May 16, 1979

Re: No. 78-610 - Columbus Board of Education v. Gary L. Penick

Dear Byron:

Please join me.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference
May 16, 1979

Re: No. 78-610 - Columbus Board of Education v. Penick; and No. 78-627 - Dayton Board of Education v. Brinkman

Dear Chief:

You have asked me to write a dissent in the Dayton case, in which you, Potter, Lewis, and I voted to reverse. Lewis and I voted to reverse in the Columbus case, while you and Potter, as I recall, voted to affirm. Byron has now circulated a proposed opinion for the Court in Columbus, and Bill Brennan has also assigned him the opinion for the Court in Dayton. On the basis of my Conference discussion, and reading Byron's proposed Court opinion, I do not believe that I could write a dissent in Dayton which would be consistent with Byron's opinion affirming the judgment of the Court of Appeals for the Sixth Circuit in Columbus. I wonder, therefore, whether perhaps either you or Potter should undertake the dissent in Dayton; I anticipate writing in both case in dissent, Lewis having asked me to do so in the Columbus case on behalf of himself and me.

Sincerely,

[Signature]

The Chief Justice

Copies to the Conference
RE: No. 78-610 Columbus Board of Education v. Penick

Dear Byron:

I agree.

Sincerely,

[Signature]

Mr. Justice White

cc: The Conference
Re: No. 78-610 - Columbus Bd. of Education v. Penick

Dear Byron:

Please join me.

Sincerely,

Harry

Mr. Justice White

cc: The Conference
MEMORANDUM

TO: Paul  DATE: May 30, 1979
FROM: Lewis F. Powell, Jr.

Columbus and Dayton

Fortunately, Justice Rehnquist is writing dissents - possibly a single dissent - in these cases.

Although I probably will not write, I would like to know - with respect to each of these cases - what the record shows as to following points:

1. Were ratios (or ranges of ratios) prescribed in both cases, and what were they?

2. Do the ratios apply indiscriminately to all schools in the system?

3. Exactly what was ordered in each of these cases with respect to busing, and what does the record show as to the number of students bused, the percentage of total, whether elementary kids also are bused, the maximum distance of busing, and any other facts relevant to busing.

It is likely that Mr. Justice Rehnquist and his clerk already have obtained this information. I suggest that you might check with his clerk. If they have the information, we can simply wait until we see Justice Rehnquist's opinions and then decide whether I should write a paragraph or two concurring in the dissent. In that event, I
may want to use the answers to the foregoing questions.

If the Rehnquist Chambers does not have this information, I would like for you or one of your colleagues to get it together within the next ten days or so.

L.F.P., Jr.
To:  Paul  
From:  L.F.P., Jr.  

Columbus and Dayton School Cases

I would like to try a dissent not so much to what 
the Court decides in these two cases, but to address the 
fabric of myths and fictions upon which the body of 
desegregation law rests. I expect to join Rehnquist's basic 
dissent, and I know that it is late in the day to write all 
that one could say about the intellectually and legally 
bankrupt path the federal courts started down with good 
reason, but have not had the good sense to abandon. But 
let's give it a try, in rather summary form.

Most of the general views that I have entertained 
for some time (wearing my "school board" hat in addition to 
my "judge's" robe) have been stated in Dr. Coleman's lecture 
that he gave at Chicago in April, 1978. We have a copy of 
this, but I understand - through the library some months ago 
- that the lecture never has been published. (I pause here 
to suggest that you have our library check with the Library 
of Congress to see what, if anything, of Dr. Coleman's views 
on school desegregation has been published either in book or 
periodical form within the past two or three years.)

I haven't had an opportunity to put my thoughts
together enough even enough to give you a skeleton outline. Accordingly, what I am now dictating does not purport to be more than identification of random thoughts and ideas that I hope you can weave into some sort of a draft opinion. The only sources you really need refer to are (i) my opinion in *Keyes*, and particularly from Part III C to the end; (ii) my opinion in *Austin*; what Bruce and I wrote in *Dallas*; and (iii) Dr. Coleman's lecture. Of course, at least some reference will be made to the more relevant decisions of this Court (e.g., *Dayton I*, *Milliken I* and *II*, etc.).

Dr. Coleman identifies correctly the principal constitutional and educational fictions and misapprehensions that have brought us to the present sad state of affairs well illustrated by the situation in Dallas. Perhaps we should commence with an identification of the fictions and fallacious assumptions relied upon by this Court and reaffirmed by its decisions in *Columbus* and *Dayton*. In essence, I suppose these are pretty much the same as those identified by Coleman, but they should be expressed — where appropriate — in the terminology used by the Court itself.

In over-simplified terms, the general rationale of Justice White's opinions runs along the following lines: since *Brown* (1954) there has been an affirmative duty to
desegregate schools (even though nobody knew about the affirmative part of this duty until late 1968 when Green was decided); a segregated school is one that is predominantly black (as Coleman points out this is presumed to be inherently bad whereas a predominantly white school is not bad unless it helps further the maintaining of predominantly black schools); if there are identifiable black schools (predominantly black) within a school district, the affirmative duty to convert them to some sort of racial balance has been on the school board since 1954 and the burden of proof is therefore upon it to establish that its segregative intent did not cause the continued existence of one or more predominantly black schools; as proving this negative in a way acceptable to many district courts is a virtual impossibility (e.g., Columbus), the next step is for the district court to conclude that there has been a system-wide violation of the affirmative duty to desegregate; having leaped to this conclusion (wholly without regard to the actual facts), the court then decrees a system-wide remedy; the system remedy must be coercive enough to assure the elimination of racially identified schools "root and branch", so that there is no "black" and "white" school remaining; ambiguous language in Swann, adopted today as the law of the
land, is that decreeing racial balance in each and every school is appropriate where there has been a system-wide violation, and the now accepted way of accomplishing this is to prescribe a ratio bearing some relation to the percentage of blacks to the total population; finally, in order to implement what the Constitution has been found to require, system-wide busing is decreed.

Although I have perhaps exaggerated to some extent, and used adjectives that one might not use in a Court opinion, I think the foregoing comes close to being precisely the of prevailing sequence of "reasoning" in Supreme Court doctrine. It makes no sense, and I believe that this type of reasoning will be ridiculed when a detached history of desegregation decisions is written.

I would particularly like to emphasize near the outset the fallaciousness of the assumption, made with respect to cities of the size of Columbus and Dayton and larger, that there has been a system-wide violation of constitutional rights in the sense that but for such violation there would be no predominantly black schools in the school district. No rational human being could believe this to be true in such cities. Coleman refers to this assumption (not identified precisely in my terms) as fiction
and as romanticizing. He states:

"Any knowledge of urban areas, and of the residential segregation that develops in urban areas along ethnic, income, and racial lines leads immediately to the recognition that most segregation, whether ethnic, or class, or race, in urban areas is due to residential patterns." (Emphasis in original.) Coleman, p. 1.

This sort of segregation results from neutral causes (and not to unconstitutional action or inaction by school authorities) and is not necessarily bad in the ethnic and pluralistic society that prevails in our country and particularly in the great cities.

In my view, and I say this only in legalistic terms, I doubt that any federal judge really believes what many of them still accept as proven fact. That is, even if the school boards in Columbus and Dayton have been guilty of some intentional neglect of their duty to desegregate, no one can believe that the number and degree of racially identified schools in these two cities have resulted from failure of duty by the board.

In short, our decisions make a mockery of the very language repetitively used to the effect that the remedy should not exceed the scope of the violation. I am sure
Rehnquist will make this point, but I would like to emphasize it.

Also, as Dr. Coleman makes clear, desegregation law as enforced by the federal courts has failed to accomplish its basic objectives: (i) as parents are free both to move to the suburbs or to choose private schools, those who can do so tend to leave court-run schools with the result that they are resegregated (e.g., Dallas and countless other cities); (ii) the schools from which this "flight" takes place, tend not only to be resegregated, but also to offer a poorer quality of education - at least this is the perception of parents and the judgment of many educators (see Coleman).

In summary, what perhaps could be Part I of a dissent would identify the fictions and false assumptions upon which the present "legal fabric" of our decisions is based, and indicate briefly the failure of the application of these fallacious views by court ordered racial balance and busing to achieve it. We have pursued what we call constitutional principles (never imagined until we came upon the slippery slope of Green and Swann) with results now widely recognized as ranging from disappointing to disasterous.

Part II of the dissent should be affirmative and on
the upbeat. As you know, I believe in the advantages of diversity in the public schools as well as in higher education. I am totally persuaded that, despite profound differences and difficulties, the white and black people of this country must learn to live together, be educated together, work together, and stop calling each other "racists". But forced integration (the Court euphemistically continues to refer to it as desegregation) is neither required by the constitution nor is it efficacious. As Coleman points out, black parents are even more anxious about good education for their children than white parents (on the average) and given the opportunity they will send their children to church schools or elsewhere to avoid deteriorating court run public schools.

In sum, the solution we should seek should be essentially voluntary, but there must be state legislation that provides the framework and perhaps support and incentives. I have thought for some time that something along the lines recommended by Coleman may be the answer (pp. 12 et. seq.). His quite summary description of the Wisconsin plan is something we should examine. In essence, as described by Coleman (pp. 10, 13) it provides, but does not require, for children within a city school district to
transfer on a voluntary basis to schools within the entire metropolitan area. There would, of course, be certain prescribed conditions: state funds would follow the child, transportation at public expense would have to be provided, the city school district would retain control over education within the city, the schools to which city pupils could transfer would have the right to limit the number of students coming in based on capacity, but could not reject students because of race. I suppose, also, that one could provide that transfers should not increase existing racial imbalance in a particular school.

State legislation would have to provide for this, as Milliken I would prevent a federal court from so ordering in the absence of an interdistrict violation. But where the state provided the framework for a voluntary transfer system, this would avoid most of the disadvantages of federal court coercion. The plan also could provide for specialized or magnet schools within the city, to which metropolitan kids could transfer. See the description of these, and the voluntary transfer program, provided in the innovative Dallas plan, with which Bruce is familiar.

L.F.P., Jr.
SUPREME COURT OF THE UNITED STATES

No. 78-610

Columbus Board of Education et al., Petitioners, v. Gary L. Penick et al.

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

[May —, 1979]

MR. JUSTICE WHITE delivered the opinion of the Court.

The public schools of Columbus, Ohio, are highly segregated by race. In 1976, over 32% of the 96,000 students in the system were black. About 70% of all students attended schools that were at least 80% black or 80% white. 429 F. Supp. 229, 240 (SD Ohio 1977). Half of the 172 schools were 90% black or 90% white. 583 F. 2d 787, 800 (CA6 1978). Fourteen named students in the Columbus school system brought this case on June 21, 1973, against the Columbus Board of Education, the State Board of Education, and the appropriate local and state officials.1 The second amended complaint, filed on October 24, 1974, charged that the Columbus defendants had pursued and were pursuing a course of conduct having the purpose and effect of causing and perpetuating the segregation in the public schools, contrary to the Fourteenth Amendment. A declaratory judgment to this effect and appropriate injunctive relief were prayed. Trial of the case began a year later, consumed 36 trial days, produced a record containing over 600 exhibits and a transcript in excess of 6,600 pages, and was completed in June 1976. Final arguments

1 A similar group of plaintiffs was allowed to intervene, and the original plaintiffs were allowed to file an amended complaint that was certified as a class action. 429 F. Supp. 229, 233-234 (SD Ohio 1977).
were heard in September, and in March 1977 the District Court filed an opinion and order containing its findings of fact and conclusions of law. 429 F. Supp. 229.

The trial court summarized its findings:

"From the evidence adduced at trial, the Court has found earlier in this opinion that the Columbus Public Schools were openly and intentionally segregated on the basis of race when Brown [v. Board of Education (I), 347 U. S. 483] was decided in 1954. The Court has found that the Columbus Board of Education never actively set out to dismantle this dual system. The Court has found that until legal action was initiated by the Columbus Area Civil Rights Council, the Columbus Board did not assign teachers and administrators to Columbus schools at random, without regard for the racial composition of the student enrollment at those schools. The Columbus Board even in very recent times has approved optional attendance zones, discontiguous attendance areas and boundary changes which have maintained and enhanced racial imbalance in the Columbus Public Schools. The Board, even in very recent times and after promising to do otherwise, has abjured workable suggestions for improving the racial balance of city schools.

"Viewed in the context of segregative optional attendance zones, segregative faculty and administrative hiring and assignments, and other such actions and decisions of the Columbus Board of Education in recent and remote history, it is fair and reasonable to draw an inference of segregative intent from the Board's actions and omission discussed in this opinion." Id., at 260-261.

The District Court's ultimate conclusion was that at the time of trial the racial segregation in the Columbus school system "directly resulted from [the Board's] intentional segregative acts and omissions," id., at 259, in violation of the Equal Protection Clause of the Fourteenth Amendment.
Accordingly, judgment was entered against the local and state defendants enjoining them from continuing to discriminate on the basis of race in operating the Columbus public schools and ordering the submission of a systemwide desegregation plan.

Following decision by this Court in Dayton Board of Education v. Brinkman (I), 433 U. S. 406, in June 1977, and in response to a motion by the Columbus Board, the District Court rejected the argument that Dayton I required or permitted any modification of its findings or judgment. It reiterated its conclusion that the District’s "liability in this case concerns the Columbus School District as a whole," Pet. App. 94, quoting 429 F. Supp., at 266, asserting that, although it had "no real interest in any remedy plan which is more sweeping than necessary to correct the constitutional wrongs plaintiffs have suffered," neither would it accept any plan "which fails to take into account the systemwide nature of the liability of the defendants." Pet. App. 95. The Board subsequently presented a plan that complied with the District Court's guidelines and that was embodied in a judgment entered on October 7. The plan was stayed pending appeal to the Court of Appeals.

Based on its own examination of the extensive record, the Court of Appeals affirmed the judgments entered against the local defendants. 583 F. 2d 787. The Court of Appeals could not find the District Court's findings of fact clearly erroneous. Id., at 789. Indeed, the Court of Appeals examined in detail each set of findings by the District Court and found strong support for them in the record. Id., at 798, 804, 805, 814. The Court of Appeals also discussed in detail and found unexceptionable the District Court's understanding and application of the Fourteenth Amendment and the cases construing it.

* The Court of Appeals vacated the judgment against the state defendants and remanded for further proceedings with respect to those parties. 583 F. 2d 787, 815-818 (CA6 1978). No issue with respect to the state defendants is before us now.
We granted the Board's petition for certiorari, — U. S. — (1979); implementation of the pending desegregation plan was stayed pending our review, — U. S. — (1978) (REHNQUIST, J.); and we now affirm the judgment of the Court of Appeals.

II

The Board earnestly contends that when this case was brought and at the time of trial its operation of a segregated school system was not done with any general or specific 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 and surely no remaining systemwide impact at the time of trial. A system remedy was therefore contrary to the teachings of the cases, such as Dayton I, that the scope of the constitutional violation measures the scope of the remedy. 3

We have discovered no reason, however, to disturb the judgment of the Court of Appeals, based on the findings and conclusions of the District Court, that the Board's conduct at the time of trial and before not only was animated by an unconstitutional, segregative purpose, but also had current segregative impact that was sufficiently systemwide to warrant the remedy ordered by the District Court.

These ultimate conclusions were rooted in a series of constitutional violations that the District Court found the Board to have committed and that together dictated its judgment and decree. In each instance, the Court of Appeals found the District Court's conclusions to be factually and legally sound.

3 Petitioners also argue that the District Court erred in requiring that every school in the system be brought roughly within proportionate racial balance. We see no misuse of the mathematical ratios under our decision in Swann v. Board of Education, 402 U. S. 1, 22-25 (1971), especially in light of the Board's failure to justify the continued existence of "some schools that are all or predominantly of one race...." Id., at 26; see Pet. App. 102. Petitioners do not otherwise question the remedy if a systemwide violation was properly found.
A

First, although at least since 1888 there had been no statutory requirement or authorization to operate segregated schools, the District Court found that in 1954, when Brown I was decided, the Columbus Board was not operating a racially neutral, unitary school system, but was conducting "an enclave of separate, black schools on the near east side of Columbus," and that "the then-existing racial separation was the direct result of cognitive acts or omissions of those school board members and administrators who had originally intentionally caused and later perpetuated the racial isolation. . . ." 429 F. Supp., at 236. Such separateness could not "be said to have been the result of racially neutral official acts." Ibid.

Based on its own examination of the record, the Court of Appeals agreed with the District Court in this respect, observing that, "[w]hile the Columbus school system's dual black-white character was not mandated by state law as of 1954, the record certainly shows intentional segregation by the Columbus Board. As of 1954 the Columbus School Board had carried out a systematic program of segregation affecting a

4 In 1871, pursuant to the requirements of state law, Columbus maintained a complete separation of the races in the public schools. 429 F. Supp., at 234-235. The Ohio Supreme Court ruled in 1888 that state law no longer required or permitted the segregation of school children. Board of Education v. State, 45 Ohio St. 555. Even prior to that, in 1881, the Columbus Board abolished its separate schools for black and white students, but by the end of the first decade of this century it had returned to a segregated school policy. Champion Avenue School was built in 1909 in a predominantly black area and was completely staffed with black teachers. Other black schools were established as the black population grew. The Board gerrymandered attendance zones so that white students who lived near these schools were assigned to or could attend white schools, which often were further from their homes. By 1943 a total of five schools had almost exclusively black student bodies, and each was assigned to an all-black faculty, often through all-white to all-black faculty transfers that occurred each time the Board came to consider a particular school as a black school. Id., at 234-236.

The Board insists that, since segregated schooling was not commanded by state law and since not all schools were wholly black or wholly white in 1954, the District Court was not warranted in finding a dual system. But the District Court found that the "Columbus Public Schools were officially segregated by race in 1954," Pet. App. 94 (emphasis added); and in any event, there is no reason to question the finding that as the "direct result of cognitive acts or omissions" the Board maintained "an enclave of separate, black schools on the near east side of Columbus." 429 F. Supp., at 236. Purposefully and effectively maintaining a system of separate black schools in a substantial part of the system itself suffices to make out a prima facie case of a dual school system and supports a finding to this effect absent sufficient contrary proof by the Board, which was not forthcoming in this case. Keyes, 413 U. S., at 203.5

Second, both courts below declared that since the decision in Brown v. Board of Education (II), 349 U. S. 294 (1955), the Columbus Board has been under a continuous constit-

---

5It is argued that Dayton Board of Education v. Brinkman (I), 433 U. S. 406 (1977), implicitly overruled or limited those portions of Keyes and Swann approving, in certain circumstances, inferences of general, systemwide purpose and current, systemwide impact from evidence of discriminatory purpose that has resulted in substantial current segregation, and approving a systemwide remedy absent a showing by the defendant of what part of the current imbalance was not caused by the constitutional breach. Dayton I does not purport to disturb any aspect of Keyes and Swann; indeed, it cites both cases with approval. On the facts of that case as it came to us at that time, there was no history of a dual system and only isolated instances of intentional segregation, which were insufficient to give rise to an inference of systemwide institutional purpose and which did not add up to a facially substantial systemwide impact.
COLUMBUS BOARD OF EDUCATION v. PENICK

With a constitutional obligation to disestablish its dual school system and that it has failed to discharge this duty. Pet. App. 94; 583 F. 2d, at —. Under the Fourteenth Amendment and the cases that have construed it, the Board's duty to dismantle its dual system cannot be gainsaid.

Where a racially discriminatory school system has been found to exist, Brown II imposes the duty on local school boards to "effectuate a transition to a racially non-discriminatory school system." 349 U. S., at 301. "Brown II was a call for the dismantling of well-entrenched dual systems," and school boards operating such systems were "clearly charged 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." Green v. County School Board, 391 U. S. 430, 437-438 (1968). Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment. Dayton I, 433 U. S., at 413-414; Wright v. Council of Emporia, 407 U. S. 451, 460 (1972).

The Green case itself was decided 13 years after Brown II. The core of the holding was that the school board involved had not done enough to eradicate the lingering consequences of the dual school system that it had been operating at the time Brown was decided. Even though a freedom of choice plan had been adopted, the school system remained essentially a segregated system, with many all-black and many all-white schools. The board's continuing obligation, which had not been satisfied, was "to come forward with a plan that promises realistically to work . . . now . . . until it is clear that state-imposed segregation has been completely removed." Swann v. Board of Education, 402 U. S. 1, 13 (1971), quoting Green, supra, at 439 (emphasis in original).

As The Chief Justice's opinion for a unanimous Court in Swann recognized, Brown and Green imposed an affirmative duty to desegregate. "If school authorities fail in their affirmin-
ative obligations under those holdings, judicial authority may be invoked. . . . In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system." 402 U. S., at 15–16. In Swann, it should be recalled, an initial segregation plan had been entered in 1965 and had been affirmed on appeal. But the case was reopened, and in 1969 the school board was required to come forth with a more effective plan. The judgment adopting the ultimate plan was affirmed here in 1971, 16 years after Brown II.

In determining whether a dual school system has been dis-established, Swann also mandates that matters aside from student assignments must be considered:

"[W]here it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown." 402 U. S., at 18.

Further, Swann stated that in devising remedies for legally imposed segregation the responsibility of the local authorities and district courts is to ensure that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual school system. Id., at 20–21. As for student assignments, the Court said:

"No per se rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued
existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory.” Id., at 26.

The Board’s continuing duty to desegregate its school system is therefore beyond question, and it has pointed to nothing in the record persuading us that at the time of trial the dual school system and its effects had been disestablished. The Board does not appear to challenge the finding of the District Court that at the time of trial most blacks were still going to black schools and most whites to white schools. Whatever the Board’s current purpose with respect to racially separate education might be, it knowingly continued its failure to eliminate the consequences of its past intentionally segregative policies. The Board “never actively set out to dismantle this dual system.” 429 F. Supp., at 260.

C

Third, the District Court not only found that the Board had breached its constitutional duty by failing effectively to eliminate the continuing consequences of its intentional systemwide segregation in 1954, but also found that in the intervening years there had been a series of Board actions and practices that could not “reasonably be explained without reference to racial concerns,” id., at 241, and that “intentionally aggravated, rather than alleviated,” racial separation in the schools. Pet. App. 94. These matters included the general practice of assigning black teachers only to those schools with substantial black student population, a practice that was terminated only in 1974 as the result of a conciliation agreement with the Ohio Civil Rights Commission; the intentionally segregative use of optional attendance zones,° discontiguous

° Despite petitioners’ avowedly strong preference for neighborhood schools, in times of residential racial transition the Board created optional
attendance areas, and boundary changes; and the selection of sites for new school construction that had the foreseeable and anticipated effect of maintaining the racial separation of the schools. The court generally noted that between 1954

attendance zones to allow white students to avoid predominantly black schools, which were often closer to the homes of the white pupils. For example, until well after the time the complaint was filed, petitioners allowed students "in a small white enclave on Columbus' predominantly black nearest side . . . to escape attendance at black" schools. 429 F. Supp., at 244. The court could perceive no racially-neutral reasons for this optional zone. Id., at 245. "Quite frankly, the Near-Bexley Option appears to this Court to be a classic example of a segregative device designed to permit white students to escape attendance at predominantly black schools." Ibid.

7 This technique was applied when neighborhood schools would have tended to desegregate the involved schools. From 1966 to 1968 a group of white students were bused past their neighborhood school to a "whiter" school. Id., at 247. From 1957 until 1963 students living in a predominantly white area near Heimandale elementary school attended a more remote, but identifiably white, school. Id., at 247-248.

8 Gerrymandering of boundary lines also continued after 1954. The District Court found, for instance, that for one area on the west side of the city containing three white schools and one black school the Board had altered the lines so that white residential areas were removed from the black school's zone and black students were contained within that zone. Id., at 245-247.

Another example involved the former Mifflin district that had been absorbed into the Columbus district. The Board staff presented two alternative means of drawing necessary attendance zones: one that was desegregative and one that was segregative. The Board chose the segregative option, and the District Court was unpersuaded that it had any legitimate education reasons for doing so. Id., at 248-250.

9 The District Court found that of the 103 schools built by the Board between 1950 and 1975, 87 opened with racially identifiable student bodies and 71 remained that way at the time of trial. This result was reasonably foreseeable under the circumstances in light of the sites selected, and the Board was often specifically warned that it was, without apparent justification, choosing sites that would maintain or further segregation. Id., at 241-243. As the Court of Appeals noted:

"[T]his record actually requires no reliance upon inference, since, as indi-
and the time of trial the Board was frequently put on notice of the consequences of its actions, yet failed to heed its duty to alleviate racial separation in the schools. 10

III

Against this background, we cannot fault the conclusion of the District Court and the Court of Appeals that at the time of trial there was systemwide segregation in the Columbus schools which was the result of recent and remote intentionally segregative actions of the Columbus Board. While appearing not to challenge most of the subsidiary findings of historical fact, Tr. of Oral Arg., at 7, petitioners dispute many of the factual inferences drawn from these facts by the two

cated above, it contains repeated instances where the Columbus Board was warned of the segregative effect of proposed site choices, and was urged to consider alternatives which could have had an integrative effect. In these instances the Columbus Board chose the segregative sites. In this situation the District Judge was justified in relying in part on the history of the Columbus Board’s site choices and construction program in finding deliberate and unconstitutional systemwide segregation.” 583 F. 2d, at 894.

10 Local community and civil rights groups, the “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 [of segregation] and made certain curative instructions.” 429 F. Supp., at 255. This was particularly important because the Columbus system grew rapidly in terms of geography and number of students, creating many crossroads where the Board could either turn toward segregation or away from it. Specifically, for example, the University Commission in 1968 made certain recommendations that it thought not only would assist desegregation of the schools but would encourage integrated residential patterns. Id., at 256. The Board itself came to similar conclusions about what could be done, but it still took no action. Ibid. Additionally, the Board refused to create a site selection advisory group to assist in avoiding sites with a segregative effect, refused to ask state education officials to present plans for desegregating the Columbus public schools, and refused to apply for federal desegregation-assistance funds. Id., at 257; see id., at 239.
courts below. On this record, however, there is no apparent reason to disturb the factual findings and conclusions entered by the District Court and strongly affirmed by the Court of Appeals after its own examination of the record.

Nor do we discern that the judgments entered below rested on any misapprehension of the controlling law. It is urged that the courts below failed to heed the requirements of Keyes, Washington v. Davis, 426 U. S. 229 (1976), and Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U. S. 252 (1977), that a plaintiff seeking to make out an equal protection violation on the basis of racial discrimination must show purpose. Both courts, it is argued, considered the requirement satisfied if it were shown that disparate impact would be the natural and foreseeable consequence of the practices and policies of the Board, which, it is said, is nothing more than equating impact with intent, contrary to the controlling precedent.

The District Court, however, was amply cognizant of the controlling cases. It is understood that to prevail the plaintiffs were required to "prove not only that segregated school-

11 Petitioners have indicated that a few of the recent violations specifically discussed by the District Court involved so few students and lasted for such a short time that they are unlikely to have any current impact. But that contention says little or nothing about the incremental impact of systemwide practices extending over many years. Petitioners also argue that because many of the involved schools were in areas that had become predominantly black residential areas by the time of trial the racial separation in the schools would have occurred even without the unlawful conduct of petitioners. But, as the District Court found, petitioners' evidence in this respect was insufficient to counter respondents' proof. See Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U. S. 252, 271 n. 21 (1977); Mt. Healthy School Dist. Bd. of Education v. Doyle, 429 U. S. 274, 287 (1977). And the phenomenon described by petitioners seems only to confirm, not disprove, the evidence accepted by the District Court that school segregation is a contributing cause of housing segregation. 429 F. Supp., at 259; Keyes, 413 U. S., at 202-203; Swann, 402 U. S., at 20-21.

78-610—OPINION

12 COLUMBUS BOARD OF EDUCATION v. PENICK

courts below. On this record, however, there is no apparent reason to disturb the factual findings and conclusions entered by the District Court and strongly affirmed by the Court of Appeals after its own examination of the record.

Nor do we discern that the judgments entered below rested on any misapprehension of the controlling law. It is urged that the courts below failed to heed the requirements of Keyes, Washington v. Davis, 426 U. S. 229 (1976), and Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U. S. 252 (1977), that a plaintiff seeking to make out an equal protection violation on the basis of racial discrimination must show purpose. Both courts, it is argued, considered the requirement satisfied if it were shown that disparate impact would be the natural and foreseeable consequence of the practices and policies of the Board, which, it is said, is nothing more than equating impact with intent, contrary to the controlling precedent.

The District Court, however, was amply cognizant of the controlling cases. It is understood that to prevail the plaintiffs were required to "prove not only that segregated school-

11 Petitioners have indicated that a few of the recent violations specifically discussed by the District Court involved so few students and lasted for such a short time that they are unlikely to have any current impact. But that contention says little or nothing about the incremental impact of systemwide practices extending over many years. Petitioners also argue that because many of the involved schools were in areas that had become predominantly black residential areas by the time of trial the racial separation in the schools would have occurred even without the unlawful conduct of petitioners. But, as the District Court found, petitioners' evidence in this respect was insufficient to counter respondents' proof. See Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U. S. 252, 271 n. 21 (1977); Mt. Healthy School Dist. Bd. of Education v. Doyle, 429 U. S. 274, 287 (1977). And the phenomenon described by petitioners seems only to confirm, not disprove, the evidence accepted by the District Court that school segregation is a contributing cause of housing segregation. 429 F. Supp., at 259; Keyes, 413 U. S., at 202-203; Swann, 402 U. S., at 20-21.
ing exists but also that it was brought about or maintained by intentional state action,'" 429 F. Supp., at 251, quoting Keyes, supra, at 198—that is, that the school officials had "intended to segregate." 429 F. Supp., at 254. The District Court also recognized that under those cases disparate impact and foreseeable consequences, without more, do not establish a constitutional violation. See, e. g., id., at 251. Nevertheless, the District Court correctly noted that actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose: Those cases do not forbid "the foreseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn." Id., at 255. Adherence to a particular policy or practice, "with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn." Ibid. The District Court thus stayed well within the requirements of Washington v. Davis and Arlington Heights. See Personnel Administrator of Massachusetts v. Feeney, U. S. , n. 25 (1979).

It is also urged that the District Court and the Court of Appeals failed to observe the requirements of our recent decision in Dayton I, which reiterated the accepted rule that the remedy imposed by a court of equity should be commensurate with the violation ascertained, and held that the remedy for the violations that had then been established in that case should be aimed at rectifying the "incremental segregative effect" of the discriminatory acts identified. In Dayton I, only a few apparently isolated discriminatory practices had been found; yet a systemwide remedy had been imposed without proof of a systemwide impact. Here, however, the District Court repeatedly emphasized that it had found purposefully segregative practices with current, systemwide im-
School board policies of systemwide application necessarily have systemwide impact: 1) The pre-1954 policy of creating an enclave of five schools intentionally designed for black students and known as 'black' schools, as found by the District Judge, clearly had a 'substantial'—indeed, a systemwide—impact. 2) The post-1954 failure of the Columbus Board to desegregate the school system in spite of many requests and demands to do so, of course, had systemwide impact. 3) So, too, did the Columbus Board's segregative school construction and sitting policy as we have detailed it above. 4) So, too, did its student assignment policy which, as shown above, produced the large majority of racially identifiable schools as of the school year 1975-1976. 5) The practice of assigning black teachers and administrators only or in large majority to black schools likewise represented a systemwide policy of segregation. This policy served until July 1974 to deprive black students of opportunities for contact with and learning from white teachers, and conversely to deprive white students of similar opportunities to meet, know and learn from black teachers. It also served

13 "For example, there is little dispute that Champion, Felton, Mt. Vernon, Pilgrim and Garfield were de jure segregated by direct acts of the Columbus defendants' predecessors. They were almost completely segregated in 1954, 1964, 1974 and today. Nothing has occurred to substantially alleviate that continuity of discrimination of thousands of black students over the intervening decades." 429 F. Supp., at 260.

"The evidence in this case and the factual determinations made earlier in this opinion support the finding that those elementary, junior and senior high schools in the Columbus school district which presently have a predominantly black student enrollment have been substantially and directly affected by the intentional acts and omissions of the defendant local and state school boards." Id., at 266.
as discriminatory, systemwide racial identification of schools." 583 F.2d, at 814.

Nor do we perceive any misuse of *Keyes*, where we held that purposeful discrimination in a substantial part of a school system furnishes a sufficient basis for an inferential finding of a systemwide discriminatory intent unless otherwise rebutted, and that given the purpose to operate a dual school system one could infer a connection between such a purpose and racial separation in other parts of the school system. There was no undue reliance here on the inferences permitted by *Keyes*, or upon those recognized by *Swann*. Furthermore, the Board was given ample opportunity to counter the evidence of segregative purpose with current systemwide impact, and the findings of the courts below were against it in both respects. 429 F. Supp., at 260; Pet. App. 95, 102, 105.

Because the District Court and the Court of Appeals committed no prejudicial errors of fact or law, the judgment appealed from must be affirmed.

*So ordered.*