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The Impact of Columbus Board of Education v. Penick and Dayton Board of Education v. Brinkman on Proving Segregative Intent in School Desegregation Cases

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The Impact of *Columbus Board of Education v. Penick* and *Dayton Board of Education v. Brinkman* on Proving Segregative Intent in School Desegregation Cases

In *Keyes v. School District No. 1, Denver, Colorado*[1] the Supreme Court ruled that where it has been proven that school authorities have pursued an intentional segregative policy in a "meaningful portion" of their school district, the burden is on school authorities to prove that their actions as to other segregated schools in that system are not also motivated by segregative intent. The Court, however, did not set forth specific criteria for determining what constitutes a segregated school in the de jure context. It merely stated, "What is or is not a segregated school will necessarily depend on the facts of each particular case."[2] The question left open in *Keyes*—what findings of constitutional violations will suffice to justify a systemwide remedy—was the principal issue addressed in *Columbus Board of Education v. Penick*[3] and *Dayton Board of Education v. Brinkman* (hereinafter referred to as *Dayton II*).[4] In both of these cases the Supreme Court affirmed the judgment of the court of appeals which ruled that (1) in 1954, when *Brown v. Board of Education* (hereinafter referred to as *Brown I*)[5] was decided, the Columbus and Dayton school boards had been intentionally operating dual systems in a substantial part of each district; (2) since that time these boards had been under a continuous constitutional obligation to disassemble these dual systems but they had failed to discharge their duty; and (3) in the intervening years the boards' actions and practices had intentionally aggravated racial separation in the schools.[6] By affirming the lower courts' findings of fact and conclusions of law, the Supreme Court endorsed the novel concept of allowing school desegregation plaintiffs to use evidence of past purposeful segregation existing in 1954 (when *Brown I* was decided), to prove, subject to rebuttal, that any current segregative impact was inspired by an unconstitutional, segregative purpose. The impact of the Court's decisions in *Keyes* and *Columbus* on the ability of future plaintiffs to prove purposeful segregation in school districts having no history of statutorily compelled seg-

1. 413 U.S. 189 (1973).
2. *Id.* at 196.
3. 443 U.S. 449 (1979).
4. 443 U.S. 526 (1979).
5. 347 U.S. 483 (1954).
6. 583 F.2d 787, 795, 799, 815, 818 (6th Cir. 1978).

regation[7] is yet to be determined.

THE *COLUMBUS* CASE

In 1973 fourteen students in the Columbus, Ohio school system brought an action seeking declaratory and injunctive relief against the Columbus Board of Education and the State Board of Education,[8] claiming that the Boards and their officials had pursued, and were pursuing, a course of conduct having the purpose and effect of causing and perpetuating racial segregation in the public schools in violation of the fourteenth amendment.[9] Evidence revealed that prior to the filing of this action in 1973, and in the intervening years that followed, the Columbus public schools were predominantly segregated by race. A 1976 survey concluded that over 32% of the 96,000 students in the system were black. Nevertheless, during the 1975-76 school year, about 70% of all the students attended schools which were populated by either 80-100% black or white students; over 73% of the black administrators were assigned to schools with 70-100% black student bodies; and about 96% of the ninety-two schools which were 80-100% white had no black administrators assigned to them.[10] The district court reviewed both the recent and the remote history of the Columbus school system, considering such factors as segregative optional attendance zones, segregative faculty and administrative hiring and assignments, discontiguous attendance zones, deliberate drawing of some attendance zones to allow white students to avoid black schools, and selection of sites for new school construction in areas where racially segregated schools foreseeably could be maintained.[11] The court was particularly swayed by the proof of notice to the Columbus Board of Education. Various segments of the community, notably black parents and civic organiza-

7. In 1881, by resolution, the Columbus Board abolished separate schools for black children. Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 235 (E.D. Ohio 1977).

8. The district court's finding of liability against the State Board of Education rested primarily upon the Board's failure to order the local Columbus Board to perform its constitutional duty to operate a school system which was not segregated by race. *Id.* at 262-64.

The Sixth Circuit Court of Appeals found no evidence of any act by the State Board requiring the Columbus Board to pursue segregative policies, nor did they find evidence that affirmative actions were taken by the State Board to desegregate the Columbus schools. In light of these considerations and others, the court of appeals remanded the case as it pertained to the State Board for more specific findings of fact. 583 F.2d at 818.

9. U.S. CONST. amend. XIV § 1:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

10. 429 F. Supp. at 240.

11. *Id.* at 260. Out of 103 schools constructed between 1950 and 1975, 87 opened with racially identifiable student bodies. Seventy-five of the 87 new schools remained racially identifiable at the time of trial. *Id.* at 241.

tions, repeatedly voiced concern and outrage over the continual overt acts and omissions of the Board which ultimately fostered segregation in the schools.[12] Based upon these and other findings of fact, the court concluded that at the time of trial, the racial segregation in the Columbus school system was a direct result of both the Board's recent and remote intentional, segregative acts and omissions in violation of the equal protection clause of the fourteenth amendment.[13]

In 1977, while *Columbus* was waiting to be heard by the Sixth Circuit Court of Appeals, the Supreme Court heard *Dayton I*[14] and ruled that in those cases where mandatory racial segregation no longer exists, it must first be determined if the school board intended to, and did in fact, discriminate on a systemwide basis before a systemwide remedy may be instituted.[15] After this decision, the Columbus Board filed a motion requesting that the district court modify its findings and judgment in light of *Dayton I*.[16]

The district judge carefully reviewed the specific language employed by the Court in the *Dayton I* opinion, distinguished the facts in *Dayton I* from the facts in *Columbus*, and reiterated its previous findings of de jure and intentional systemwide segregation. The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court.[17]

On appeal to the Supreme Court of the United States, the Board argued that at the time of trial its operation of a segregated school system was not done with any racially discriminatory purpose, and that whatever unconstitutional conduct it may have been guilty of in the past, such conduct at no time had systemwide segregative impact.[18] In the opinion, written by Justice White and joined by Justices Brennan, Marshall, Blackmun, and Stevens (Justice Stewart and Chief Justice Burger concurred only in the judgment), the Court ruled that there was no reason to disturb the court of appeals' ruling that the past and pres-

12. If there exists in this case a factor which distinguishes it from some other northern desegregation cases, it is the proof adduced concerning notice to the Columbus Board of Education. Various segments of the community, notably black parents and civic organizations, have repeatedly and articulately vocalized concern, anger or dismay concerning both overtly segregative actions and lost integrative opportunities. . . .The local NAACP group, Columbus Urban League, Columbus Metropolitan League of Women Voters, Columbus Area Civil Rights Council, Columbus Metropolitan Council on Quality Integrated Education, the Columbus Board—sponsored Ohio State University Advisory Commission on Problems Facing the Columbus Public Schools, and officials of the Ohio State Board of Education, all called attention to the problem and made certain curative recommendations. *Id.* at 255.

13. *Id.* at 264-67.

14. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977).

15. *Id.* at 418-20.

16. 583 F.2d at 796.

17. *Id.* at 787, 818.

18. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 455 (1979).

ent conduct of the Columbus Board of Education was not only inspired by an unconstitutional segregative purpose, but also had current segregative impact that was sufficiently systemwide to warrant the remedy ordered by the district court.[19]

Before the Supreme Court, the Columbus Board of Education again argued that a systemwide remedy was contrary to the teachings of *Dayton I*, because whatever unconstitutional conduct it may have been guilty of in the past, such conduct at no time in the past or present had systemwide impact. The Board also argued that because segregated schooling was not commanded by state law, and because all schools were neither totally black nor totally white in 1954, the district court's findings were unwarranted.[20] The Supreme Court answered both of these arguments after reviewing the record and pointed out that the Columbus public schools were "officially" segregated by race in 1954, and subsequent acts and omissions by the Board had perpetuated racial segregation. Applying the doctrine of *Keyes*, the Court expressed reasoning that proof of purposeful and effective maintenance of a body of separate black schools in a substantial part of a school system is in itself prima facie proof of a dual school system, and absent sufficient evidence to rebut this presumption, which the Board did not produce, the plaintiffs should prevail.[21]

The Columbus Board of Education also contended that the lower courts misapplied the prevailing law. The Supreme Court disagreed, stating that the doctrines of *Washington v. Davis*,[22] *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[23] and *Keyes v. School District No. 1, Denver, Colorado*[24] were satisfied by the decision below.

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19. *Id.* at 450, 453-54.

20. *Id* at 454-57.

21. *Id.* at 467-69.

22. 426 U.S. 229 (1976). The Court in *Davis* made an effort to clarify the difference between discriminatory purpose and differential effect: it emphasized that "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." The majority stated that the Court had "not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact," and that while "disproportionate impact is not irrelevant, it is not the sole touchstone of an invidious racial discrimination forbidden by the constitution." *Id.* at 229, 239, 240, 242.

23. 429 U.S. 252 (1977). The Court in *Arlington Heights* reaffirmed the *Washington v. Davis* principle that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." The Court also outlined some of the "subjects of proper inquiry" to be reviewed in determining whether racially discriminatory intent existed. *Id.* at 252, 264, 268.

24. 413 U.S. 189 (1973). In *Keyes*, the Court held:

> [A] finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden

The Court expressed confidence that the district court, in rendering its decision, was fully aware that plaintiffs seeking to establish proof of an equal protection violation based on racial discrimination must show a discriminatory purpose, and that plaintiffs are required by *Keyes* to prove not only that segregated schooling existed, but also that it was brought about and maintained by intentional state action. The Court also stated that it was confident that the district court recognized that disparate impact and foreseeable consequences alone do not establish a constitutional violation, but are only examples of the kinds of proof from which an inference of segregative intent may be drawn. Thus, the district court's conclusions of law were consistent with Court precedent, and because there were no prejudicial errors of fact or law, the judgment was affirmed.[25]

THE *DAYTON II* CASE

In *Dayton II*, a companion case that also originated in Ohio, the Supreme Court, in a five to four decision, affirmed the judgment of the court of appeals, which ruled that a dual system existed in Dayton at the time of *Brown I*, and ordered a systemwide remedy.[26] The action in *Dayton I & II* was filed by students in the Dayton, Ohio school system in 1972. They alleged that the Dayton Board of Education, the State Board of Education, and various local and state officials were operating a racially segregated school system in violation of the equal protection clause of the fourteenth amendment.[27] In 1972-73, the twenty-five white schools in the system all had 90% or more white attendance; this was the same percentage ratio reported in 1963-64 and in 1951-52. By comparison, every school that was 90% or more black in 1951-52, 1963-64, or 1971-72 was still 90% or more black at the time of trial.[28]

The *Dayton* case had a long and unrelenting history of litigation. Before ultimately being decided in 1979, it made four round trips through the federal courts[29] and was decided twice by the Supreme

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of proving that other segregated schools within the system are not also the result of intentionally segregative actions. . . .

In discharging that burden, it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions. Their burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions.

Id. at 208-10.

25. 443 U.S. at 463-68.

26. *Id.* at 534 (quoting 583 F.2d at 243).

27. 583 F.2d 243, 254 (6th Cir. 1978) (quoting 503 F.2d 684, 694-95).

28. 446 F. Supp. 1232 (S.D. Ohio 1977).

29. 583 F.2d 243 (1978); 561 F.2d 652 (1977); 539 F.2d 1084 (1976); 518 F.2d 853 (1975); Brinkman v. Gilligan, 446 F. Supp. 1232 (1977).

Court of the United States.[30] On its fourth trip through the lower federal courts (after remand from the Supreme Court in *Dayton I*), the district court concluded that the plaintiffs had failed to meet the burden of proving a constitutional violation and dismissed the complaint.[31] The plaintiffs, as one of their assignments of error, argued to the court of appeals that the district court had ignored the principle that if the Board was operating a dual system at the time of *Brown I*, it had an affirmative duty to eliminate the systemwide effects of its prior acts of segregation.[32] This same court had just two months earlier listened to this same argument in the *Columbus* case. Several months later, the Sixth Circuit Court of Appeals applied this affirmative duty doctrine in *Dayton II* and *Columbus* and ordered a systemwide remedy in each instance.[33]

Justice White, writing for the Supreme Court,[34] delivered an opinion which was essentially a repetition of the basic reasoning of *Columbus*. The Court affirmed the judgment of the court of appeals that the Dayton Board of Education had operated a racially segregated dual system at the time of *Brown I*, and that the evidence in the record clearly and convincingly established that the Board had failed to eliminate the continuing, systemwide effect of its prior discrimination.[35] Arguably, the Court should have had a more difficult task reaching the same result in this case as it did in *Columbus* because it was bound by its own precedent in *Dayton I*, advising the district court on remand to determine how much increased segregative effect the Board's violations had on the current racial distribution of the Dayton school population, compared to what it would have been in the absence of such constitutional violations.[36] The district court had interpreted this ruling as requiring plaintiffs to prove what effect each individual act of discrimination had on current patterns of segregation.[37] Justice White reasoned that this

30. 443 U.S. 526 (1979); 433 U.S. 406 (1977).
31. 446 F. Supp. at 1253.
32. 583 F.2d at 246-47.
33. Penick v. Columbus Bd. of Educ., 583 F.2d 787, 818 (6th Cir. 1978).
34. Dayton II, 443 U.S. 526.
35. *Id.* at 526-27, 537-40.
36. 433 U.S. at 420:

> The duty of both the [d]istrict [c]ourt and the [c]ourt of [a]ppeals in a case such as this, where mandatory segregation by law of the races in the schools has long ceased, is to first determine whether there was any action[s] in the conduct of the business of the School Board which are intended to, and did in fact discriminate against minority pupils, teachers or staff. . . . If such violations are found, the [d]istrict [c]ourt in the first instance, subject to review by the [c]ourt of [a]ppeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy.

37. 446 F. Supp. at 1253.

interpretation resulted from a misunderstanding of *Dayton I*,[38] but he failed to reconcile the Court's rulings in the two cases—*Dayton I* and *Dayton II*.

In his concurring opinion, Justice Stewart, joined by Chief Justice Burger, explained why they concurred in *Columbus* and dissented in *Dayton II*. Both Justices believed that the critical difference between the two cases was that the court of appeals in *Dayton II* (contrary to *Columbus*) had ignored the crucial fact-finding role of federal district courts in school desegregation litigation.[39] They also believed that in each case the Supreme Court had attached far too much importance to the question of whether there existed a dual system in 1954. Justice Stewart argued that the duty of a school district to remedy a consitutional violation existing in 1954 does not justify shifting the burden of proof in a case in the 1970's.[40] In addressing the question of whether plaintiffs showed that racial separation was the result of intentional systemwide discrimination, Justice Stewart distinguished the *Dayton II* and *Columbus* cases on several grounds: (1) that the court of appeals overturned the district court's judgment in *Dayton*, but not in *Columbus*; (2) that the evidence of recent discriminatory intent lacking in *Dayton II* was relatively strong in *Columbus*; and (3) that the plaintiffs in the *Columbus* case, unlike those in *Dayton II*, established a prima facie case of intentional discrimination which the Board did not rebut.[41]

In a separate concurring opinion, Chief Justice Burger agreed with portions of the dissenting opinions of Justices Powell and Rehnquist. He, like Justice Rehnquist, had serious doubts about how many of the post-1954 actions of the two school boards could be characterized as segregative in intent and effect, but he, like Justice Stewart, felt compelled to yield to the decision of the trier of fact because the errors did not rise to the level of "clearly erroneous."[42]

Justice Powell joined the dissenting opinion of Justice Rehnquist, but wrote separately to emphasize several points. He expressed concern that the Court had endorsed a totally new constitutional concept appli-

38. 443 U.S. at 540-41.

39. *Id.* at 468-70. The Sixth Circuit Court of Appeals in *Dayton II* reversed the judgment of the district court. 583 F.2d 243 (6th Cir. 1978).

40. *Id.* at 472:

> Much has changed in 25 years in the Nation at large and in Dayton and Columbus in particular. . . . The prejudices of the school board of 1954 (and earlier) cannot realistically be assumed to haunt the school boards of today. . . . It is unrealistic to assume that the hand of 1954 plays any major part in shaping the current school system in either city.

41. *Id.* at 541.

42. *Id.* at 468. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. . . ." FED. R. CIV. P. 52.

cable to school desegregation cases, and that the Court seemed to be expanding, rather than limiting, judicial control over the operation of public schools. He felt convinced that the Court was condoning the "creation of bad constitutional law."[43]

In his dissenting opinion, Justice Rehnquist was strongly critical of the logic and reasoning set forth in the majority opinion. He asserted that the school desegregation remedy imposed in *Columbus* was as complete and dramatic a displacement of local autonomy by the judiciary as is possible in our federal system. This local autonomy, he added, has historically been viewed as essential to the maintenance of community concerns, the support for public schools, and the quality of the educational process. The district court and court of appeals, he insisted, had no concrete notion of what a systemwide violation is, or how to ascertain whether one exists, and the Supreme Court's relegation of responsibility to these courts to determine the presence of such violations and the scope of the remedy is likely to cause confusion and misapplication of the prevailing law.[44]

Justice Rehnquist attacked the Court's logic in emphasizing 1954 violations as "benchmarks" in order to justify current systemwide remedies, insisting that "as a matter of history, case law, or logic, there is nothing to support the novel proposition that the primary inquiry in school desegregation cases involving systems without a history of statutorily mandated racial assignments is what happened in those systems before 1954."[45] Moreover, he added, if a district court concludes that there was a dual system at the time of *Brown I*, this constitutes an irrebuttable presumption, and a school board's failure to take every affirmative step to integrate the system would amount to a constitutional violation, irrespective of whether there is a causal nexus between those pre-1954 violations and current segregation.[46]

To Justice Rehnquist, the Court's analysis of 1954 violations marked a departure from established doctrines of causation and discriminatory purpose. He cautioned that objective evidence should be carefully analyzed, for it may reduce the discriminatory purpose requirement of *Washington v. Davis* to a discriminatory impact test. Following the lower court's methodology, he insisted, would eliminate all distinction between de jure and de facto segregation and would render school sys-

43. 443 U.S. at 480.

44. *Id.* at 489-90.

45. *Id.* at 500. Justice Rehnquist suggested that if a year must serve as a "benchmark" upon which to predicate equal protection violations in the school context, that 1973 would be a better year because in that year the Court in *Keyes* was "first confronted with the problem of school segregation in the context of systems without a history of statutorily mandated separation of the races." *Id.*

46. *Id.* at 493.

tems captives of their remote past.[47]

ANALYSIS

What is the state of the law in school desegregation cases after *Columbus* and *Dayton II*? These cases will probably be debated in years to come, but at this point it seems clear that all plaintiffs may employ the same test, regardless of where the action is brought, or whether the action did or did not originate in a district having a history of statutorily mandated segregation in 1954. All plaintiffs may prove segregative intent by showing that in 1954, when *Brown I* was decided, the defendant board was not operating a racially neutral, unitary school system, but was purposefully operating segregative, dual schools which had originally caused and later perpetuated racial isolation; and that since the *Brown II* decision the board had been under a continuous, affirmative duty to disestablish its dual system, but had failed to discharge this duty. Moreover, it makes no difference whether segregated schooling was compelled by state law or not, so long as plaintiffs can show that the public schools were officially segregated by race in 1954.[48]

The doctrines of *Columbus* and *Dayton II* explicitly encompass those cases where plaintiffs can prove that a school board's actions and policies were motivated by segregative intent in 1954. But do they apply to those cases where proof of intentional or de jure segregation dates back to a year subsequent to 1954, or would they apply to a school system which was not in existence in 1954? The logical answer is "yes" in light of the Court's application of *Keyes*, *Columbus*, and *Dayton II*.[49]

The *Keyes* presumption is predicated on the concept of space, not time. It stands for the proposition that where plaintiffs show that intentional or de jure segregation exists in a meaningful portion of a school system, the burden of proof shifts to the school authorities to show that other or subsequent actions and policies in other parts of the system having segregative impact are not also motivated by an intent to segregate.[50] *Columbus* and *Dayton II*, on the contrary, are predicated on the concept of time. They stand for the proposition that where plaintiffs can prove that intentional, de jure segregation existed in a school system at the time *Brown I* was decided in 1954, the school board was automatically charged (as of 1954) with an affirmative duty to effectuate a transition to a racially nondiscriminatory school system. When

47. *Id.* at 491. Justice Rehnquist suggested that by affirming the Court of Appeals for the Sixth Circuit in this case, the approach taken lends itself to the possibility of differing remedies imposed on similar school systems because of the predilections of individual judges.

48. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

49. 443 U.S. at 467, 537.

50. 413 U.S. at 200.

Keyes is combined with the doctrines of *Columbus* and *Dayton II*, the concepts of space and time are also combined. Consequently, if a plaintiff can prove that a school board's actions and policies in recent times have had segregative impact, he can still establish a prima facie case by either (1) proving that the present segregative impact is causally related to the board's intentional segregative policies and actions that were in operation in 1954, or (2) proving that the present actions and policies of the board, although only segregative in effect, are part of an unlawful segregative pattern on the part of the school authorities and that they have pursued an intentional segregative policy in a substantial portion of that school district.[51]

The question left open by *Keyes*, which forms the underlying basis for both *Columbus* and *Dayton II*, is what is meant by "meaningful portion" or "substantial portion." Plaintiffs in *Columbus* and *Dayton II* presented evidence of intentional segregative policies in portions of both school districts. In *Dayton II*, the district court ruled that these were isolated instances of intentional segregation.[52] The district court in *Columbus*, however, allowed evidence of official acts of intentional segregation existing at the time of *Brown I* as proof of "substantial" acts of segregation in a meaningful portion of the school system justifying a systemwide remedy.[53] Viewed in this light, *Columbus* and *Dayton II* reaffirmed the basic rationale of the *Keyes* doctrine and also extended its application by making proof easier to ascertain.

In their dissenting opinions, Justices Powell and Rehnquist asserted that the Court ignored the principles and precedents of *Davis* and *Arlington Heights*, neither of which were school desegregation cases. *Davis* is significant here, however, because the Supreme Court ruled for the first time that proof of a discriminatory purpose is required to show a violation under the equal protection clause. The Court ruled that a law or other official act is not unconstitutional solely because it has a racially disproportionate impact.[54] Neither case set forth a precise formula for proving discriminatory purpose. Justice Rehnquist suggested that the focus of inquiry in cases such as *Columbus* and *Dayton II* is whether a desire to separate the races is among the reasons for a school board's decision to pursue a particular course of action.[55] He further suggested that "[t]he best evidence on this score would be a contemporaneous explanation of its action by the school board. . . ."[56] Most of the plaintiffs in school desegregation cases would probably dis-

51. 443 U.S. at 465-68.
52. Brinkman v. Gilligan, 446 F. Supp. 1232 (1977).
53. 429 F. Supp. 229 (1977).
54. Washington v. Davis, 426 U.S. 229 (1977).
55. 443 U.S. at 509.
56. *Id.*

agree, because school boards can be much too sophisticated to place on record any type of evidence that could possibly be used against them in a school desegregation suit.

In both *Columbus*[57] and *Dayton II*[58] Justice Rehnquist specifically charged that the Court's cascade of presumptions has totally eliminated all distinction between de jure and de facto segregation. To determine the validity of this charge, it is necessary to examine these two doctrines from a historical standpoint. When *Brown I* was decided, the distinction was consistent with the limited constitutional rationale of that case—de jure segregation was that form of segregation which resulted from state imposed classification of the races.[59] Logically then, de facto segregation was that kind of segregation which resulted from neighborhood housing patterns and official acts and omissions, in the absence of state laws compelling separation of the races.[60]

The *Brown II* doctrine was construed for many years as requiring only state neutrality, allowing freedom of choice as to which schools to attend so long as the state itself assured that the choice was free from restraint.[61] A critical question not decided was whether freedom of choice was an end in itself, constituting compliance with the school board's obligation to establish a unitary, nonracial system, thereby eliminating all vestiges of de jure segregation. This issue came before the Supreme Court in *Green v. County School Board*,[62] a case arising out of a rural setting in Kent County, Virginia, where blacks and whites were dispersed in fairly equal numbers. After three years in op-

57. *Id.* at 491.

58. *Id.* at 542.

59. 347 U.S. at 486-88. The *Brown I* opinion represented a consolidation of four cases from four different states—Kansas, South Carolina, Virginia and Delaware. In each case black children sought the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each case, they had been denied admission to schools attended by white children under laws of their states which required or permitted segregation according to race.

60. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1970). In this case the district court found that certain actions of the Charlotte-Mecklenburg school board were discriminatory, and that residential patterns in the city and county resulting in part from federal, state, and local government action resulted in segregated education. The Court held, *inter alia*, that the district court could properly take affirmative action in the form of remedial altering of attendance zones in order to achieve nondiscriminatory assignments of students. The Court also affirmed the district court's order requiring additional busing as a tool to enhance desegregation. *Id.* at 27-31.

61. Green v. County School Bd., 391 U.S. 430 (1968). The school system consisted of two schools, one black and one white. At the time of the suit a black student had never attended the white school nor a white student the black school. The freedom of choice plan adopted by the school board was found to be unacceptable because it offered no real promise of achieving a unitary, nonracial school system. The Court concluded that a freedom of choice plan in a school system such as this and in the absence of other efforts at desegregation, was not sufficient to provide the remedy mandated by *Brown II*. *Id.* at 441-42. *See also* Raney v. Board of Educ., 391 U.S. 433, 438, 443 (1968).

62. 391 U.S. 430 (1968).

eration, the freedom of choice plan was not working. The racial composition of previously all-black schools was still 100% black, while only 15% of the blacks had chosen to attend white schools. Yet, the school board maintained that they had complied with their obligations to desegregate. The Court identified the freedom of choice program as a subterfuge, and declared that *Brown II* clearly charged school boards operating a dual system with "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[63] The extent to which this affirmative duty might apply to a large city setting with extensive areas of residential patterns of segregation, presenting problems and calling for solutions vastly different from those in *Green*, was unanswered by this decision.

A few years later, *Swann v. Charlotte-Mecklenburg Board of Education*[64] partially answered the questions left open in *Green*. The Court ruled that federal district courts have wide remedial discretion in the field of desegregation and that they do not abuse it by requiring major restructuring of attendance zones along with reasonable busing. Thus, the Court imposed upon a large metropolitan area—Charlotte, North Carolina—the affirmative duty to eliminate segregation in the schools, and also approved the use of busing to achieve this end.[65] In so ruling, the Court was requiring districts to alleviate conditions which in large part did not result from historic state-imposed de jure segregation, but from segregated residential and migratory patterns. Hence, the Court all but eliminated any logical distinction left between de facto and de jure segregation. The Court viewed the issue presented in *Swann* as a national, not just a southern problem. Justice Powell argued these points in his concurring opinion in *Keyes*[66] and again, along with Justice Rehnquist, in his dissenting opinion in *Columbus* and *Dayton II*.[67] The crucial question, however, is not whether there is any distinction left between de facto and de jure segregation, but what the merging of these two doctrines would mean in school desegregation litigation. Powell urged that "[t]he principal reason for abandonment of the de jure/de facto distinction is that, in view of the evolution of the holding of *Brown I* into the affirmative-duty doctrine, the distinction no longer can be justified on a principled basis . . ." and that it also operates inequitably on communities in different sections of the country.[68]

Despite criticisms, case law has continued to distinguish between de

63. *Id.* at 437-38.
64. 402 U.S. 1 (1970).
65. *Id.* at 29-31.
66. 413 U.S. at 217-36.
67. 443 U.S. at 481-82.
68. 413 U.S. at 224, 229.

facto and de jure segregation. For example, in *Keyes*, the Court reasoned that "plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action."[69] Several years later the Supreme Court, in *Davis*, ruled for the first time that a law or other official act is not unconstitutional solely because it has a racially disproportionate impact; there must be a purpose or intent to segregate.[70]

The full impact of *Columbus* and *Dayton II* is probably yet to be felt. At present, it appears that the underlying rationale of the Court's holdings encompasses two distinct theories—the *Brown II* "affirmative duty" theory and the *Davis* "purposeful discrimination" requirement. It is not explicitly clear from the opinion whether the Court based its holdings on one or both of these theories. Close scrutiny of the district court's analysis seems to indicate that both theories were incorporated in its decision. It relied upon the *Brown I* holding for the proposition that segregation is a denial of equal protection of the laws,[71] and upon *Brown II* and *Green* to support the proposition that once de jure segregation is found, school boards are under a continuing affirmative duty to eliminate from the public schools all vestiges of state-imposed segregation.[72]

Thus, if a plaintiff can prove that a school board was intentionally operating a dual system of segregated schooling in 1954, this gives rise to a presumption that the intentional segregation has continued to exist until recent times. School boards are thereby saddled with the burden of proving that current racially separate education is not the result of their failure to eliminate the consequences of past intentionally segregative policies.[73] Once a plaintiff proves segregative intent in the official acts and policies of the board in the pre-1954 years, he must go one step further and show that in the intervening years there have been a series of board actions and practices that have intentionally aggravated racial separation in the schools. From the Court's analysis, it appears that in order for plaintiffs to prove this, they need only show that the board had not followed a "racially neutral" policy, but had intentionally chosen alternatives which were predictably segregative and from which it was reasonable to infer segregative intent.[74]

In *Columbus*, the plaintiffs established satisfactory proof of recent segregative intent by evidence of the Board's approval of optional at-

69. *Id.* at 198.
70. 426 U.S. at 239.
71. Brown v. Board of Educ., 347 U.S. at 483, 495 (1954).
72. Brown II, 349 U.S. at 300; Green, 391 U.S. at 437-38.
73. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).
74. 443 U.S. at 454-63.

tendance zones, discontiguous attendance areas, and boundary changes which had the effect of maintaining and enhancing racial imbalance in the schools. The court of appeals was persuaded by the fact that the Board had repeatedly been warned of the consequences of its actions and had still abjured workable suggestions for improving racial balance.[75] The court of appeals' opinion, however, seems to indicate that a lesser degree of proof of intent to segregate would have been sufficient. It stated that the Columbus pupil assignment figures for the 1975-76 school year alone would have been enough to establish that the Board had not met its continuing constitutional duty to desegregate the schools.[76] Thus, in *Columbus* and *Dayton II*, the *Davis* requirement was satisfied.

Another question that must be considered is how the *Keyes* doctrine fits into the *Brown II* "affirmative duty" theory and the *Davis* "purposeful discrimination" requirement. Arguably, it could be incorporated on two levels. First plaintiffs must prove the existence of de jure segregation at the time of *Brown I*. If sufficient proof is produced at this level, the *Keyes* doctrine may be applied for the following proposition:

> [Where] a policy of intentional segregation has been proved with respect to a significant portion of the school system, the burden is on the school authorities (regardless of claims that their neighborhood school policy was racially neutral) to prove that their actions as to other segregated schools in the system were not likewise motivated by a segregative intent.[77]

Thus, the *Keyes* doctrine, when combined with the doctrine of *Brown II*, places school boards as of 1954 under a continuing affirmative duty to either eliminate racial separation systemwide (not just in that "meaningful" portion of the school system where de jure segregation has been proven to exist), or present sufficient evidence that segregative intent was not among the factors that motivated their actions.

Furthermore, the *Keyes* doctrine can be applied to lend credence to plaintiffs' prima facie case of a current dual school system in precisely the same manner as set forth above. Once the plaintiff shows sufficient acts and omissions in the policies and practices of a school board having the purpose and effect of aggravating and perpetuating racial separation, the *Keyes* doctrine could again be invoked to support a systemwide remedy.

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75. 583 F.2d at 795.
76. *Id.* at 800.
77. 413 U.S. at 208-09.

CONCLUSION

The Supreme Court's rulings in *Columbus* and *Dayton II* represent both a reaffirmation and an extension of the *Keyes* doctrine. Contrary to what some of the dissenters had to say, this was not a drastic change in the course of the law; it merely represents an extension of the law as applied to northern desegregation cases. Southern school boards have been laboring under a continuing affirmative duty to eliminate all vestiges of intentional segregation "root and branch" since *Brown II*.[78]

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78. 349 U.S. at 299. *See, e.g.,* Green, 391 U.S. at 437-38.