

# The *Keyes* of Constitutional Law

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## INTRODUCTION

Before beginning law school in 2001, I knew the names of an embarrassingly small number of judicial decisions. The only case names that I readily possessed were *Brown v. Board of Education*, *Roe v. Wade*, *Bush v. Gore*, and a smattering of other opinions that had managed to escape the narrow confines of the legal community.<sup>1</sup> I did, however, know the name of at least one relatively obscure opinion, *Goldberg v. Kelly*, though I would have been at an utter loss if I were asked to identify the holding, the parties, or even the underlying dispute.<sup>2</sup> The sole reason that I had encountered *Goldberg v. Kelly* is this year's Jorde lecturer, Professor Owen Fiss of Yale Law School.

Some of my closest friends from Oxford University started law school in New Haven, Connecticut, in the fall of 2000, one year before I was set to begin law school up the road in Cambridge, Massachusetts. When I anxiously pressed these friends for the most salient details of their first few weeks of legal education, several of them mentioned how their instructor for Civil Procedure (whatever that was) focused for several weeks in a row on a single case. While this arrangement sounded to me then something like *The Paper Chase* meets *Groundhog Day*, they insisted that it was fascinating to refract one opinion through various prisms in order to elucidate foundational points about our legal system. What made a much deeper impression on me than anything about *Goldberg v. Kelly*, though, was the way that Professor Fiss's students—my buddies—would utter his name in what can only be described as hushed tones.

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1. See *Brown v. Board of Education*, 347 U.S. 483 (1954); *Roe v. Wade*, 410 U.S. 113 (1973); *Bush v. Gore*, 531 U.S. 98 (2000).

2. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

It was plain simply from the way that they almost whispered his name that Owen Fiss inspired deep reverence, even from my most irreverent peers.

Recently, I emailed three old friends who attended Yale to notify them about my role in today's event and to ask them what precisely about Professor Fiss evoked such veneration. Despite being quite prominent in their chosen fields (not legal academia, I might add), they all responded with alacrity, emphasizing virtually identical themes regarding the significance of Professor Fiss's presence in the classroom and beyond. The first friend called Fiss "the moral center of the law school," and she noted that he taught, regardless of "what kind of law you were practicing, there was no point unless you had first developed a . . . clear understanding of justice and dedicated yourself to pursuing it. This may sound old fashioned but actually it's a timeless and brave idea." The second friend stated: "[Fiss] had a special gift (and passion) for teaching us not to just make arguments based on logic, but also based on a sense of justice. He . . . insisted that we not stop at 'what is the right answer,' but really grapple with 'is the answer right?' That's in the spirit of Yale Law School, but Owen Fiss was the keeper of the flame." The third student reflected:

In ways that I'm really only appreciating now, [Fiss's] focus on looking to the past as a means of keeping the flame of legal imagination alive about what the law could accomplish in fighting both individual and systematic wrongs . . . was a welcome antidote to a period when that imagination seemed at a low ebb. . . . Said another way, there was something about Professor Fiss that seemed almost old fashioned at the time, but I now see as resolute and alive to a moment when the possibilities of the past could be made present again.

These essential lessons that Professor Fiss imparted to his students more than fifteen years ago also eventually made a deep impression on me. Though I never had the privilege of being in a class taught by Professor Fiss, much of my scholarly writing over the last decade establishes that I am very much his student. Like Professor Fiss, I aim to emphasize in my own work the egalitarian contributions that the Supreme Court has made to the nation, resisting those who depict the Court as a fundamentally fragile institution. Like Professor Fiss, I aim to honor the possibilities of judicial decision making, even while taking care to chart the yawning gap that separates constitutional ideals from contemporary constitutional realities.

Apart from our shared overarching ambitions, which some would doubtless dismiss as quixotic, Professor Fiss's work also played a significant role in inspiring my first book, *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind*.<sup>3</sup> It provides a panoramic examination of the Supreme Court's constitutional decisions that have shaped

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3. JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* (2018).

students' rights, placing those opinions in historical context and advancing normative claims about the future of the domain. Although I have long nurtured an interest in the field of education law, it is—to put the point mildly—in no grave danger of being mistaken for legal academia's hottest area. Many of the nation's leading law schools do not regularly offer a course in the law of schools. Indeed, one of the central goals that animates my project is to reinvigorate the field of education law. The prefix in the word “reinvigorate,” of course, suggests that there were in fact halcyon days of yore that someday might return. Professor Fiss's early scholarship—much of which he undertook here at the University of Chicago, and occurred in what would become known as the field of education law—played no small role in affirming my decision to undertake *The Schoolhouse Gate*. If the formidable Professor Fiss deemed the subject matter worthy of sustained engagement, my thinking ran at the outset, then I could certainly dedicate my intellectual energy to immersing myself in this understudied field.<sup>4</sup> My work aims to bring constitutional law scholars into conversation with education law scholars, even though those two groups seldom have sustained exchanges in the modern era. This task is vital, I contend, because the two areas have influenced each other in significant, too-often-overlooked ways.

In perhaps no area is the connection between these two fields clearer and more gravid than the Supreme Court's decision to reject what Professor Fiss evocatively labels the theory of “cumulative responsibility.”<sup>5</sup> Simply put, the doctrine of cumulative responsibility suggests that, as a constitutional matter, the duty for addressing racial inequality falls on American entities not south of the Mason-Dixon Line, but instead south of the Canadian border. In many constitutional law courses, the Court's opinion in *Washington v. Davis*, from 1976, is identified as the constitutional culprit in a narrative that could have afforded much stronger protection to racial minorities under the Equal Protection Clause.<sup>6</sup> To the extent that an education law case is understood as laying the groundwork for *Davis*, most constitutional professors lay blame at the feet of *Milliken v. Bradley*, the case from 1974 that invalidated a court-ordered inter-district desegregation program in metropolitan Detroit, Michigan.<sup>7</sup>

Yet, I contend that this conventional account overlooks an important forerunner for *Davis* in the educational realm, a case from 1973 called *Keyes v. School District No. 1, Denver, Colorado*.<sup>8</sup> While *Keyes* acknowledged that unconstitutionally segregated schools existed outside of the South, the Court

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4. See, e.g., Owen M. Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697 (1971).

5. See Owen Fiss, *The Accumulation of Disadvantages*, 106 CALIF. L. REV. 1946 (2018).

6. See 426 U.S. 229 (1976).

7. See 418 U.S. 717 (1974).

8. 413 U.S. 189 (1973).

nevertheless imputed liability to non-southern jurisdictions only by identifying intentionally discriminatory acts—a technique that made it unduly difficult for civil rights plaintiffs to prevail on desegregation suits. While proponents of desegregation won the narrow battle for liability in *Keyes*, that opinion also contained the seeds of the modern Equal Protection Clause governing race. Thus, for students of racial inequality and the Constitution, wrestling with the *Keyes* of constitutional law is nothing less than key.

### I.

In *Keyes*, the Supreme Court resolved a lawsuit that black and Latino students filed challenging school segregation in the Mile-High City. Because neither Denver nor Colorado had enacted official laws requiring racially segregated schools, many observers predicted before *Keyes* that the Court would seize the opportunity to devise a standard to regulate *de facto* segregation.<sup>9</sup> As it would turn out, however, the Court confounded such expectations. Rather than broadly requiring educators to remedy segregated school conditions—wherever they appeared, and whatever their origins—*Keyes* instead held Denver liable for its racially isolated schools by issuing a highly fact-sensitive decision finding fault with the school board itself.

In a 7–1 decision, Justice William Brennan wrote an opinion for the Court emphasizing that the board had intentionally gerrymandered attendance zones near the city’s predominantly black Park Hill community—and even built an atypically small school in the middle of that neighborhood—in efforts to maintain segregated education. Such actions were, according to *Keyes*, sufficient to render the entire school system’s pupil assignment method unconstitutional, as the board’s actions evinced the “*purpose or intent to segregate.*”<sup>10</sup> That criterion would become the touchstone for determining

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9. See Christopher Jencks, *Busing: The Supreme Court Goes North*, N.Y. TIMES, November 19, 1972, at SM40.

10. *Keyes*, 413 U.S. at 208. See *id.*, 206 (“[T]he Board, through its actions over a period of years, intentionally created and maintained the segregated character of the core city schools.”). The Denver School Board argued that some of its schools should be regarded as integrated because African Americans and Mexican Americans attended the institutions together, even though they were joined by a trivial number of white students. *Keyes*, however, flatly rejected this argument, concluding in effect that schools that happen to be located where the barrio meets the ghetto do not adequately present the ideal of racial integration that the Court envisioned. *Keyes* held that it was erroneous to “separat[e] Negroes and Hispanos for purposes of defining a ‘segregated’ school” because “much evidence [indicates] that in the Southwest Hispanos and Negroes have a great many things in common.” *Id.* at 197. The two racial groups’ shared history of “discrimination in treatment when compared with the treatment afforded Anglo students” meant that legal challengers were “entitled to have schools with a combined predominance of Negroes and Hispanos included in the category of ‘segregated’ schools.” *Id.* at 198. This understanding of segregation complicates the view advanced by some commentators who have suggested that the nation’s increased racial diversity in recent decades, which has affected the composition of the nation’s public schools, indicates that schools predominantly made up of students from two different minority groups should be viewed as evidence of a desegregating nation. See Nicholas O. Stephanopolous, *Civil Rights in a Desegregating America*,

whether racially isolated schools violated the Constitution in jurisdictions that lacked Jim Crow laws, and would be imported into the overall structure for determining violations of the Equal Protection Clause.

In certain respects, however, Justice Lewis F. Powell wrote a more noteworthy, and more poignant, opinion in *Keyes* than did the majority. Justice Powell's separate opinion endorsed the Court's conclusion in *Keyes*, but would have reached that destination via a markedly different route. Knowledgeable observers eagerly awaited Powell's vote in *Keyes* because it represented the first time that he would weigh in on school desegregation—at least as a member of the Supreme Court. Powell's prior involvement with these issues provided advocates of robust desegregation little, if any, reason for believing that he would champion their cause. As Chairman of the Richmond School Board when the Court issued *Brown v. Board of Education*, Powell oversaw a system that for six full years after the decision saw not a single black student attend school with white students. In 1959, when educators in Prince Edward County decided to close their schools rather than integrate them, Powell announced “public education will be continued in our city—although every proper effort will be made to minimize the extent of integration when it comes.”<sup>11</sup>

Assessed only by the racial composition of Richmond's schools, Powell proved to be a man of his word. When he departed the school board in the spring of 1961, only two of the city's more than 20,000 black pupils attended school with whites. During his confirmation hearings, which yielded an 89–1 vote in his favor, Powell successfully avoided responsibility for this dismal desegregation record by noting that Virginia had removed pupil-assignment authority from local school boards and instead consigned that authority to a state agency. In the intervening years, however, Powell had not exactly acquired a reputation as a crusading proponent of desegregation. To the contrary, Powell filed an amicus brief in a North Carolina desegregation case, *Swann v. Charlotte-Mecklenburg Board of Education*, where he mounted a withering attack against busing efforts on consequentialist grounds. Busing would result in a perverse failure, Powell maintained, because its introduction would serve only to accelerate white flight, thus intensifying the very problem that it sought to alleviate.<sup>12</sup>

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83 U. CHI. L. REV. 1329, 1393–1415 (2016); EDWARD GLAESER & JACOB VIGDOR, *THE END OF THE SEGREGATED CENTURY: RACIAL SEPARATION IN AMERICA'S NEIGHBORHOODS, 1890–2010* (2012).

11. JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 47 (2010). For a thoughtful evaluation of Ryan's book, see Wendy Parker, *The Failings of Education Reform and the Promise of Integration*, 90 TEX. L. REV. 395 (2011).

12. See JOHN C. JEFFRIES, *JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY* 286 (1994). In the fall of 1960, two black teenage girls began attending what had been an entirely white junior high school. See *id.* at 141. See also *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

To the surprise of many onlookers, Powell's opinion in *Keyes* proposed nothing less than fundamentally reconceptualizing the judiciary's approach to the racial composition of schools by calling for the abandonment of the *de jure* / *de facto* distinction, and the implementation of "a uniform, constitutional approach to our national problem of school segregation."<sup>13</sup> Instead of examining a school board's motives in areas that lacked formal laws requiring segregated education, as the majority did in *Keyes*, Powell contended that courts throughout the nation should concentrate on correcting the existence of racially isolated schools—hardly an unknown phenomenon in northern jurisdictions: "[I]f our national concern is for those who attend [segregated] schools, . . . we must recognize that the evil of operating separate schools is no less in Denver than in Atlanta."<sup>14</sup>

Extending upon a Supreme Court precedent, which required a school district in rural Virginia to take affirmative steps to discontinue its dual school system, Powell promoted the adoption of a nationwide rule that would have *required*, under the Constitution, schools to pursue racial integration. Powell maintained that students should be understood as possessing "the right, derived from the Equal Protection Clause, to expect that . . . local school boards will operate *integrated school systems* within their respective districts. This means that school authorities . . . must make and implement their customary decisions with a view toward enhancing integrated school opportunities."<sup>15</sup> Powell's new constitutional standard would have compelled school officials, among other measures, to establish attendance zones that would facilitate integration, open schools in locations to foster integration, and, if the district provided students with transportation to school, draw routes within reason to promote integration. This far-reaching opinion would have mandated schools in *de facto* segregated jurisdictions to pursue racial integration in a far more aggressive fashion than anything the Court had yet mandated, or, indeed, has compelled to date.

Cutting against this sweeping remedy, however, Powell did aim in *Keyes* to dial back the status quo in one major respect: he would not have obligated schools to bus students for the purpose of maximizing integration, even in areas of *de jure* segregation. Powell repeatedly expressed anxieties about students—particularly young students—being bused great distances away from their homes. This aversion to extensive busing programs, Powell noted, stemmed from concerns that such practices could devastate the sense of community engendered when youngsters living in the same neighborhood attended the same school.<sup>16</sup> Consistent with his overarching requirement for integration,

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13. *Keyes*, 413 U.S. at 223 (Powell, J., concurring in part and dissenting in part).

14. *Id.* at 219.

15. *Id.* at 225–226 (emphasis in original). *See also id.* at 226 ("Where school authorities decide to undertake the transportation of students, this also must be with integrative opportunities in mind.")

16. *Id.* at 246. *See also id.* at 242 ("The Equal Protection Clause does, indeed, command that racial discrimination not be tolerated in the decisions of public school authorities. But it does not

however, Powell made clear that he used the term “neighborhood school” in an elastic sense: a neighborhood school was a school close to a student’s home, though not necessarily the absolute closest school.<sup>17</sup>

## II.

*Keyes* marked a pivotal moment in the Court’s desegregation jurisprudence because it—more acutely than any other single decision—shone a light on what could have been, and indeed what already should have been, in this area. In *Keyes*, the Court faced a clear opportunity to move away from the hunt for bad actors and toward considering whether school districts throughout the country in fact contained pockets of racially isolated schools. Wherever such pockets occurred, the Court should have made it incumbent upon educators to address that issue, an approach that would have acknowledged the nation’s “cumulative responsibility” for the isolation of racial minorities. Instead, *Keyes* clung to the *de jure* / *de facto* distinction, tweaking the traditional mindset ever so slightly by finding that there were some evildoers in non-southern jurisdictions who acted with an impermissible purpose by taking identifiable steps to isolate racial minorities, and who in effect should be treated as operating *de jure* segregated school systems. In so doing, the Court wrongly perpetuated the fiction that many communities existed throughout the nation where racial minorities simply happened to cluster due to their own preferences, rather than being forced into racialized ghettos through a complex web of mutually reinforcing public and private exclusions.

The Court’s emphasis on discriminatory purpose seems particularly misguided in the educational sphere because it obfuscates how segregated schools are invariably the product of some official governmental action, namely the assignment of students to attend designated schools. When educators’ current pupil assignment plans result in racially isolated schools, they must decide either to perpetuate or to remediate that condition. Perpetuating *de facto* segregation in schools by retaining pupil assignment plans should not, however, be misunderstood as tantamount to making no decision at all. Embracing an effects-based test for school segregation would have had the virtue of dramatically lightening the evidentiary burden on litigants and civil rights organizations. Rather than being required to identify some particular wayward step where the actions of school officials revealed impermissible racial considerations, parties seeking desegregation could have instead simply identified schools with student bodies that were predominantly racial minorities. In other words, the Supreme Court should have interpreted the Constitution to require school districts to pursue racial integration

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require that school authorities undertake widespread student transportation solely for the sake of maximizing integration.”).

17. See *id.* at 245 n.25 (“In the school context, ‘neighborhood’ refers to relative proximity, to a preference for a school near to, rather than more distant from, home.”).

throughout the nation regardless of their recent history—taking a cue from Justice Powell’s opinion in *Keyes*, even if it declined to adopt his aversion to busing. That an opinion written by Justice Powell—a man who steadfastly sought to prop up Jim Crow’s crumbling edifice, even as an adult member of the bar—could in any meaningful sense be understood as seeking to advance the Court’s pursuit of school integration serves only to underscore the disgraceful timidity with which the Court regulated the racial composition of schools during the long post-*Brown* era.<sup>18</sup>

Had the Supreme Court in *Keyes* embraced a more results-oriented approach to locating unconstitutional segregation in schools, the adoption of such a standard could well have had profound implications for the judiciary’s interpretation of the Equal Protection Clause as a general proposition. The Court decided *Keyes* three years before it decided *Washington v. Davis*, the most influential opinion in shaping the Fourteenth Amendment’s racial landscape decided during the last five decades. *Davis* involved a lawsuit challenging the legitimacy of a standardized test for becoming a police officer that black applicants failed at a disproportionately high rate compared to white applicants. *Davis* interpreted the Equal Protection Clause to mean that absent highly unusual circumstances, measures that produce racially-discriminatory effects, but that were not adopted for racially-discriminatory purposes, do not violate the Equal Protection Clause. *Davis*’s holding has succeeded in making it extremely difficult for racial minorities to prevail on claims under the Equal Protection Clause in the modern era. But that outcome at least plausibly could have been different if *Keyes* had adopted an effect-based segregation standard, and that standard informed the Court’s general view of the Equal Protection Clause that it would subsequently devise in *Davis*. Viewed from the opposite angle, *Keyes*’s purpose-based standard can be understood as laying the foundation for the Court’s reasoning in *Davis*.<sup>19</sup>

Criticizing *Keyes* for its failure to realize the prospect of momentous school integration throughout the nation should not be dismissed as the product of hindsight. To the contrary, a prominent theme of the media’s contemporaneous coverage of *Keyes* emphasized the decision’s refusal to

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18. For works that influenced the ideas contained in the preceding paragraphs, see DAVID L. KIRP, JUST SCHOOLS: THE IDEAL OF RACIAL EQUALITY IN AMERICAN EDUCATION 285 (1982); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); and Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC, June 2014, at 54. For support for the proposition that blacks have not typically desired high levels of racial separation, see Lee Anne Fennell, *Searching for Fair Housing*, 97 B.U. L. REV. 349 (2017).

19. *Washington v. Davis*, 426 U.S. 229, 240 (1976). For an important critique of *Washington v. Davis*, see Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). For evidence of this last proposition, see *Davis*, 426 U.S. at 240 (citing *Keyes*, 413 U.S. at 189) (“The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.”).



articulate a sufficiently demanding desegregation standard for non-southern jurisdictions. Thus, the *Chicago Defender* noted that lawyers “believe that the Supreme Court missed a precious opportunity to end any legal distinction between *de facto* discrimination and *de jure* segregation.”<sup>20</sup> The *Los Angeles Times* added: “By its decision, the court in effect has accepted a double standard in which the intent of school boards is irrelevant in the South and paramount in the North in determining judicial remedy to segregation.”<sup>21</sup> In a similar vein, the *Washington Post*’s editorial board noted that, though “Denver was generally thought to be the first ‘de facto’ segregation case the Court would rule on,” *Keyes* in fact “made essentially a ‘Southern’ finding” by “deal[ing] with Denver on ‘de jure’ lines.”<sup>22</sup>

By the early 1970s, no one could seriously doubt the prevalence of segregation in non-southern communities. In 1971, according to data collected by the federal government, the percentage of black students who attended schools where the student body was greater than 80 percent black stood at staggeringly high levels in many northern and western jurisdictions, including: 90 percent in St. Louis, Missouri; 91 percent in Cleveland, Ohio; 91 percent in Newark, New Jersey; 96 percent in Gary, Indiana; and 98 percent in Compton, California. In Chicago, Illinois, nearly half of the city’s elementary schools reported greater than 90 percent black student bodies, and more than one in four reported 100 percent black student bodies. By at least one measure, moreover, non-southern jurisdictions at this time featured starker rates of school segregation than southern jurisdictions: although 44 percent of black students in the South attended schools with a majority of white students, only 28 percent of their counterparts in the North and West could say the same.<sup>23</sup>

It would be profoundly mistaken, though, to believe that the issue of *de facto* segregation only recently attracted attention when the Court essentially opted to evade this fundamental question in 1973 with *Keyes*. Long before that time, individuals occupying a wide array of positions in American society—ranging from judges to journalists, from professors to politicians, from ordinary citizens to extraordinary essayists—had all identified *de facto* segregation as a serious problem that demanded remediation. In the early 1960s, some federal judges issued opinions that deemed *de facto* segregation unconstitutional, even as other federal judges disagreed; the Supreme Court, moreover, during that decade repeatedly declined invitations to reverse conservative circuit court decisions on this question that arose in various cities—including Gary, Indiana, Kansas City, Kansas, and Cincinnati, Ohio.<sup>24</sup> As *Brown* approached its tenth

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20. Editorial, *As the Court Sees It*, CHI. DEFENDER, June 26, 1973, at 13 (emphasis added).

21. Editorial, *The Court’s Double Standard*, L.A. TIMES, June 22, 1973, at C6.

22. Editorial, *Denver: A ‘Southern’ Finding in the West*, WASH. POST, June 22, 1973, at A22.

23. See 118 CONG. REC. 1, 563–66 (1972); Austin Scott, *20 Years After School Ruling Institutions Still Segregated*, WASH. POST, May 18, 1974, at A2.

24. See *Kelly v. Guinn*, 456 F.2d 100 (9th Cir. 1972), cert. denied, 413 U.S. 100 (1973); *Deal v. Cincinnati Bd. of Educ.*, 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967); *Downs v.*

anniversary in 1964, Anthony Lewis surveyed the broad landscape of segregation in the *New York Times Magazine*. “[I]t should not be disturbing that all the country is now engaged in the race problem,” Lewis wrote. “The pretense that the problem existed only in the South was just that, a pretense, and it is better to have the truth out, however painful it is.”<sup>25</sup> One year later, Owen Fiss wrote a significant article in the *Harvard Law Review* contending that *Brown*, and its requirement for “equality of educational opportunity, may in some instances be violated by the maintenance of racially imbalanced schools,” and insisting further that “[t]he refusal to recoil from the specter of such reform is rooted in Brecht’s intellectual injunction, ‘When a thing continually occurs / Not on that account find it natural.’”<sup>26</sup> A few months later, President Lyndon Baines Johnson requested a report from the U.S. Commission on Civil Rights examining racial isolation in public schools, presumably with an eye toward attacking segregation in non-southern venues. As far back as the 1950s, a protestor of school conditions in New York City sought to draw attention to northern-style segregation by carrying a placard that read: “Is Brooklyn, New York above the Mason Dixon line?”<sup>27</sup> Finally, in 1965, James Baldwin similarly highlighted the absurdity of the *de facto*

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Bd. of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); *Bell v. School City of Gary, Indiana*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964); *Bell v. School City of Gary*, 213 F. Supp. 819 (N.D. Ind. 1963); *Taylor v. Bd. of Educ. of New Rochelle*, 191 F. Supp. 181 (S.D.N.Y. 1961).

25. J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, 53 (quoting Anthony Lewis, *Since the Supreme Court Spoke*, N.Y. TIMES, May 10, 1964, at 9, 93). See also DIANE RAVITCH, THE TROUBLED CRUSADE: AMERICAN EDUCATION, 1945–1980, at 171 (1983). Four years later, the *New York Times Magazine* revisited this issue when an attorney named Lewis Steel published a critique of the Supreme Court’s record on racial equality titled, “Nine Men in Black Who Think White.” Steel criticized the Court’s failure to correct the repeated circuit court opinions approving of “accidental segregation” in schools, and further commented that *Green*’s recent tough stance on segregation in rural Virginia “will yield small dividends unless the Court also agrees to tackle the question of *de facto* segregation.” Lewis M. Steel, *Nine Men in Black Who Think White*, N.Y. TIMES MAG., October 13, 1968, at 56, 112.

26. Owen M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 617 (1965). See Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 241–42 (1968) (“The Court has not expanded or extended *Brown*. It has not dealt with the question of *de facto* school segregation—an issue which is as potentially explosive today as was formal segregation in 1954. Therefore, we do not know what equal education means in the context of Northern-style school segregation.”); Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972).

27. MATTHEW F. DELMONT, WHY Busing FAILED: RACE, MEDIA, AND THE NATIONAL RESISTANCE TO SCHOOL DESEGREGATION 37 (2016). See also U.S. COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967); RAVITCH, *supra* note 25, at 171. Speaking from the floor of the U.S. Senate in 1972, Senator Abraham Ribicoff of Connecticut decried northern hypocrisy on segregation. “Our motto seems to have been ‘Do to southerners what you do not want to do to yourself,’” Ribicoff contended. 118 CONG. REC. 5455 (1972). “Somehow residential segregation in the North was accidental or *de facto* and that made it better than the . . . *de jure* segregation of the South. It was a hard distinction for black children in totally segregated schools in the North to understand, but it allowed us to avoid the problem.” *Id.*

category by quipping: “De facto segregation means Negroes are segregated, but nobody did it.”<sup>28</sup>

Thus, despite vociferous complaints about *de facto* segregation arising in many different corners of the national discourse, the Supreme Court simply turned a deaf ear to this issue for many years. And, indeed, it could be argued with some force that the Court has never answered the call. Had the Supreme Court demonstrated any urgency whatsoever in combatting *de facto* segregation when those issues initially appeared in the federal courts, the liberal Warren Court would have resolved the question, virtually guaranteeing a progressive victory on this issue. When the Supreme Court, under Chief Justice Burger’s leadership, finally agreed to resolve a case arising from a *de facto* jurisdiction with *Keyes*, moreover, its analytical approach foundered badly by blinking the issue away, shunting Denver into the *de jure* framework.

### III.

Surveying the state of racial isolation in the country’s public schools today, forty-five years after *Keyes*, provides ample reason for pessimism about the rate of progress. Throughout the nation, more than one in three black students now attend schools whose student bodies are composed of at least 90 percent racial minorities; in the Northeast, more than one in two black students attend such schools. Perhaps even more distressingly, those figures have increased since the early 1990s, when the Supreme Court began its hasty retreat from this realm by allowing school districts to abandon their desegregation commitments. While the nation’s school system as a whole has become more diverse in recent decades, largely due to the sharp increase of Latino students, many Latinos are also concentrated in overwhelmingly minority schools.

Some commentators in recent years have documented the rise of what they call “apartheid schools,” where white students make up 1 percent or less of the student body; in 1988, there were fewer than three thousand such schools, but by 2011, there were nearly seven thousand, accounting for approximately 7 percent of the public schools in the entire nation. Relatedly, some major school districts—not schools, mind you, but entire districts—contain astonishingly tiny percentages of white pupils. In the school year that ended in 2013, for instance, a mere 5 percent of public school students in Dallas, Texas, were white; that same figure was 9 percent in Los Angeles, California, 11 percent in Washington, D.C., and 12 percent in Boston, Massachusetts. While public schools with very few nonwhite students have decreased in recent years, some scholars have suggested that this salutary development may have the regrettable effect of communicating a misleading

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28. DELMONT, *supra* note 27, at 6 (emphasis added).

impression to white families about the progress of desegregation, obscuring the persistent racial isolation that continues to plague far too many schools.<sup>29</sup>

In law school classes today, it may be tempting to attribute this persistent racial isolation of American schools to the Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, which prohibits school boards from voluntarily enacting integration programs in elementary and secondary schools if they racially classify individual students.<sup>30</sup> While I vehemently disagree with the Court's outcome in *Parents Involved*, that opinion cannot be held primarily responsible for the sorry state of racial integration in schools. Many commentators alternately hoped and feared that *Parents Involved* spelled the end of efforts to enhance racial integration in schools. But those expectations have not yet materialized.

Integration plans are hardly pervasive, but neither are they unprecedented. The most reliable recent assessment indicates that educators in approximately seventy school districts around the country continue to employ various methods of increasing racial integration in their schools. While these various methods may not be as efficient at achieving meaningful integration as classifying students according to race, they do leave enterprising school districts with at least some room to maneuver. Typically, they do so by—consistent with Justice Anthony Kennedy's controlling opinion in *Parents Involved*—establishing attendance zones with awareness of the racial demographics in various neighborhoods.<sup>31</sup> Efforts to render that technique unconstitutional have thus far gone nowhere. In addition, some school districts—including in Cambridge, Massachusetts; Wake County, North Carolina; Dallas, Texas; and La Crosse, Wisconsin—have selected an indirect route to racial integration by integrating students according to their families' socioeconomic class.<sup>32</sup> The Constitution does not prohibit schools from assigning students to schools on the basis of class, and educators are able to increase racial integration due to the strong correlation of low socioeconomic status with racial minority status.

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29. See Gary Orfield, Erica Frankenberg et al., *Brown at 60: Great Progress, A Long Retreat and an Uncertain Future*, *Civil Rights Project*, CIVIL RIGHTS PROJECT, May 15, 2014, at 18 tbl.8, 24 tbl.11 (reporting percentages of black students who attend schools with overwhelmingly racial minorities); ERWIN CHERMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 138 (2014) (noting low percentages of white students in some urban school districts); Gary Orfield et al., *Brown at 62: School Segregation by Race, Poverty, and State*, CIVIL RIGHTS PROJECT 3 (May 2016) (noting that changes in school composition mean that “whites can perceive an increase in interracial contact even as African American and Latino students are increasingly isolated, often severely so”); James E. Ryan, *The Real Lessons of School Desegregation*, in *FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION* 73, 87 (Joshua M. Dunn & Martin R. West eds., 2009) (emphasizing that entire school districts, not only schools, exist in racial isolation); Nikole Hannah-Jones, *Segregation Now . . .*, *ATLANTIC*, May 2014, at 70–71 (documenting the ascent of “apartheid schools”).

30. *Parents Involved in Cmty. Sch. v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007).

31. *Id.* at 789 (Kennedy, J., concurring in part and concurring in the judgment).

32. Richard D. Kahlenberg, *Rescuing Brown v. Board of Education: Profiles of Twelve School Districts Pursuing Socioeconomic Integration*, CENTURY FOUNDATION (2007).

It is certainly possible that *Parents Involved* and the threat of litigation have deterred school districts from voluntarily enacting integration plans when they would otherwise have done so. But that account seems a highly implausible explanation for the relative paucity of pro-integration school programs in existence today. Few school districts pursued racial integration before the Court decided *Parents Involved*, and few do so afterward; the tepid appetite for genuine racial integration in education, at least as assessed by the enacted policies, represents a continuous theme in modern American education. The primary obstacle to realizing meaningfully integrated schools nowadays comes not in the form of an unbending judiciary, but instead an inert body politic. In the event that a desire for meaningful racial integration in schools somehow gains traction, current constitutional doctrine should not be misunderstood to foreclose attempts at vindicating those interests.<sup>33</sup> In other words, even if the Supreme Court can be understood to have rejected the doctrine of “cumulative responsibility,” nothing the Court has done prohibits the rest of us from embracing it. That idea may sound hopelessly old-fashioned, but what once was old can become new again.

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33. See *Stevenson v. Blytheville Sch. Dist. #5*, 800 F.3d 955 (8th Cir. 2015); *Lewis v. Ascension Parish Sch. Bd.*, 806 F.3d 344 (5th Cir. 2015); *Spurlock v. Fox*, 716 F.3d 383 (6th Cir. 2013); *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524 (3d Cir. 2011). See also U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (2011); Kahlenberg, *supra* note 32 (detailing and promoting class-based solutions as workarounds to *Parents Involved*); Erica Frankenberg, *Assessing the Status of School Desegregation Sixty Years After Brown*, 2014 MICH. ST. L. REV. 677, 697–98 (indicating sixty-nine school districts continue to pursue integration post-*Parents Involved*); Dana Goldstein, *In Dallas, Opening Up Long-Divided Schools*, N.Y. TIMES, June 20, 2017, at A1. For an argument suggesting that *Parents Involved* placed school districts in an extremely uncertain litigating situation, see Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 282 (2009). See also James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131 (2007) (suggesting that *Parents Involved* may dampen enthusiasm for pro-integration policies, even while acknowledging that few school districts had plans pursuing integration).

