June 20, 1979

78-610 Columbus Bd. of Educ. v. Fenick

Dear Bill:

Please join me in your dissenting opinion, which I think correctly states the principles that have guided the Court in these cases until today.

I may write briefly. If I do, I will send it out within the next couple of days.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference
I join the dissenting opinion of Mr. Justice Rehnquist and write separately to emphasize several points. The Court's opinion in these two cases is profoundly disturbing. It appears to endorse a wholly new constitutional concept applicable to school cases. The opinion also appears to be insensitive to the now widely accepted fact that a quarter of a century after Brown the federal judiciary should be limiting rather than expanding the extent to which courts are operating — hardly with conspicuous success — many of the public school systems of our country.

In expressing these views, I recognize, of course, that my Brothers who have joined the Court's opinion are motivated by purposes and ideals that few would question. My dissent is based on a conviction that the Court's opinion is bad constitutional law and even worse for public education — an element of American life that is so essential, especially for minority children.

Mr. Justice Rehnquist's dissent
demonstrates that the Court's decision marks a break with both precedent and principle. The Court  
approves the stringing together of a chain of "presumptions", not one of which is close enough to reality to be reasonable. This chain leads  
inexorably to the remarkable conclusion that the  

**The Court finds**  

that the degree of segregation that exists in every one of the schools in Columbus and Dayton was caused by intentional violations of the Fourteenth Amendment by the school boards of these two cities.  

This is a conclusion that has not supported by evidence in either of these cases, also, it is a conclusion no one could believe.  

There are segregated schools - that is schools that are wholly or predominantly black or white in terms of composition - in every major urbanized area in the country in which there is a substantial minority population. This condition results primarily from the familiar segregated housing patterns, which in turn - are caused by social, economic and demographic forces for which no school board is responsible.  

*Footnote: Cite and quote Coleman on this point*
cases, relying upon fictions and presumptions that repeatedly have been rejected in other Fourteenth Amendment cases. See, e.g., Personnel Administrator v. Feeney, ___ U.S. ___ (1979).


The Court's opinion also takes unprecedented liberties even with the prior school decisions of this Court, particularly Milliken I, Milliken II and Dayton I. Mr. Justice Rehnquist has dealt devastatingly — at more than a little — with the way in which prior precedents have been endowed with new wonderous meaning. I can add little to what he has said. I therefore move to more generalized but, in my view, important considerations that the Court has ignored.

II

Holding the school boards of these two cities responsible for all of the segregation in the Dayton and Columbus systems necessarily implies a belief that the same school boards — under court
supervision—and now charged with the busing of tens of thousands of children—will be capable of
bringing about and maintaining genuine balance in each of these schools. The experience in city after city demonstrates that this is an illusion.

Unless the racial balance quotas mandated by the decisions of the Court of Appeals, now affirmed, are updated at least every year with fresh busing decrees, forces that no court can control will commence the resegregation process. The history of busing decrees to attain racial balance is that they accelerate this process.

The type of state-enforced segregation that Brown properly condemned no long exists in this country. This is not to say that school boards—particularly in the great cities of the north and middle west—are taking all reasonable measures to provide integrated educational opportunities. As I indicated in my concurring opinion in Keyes v. School District No. 1, 413 U.S. 223, 234, 189 (1973), de facto segregation has existed on a large scale in many of these cities, and often it is indistinguishable in effect from the Brown.
type of de jure segregation. Where there is proof of intentional segregative action or inaction, the time has come for the federal courts should act, but cannot exceed their remedies to the scope of the constitutional violation. Dayton I: System-wide remedies such as those ordered in these cases cannot be justified. The problems, particularly in the inner cities, are far too complex for ill equipped and under staffed courts to undertake extensive supervisory roles in derogation of the responsibility of the legislative and executive departments of government.

The orders affirmed today typify intrusions on local and professional authorities that are destructive of quality education. They require an extensive reorganization of both school systems, including the reassignment of almost half of the 96,000 students in the Columbus system and some 15,000 students in Dayton. They also require reassignments of teachers and other staff personnel, reorganization of grade structures, the closing of certain schools, and extensive transportation of students. The orders
substantially dismantle and displace neighborhood schools even though there are compelling economic and educational reasons for preserving them. This wholesale substitution of judicial legislation for the judgments of elected officials and professional educators derogates the entire process of public education. Moreover, it constitutes a serious interference with the private decisions of parents as to how their children will be educated. These consequences are the inevitable byproducts of a judicial approach that ignores other relevant factors in favor of a single-minded focus on racial balance in every school.

I have mentioned above the self-defeating nature of this judicial intrusion. Parents, unlike school officials, are not bound by these decrees and they may frustrate them through the simple expedient of withdrawing their children from a public school system in which they have lost confidence. In spite of the substantial costs often involved in relocation of the family or in resort to private education, it is evident that many parents view these alternatives as preferable
submitting their children to court-run school systems. In the words of a leading authority,

"An implication that should have been seen all along but can no longer be ignored is that a child's enrollment in a given public school is not determined by a governmental decision alone. It is a joint result of a governmental decision (the making of school assignments) and parental decisions, whether to remain in the same residential location, whether to send their child to a private school, or which school district to move into when moving into a metropolitan area. The fact that the child's enrollment is a result of two decisions operating jointly means that government policies must, to be effective, anticipate parental decisions and obtain the parents' active cooperation in implementing school policies." Coleman, New Incentives for Desegregation, 7 Human Rights 10, 13 (1978).

At least where inner-city populations comprise a large proportion of racial minorities and surrounding suburbs remain white, conditions that exist in most large American cities, the demonstrated effect of compulsory integration is a substantial exodus of whites from the system.


It would be unfair and misleading to attribute this phenomenon to a racist response to integration per se. A reaction to the frustration of professional and local control that occurs when courts go into the business of restructuring and operating school systems is at least as likely an explanation of
this exodus.

Nor is resegregation the only negative effect of court-coerced integration. Public schools depend on community support for their effectiveness. When substantial elements of the community are driven to abandon these schools, their quality inevitably declines. Members of minority groups, who have relied especially on education as a means of advancing themselves over the past quarter century, also are likely to react to this decline in quality by removing their children from public schools. As a result, public school enrollment increasingly will become limited to children from families which either lack the resources to obtain any alternative or are indifferent to the quality of education. The net effect is an overall deterioration in public education, the one national resource that traditionally has made this country a land of opportunity for diverse ethnic and racial groups.

See Keyes v. Independent School District No. 1, 413 U.S. 189, 250 (1973) (opinion of Powell, J.). In this case, a real danger exists that the
attempts of the courts below to bring about racial balance throughout the Columbus and Dayton school systems will be both futile and destructive. No justification for running these risks has been offered or even addressed by the Court. These are not cases where local authorities have sought to segregate schools at any cost, displaying indifference to the educational needs of the children under their responsibility. Cf. Griffin v. County School Board, 377 U.S. 218 (1964); Cooper v. Aaron, 358 U.S. 1 (1958); Brown v. Board of Education, 347 U.S. 483 (1954); Wilkinson, The Supreme Court and Southern School Desegregation, 1955–1970: A History and Analysis, 64 Va. L. Rev. 485 (1978). Aside from a few regrettable episodes of no substantial impact, petitioners have been guilty only of failing to respond vigorously to a form of segregation caused by forces entirely outside their control. This failure alone has never been enough, until today, to be viewed as a constitutional violation. Dayton v. Brinkman, 433 U.S. 406 (1977); Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976);
Milliken v. Bradley, 418 U.S. 717, 738 (1974);
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402 U.S. 1, 16 (1971).

III

If public education is not to suffer further, we must "return to a more balanced evaluation of the recognized interests of our society in achieving desegregation with other educational and societal interests a community may legitimately assert". Keyes, supra, at 253 (Powell, J., concurring). The ultimate goal is to have quality school systems in which racial discrimination is neither practiced nor tolerated. It has been thought that ethnic and racial diversity in the classroom is a desirable component of sound education in our country of diverse populations, a view to which I subscribe. The question that courts, in their single minded pursuit of racial balance seem to ignore, is how best to move toward this goal.

For a long decade or more after Brown, the courts properly focused on dismantling segregated school systems as a means of eliminating
state-imposed discrimination and furthering wholesome diversity in the schools. Experience in recent years, however, has cast serious doubt upon the efficacy of far-reaching judicial remedies directed not against specific constitutional violations, but rather imposed on an entire school system on the fictional assumption that the existence of identifiable black or white schools is caused entirely by intentional segregative conduct, and is evidence of system-wide discrimination. In my view, stated at the outset of this opinion, our courts — now led by this Court — are pursuing a path away from rather than toward the desired goal.

The time has come to seek more acceptable and effective means of achieving ethnic and racial diversity in the classrooms of our public schools. The emphasis should be on the opportunities that school authorities can provide, and that will invite accommodation and cooperation of parents and the community. Although the emphasis in Swann was primarily on desegregating a district in which state mandated segregation long had existed, the
Court also cited examples of more enduring and palatable remedies:

"An optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan. Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority (or less in the majority) is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation. In order to be effective, such a transfer arrangement must grant the transferring student free transportation and space must be made available in the school to which he desires to move." 402 U.S., at 26-27.

See also Keyes, supra, at 240-241 (opinion of Powell, J.). Incentives can be employed to encourage such transfers, such as the creation of magnet schools—especially in the inner city—that provide extraordinary educational benefits and state subsidization of those schools that expand their minority enrollments. See, e.g., Willie, Racial Balance or Quality Education?, in School Desegregation, Shadow and Substance (Levinsohn and Wright eds. 1976). These and like plans, if adopted voluntarily by States, also could counter the effects of racial imbalances between school districts that are beyond the
reach of judicial correction. See Milliken I; cf. Coleman, 7 Human Rights 10, supra, at 48-49. Professional educators no doubt can devise other constructive approaches to the furthering of ethnic and racial diversity in public schools.

The point is a simple one, although its implementation requires community and government support: Integrated schools, to survive and succeed as such, must be made attractive to parents who frequently have the freedom to choose where their children will attend school. The converse is equally plain: Treating integration as a burden to be forced by court decree upon parents and children to atone for past societal wrongs by earlier generations is doomed to failure.
DAYTON AND COLUMBUS

MR. JUSTICE POWELL, dissenting

I join the dissenting opinion of Mr. Justice Rehnquist and write separately to emphasize several points. The Court's opinion in these two cases is profoundly disturbing. It appears to endorse a wholly new constitutional concept applicable to school cases. The opinion also appears to be insensitive to the now widely accepted fact that a quarter of a century after Brown the federal judiciary should be limiting rather than expanding the extent to which courts are operating — hardly with conspicuous success — many of the public school systems of our country.

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I

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3.

seem to be ignored by federal courts in school cases, relying upon fictions and presumptions that repeatedly have been rejected in other Fourteenth Amendment cases. See, e.g., Personnel Administrator v. Feeney, ___ U.S. ___ (1979).


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to submitting their children to court-run school systems. In the words of a leading authority,

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At least where inner-city populations comprise a large proportion of racial minorities and surrounding suburbs remain white, conditions that exist in most large American cities, the demonstrated effect of compulsory integration is a substantial exodus of whites from the system. J. See Coleman, S. Kelly, and J. Moore, Trends in School Segregation, 1968-1973, at 66, 76-77 (1975).

It would be unfair and misleading to attribute this phenomenon to a racist response to integration per se. A reaction to the frustration of professional and local control that occurs courts go into the business of restructuring and operating school systems is at least as likely an explanation of
this exodus.

Nor is resegregation the only negative effect of court-coerced integration. Public schools depend on community support for their effectiveness. When substantial elements of the community are driven to abandon these schools, their quality inevitably declines. Members of minority groups, who have relied especially on education as a means of advancing themselves over the past quarter century, also are likely to react to this decline in quality by removing their children from public schools. As a result, public school enrollment increasingly will become limited to children from families which either lack the resources to obtain any alternative or are indifferent to the quality of education. The net effect is an overall deterioration in public education, the one national resource that traditionally has made this country a land of opportunity for diverse ethnic and racial groups. See Keyes v. Independent School District No. 1, 413 U.S. 189, 250 (1973) (opinion of Powell, J.).

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IV

The time has come to seek more acceptable and effective means of achieving ethnic and racial diversity in the classrooms of our public schools. The emphasis should be on the opportunities that school authorities can provide, and that will invite accommodation and cooperation of parents and the community. Although the emphasis in Swann was primarily on desegregating a district in which state mandated segregation long had existed, the
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reach of judicial correction. See Milliken I; cf. Coleman, 7 Human Rights 10, supra, at 48-49.4 Professional educators no doubt can devise other constructive approaches to the furthering of ethnic and racial diversity in public schools.

The point is a simple one, although its implementation requires community and government support: Integrated schools, to survive and succeed as such, must be made attractive to parents who frequently have the freedom to choose where their children will attend school. The converse is equally plain: Treating integration as a burden to be forced by court decree upon parents and children to atone for past societal wrongs by earlier generations is doomed to failure.
Mr. Justice Powell, dissenting.

I fully agree with the views expressed in the dissenting opinion of Mr. Justice Rehnquist, and I join it. I write separately to elaborate on what I perceive to be the illegitimate premises of the decisions affirmed by the Court today.

I

As a matter of constitutional law, the Court's decision in these two cases marks a break with both precedent and principle. The Court indulges the courts below in stringing together a chain of so-called presumptions, none of which is likely enough as a general matter to be considered reasonable, that produce the result of holding a local school board constitutionally liable for all racial imbalance in the schools under its jurisdiction. This decision undermines our holding two
Terms ago in Dayton v. Brinkman, 433 U.S. 406 (1977), and wrenches out of context our much more limited opinion in Keyes v. School District No. 1, 413 U.S. 189 (1973). In effect a special rule has been crafted for school cases, reversing the general principle that the person claiming a constitutional violation, and not the State, must bear the burden of persuading the trier of fact that he has been harmed by intentional discrimination. See, e.g., Personnel Administrator v. Feeney, ___ U.S. ___ (1979).

It is clear that the District Court in No. 78-610, and the Court of Appeals in both of these cases, have created an extraordinary legal fiction in order to achieve a desired result. Without any direct evidentiary support, the lower courts have held school officials singularly responsible for the racial distribution of students in these large urban school systems. In effect these courts have begged the question whether segregation in these schools can be attributed to the actions of these defendants, see Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 22-23 (1971), and instead have held the school system as pawn for the larger goal of achieving racial integration throughout each system. The cold statistics of racial balance have become for these courts the sole criterion for assessing the validity of these educational systems, and a
constitutional violation has been fabricated to match the intended degree. By refusing to reverse these decisions and to remand for findings of the actual degree of segregation attributable to these defendants, the Court permits a translucent constitutional veneer to be applied to what is naked social engineering.

II

Not only do the decisions of the courts below torture a broad legal principle to achieve particular social ends, but they also evince the problems that can be expected when courts substitute sociology for jurisprudence. Holding these petitioners responsible for all of the segregation in the Dayton and Columbus school systems leads directly to the dangerous illusion that they actually are capable of bringing about desegregation in these schools. The foreseeable result of the rulings affirmed today, which fully reflect this illusion, is exacerbation of the fundamental racial problems which the federal judiciary has a special mission to confront. Increased racial tension, decreased educational opportunities for racial minorities, and, ultimately, greater segregation than before are the predictable, if not inevitable, effects of these decrees.

The orders affirmed today require a massive reorganization of both school systems, including the forced
busing of thousands of students and the reassignment of many more. This wholesale substitution of judicial decisionmaking for the judgments of professional educators and elected officials derogates the entire process of public education. Moreover, it constitutes a substantial interference with the private decisions of parents as to how their children will be educated. But such imposition is the inevitable byproduct of a judicial approach that ignores the particular characteristics of a community and its school system in favor of a single-minded focus on racial balance.

Unfortunately, it is increasingly becoming the experience of courts seeking to administer desegregation decrees that this sort of judicial imposition is self-defeating. Parents, unlike school officials, are not bound by such decrees and may frustrate them through the simple expedient of withdrawing their children from the affected school. In spite of the substantial costs involved in relocation or private education, it is evident that many parents view these alternatives as preferable to submitting their children to court-run school systems. In the words of a leading authority,
"An implication that should have been seen all along but can no longer be ignored is that a child's enrollment in a given public school is not determined by a governmental decision alone. It is a joint result of a governmental decision (the making of school assignments) and parental decisions, whether to remain in the same residential location, whether to sent their child to a private school, or which school district to move into when moving into a metropolitan area. The fact that the child's enrollment is a result of two decisions operating jointly means that government policies must, to be effective, anticipate parental decisions and obtain the parents' active cooperation in implementing school policies." Coleman, New Incentives for Desegregation, 7 Human Rights 10, 13 (1978).

At least where inner-city populations comprise a large proportion of racial minorities and surrounding suburbs remain white, conditions that exist in most large American cities, the demonstrated effect of compulsory integration is a substantial exodus of whites from the system. See Coleman, S. Kelly, and J. Moore, Trends in School Segregation, 1968-1973, at 66, 76-77 (1975). It would be unfair and misleading to attribute this phenomenon to a racist response to integration per se. A reaction to the frustration of professional and local control that occurs when courts go into the business of running school systems is at least as likely an explanation of this exodus.
Nor is resegregation the only negative effect of court-coerced integration. Public schools depend on community support for their effectiveness. When substantial elements of the community are driven to abandon these schools, their quality inevitably declines. Members of minority groups, who have relied especially on education as a means of advancing themselves over the past quarter-century, also are likely to react to this decline in quality by removing their children from public schools. As a result, public school enrollment increasingly will become limited to children from families which either lack the resources to obtain any alternative or are indifferent to the quality of education. The net effect is an overall deterioration in public education, the very national resource that traditionally has made this country a land of opportunity for diverse ethnic and racial groups. See Keyes v. Independent School District No. 1, 413 U.S. 189, 250 (1973) (opinion of Powell, J.).

In short, a very real danger exists that the attempts of the courts below to bring about racial balance throughout the Columbus and Dayton school systems will be both futile and destructive. No justification for running these risks has been offered here. These are not cases
where local authorities have sought to segregate schools at any cost, displaying indifference to the educational needs of the children under their responsibility. Cf. Griffin v. County School Board, 377 U.S. 218 (1964); Cooper v. Aaron, 358 U.S. 1 (1958); Brown v. Board of Education, 347 U.S. 483 (1954); Wilkinson, The Supreme Court and Southern School Desegregation, 1955-1970: A History and Analysis, 64 Va. L. Rev. 485 (1978). Aside from a few regrettable episodes of no substantial impact, petitioners have been guilty only of failing to respond vigorously to a form of segregation caused by forces entirely outside their control. This failure alone has never been enough to constitute a constitutional violation under our decisions, Dayton v. Brinkman, 433 U.S. 406 (1977); Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976); Milliken v. Bradley, 418 U.S. 717, 738 (1974); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971), and does not demonstrate the kind of irresponsibility that can justify wholesale substitution of judicial authority. In sum, the decrees approved today present the dangers associated with a desperate, last-ditch attempt to stave off an impending disaster, without any evidence that last-resort measures are needed or that a disaster is pending.
It has become a commonplace that racial segregation is a pervasive national problem, not a regional phenomenon. See Keyes v. School District No. 1, 413 U.S. 189, 217-236 (1973) (opinion of Powell, J.). The necessary solution also must be national in scope, and cannot rest solely on the shoulders of the federal judiciary. To be enduring, racial integration must be accomplished through a process of accommodation and cooperation. There are limits to what judicial fiat can accomplish, as our experience with school desegregation illustrates.

Limited judicial capabilities do not mean impotence. That the public schools of Dayton and Columbus are not integrated is indisputable. That school officials in these two cities may have some limited responsibility for the present racial distribution of the student populations is possible. To the extent these officials have contributed to the problem, the courts below have a duty to compel them to undo the effects of their unlawful action. Beyond this, these courts have a role to play in encouraging these officials to find effective means of counteracting the diverse social forces that have led to the substantial racial imbalance present in these schools. At this point, however, courts can only be supportive of
good faith efforts to promote integration; their coercive powers become useless.

It is too late in the day to regard genuine, durable integration as an unachievable goal for the public schools. Various means have been suggested to further this end; our prior opinions have not been silent on the matter. In Swann, the Court remarked:

"An optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan. Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority [or less in the majority] is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation. In order to be effective, such a transfer arrangement must grant the transferring student free transportation and space must be made available in the school to which he desires to move." 402 U.S., at 26-27.

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School Desegregation, Shadow and Substance (Levinsohn and Wright eds. 1976). These plans, if adopted voluntarily by States, could also counter the effects of racial imbalances between school districts that are manifestly beyond the reach of judicial correction. See Coleman, 7 Human Rights 10, supra, at 48-49.4 Professional educators no doubt can devise other approaches. The point is a simple one, although its implementation complex: Integrated schools, to succeed, must be made attractive to parents who have the freedom to choose where their children will attend school. The converse is equally plain: Treating integration as a burden to be placed on parents and children to atone for past societal wrongs is doomed to failure.

III

It is unclear to me, as it is to MR. JUSTICE REHNQUIST, whether the Court today is endorsing the incredible fabric of presumptions erected by the courts below, or merely is adopting a posture of extraordinary deference to lower courts in busing cases. Whichever of these interpretations is correct, I regret that the Court has abandoned its paramount role in supervising the orderly realization of the constitutional principles announced in Brown. Accordingly, I dissent.
1. It has long been realized that residential patterns are responsible for much if not most of the racial imbalance in present-day urban school systems. See Farley, Residential Segregation and Its Implications for School Integration, 39 L. & Contemp. Probs. 164 (1975); K. Taeuber & A. Taeuber, Negroes in Cities (1965). The courts below did not find that Dayton or Columbus were any different in this respect; rather, they treated the fact of residential segregation as irrelevant. See post, at ___ & n. 24 (REHNQUIST, J., dissenting).

2. Academic debate has grown as to the degree of educational benefit realized by children due to integration. See R. Crain & R. Mahard, The Influence of High School Racial Composition on Black College Attendance and Test Performance (1978); Coleman, New Incentives for Desegregation, 7 Human Rights 10 (1978); Weinberg, The Relationship Between School Desegregation and Academic Achievement: A Review of the Research, 39 L. & Contemp. Probs. 240 (1975). Much of the dispute seems somewhat beside the point. Whatever educational benefits afforded minority children through attendance at majority schools--and at least some evidence indicates these benefits can be substantial--will be compromised if the actual method

3. The District Court in No. 78-627 found that although school officials had engaged in several intentionally discriminatory acts, none of these actions had caused any of the lack of integration currently existing in the Dayton school system. Because of the distorted burden-shifting rules applied by the Court of Appeals, it has not yet had an opportunity to review this finding under normal sufficiency-of-the-evidence principles. Similarly, the District Court and Court of Appeals in No. 78-610, in ruling that school officials were responsible for all of the lack of integration in the Columbus system, also applied presumptions that improperly shifted their focus from the relevant inquiry. It is at least conceivable that more conventional evidentiary rules still might lead to findings in each of these cases that racial discrimination by school officials caused some amount of segregation in these schools.

4. One such State has implemented a system of subsidized intra- and inter-district majority-to-minority transfers is Wisconsin. 1975 Laws of Wisconsin ch. 220, codified at
Wisc. Stat. Ann. 121.85. Although it is too early to determine whether this experiment in voluntary integration has been successful, the contrast with the massive coercion undertaken by the courts below is striking. See also Meadows, Open Enrollment and Fiscal Incentives, in School Desegregation, Shadow and Substance (Levinsohn and Wright eds. 1976).
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