The Burger Court Opinion Writing Database

Keyes v. School District No. 1, Denver

413 U.S. 189 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 18, 1972

Re: No. 71-507 - Keyes v. School District No. 1, Denver, Colo.

Dear Bill:

I want to give you a "progress report" on my consideration of your proposed opinion.

With the likelihood of the Detroit cases being linked on some points, I suspect there is some common ground between issues in Detroit and Denver. I have no definite feeling that Denver must wait on Detroit but for the moment I will hold up until the situation is clarified.

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

7

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 30, 1973

Re: No. 71-507 - Keyes v. Sch. Dist. No. 1

Dear Bill:

I have been waiting for the 6th Circuit case and I now conclude that I will defer action.

Indeed I think this case should go over to the next Term, but the 6th Circuit opinion may alter my view.

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 30, 1973

Re: No. 71-507 - Keyes v. School District No. 1

Dear Bill:

Your note of today indicates you did not observe that my comment about putting this case over is tied to what is revealed by the Court of Appeals opinion in the Detroit case. I freely confess I have not canvassed the Detroit issues. I have an abundance of work on the cases already here and for my part my final conclusion on Keyes would await a reading of the 6th Circuit opinion in Keyes. Their analysis of the issues may not correspond with yours and, of course, it will be their opinion we will be asked to review.

I do not understand your point on Byron's participation. We pointedly laid aside an 8th Circuit case on the death penalty to decide the same issue in another case presenting precisely the same issue in order to be sure Harry could participate. There is no basis to think Byron would need to stay out of the Detroit case in any circumstance.

May I suggest that your concern is premature. After I read the CA6 opinion I may well agree with you.

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 19, 1973

Re: No. 71-507 - Keyes v. School Dist. No. 1

Dear Bill:

Will you be good enough to show me as concurring in the result.

Regards,

Mr. Justice Brennan

Copies to the Conference

You have joined

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 5, 1972

Dear Bill:

In 71-507, Keyes v. School District, I join your opinion as I told you less formally last week.

William O. Douglas

Mr. Justice Brennan

cc: Conference
Law Clerks

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Circulated: 4-9-73

No. 71–507

Recirculated:

Wilfred Keyes et al., Petitioners, *v.* School District No. 1, Denver, Colorado, et al.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[December —, 1972]

MR. JUSTICE DOUGLAS.

While I join the opinion of the Court, I agree with my Brother POWELL that there is, for the purposes of the Equal Protection Clause of the Fourteenth Amendment as applied to the school cases, no difference between *de facto* and de *jure* segregation. The school board is a state agency and the lines that it draws, the locations it selects for school sites, the allocation it makes of students, the budgets it prepares are state action for Fourteenth Amendment purposes.

I think it is time to state that there is no constitutional difference between *de jure* and *de facto* segregation, for each is the product of state actions or policies. If a "neighborhood" or "geographical" unit has been created along racial lines by reason of the play of restrictive covenants that restrict certain areas to "the elite," leaving the "undesirables" to move elsewhere, there is state action in the constitutional sense because the force of law is placed behind those covenants.

There is state action in the constitutional sense when public funds are dispersed by urban development agencies to build racial ghettoes.

Where the school district is racially mixed and the races are segregated in separate schools, where black

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-507

Circulated:

Recirculated: 4-17

Wilfred Keyes et al., Petitioners, *v.* School District No. 1, Denver, Colorado, et al.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[April —, 1973]

MR. JUSTICE DOUGLAS.

While I join the opinion of the Court, I agree with my Brother POWELL that there is, for the purposes of the Equal Protection Clause of the Fourteenth Amendment as applied to the school cases, no difference between *de facto* and de *jure* segregation. The school board is a state agency and the lines that it draws, the locations it selects for school sites, the allocation it makes of students, the budgets it prepares are state action for Fourteenth Amendment purposes.

As Judge Wisdom cogently stated in *United States* v. *Texas Education Agency*, 467 F. 2d 845, segregated schools are often created, not by dual school systems decreed by the legislature, but by the administration of school districts by school boards. Each is state action within the meaning of the Fourteenth Amendment. "Here school authorities assigned students, faculty, and professional staff, employed faculty and staff; chose sites for schools; constructed new schools and renovated old ones; and drew attendance zone lines. The natural and foreseeable consequence of these actions was segregation of Mexican-Americans. Affirmative action to the contrary would have resulted in desegregation. When school authorities by their actions, contribute to segrega-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 30, 1972

MEMORANDUM TO THE CONFERENCE

Box 109

RE: No. 71-507 - Keyes v. School District No. 1, Denver, Colorado

The Appendix referred to in footnotes 3 and 4 is a map of the Park Hill and core city areas involved. The printer advises that it will be some weeks before the Appendix will be prepared. I'll circulate it as soon as it is received.

W.J. B. Jr.

10, 11

Please join me JM

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Brennan, J.

4th DRAFT

Circulated: 11-30-72

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 71-507

Wilfred Keyes, et al., Petitioners, *v.* School District No. 1, Denver, Colorado, et al. | On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[December —, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This school desegregation case concerns the Denver, Colorado, school system. That system has never been operated under a constitutional or statutory provision that mandated or permitted racial segregation in public education.[1] Rather, the gravamen of this action, brought in June 1969 in the District Court for the District of Colorado by parents of Denver school children, is that respondent School Board alone, by use of various techniques such as the manipulation of student attendance zones, school site selection and a neighborhood school policy, created or maintained racially or ethnically (or both racially and ethnically) segregated schools throughout the school district, entitling petitioners to a decree directing desegregation of the entire school district.

[1] To the contrary, Art. IX, § 8, of the Colorado Constitution expressly prohibits "any classification of pupils . . . on account of race or color." As early as 1927, the Colorado Supreme Court held that a Denver practice of excluding black students from school programs at Manual High School and Morey Junior High School violated state law. *Jones* v. *Newlon*, 81 Colo. 25, 253 P. 386 (1927).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 7, 1972

Map Attached

MEMORANDUM TO THE CONFERENCE

No. 71-507 Keyes v. School District No. 1.

Enclosed is the copy of the Appendix to be attached to my circulation of November 30 in the above.

W.J.B. Jr.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

5th DRAFT

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 71-507

Recirculated: 2-12-73

Wilfred Keyes et al., Petitioners, *v.* School District No. 1, Denver, Colorado, et al.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[December —, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This school desegregation case concerns the Denver, Colorado, school system. That system has never been operated under a constitutional or statutory provision that mandated or permitted racial segregation in public education.[1] Rather, the gravamen of this action, brought in June 1969 in the District Court for the District of Colorado by parents of Denver school children, is that respondent School Board alone, by use of various techniques such as the manipulation of student attendance zones, school site selection and a neighborhood school policy, created or maintained racially or ethnically (or both racially and ethnically) segregated schools throughout the school district, entitling petitioners to a decree directing desegregation of the entire school district.

The boundaries of the school district are co-terminus with the boundaries of the City and County of Denver.

[1] To the contrary, Art. IX, § 8, of the Colorado Constitution expressly prohibits "any classification of pupils . . . on account of race or color." As early as 1927, the Colorado Supreme Court held that a Denver practice of excluding black students from school programs at Manual High School and Morey Junior High School violated state law. *Jones* v. *Newlon*, 81 Colo. 25, 253 P. 386 (1927).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 3, 1973

MEMORANDUM TO THE CONFERENCE

RE: No. 71-507 Keyes v. School District

At our original conference discussion of this case, Lewis first expressed his view that the de jure/de facto distinction should be discarded. I told him then that I too was deeply troubled by the distinction. Nevertheless, it appeared that a majority of the Court was committed to the view that the distinction should be maintained, and I therefore drafted Keyes within the framework established in our earlier cases. While I am still convinced that my proposed opinion for the Court is, assuming the continued vitality of the de jure/de facto distinction, a proper resolution of the case, I would be happy indeed to recast the opinion and jettison the distinction if a majority of the Court is prepared to do so.

Although Lewis and I seem to share the view that de facto segregation and de jure segregation (as we have previously used those terms) should receive like constitutional treatment, we are in substantial disagreement, I think, on what that treatment should be. Unlike Lewis, I would retain the definition of the "affirmative duty to desegregate" that we have set forth in our prior cases, in particular Brown II, Green, and Swann. Lewis's approach has the virtue of discarding an illogical and unworkable distinction, but only at the price of a substantial retreat from our commitment of the past twenty years to eliminate all vestiges of state-imposed segregation in the public schools. In my view, we can eliminate the distinction without cutting back on our commitment, and I would gladly do so. I welcome your comments.

W. J. B. Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 30, 1973

RE: No. 71-507 Keyes v. School District No. 1

Dear Chief:

I most strenuously oppose your suggestion that Keyes go over for reargument. If you have canvassed the Detroit issues, as I have, you might agree that none of them is even remotely connected with any decided in Keyes. Moreover, Byron is out of Keyes, and any idea that it must go over because it overlaps issues in Detroit is only to suggest that he must also stay out of Detroit. I thought we all agreed that Richmond should come down when it did to be sure that we'd have a nine-judge Court for Detroit. Your suggestion would defeat that objective.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 13, 1973

MEMORANDUM TO THE CONFERENCE

RE: No. 71-507 - Keyes v. Denver School District

I have studied the en banc opinions in the Detroit case, Bradley v. Milliken, et al. They confirm my conclusion that Keyes and Detroit do not present common issues requiring that we defer handing down Keyes pending knowledge whether review will be sought here in Detroit.

The three issues litigated in Detroit were (1) whether "the district court's finding of fact pertaining to constitutional violations resulting in systemwide racial segregation of the Detroit public schools are supported by substantial evidence or are they clearly erroneous"; (2) whether on the record a "constitutionally adequate system of desegregated schools can be established within the geographical limits of the Detroit school district" and (3) whether "the district judge's order requiring preparation of a metropolitan plan for cross-district assignment and transportation of school children throughout the Detroit Metropolitan area represents a proper exercise of the equity power of the District Court." (slip opinion pages 8-9)

Keyes presents none of these questions. Question (1) - the sufficiency of the evidence to support the factual findings of constitutional violations - is not presented in Keyes in light of our denial of the Denver School Board's cross-petition for certiorari. School District, etc. v. Keyes, No. 71-572. Question (2) - whether a Detroit only desegregation plan is possible - and question (3) - whether the order to prepare a metropolitan area desegregation

WJB

plan exceeded the District Court's powers - are, of course, matters of remedy and Keyes presents no question whatever of remedy.

Following Swann, 402 U.S., at 31-32, the Sixth Circuit held in Detroit and the Tenth Circuit held in Keyes, that actions of a school board may be sufficient to constitute de jure segregation notwithstanding operation of a dual system is not mandated by state statute or constitution. Indeed, this is true even if the School Board's actions are in derogation of state law forbidding segregation, as does Colorado's Constitution. Thus both the Sixth Circuit and the Tenth Circuit treated the threshold question as simply whether the evidence of actions by the respective School Boards supported the findings of the respective District Courts of unconstitutional actions constituting de jure segregation. The dissenting opinions of Judges Weick, Kent and Miller were in accord except that Judge Weick (slip opinion 107) and Judge Miller (slip opinion 130) would have had a redetermination of the factual question after joinder of the outlying school districts; Judge Kent on the other hand expressed "complete agreement with the majority's conclusion that on the record as presented and because of the concessions made by counsel for the School District of the City of Detroit during oral argument, it appears without question that the Detroit City schools were unconstitutionally segregated and that an order for integration of those schools must be fashioned by the District Court." Since our denial of the Denver School Board's cross-petition effectively disposes of any such claim in Keyes, it is irrelevant that the School Board in Detroit may at some future date ask us to review that question in that case.

W.J.B.Jr.

WB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 15, 1973

MEMORANDUM TO THE CONFERENCE

RE: No. 71-507 - Keyes v. School District

I attach a memorandum with my recommendations for the disposition of seven cases held for Keyes. An added starter, an eighth case, No. 72-1450 - Indianapolis School Board v. United States, was on the conference list today, June 15, and was relisted for disposition with the other held cases at the conference for June 22.

Indiana once had a statute permitting the operation of dual school systems. It was repealed in 1949. However, the Indianapolis School Board continued the operation of the dual system long after the decision in Brown. In consequence the United States brought this action under the Civil Rights Act of 1964 to compel desegregation of the system. The District Court found that the School Board had affirmatively imposed and promoted racial segregation in the Indianapolis public schools and that the system there-

WJB

fore was a de jure segregated system. The Court of Appeals for the Seventh Circuit affirmed on the ground that the District Court's findings were not clearly erroneous. The only question presented in the School Board's petition to this Court is whether the District Court and the Court of Appeals properly determined the presence of de jure segregation. The Board's argument rests primarily on the mistaken premise that only statutorily segregated dual school systems constitute de jure segregation. I would Deny.

W.J.B. Jr.

WB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 15, 1973

RE: Supplemental Memo on Cases held for No. 71-507
Keyes v. School District

Our Brother Marshall calls my attention to the fact that Combs v. Johnson, No. 72-1187 was held for Keyes.

The case involves a single school in Grand Prairie, Texas. The District Court found that the school had always been operated as a one race school and ordered its desegregation by the device of a cluster of the school with two other schools. The Court of Appeals for the Fifth Circuit affirmed. This is purely a factual question and as to that aspect of the case I would deny.

The School Board also challenges the award of counsel fees under § 718. We have taken the Richmond School case to determine the application of § 718 in respect of services rendered before that statute was adopted. However, no such question is involved in this case. I therefore see no reason to hold it for the Richmond case and on this issue too would deny.

W.J.B. Jr.

WB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 7, 1972

No. 71-507 - Keyes v. School District No. 1

Dear Bill,

I am in basic agreement with your opinion in this case, although I do have some suggestions about which I shall be getting in touch with you.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference
the Law Clerks

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 11, 1972

71-507

MEMORANDUM TO THE CONFERENCE

Herewith the opinion of the U. S. Court of Appeals for the Sixth Circuit in the Detroit school case.

P.S.

P. S.

WB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 12, 1973

71-507

MEMORANDUM TO THE CONFERENCE

The en banc decision of the United States Court of Appeals for the Sixth Circuit in the Detroit school case was announced today. My information is that the court opinion, written by Chief Judge Phillips, is substantially the same as the one he wrote for the three-judge panel earlier in the year. There were two dissents (Weick and Miller, JJ.), and one posthumous partial dissent (Kent, J.). The Clerk of the court has put nine copies of the opinions in the mail, addressed to me, and I hope they will be delivered before our Conference tomorrow.

P.S.

P. S.

WB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 1, 1972

Re: No. 71-507 - Keyes v. School District No. 1

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: Conference

7 18

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 9, 1973

Re: No. 71-507 - Keyes v. School District No. 1

Dear Bill:

I am in large part in accord with your circulation of November 30. I am not at all certain that the de jure--de facto distinction in school segregation will hold up in the long run. Segregation may well be segregation, whatever the form.

Nevertheless, I withhold my vote pending other circulations and pending further consideration of the Detroit and Richmond situations.

Sincerely,

H. A. B.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 30, 1973

Re: No. 71-507 - Keyes v. School District No. 1

Dear Bill:

I had again reviewed the circulations in this Denver case and was ready to write when the Chief's note to you of today came around.

Wholly apart from the suggestion of the Chief Justice, and without passing upon the merits of that suggestion pending further discussions, I would be ready to join your last circulation. This generally is in line with my note to you of January 9.

I retain some unease about the situation, for I am persuaded, as Lewis and Bill Douglas appear to be, that the de jure-de facto distinction eventually must give way. Lewis' opinion -- both parts of it -- is, for me, forceful and persuasive. I take it, from your letter of April 3, that you also are inclined to the view Lewis entertains except for the question of remedy. I feel, however, as apparently you do, that we need not meet the de jure-de facto distinction for purposes of the Denver case. Because I feel this way, I join you.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 1, 1972

Re: No. 71-507 Keyes v. School District No. 1

Dear Bill:

As I was inclined toward a different view from that of the majority, I will defer decision for some further study and also to see whether one of the other Justices writes.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 9, 1973

Re: No. 71-507 Keyes v. School District No. 1

Dear Bill:

This is a supplement to my note of December 1.

Although I have not come to rest as to my final position, I am now working on a draft of an opinion that may concur in the remand but for different reasons.

In view of the complexity of the problem and our other workload, it will be some time before I am able to circulate it.

Sincerely,

Lewis

Mr. Justice Brennan

cc: The Conference

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-507

Wilfred Keyes et al., Petitioners, v. School District No. 1, Denver, Colorado, et al. | On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[March —, 1973]

MR. JUSTICE POWELL concurring in part and dissenting in part.

I concur in the remand of this case for further proceedings in the District Court, but on grounds that differ from those relied upon by the Court.

This is the first school desegregation case to reach this Court which involves a major city outside the South. It comes from Denver, Colorado, a city and a State which have not operated public schools under constitutional or statutory provisions which mandated or permitted racial segregation.[1] Nor has it been argued that any other legislative actions (such as zoning and housing laws) contributed to the segregation which is at issue.[2] The

[1] Article IX, § 8, of the Colorado Constitution has expressly prohibited "any classification of pupils . . . on account of race or color."

[2] See, *e. g.*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 23 (1971):

"We do not reach . . . the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by school authorities, is a constitutional violation requiring remedial action by a school desegregation decree." The term "state action," as used herein, thus refers to actions of the appropriate public school authorities.

71-507

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

5/4

Dear Harry,

I have wanted to say that your generous comments about my Keyes effort greatly heartened me, as for the most part comments have been few. If, as you consider my draft further, you have suggestions they will be most welcome.

I appreciate, of course that you have not decided finally what you will do.

Lewis

P. 26,34.
minor Stylistic Changes Throughout.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated:

Recirculated: JUN 6 1973

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-507

Wilfred Keyes et al., Petitioners, v. School District No. 1, Denver, Colorado, et al. } On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[March —, 1973]

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[2] See, *e. g., Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 23 (1971):

"We do not reach . . . the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by school authorities, is a constitutional violation requiring remedial action by a school desegregation decree." The term "state action," as used herein, thus refers to actions of the appropriate public school authorities.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 7, 1972

Re: No. 71-507 - Keyes v. School District

Dear Bill:

At Conference I voted contrary to the opinion which you have written for the Court, and will probably adhere to that position; I will write something myself only as a last resort.

Sincerely,

WHR

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 9, 1973

Re: No. 71-507 - Keyes v. Denver School District

Dear Bill:

I think I will try my hand at writing a dissent from your opinion in this case. I will try to have it in circulation late this week or early next week.

Sincerely,

Bill

Mr. Justice Brennan

Copies to the Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-507

Wilfred Keyes et al., Petitioners, *v.* School District No. 1, Denver, Colorado, et al.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[February —, 1973]

MR. JUSTICE REHNQUIST, dissenting.

I

The Court notes at the outset of its opinion the differences between the claims made by the plaintiffs in this case and the classical *"de jure"* type of claims made by plaintiffs in cases such as *Brown* v. *Board of Education*, ~~349 U. S. 294 (1955)~~, and its progeny. I think the similarities and differences, not only in the claims, but in the nature of the constitutional violation, deserve somewhat more attention than the Court gives them.

In *Brown,* the Court held unconstitutional statutes then prevalent in southern and border States mandating that Negro children and white children attend separate schools. Under such a statute, of course, every child in the school system is segregated by race, and there is no racial mixing whatever in the population of any particular school.

It is conceded that the State of Colorado and the city of Denver have never had a statute or ordnance of that description. The claim made by these plaintiffs, as described in the Court's opinion, is that the school board by "use of various techniques such as the manipulation of students' attendance zones, school site selection and a neighborhood school policy" took race into account