer than 4% of the city's schools were charters, and only

115. BRAY & MEDLER, *supra* note 53, at 25.

116. ED WILEY ET AL., DENVER PROCOMP EVALUATION: A MIXED-METHOD EVALUATION OF DENVER'S ALTERNATIVE TEACHER COMPENSATION SYSTEM; YEAR 1 REPORT 21 (2008).

117. WILEY ET AL., *supra* note 109, at 70–71; Robles, *supra* note 114.

118. BRAY & MEDLER, *supra* note 53, at 26.

119. *Id.* at 27.

120. Tom McGhee, *Newbies Learn to Teach by Doing*, DENVER POST, Aug. 16, 2009, at B1.

121. *Id.*

122. *Id.*

123. KIM KNOUS DOLAN & AMY BERK ANDERSON, DONNELL-KAY FOUND., DPS BLUEPRINT: TOWARDS A HIGH-PERFORMING DISTRICT—NEW SCHOOL DEVELOPMENT AND BEYOND *passim* (2007); *see also* BRAY & MEDLER, *supra* note 53, at 27.

124. BRAY & MEDLER, *supra* note 53, at 27–28.

about 2% of students attended them. By 2006, more than 12% of Denver schools were charters, and over 8% of students attended one of them.[125]

The New Schools, Performance and Innovation initiative is designed to encourage greater school choice by supporting the creation of new charter schools as well as other alternatives like innovation schools, which are district-managed institutions that promote innovative practices and greater autonomy to improve student outcomes.[126] The plan was designed to promote the development of high-quality school offerings, especially at the secondary level, and to create an orderly way of closing failing schools.[127] In undertaking these reforms, the Denver school system hoped to staunch attrition in enrollments resulting from a policy that allows students to register across district boundaries.[128] In addition, school officials hoped to lure students into Denver's public schools and away from private schools, home schooling, and nearby schools in other districts. The steady growth in the number of charter schools and the proportion of students they enroll indicate that school choice has an inherent appeal, though the impact on achievement remains uncertain.[129] In many ways, the plan reflects the vision of school choice that Joe Rogers embraced in the lawsuit he filed shortly after the Denver school system was declared unitary. Yet, this plan is the product of the political rather than the judicial process, and it is framed as a colorblind effort to promote educational quality and to empower parents to exercise the freedom to make informed decisions about their children's education.

The current state of the school reform movement in Denver reveals what may be the *Keyes* case's ultimate irony. At the inception, litigators considered making the lawsuit a test case for the proposition that de jure and de facto school segregation were equally pernicious. Although that strategy ultimately was dropped, today the very notion of equating these two types of racial and ethnic isolation has largely disappeared from the political discourse. Denverites seem to take as a given that their schools will be segregated, and indeed, leaders frame these conditions as an outgrowth of legitimate private preferences about where to live. Because conditions of racial and ethnic separation have been naturalized and even normalized, reform efforts now focus on quality education in classrooms largely devoid of diversity and often marked by concentrated poverty.

CONCLUSION

Keyes was an extraordinary moment in the history of the Denver Public Schools. The push for change was driven by local activism, and the reform agenda was defined by the normative imperative of eradicat-

125. *Id.* at 28.
126. DOLAN & ANDERSON, *supra* note 123, at 24–27.
127. *Id.* at 3–6.
128. *Id.* at 3.
129. *Id.*; *see also* BRAY & MEDLER, *supra* note 53, at 27.

ing racial discrimination. There was a presumption that curing the wrong of intentional discrimination would lead to improved school performance for black and Latino students. Instead, after *Keyes*, public schools in Denver remain racially and ethnically identifiable, and the achievement gap persists. Despite ongoing racial disparities, reformers today pursue a colorblind reform agenda. With segregated conditions treated as a given, officials struggle to find solutions that will transform every child's experience, no matter how impoverished or isolated the school. With educational administrators taking the lead in pursuing current efforts at innovation, changes are framed in terms of managerial efficiency—whether in the way that teachers are paid and trained, principals are prepared for leadership, or new schools are formed. Given this focus on restructuring educational services to improve student outcomes, implementation is accompanied by expert empirical analysis to determine whether a plan has any meaningful impact. No longer is there room for the purely symbolic victory in educational reform. The plaintiffs in *Keyes* could claim the moral high ground, even though many everyday problems in the schools were unresolved. Today's gains, by contrast, must be tangible and measurable. By that metric, progress remains elusive.