The Burger Court Opinion Writing Database

Milliken v. Bradley

418 U.S. 717 (1974)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

February 26, 1974

Re: 73-434) - Milliken v. Bradley
73-435) - Allen Park Public Schools v. Bradley
73-436) - Grosse Pointe Public School System v. Bradley

MEMORANDUM TO THE CONFERENCE:

The "visual aid" the respondent desires to set up in the Court room is an overlay type map of Detroit and environs, approximately 8 x 8. It was not submitted "at least one week before" the case is to be heard. It is objected to by the opposing party, who claims to have had no chance to verify its accuracy, which is one reason for the "one week" requirement. It would not be impossible but surely difficult to set up as we usually do.

The Clerk advised the respondent to submit smaller, "manageable" versions for each Justice.

I would not accept this visual aid in these circumstances but I would have no objection to advising both parties that we will keep it on hand for any examination any Justice desires, provided the petitioner, upon examining it, concedes its basic accuracy.

Regards,

WEB

P. S. -- We will confer ten minutes after the final case tomorrow. -- WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

May 31, 1974

Re: Nos. 73-434) - Milliken v. Bradley
73-435) - Allen Park Public Schools v. Bradley
73-436) - Grosse Pointe Public School System v. Bradle

MEMORANDUM TO THE CONFERENCE:

Enclosed is a typed draft in the above cases since the print shop problem will not relax before Monday.

Regards,

WEB

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

MILLIKEN v. BRADLEY, No. 73-434

Circulated: MAY 31 1974

Recirculated:

We granted certiorari in these consolidated cases to determine whether a federal court may impose a multi-district, area wide remedy to a single district de jure segregation problem absent any finding that the included school districts have failed to operate unitary school systems within their districts, absent any claim or finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools, absent any finding that the included districts committed acts which effected segregation within the other districts, and absent a meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multi-district remedy or on the question of constitutional violations by those neighboring districts. 1/

I

The action was commenced in August of 1970 by the respondents, the Detroit Branch of the National Association for the Advancement of Colored People and individual parents and students, on behalf of a class later defined by order of the United States District Court, E.D. Michigan, dated February 16, 1971, to include "all school children of the City of Detroit and all Detroit resident parents who have children of school age." The named defendants in ——→

1/ Bradley v. Milliken, 484 F. 2d 215 (CA 6 1973); cert. granted, 414 U.S. 1038 (Nov. 19, 1973).

2/ The standing of the NAACP as a proper party plaintiff was not contested in the trial court and is not an issue in this case.

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

CHAMBERS OF
THE CHIEF JUSTICE

June 11, 1974

Re: 73-434 - Milliken v. Bradley
73-435 - Allen Park Public Schools v. Bradley
73-436 - Grosse Pointe Public School System v. Bradley

MEMORANDUM TO THE CONFERENCE:

Enclosed is second draft of the above opinion. Areas of change are marginally indicated and consist essentially of enlarged and more detailed treatment.

Regards,

WEB

Changes: 17, 20, 21, 22, 26, 27, 28, 29, 32, 34

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

2nd DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated:

Recirculated: JUN 11 1974

Nos. 73–434, 73–435, AND 73–436

William G. Milliken, Governor of Michigan, et al., Petitioners,
73–434 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

Allen Park Public Schools et al., Petitioners,
73–435 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

The Grosse Pointe Public School System, Petitioner,
73–436 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

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

[June —, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in these consolidated cases to determine whether a federal court may impose a multi-

73-434

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

CHAMBERS OF
THE CHIEF JUSTICE

Bill

My "Detroit"
law clerk has been
out with virus flu
& I'm on my own —
as you see from
inserts etc.

This is generally
OK with Potter &
Lewis, subject to
closer study by them.

WEB

Chief's suggested revisions in light of our talk (all 5 of us) on 6/13. See my memo. to C.J. of 6/14 commenting on this.

ZTP

lead directly to a single segregated
district overwhelmingly black in all
surrounded by a ring of suburbs and
l districts overwhelmingly white in
a state in which the racial composi-
ent white and 13 percent black."
249.

Viewing the record as a whole, it is clear that the Distric Court and the Court of Appeals placed their primary focus on the assumption that the city of Detroit school system could not be desegregated -- in their view of what constituted desegregation -- unless the racial composition of the student body in the schools within the Detroit system reflected substantially the racial composition of the population of the Detroit metropolitan area as a whole. The scope of the "metropolitan area" was later defined as embracing 53 outlying districts and the City of Detroit. Both courts sought to prescribe a particular percentage of racial balance as a touchstone of a desegregated school system and to equate desegregation with racial balance. This Court has never so held, and indeed explicitly rejected racial balance as a constitutional requirement in a unanimous opinion in Swann. There we recognized that limited use of "mathematical ratios" was one appropriate "starting point" in a desegregation case. But we also stated that "to require, as a matter of constitutional right, any particular degree of racial balance or mixing" would

> gation plan will lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white in composition in a state in which the racial composition is 87 percent white and 13 percent black." 484 F. 2d, at 249.

Viewing the record as a whole, it is clear that the Distri Court and the Court of Appeals placed their primary focus on the assumption that the city of Detroit school system could not be desegregated -- in their view of what constituted desegregation -- unless the racial composition of the student body in t he schools within the Detroit system reflected substantially the racial composition of the population of the Detroit metropolitan area as a whole. The scope of the "metropolitan area" was late defined as embracing 53 outlying districts and the City of Detroit. Both courts sought to prescribe a particular percentag of racial balance as a touchstone of a desegregated school syste and to equate desegregation with racial balance. This Court has never so held, and indeed explicitly rejected racial balance as a constitutional requirement in a unanimous opinion in Swann. There we recognized that limited use of "mathematical ratios" was one appropriate "starting point" in a desegregation case. But we also stated that "to require, as a matter of constitutional right, any particular degree of racial balance or mixing" would

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

CHAMBERS OF
THE CHIEF JUSTICE

June 18, 1974

Re: 73-434 - Milliken v. Bradley
73-435 - Allen Park Public Schools v. Bradley
73-436 - Grosse Pointe Public School System v. Bradley

MEMORANDUM TO: Mr. Justice Stewart
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

I have your several memos and I reiterate what I said in our informal discussion that our differences are essentially semantical. To say that racial balance is not in the case, of course, eludes reality since it was the explicitly articulated basis for the inter-district remedy the court ordered to be formulated.

I do not care what words are used to describe the sequence of events. The draft sent to the printer before I received your memos has now been stripped down regarding the discussion of "racial balance" and it has been confined to one page in which I recite the uncontrovertible fact that the desire for racial balance was the fulcrum from which the District Court proceeded to the error that followed, i.e., mandating an inter-district remedy with no showing of an inter-district violation.

The print shop is "swamped" with Wednesday's opinions but they have only the re-run from page 20 onward, plus minor editorial changes.

I hope it will be available soon.

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

June 19, 1974

Re: 73-434 - Milliken v. Bradley
73-435 - Allen Park Public Schools v. Bradley
73-436 - Grosse Pointe Public School System v. Bradley

MEMORANDUM TO:

Mr. Justice Stewart
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

The print shop is still bogged down but has finally delivered the pages from 20 onward. Part II is truncated and editorial changes were made from Part III to the end.

I will not circulate as yet.

Regards,

Undated, but has gap from page 1 to page 20

Same

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 73–434, 73–435, AND 73–436

William G. Milliken, Governor of Michigan, et al., Petitioners,
73–434 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

Allen Park Public Schools et al., Petitioners,
73–435 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

The Grosse Pointe Public School System, Petitioner,
73–436 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

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

[June —, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in these consolidated cases to determine whether a federal court may impose a multi-

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

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1974

PERSONAL

Re: 73-434 - Milliken v. Bradley
73-435 - Allen Park Public Schools v. Bradley
73-436 - Grosse Pointe Public School System v. Bradley

MEMORANDUM TO:

Mr. Justice Stewart
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

The balance of the opinion in the above is now ready for circulation. If there are details on which any of you have suggestions, it would seem these could be dealt with in the final "honing" process. I believe I have met the problems raised by Potter's memo.

Meanwhile we should try to circulate the draft to the full Court today if at all possible.

Regards,

WEB

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

3rd DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Nos. 73-434, 73-435, AND 73-436

Circulated: _____

Recirculated: JUN 21 1974

William G. Milliken, Governor of Michigan, et al., Petitioners,
73-434 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

Allen Park Public Schools et al., Petitioners,
73-435 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

The Grosse Pointe Public School System, Petitioner,
73-436 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

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

[June —, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in these consolidated cases to determine whether a federal court may impose a multi-

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

CHAMBERS OF
THE CHIEF JUSTICE

June 24, 1974

Re: 73-434 - Milliken v. Bradley
73-435 - Allen Park Public Schools v. Bradley
73-436 - Grosse Pointe Public School System v. Bradley

MEMORANDUM TO THE CONFERENCE:

When the Print Shop finally got the Third Draft out late Friday, we had only two copies and we made xerox copies for distribution. In our hurry to make delivery before the Justices departed, we did not marginally mark changed areas. Changes begin on p. 20 and we now enclose two prints with those parts marginally noted.

Regards,

WEB

17,21,23,24,25,26
28,29,30,31

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

3rd DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated:

Nos. 73-434, 73-435, AND 73-436

Recirculated: JUN 24 1974

William G. Milliken, Governor of Michigan, et al., Petitioners,
73-434 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

Allen Park Public Schools et al., Petitioners,
73-435 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

The Grosse Pointe Public School System, Petitioner,
73-436 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

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

[June —, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in these consolidated cases to determine whether a federal court may impose a multi-

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

CHAMBERS OF
THE CHIEF JUSTICE

July 2, 1974

Re: 73-434 - Milliken v. Bradley
73-435 - Allen Park Public Schools v. Bradley
73-436 - Grosse Pointe Public School System v. Bradley

Dear Lewis:

Most of the "errors" you mention in your July 2 memo have been caught on my "Master Draft".

You recall we had to "pull all the stops" to get a print for distribution on Friday and the pressure produced the errors you mention plus several others, also to be corrected.

To avoid having multiple circulations I will defer catching all these items until I see whether there is any need to respond to a dissent.

Regards,

WEB

Mr. Justice Powell

cc: Mr. Justice Stewart
Mr. Justice Blackmun
Mr. Justice Rehnquist

WEB 73-434

7/19/74

CHANGES IN COURT OPINION IN DETROIT SCHOOL CASES

Page 22, line 12: Substitute "quality" for "equality".

Page 23, line 9: Following the word "logistical" add "and other serious".

Page 24, line 2: After the word "attend" add the word "to".

Page 24, line 10: Substitute "remedy" for "plan".

Page 26, add the following text and footnotes at the end of Part II:

In dissent Mr. Justice White and Mr. Justice Marshall undertake to demonstrate that agencies having state-wide authority participated in maintaining the dual school system found to exist in Detroit. They are apparently of the view that once such participation is shown, the District Court should have a relatively free hand to reconstruct school districts outside of Detroit in fashioning relief. Our assumption, arguendo, see post, page ___, that state agencies did participate in the maintenance of the Detroit system, should make it clear that it is not on this point that we part company. 21/ The difference between us arises instead from established doctrine laid down by our cases. Brown, supra, Green, supra, Swann, supra, Scotland Neck, supra, and Emporia, supra, each addressed

21/ Since the Court has held that a resident of a school district has a fundamental right protected by the Federal Constitution to vote in a district election, it would seem incongruous to disparage the importance of the school district in a different context. Kramer v. Union Free School District No. 15, 395 U.S. 621, 626. While the district there involved was located in New York, none of the facts in our possession suggest that the relation of school districts to the state is significantly different in New York than it is in Michigan.

the issue of constitutional wrong in terms of an established geographic and administrative school system populated by both Negro and White children. In such a context, terms such as "unitary" and "dual" systems, and "racially identifiable schools", have meaning, and the necessary federal authority to remedy the constitutional wrong is firmly established. But the remedy is necessarily designed, as all remedies are, to restore ~~to~~ the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. Disparate treatment of White and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system. Swann, supra, at 16.

The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district. Unless petitioners ~~have drawn~~ drew the district lines in a discriminatory fashion, or arranged for White students residing in the Detroit district to attend schools in Oakland and Macomb Counties, they were under no constitutional duty to make provisions for Negro students to do so. The view of the dissenters, that the existence of a dual system in Detroit can be made the basis for a decree requiring cross-district transportation of pupils cannot be supported on the grounds that it represents merely the devising of a suitably flexible remedy for the violation of rights already established by our prior decisions. It can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent. 22/

22/ The suggestion in the dissent of Mr. Justice Marshall that schools which have a majority of Negro students are not "desegregated", whatever the racial makeup of the school district's population and however neutrally the district lines have been drawn and administered, finds no support in our prior cases. In Green v. County School Board of New Kent (cont'd)

Page 31, line 3: Delete the word "constitutional".

(footnote 22, cont'd) County, 391 U.S. 403 (1968), for example, this Court approved a desegregation plan which would have resulted in each of the schools within the district having a racial composition of 57% Negro and 48% White. In Wright v. Council of the City of Emporia, 407 U.S. 451 (1972), the optimal desegregation plan would have resulted in the schools being 66% Negro and 34% White, substantially the same percentages as could be obtained under one of the plans involved in this case. And in United States v. Scotland Neck Board of Education, 407 U.S. 484, 491, note 5 (1972), a desegregation plan was implicitly approved for a school district which had a racial composition of 77% Negro and 22% White. In none of these cases was it even intimated that "actual desegregation" could not be accomplished as long as the number of Negro students was greater than the number of White students.

The dissents also seem to attach importance to the metropolitan character of Detroit and neighboring school districts. But the constitutional principles applicable in school desegregation cases cannot vary in accordance with the size or population dispersal of the particular city, county or school district as compared with neighboring areas.

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

CHAMBERS OF
THE CHIEF JUSTICE

July 19, 1974

Re: 73-434 - Milliken v. Bradley
73-435 - Allen Park Public Schools v. Bradley
73-436 - Grosse Pointe Public School System v. Bradley

MEMORANDUM TO THE CONFERENCE:

I enclose Xerox copies of changes which I am making in the third draft of the proposed Court opinion in this case, which circulated June 24th.

Regards,

WEB

Some other purely "typo" errors are also being routinely corrected

WEB

4, 5, 21, 22, 23, 24, 25, 26, 27, 28, 33

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

From: The Chief Justice

Circulated: _____

Recirculated: JUL 22 1974

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 73-434, 73-435, AND 73-436

William G. Milliken, Governor of Michigan, et al., Petitioners,
73-434 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

Allen Park Public Schools et al., Petitioners,
73-435 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

The Grosse Pointe Public School System, Petitioner,
73-436 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

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

[June —, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in these consolidated cases to determine whether a federal court may impose a multi-

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

CHAMBERS OF
THE CHIEF JUSTICE

July 23, 1974

Re: 73-1430 - Board of Education of Jefferson Cty. v. Newburg Are
73-1431 - Board of Education of Louisville v. Haycraft
73-1445 - Board of Education of Anchorage v. Haycraft

MEMORANDUM TO THE CONFERENCE:

file 72-424

The above cases were held for the "Detroit case". I enclosure the original cert memo which gives the general picture.

I will vote to vacate and remand for reconsideration in light of our opinion in the Detroit case.

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

July 24, 1974

Re: Close of Term

MEMORANDUM TO THE CONFERENCE:

The Milliken case is now scheduled to come down at a 10:00 a.m. session Thursday subject to emergencies, but I see none as likely.

The Order List with the "obscenity holds" and other matters cannot be completed by 10:00 a.m. as I am presently advised. It may be ready later in the day.

I propose that when I announce the usual close-of-the-Term rubric I make it at the "close of the business" day. Preceding that I would "announce" the Order List but state that due to mechanical problems it might not be available until late in the day but it will be "filed" as of Thursday, July 25, 1974, during the current Term.

Does anyone object?

Regards,

To : The Chief Justice
Mr. Justice Brennan
Justice Stewart
Justice
Justice
Justice
Justice

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 73–434, 73–435, AND 73–436

m. Mills: J.

Circulate: 6-5

Recirculated: _____

William G. Milliken, Governor of Michigan, et al., Petitioners,
73–434 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

Allen Park Public Schools et al., Petitioners,
73–435 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

The Grosse Pointe Public School System, Petitioner,
73–436 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

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

[June —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

The Court of Appeals has acted responsibly in these cases and we should affirm its judgment. This was the fourth time the case was before it over a span of less than

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 13, 1974

MEMORANDUM TO THE CONFERENCE:

I am adding at the end of my present dissent in 73-434, Milliken v. Bradley, the following:

As I indicated in Keyes v. School District No. 1, 413 US 189, 214-217, there is so far as the school cases go no constitutional difference between de facto and de jure segregation. Each school board performs state action for Fourteenth Amendment purposes when it draws the lines that confine it to a given area, when it builds schools at particular sites, or when it allocates students. The creation of the school districts in Metropolitan Detroit either maintained existing segregation or caused additional segregation. Restrictive covenents maintained by state action or inaction build black ghettos. It is state action when public funds are dispensed by housing agencies to build racial ghettos. Where a community is racially mixed and school authorities segregate schools, or assign black teachers to black schools or close schools in fringe areas and build new schools in black areas and in more distant white areas, the state creates and nurtures a segregated school system, just as surely as did those states involved in Brown v. Board of Education when they maintained dual school systems.

All these conditions and more were found by the District Court to exist. The issue is not whether there should be racial balance but whether the state's use of various devices that end up with black schools and white schools brought the Equal Protection Clause into effect. No specific plan has as yet been adopted. We are still at an interlocutory stage of a long drawn-out judicial effort at school desegregation. It is conceivable that ghettos develop on their own without any hint of state action. But since Michigan by one device or another has over the years created black school districts and white school districts, the task of equity is to provide a unitary system for the affected area where, as here, the state washes its hands of its own creations.

W. O. D. mcB

William O. Douglas

p. 3, 4

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

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 73-434, 73-435, AND 73-436: Douglas, J.

Circulated: _____

Recirculated: 6-14

William G. Milliken, Governor of Michigan, et al., Petitioners,
73-434 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

Allen Park Public Schools et al., Petitioners,
73-435 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

The Grosse Pointe Public School System, Petitioner,
73-436 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

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

[June —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

The Court of Appeals has acted responsibly in these cases and we should affirm its judgment. This was the fourth time the case was before it over a span of less than three years. The Court of Appeals affirmed the District

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

July 9, 1974

Dear Byron:

Please join me in your ~~opinion~~ dissent in 73-434, 73-435, 73-436, MILLIKEN v. BRADLEY.

William O. Douglas

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

July 12, 1974

Dear Thurgood:

Please join me in your dissent in 73-434, MILLIKEN v. BRADLEY.

WOD

William O. Douglas

Mr. Justice Marshall

cc: The Conference

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: -

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

5th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas; J.

Nos. 73–434, 73–435, AND 73–436

Circulate:

Recirculated: 7-10

William G. Milliken, Governor of Michigan, et al., Petitioners,
73–434 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

Allen Park Public Schools et al., Petitioners,
73–435 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

The Grosse Pointe Public School System, Petitioner,
73–436 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

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

[June —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

The Court of Appeals has acted responsibly in these cases and we should affirm its judgment. This was the fourth time the case was before it over a span of less than three years. The Court of Appeals affirmed the District

5, 6

for the Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

6th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

Nos. 73–434, 73–435, AND 73–436

Circulated: _____

Recirculated: 7/23/74

William G. Milliken, Governor of Michigan, et al., Petitioners,
73–434 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

Allen Park Public Schools et al., Petitioners,
73–435 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

The Grosse Pointe Public School System, Petitioner,
73–436 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

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

[June —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

The Court of Appeals has acted responsibly in these cases and we should affirm its judgment. This was the fourth time the case was before it over a span of less than three years. The Court of Appeals affirmed the District

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

July 15, 1974

RE: Nos. 73-434, 435 & 436 - Milliken, et al. v. Bradley, et al.

Dear Byron:

Please join me in your dissent in the above.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

July 15, 1974

RE: Nos. 73-434, 435 & 436 Milliken, et al.
v. Bradley, et al.

Dear Thurgood:

Please join me in your dissent in the above.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 17, 1974

Re: No. 73-434, Milliken v. Bradley

Dear Chief,

I continue firmly to believe that "racial balance" is not a question in this case, and that a discussion of that subject in the Court opinion will serve only to distract attention from the real issue.

"Racial balance" has become something of a code phrase, and perhaps means different things to different people. As I have understood the term, however, it relates to the proper scope of a remedial decree designed to effectuate the dismantling of an unconstitutionally segregated school district. It does not relate to the initial question of whether or not the school district has been unconstitutionally segregated, and it certainly does not relate to some supposed abstract constitutional requirement of a minimum percentage of white students in any school district or any individual school.

Specifically, the "racial balance" question has been whether the objective of a remedial decree to correct an adjudged violation (a) must or (b) may be to produce a situation

where every individual school within the district contains, so far as practicable, the same racial ratio that is contained in the district as a whole -- whatever that ratio may be. So far as I am concerned, this double-barreled question has no categorical answers. For the questions are not questions of constitutional law, but questions for a court of equity. In a small district containing three schools, racial balance in each school might be so easy to achieve and so clearly equitable as to be a virtual requirement of any permissible decree. In New York City or Los Angeles, racial balance in every individual school would obviously be impossible to achieve except at a wholly intolerable social cost.

In short, I think that when a constitutional violation has been found in any school district, the appropriate decree should be largely left to the equitable discretion of the district court -- under the ultimate supervision of the Court of Appeals. This view no more than reflects my understanding of what was said both in Swann and in Brown II many years earlier.

In the present case, however, we deal with quite a different question. We do not have any remedial decree before us. For here the courts have held that even assuming that such an equitable decree could properly accomplish racial balance in every individual Detroit school, the result would be that each school would then be identifiably black. This, in the courts' view, would be an impermissible situation, and the only remedy for that situation, the courts held, was to reach beyond Detroit's boundaries and implicate a large number of outlying school districts in the remedial decree. It is here, and here only, that I think the courts went astray.

The significant facts are these: The respondents commenced this suit in 1970 claiming only that a constitutionally impermissible allocation of educational facilities along racial lines had occurred within the City of Detroit. No evidence was adduced and no findings were made concerning the activities of school officials in districts outside the City of Detroit, and no school officials from the outside districts even participated in the suit until after the District Court had made the initial determination that is the focus of this case.

In spite of the limited scope of the inquiry and the findings, the District Court concluded that the sole sufficient remedy for the constitutional violations found to have existed within the City of Detroit was a desegregation plan calling for busing pupils to and from school districts outside the city. The District Court found that any desegregation plan operating wholly "within the corporate geographical limits of the city" was insufficient since it "would clearly make the entire Detroit public school system racially identifiable as Black." Pet. App. 161a-162a. The Court of Appeals, in affirming the decision that an inter-district remedy was necessary, noted that a Detroit only plan "would result in an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area."

The courts were in error for the simple reason that the remedy they thought necessary was not commensurate with the constitutional violation found. In particular, there has been absolutely no showing that the disparity in racial composition between schools in the City of Detroit and the schools immediately outside the City was the result of segregation imposed, fostered, or encouraged by the State or any of its subdivisions.

This is not a case where the State has contributed to a separation of the races by drawing or redrawing school district lines, see Haney v. County Board of Education of Sevier County, 429 F.2d 364 (CA 8, 1969); cf., Wright v. Council of City of Emporia, 407 U.S. 451; United States v. Scotland Neck Board of Education, 407 U.S. 484; by transfer of school units between districts, United States v. Texas, 321 F. Supp. 1043 (E.D. Tex., 1970), aff'd, 447 F.2d 441 (CA 5, 1971); Turner v. Warren County Board of Education, 313 F. Supp. 380 (E.D.N.C., 1970); by busing students across district lines; or by purposeful use of state housing or zoning laws. In the absence of such an interdistrict violation, the order directing the formulation of an interdistrict remedy was simply not responsive to the factual record before the District Court and was an abuse of that court's equitable powers.

In Swann the Court addressed itself to the range of equitable remedies available to the courts to effectuate the desegregation mandated by Brown and its progeny, noting that the task in choosing appropriate relief is "to correct ... the condition that offends the Constitution," and that "the nature of the violation determines the scope of the remedy...." 402 U.S., at 16.

The disposition of this case thus falls squarely under these principles. The only "condition that offends the Constitution" found by the District Court in this case is the existence of officially-supported segregation in and among public schools within the City of Detroit. There were no findings that the fact of differing racial composition between schools in the City and in the outlying suburbs was caused by official activity of any sort. It follows that the decision to include in the desegration plan pupils from school districts outside Detroit was not predicated upon any constitutional violation involving such pupils. By ordering a plan to reach beyond the limits of the City of Detroit to correct a constitutional violation found to have occurred solely within the City the District Court thus overreached the governing remedial principles developed in this Court's decisions.

The resolution of this case, in my view, rests on a relatively simple proposition: an interdistrict remedy may permissibly be based only upon an inter-district violation.

Sincerely yours,

P.S.

The Chief Justice

cc: Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 20, 1974

73-434, Milliken v. Bradley, etc.

Dear Chief,

While I do not want to delay the recirculation of your proposed opinion in these cases, I feel obligated to say that I still have serious reservations about some aspects of your partial recirculation of yesterday.

Sincerely yours,

P.S.

The Chief Justice

cc: Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 24, 1974

Re: 73-434, Milliken v. Bradley
73-435, Allen Park Public Schools v. Bradley
73-436, Grosse Pointe Public School System v. Bradley

Dear Chief,

I am glad to join your opinion for the Court in these cases.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

2nd DRAFT

From: Stewart, J.

Circulated: 7/15/74

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

Nos. 73–434, 73–435, AND 73–436

William G. Milliken, Governor of Michigan, et al., Petitioners,
73–434 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

Allen Park Public Schools et al., Petitioners,
73–435 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

The Grosse Pointe Public School System, Petitioner,
73–436 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

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

[July —, 1974]

MR. JUSTICE STEWART, concurring.

In joining the opinion of the Court, I think it appropriate, in view of some of the extravagant language of the dissenting opinions, to state briefly my understanding of what it is that the Court decides today.

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

CHAMBERS OF
JUSTICE POTTER STEWART

July 16, 1974

MEMORANDUM TO THE CONFERENCE

Re: Detroit School Cases

Judge Stephen J. Roth died last week. Enclosed is a copy of the article in the Detroit Free Press, reporting his death.

P. S.

Sally - We should have a file on Detroit school cases — on way here. Open if you don't have one

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 8, 1973

MEMORANDUM FOR THE CONFERENCE

A word in reply to Bill Rehnquist's circulation in the Richmond school case.

The Fourteenth Amendment's proscription of denial of equal protection of the laws applies to the States, as well as to individual school boards as instrumentalities of the "state." Where essential to correct the maintenance of a dual school system, it is my position that the remedial power of a federal district court is not necessarily limited by political subdivision lines. This does not mean that district lines should not be respected where reasonably adequate remedies may otherwise be fashioned; nor does it mean at this point that district lines should be crossed in this case.

In the present case, the unreversed findings of the District Court were that political subdivision lines throughout the Commonwealth of Virginia have "been ignored when necessary to serve public education policies, including

segregation." 338 F. Supp., at 113. In these circumstances, it makes little difference if the fact is that the lines of these particular districts were not crossed to any great extent. The point is that the findings of the District Court call into question the State's whole argument with respect to the sanctity of district lines. In the words of the District Court: "[The district lines] have never been obstacles for the travel of pupils under various schemes, some of them centrally administered, some of them overtly intended to promote the dual system." 338 F. Supp., at 83. The lines, even if never manipulated by the subject districts in this lawsuit, were never sacrosanct as a matter of state policy when segregation was the goal and should not stand as an insuperable barrier to an effective remedy in any of these three districts, each of which had officially maintained dual school systems. At the very least, if the Court of Appeals is wrong in thinking that in fashioning an effective remedy it was legally barred by the Tenth Amendment or otherwise from crossing district lines, must not the Court of Appeals have to overturn the District Court's findings as to the lack of integrity of school district lines in

Virginia if it is to rely on those lines as a barrier to an interdistrict remedy?

B.R.W.

Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 7-8-74

Nos. 73–434, 73–435, AND 73–436

Recirculated: _____

William G. Milliken, Governor of Michigan, et al., Petitioners,
73–434 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

Allen Park Public Schools et al., Petitioners,
73–435 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

The Grosse Pointe Public School System, Petitioner,
73–436 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

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

[July —, 1974]

MR. JUSTICE WHITE, dissenting.

The District Court and the Court of Appeals found that over a long period of years those in charge of the Michigan public schools engaged in various practices

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

CHAMBERS OF
JUSTICE BYRON R WHITE

July 15, 1974

Re: Nos. 73-434, 73-435 & 73-436 - Milliken v. Bradley

Dear Thurgood:

Please join me.

Sincerely,

Byron

Mr. Justice Marshall

Copies to Conference

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

CHAMBERS OF
JUSTICE BYRON R WHITE

July 23, 1974

MEMORANDUM TO THE CONFERENCE

Re: Nos. 73-434, 73-435 & 73-436 - Milliken v. Bradley

I propose inserting the attached before the first full paragraph on page 18 of my dissent in this case.

B.R.W.

is confined to present-day Detroit; for the maximum

Attached to BRW 7-23-1974
73-434...

Finally, I remain wholly unpersuaded by the Court's assertion that "the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Ante, p. ____. In the first place, under this premise the Court's judgment is itself infirm; for had the Detroit school system not followed an official policy of segregation throughout the 1950's and 1960's, Negroes and whites would have been going to school together, there would have been no, or at least not as many, recognizable Negro schools and no, or at least not as many, white schools, but "just schools," and neither Negroes nor whites would have suffered from the effects of segregated education, with all its shortcomings. Surely, the Court's remedy will not restore to the Negro community, stigmatized as it was by the dual school system, what it would have enjoyed over all or most of this period if the remedy

STYLISTIC CHANGES THROUGHOUT.
SEE PAGE(S) 1

Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: White, J.

Circulated: _____

Recirculated: 7-23-74

SUPREME COURT OF THE UNITED STATES

Nos. 73-434, 73-435, AND 73-436

William G. Milliken, Governor of Michigan, et al., Petitioners,
73-434 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

Allen Park Public Schools et al., Petitioners,
73-435 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

The Grosse Pointe Public School System, Petitioner,
73-436 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

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

[July —, 1974]

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

The District Court and the Court of Appeals found that over a long period of years those in charge of the

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 13, 1974

MEMORANDUM TO THE CONFERENCE

Re: 73-434 -- Milliken v. Bradley
73-435 -- Allen Park Public Schools v. Bradley
73-436 -- Grosse Pointe Public School System v. Bradley

After much work, and even greater deliberation, I have come to the conclusion that it will be impossible for me to complete my dissent in these cases before adjournment.

The issues in these cases are as complex as they are momentous, ultimately requiring for their resolution, as the Court's opinion recognizes, extensive review of a lengthy record which was somewhat haphazardly put together. The great difficulties of these cases, both factually and doctrinally, are evidenced by the amount of time required for the initial draft of the Court's opinion, which was circulated in typewritten form on May 31, three full months after the Conference voted on these cases on March 1. They are also evidenced by the substantial changes, both as to the legal standard which should govern the use of an inter-district remedy and with respect to the extent to which the present record satisfies this standard, which have been introduced into the second draft of the opinion which was circulated on June 11, less than two weeks before the cases are scheduled to be handed down. (See pp. 20-22, 26, 27, 29). And it still appears possible that further substantive changes may be made before the majority agrees upon an opinion for the Court.

There is much I wish to say on the issues now presented in these cases, and much said in the majority opinion to which I hope to respond. Among the issues I intend to address are the following:

(1) the practical significance of school district lines in Michigan -- in particular, the degree of autonomy vis-a-vis the state actually exercised by local school districts on such key matters as school financing, school construction and site selection, and educational and administrative policy;

(2) the extent to which inter-district lines have in fact been deemed sacrosanct by the school districts and the State in the past -- focusing upon the formation of school districts, past mergers of adjacent school districts, the annexation of unincorporated areas by municipalities, and the crossing of school district lines for special educational programs;

(3) the use of MCLA 340.461 - .468, allowing school districts to contract for the education of its students by neighboring districts, as it respects the practical financial problems of an inter-district remedy;

(4) the extent to which disparity in state aid between school districts in the city and outlying suburbs has had an inter-district effect by attracting to the suburban districts those with greater economic mobility, mostly whites, and relegated to the central city those with least economic mobility, mostly Negroes;

(5) the distance between schools which might be "paired" as part of a metropolitan remedy and the extent of pupil transportation which would be required by such a remedy, particularly as compared with present school transportation patterns in the metropolitan area;

(6) the extent to which the entire metropolitan area is a single economic unit -- particularly the percentage of residents of suburban districts who derive their income from employment in the central city; and

(7) the indications in the record of any action of suburban governmental bodies -- as through zoning or action on proposed low-income housing projects -- which has directly contributed to housing patterns causing an inter-district effect.

As the Court's opinion recognizes, the District Court's primary findings in this case were made at a time when the focus of the case was solely the city of Detroit. Rather than vacate and remand for additional hearings on inter-district segregation, with the participation of all interested parties, the Court has evaluated the record on its own. This, in turn, requires on my part an in-depth examination of the present record. In short, discussion of the questions I intend to

address will, of necessity, be predicated on a great deal of research (a) into the record and (b) into the fine details of the Michigan School Code, both as it exists on the books and as it is applied in practice, and this research will take time.

Given the foregoing, I frankly find myself unable to muster a fair and reasoned response to the majority's opinion before adjournment. I therefore respectfully request that the Conference put this case over to the 1974 Term.

Thurgood Marshall

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

1st DRAFT

From: Marshall, J.

Circulated: JUL 12 '74

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

Nos. 73–434, 73–435, AND 73–436

William G. Milliken, Governor of Michigan, et al., Petitioners.
73–434 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

Allen Park Public Schools et al., Petitioners,
73–435 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al

The Grosse Pointe Public School System, Petitioner
73–436 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

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

[July —, 1974]

MR. JUSTICE MARSHALL, dissenting.

In *Brown* v. *Board of Education*, 347 U. S. 483 (1954), this Court held that segregation of children in public schools on the basis of race deprives minority group chil-

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

July 15, 1974

Re: Nos. 73-434, 435 & 436 Milliken, et al. v. Bradley, et al.

Dear Byron:

Please join me in your dissent in the above.

Sincerely,

T. M.

Mr. Justice White

cc: The Conference

1, 19, 20, 21, 26, 30, 31

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

From: Marshall, J.

Circulated: _____

Recirculated: JUL 18

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 73–434, 73–435, AND 73–436

William G. Milliken, Governor of Michigan, et al., Petitioners,
73–434 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

Allen Park Public Schools et al., Petitioners,
73–435 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

The Grosse Pointe Public School System, Petitioner,
73–436 *v.*
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

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

[July —, 1974]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE WHITE join, dissenting.

In *Brown* v. *Board of Education*, 347 U. S. 483 (1954), this Court held that segregation of children in public schools on the basis of race deprives minority group chil-

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1974

Re: No. 73-434 - Milliken v. Bradley

Dear Chief:

Last evening I carefully read Potter's letter to you of June 17. I am in agreement with him and feel that, generally, emphasis on remedy and de-emphasis on racial balance is indicated for this opinion. It may well be that the district judge went astray on racial balance but I, for one, would prefer to give it little more than the necessary passing reference.

You advised me that you have a new draft at the Printer. Perhaps it will do just that, and I look forward to reading it.

Sincerely,

The Chief Justice

cc: Mr. Justice Stewart
Mr. Justice Powell
Mr. Justice Rehnquist

June 20, 1974

Re: Nos. 73-434, 73-435, 73-436 - Milliken v. Bradley

Dear Chief:

I agree with Bill Rehnquist's comments that the changes effected in what you circulated to the four of us on June 19 take us a long way toward accommodating the views that have been expressed.

In my judgment, it is imperative that we have a solid majority in this case, and that it would be tragic if the judgment were to come down with several opinions revealing a fractionated court.

In general, I am inclined to go along with what now has been developed. I offer the following, however, as additional (and comparatively minor) suggestions for your consideration.

1. On page 21, in the second line of the paragraph beginning on that page, I would like to eliminate the words "additional and."

2. As you have undoubtedly noticed, there are typographical mixups in the material at the bottom of page 23 and the top of page 24; specifically, the top line of page 24 belongs above the present sixth from the last line of the paragraph ending on page 23.

3. On page 25, first paragraph, second line, would it be well to insert the words "de jure" before the word "segregated"?

4. The next full sentence in the same paragraph begins with the words "The Court went" and ends with the phrase "with

no showing of significant violation by the 53 outlying school districts." Would it help to have the ending phrase read "with no showing of any significant government responsibility, either state or local, for the interdistrict imbalance." I suggest this because the opinion does not preclude an interdistrict remedy if it is shown that the State itself (in contrast with the district) caused the imbalance.

5. I, for one, could go along with the elimination of Part IV except, of course, the material bringing the opinion to a close.

Sincerely,

Harry Blackmun (HAB)

The Chief Justice

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 25, 1974

Dear Chief:

Re: No. 73-434 - Milliken v. Bradley
No. 73-435 - Allen Park Public Schools v. Bradley
No. 73-436 - Grosse Pointe Public School System v. Bradley

Please join me.

Sincerely,

Harry

The Chief Justice

Copies to the Conference

March 7, 1974

Detroit School Case

Dear Chief:

I recall a story in the press - several weeks ago I believe - to the effect that Senator Ervin was then holding hearings of a subcommittee on the proposed anti-busing constitutional amendment.

The story mentioned the testimony, as I recall, of an official of the Charlotte-Mecklenberg school district on the effect of the Court's decision on the public school system there.

I have no idea whether this or other testimony before the subcommittee would be relevant or helpful background to your research on the Detroit case, but thought possibly you might wish to have a clerk see what is available. My guess is that the subcommitee has heard testimony both pro and con, which might well cancel out. Yet, Charlotte-Mecklenberg was the first major guinea pig and any documentary evidence as to what has happened there might be relevant background. I doubt that the subcommittee has yet submitted a report, but this might also be the subject of inquiry.

Sincerely,

The Chief Justice

lfp/ss

June 5, 1974

No. 73-434 Milliken v. Bradley

MEMORANDUM TO THE CHIEF JUSTICE:

In accordance with your request, I submit comments on your preliminary, xeroxed draft of May 31. I am not unmindful of the inherent complexity of identifying and defining the issues in this difficult case or of the problem of dealing with the enormous record. Accordingly, I am sure you will accept my comments in the uncritical spirit in which they are offered and also as reflecting only my preliminary impressions of the draft - impressions which will probably change as your work on the case progresses.

In any event, and for what they are worth, I submit the following:

1. In the broadest sense, this case is viewed as the test case to resolve two burning issues of great public

concern: (i) what conditions, if any, would justify a federal court in ordering "consolidation" of two or more school districts or parts thereof for the purpose of achieving racial desegregation; and (ii) assuming that conditions do justify such a court order, what are the limitations, if any, upon the power of a federal court to order extensive interdistrict transportation to achieve desegregation?

These, stated in quite general terms, are the broad issues involved. The draft opinion, as I read it, deals summarily and not entirely clearly with the first of these issues. It does not mention transportation or busing at all.

2. As to whether and when interdistrict remedies * may be ordered, I commend to you the Solicitor General's amicus memorandum. At Conference, each of us who voted

---

* I will equate the popular term "consolidation" with "interdistrict remedies", which necessarily involve consolidation - in varying degrees - of the functions and responsibilities of two or more separate school districts.

to reverse expressed a significant degree of approval of the SG's analysis. The draft opinion finally comes close to this analysis, but is pretty much limited to the condensed discussion on page 24 of the xeroxed draft.

3. The principal concern of the draft is with the racial balance issue. I agree that the courts below concluded that this was the appropriate remedy for the segregated condition in Detroit, and that the only means of achieving it was partial consolidation of some 53 other school districts with the Detroit district. But it seems to me that an analysis based on racial balance misses the core issue. Assume, for example, that the DC - instead of decreeing what in effect was mathematical racial balance - had concluded that the remedy for the segregated condition in Detroit was consolidation with the surrounding districts, but had expressly also held that racial balance was not necessary? Putting it differently, busing - as noted in Swann - is only one tool of desegregation; there could have been a consolidation decree with the DC merely saying that the consolidated district should proceed to desegregate the schools therein in accordance with the Court's opinion in Swann - expressly disclaiming any necessity for racial balance.

I thus conclude that whether the DC ordered racial balance or not is essentially immaterial to the basic issue in this case, namely, whether and under what circumstances a federal court may order a consolidation of school operations in disregard of established school districts pursuant to state law.

4. As the draft recognizes, before a DC may inject itself into the manner in which a state and school districts operate the public schools, there must be a constitutional violation. Here the only violation found was by and within the Detroit district, namely, the operation there of a segregated school system. There was no finding that the violation within the City had been caused or contributed to in any way by action of the other 53 districts sought to be consolidated or indeed by any one of them. Nor was there any evidence that the violation within the City had caused or contributed to unlawful segregation in these neighboring districts. This Court has never held that a constitutional infringement within one school district, without implicating in some significant manner another school district, justified remedies beyond

and outside of the offending district. We are asked in this case to do precisely that. Five members of the Court are willing to say - and I think we should say it explicitly - that the Constitution requires no such extra district or interdistrict remedy.

5. In this connection, it is important to bear in mind the difference between states which, for historic and other reasons, practiced school segregation, and on the other hand states (of which Michigan may be one) in which there is no past history of segregated schools. For example, in the Richmond case, both Chesterfield County and the City of Richmond had de jure segregation in accordance with Virginia law until compelled by Brown and subsequent cases to take affirmative action to desegregate. Four members of the Court in Bradley were of the opinion that the mere fact that these two adjacent school districts had formerly practiced segregation did not in itself justify consolidation or interdistrict remedies. Some interdistrict violation was required.

I will mention specific examples below, but stated in general terms there must be a showing that Detroit and the adjoining district or neighboring districts acted in

concert to further or maintain desegregation.

As the Solicitor General put it:

> ". . . an interdistrict remedy, requiring the restructuring of state or local government entities, is appropriate only in the unusual circumstance where it is necessary to undo the interdistrict effect of a constitutional violation. Specifically, if it were shown that the racially discriminatory acts of the State, or of several local school districts, or of a single local district, have been a direct or substantial cause of interdistrict school segregation [with Detroit], then a remedy designed to eliminate the segregation so caused would be appropriate." (S.G's Br. 13-14)

The Solicitor General then cited the following examples:

> "One example of circumstances warranting interdistrict relief is where one or more school systems have been created and maintained for members of one race. See, e.g., United States v. Texas, 321 F. Supp. 1043 (E.D. Texas) affirmed, 447 F. 2d 441 (C.A. 5), certiorari denied sub nom. Edgar v. United States, 404 U.S. 1016; Haney v. County Board of Education of Sevier County, 429 F. 2d 364 (C.A. 8). Similarly, where the boundaries separating districts have been drawn on account of race, an interdistrict remedy is appropriate. See, e.g., United States v. Missouri, 363 F. Supp. 739 (E.D. Mo.). Some form of interdistrict relief may also be appropriate where pupils have been transferred across district lines on a racially discriminatory basis.
>
> In each instance of an interdistrict violation, the remedy should, in accordance with traditional principles of equity and the law of remedies, be tailored to fit the violation,

particularly in view of the deference owed to existing governmental structures. See, e.g., Bradley v. School Board of the City of Richmond, Virginia, supra, 462 F. 2d at 1067-1069; cf. Wright v. Council of City of Emporia, supra, 407 U.S. at 478 (Burger, C.J., dissenting).

I am sure we are in agreement that we should give the DC and other federal courts fairly specific guidance in terms of standards to be applied in cases like this. I would hold expressly that there must be a finding that unlawful segregatory acts of a suburban school district have contributed substantially to the unlawful segregation of the city school district. In other words, there must be an interdistrict effect resulting from the discriminatory action of the suburban district. In determining what constitutes unlawful segregatory conduct, the Keyes standard, requiring intentional and de jure action by the school authorities, must be applied.

The Solicitor General expressed the rule as follows:

> "It is our view that the remedy for unconstitutional segregation of the public schools in a school district can properly extend beyond the boundaries of the district only where the violation has directly altered or substantially affected the racial composition of schools outside the district and only to the extent necessary to eliminate the segregative effects of the violation. Where the schools of only one district have been affected, there is no constitutional requirement that the relief include a balancing of the racial composition of that district's schools with those of surrounding districts."

Finally, in stating standards, I would reiterate the Swann principle that the scope of the remedy is determined by the scope of the Constitutional violation.

6. The draft (p. 25 et seq) addresses the argument that the State itself (State Board of Education, State Legislature and State officials) is responsible, and that the district school boards are mere agencies of the State. You probably have in mind tightening and strengthing the opinion on this point.

A good deal of assistance can be obtained in the brief filed on behalf of the Grosse Pointe public school system, commencing at p. 46.

This Court in all previous cases has looked solely to the local school district. Moreover, as we said in Rodriguez (411 U.S. 1), and in other cases (see, e.g., Emporia), public education in this country has been organized around the concept of local control. To be sure, a state board of education has certain authority and the state government itself - amending a state constitution where necessary - could exercise a broad control and supervision over the schools. But this would be contrary to our tradition and to the conviction that the values of

local school board autonomy and responsibility are fundamental.

See Footnote 91 in the Grosse Pointe brief for a summary of some of the powers of local boards in Michigan. These are to be borne in mind when one considers the consequences of consolidation or interdistrict remedies. Who then makes all of these decisions? Who, in particular, determines school budgets, the assessment and collection of school taxes, etc? Does the Detroit board decide this for the other 53 districts? How do 54 school boards work all of these out? In the end, interdistrict remedies really will require consolidation so that a single controlling entity can make the vital decisions as to how much money is required, how to raise it, curricula content, teacher's salaries, etc., etc.

7. The opinion of the Court of Appeals denegrates school districts as little more than lines on a map "drawn for political convenience". This is nonsense for the reasons indicated above, and should be so pointed out in our opinion.

8. The draft conveys the impression, at least to me, of an overriding concern with the way the case was tried

and the failure to afford an effective hearing to the various districts. For example, the draft refers (p. 27) to the "crucial fact that the theory upon which the case proceeded related solely to the establishment of Detroit City violations . . . and that, at the time of trial, neither the parties nor the trial judge were concerned with a foundation for interdistrict relief."

This is quite true, and is a point which is adequately made in Part IV of the draft. I urge you, however, to deemphasize it in the preceding parts of the opinion (except in the statement of facts), as it conveys the impression that we are more concerned about failure to afford hearings to the suburban districts than we are about the fundamental issues. Little purpose will be served by our taking this case merely to remand it for a full rehearing with all parties before the court. Whether we reverse outright or remand, ~~our opinion~~, I think we should state unequivocally the standards to be applied on the merits.

9. As to the extent of busing or transporting students for vast distances in the enormous area included within the decree below, I quote the following statement from the SG's brief:

> "Moreover, even a finding of some interdistrict violations would not mean

> that extensive interdistrict busing should be required as a remedy regardless of its disruptive effects or other costs." Footnote 12, p. 15 S.G.'s Br.

See also the portion of my concurring opinion in Keyes in which I argued(with some force, I thought) that the Constitution does not require busing solely to achieve desegregation.

10. I would certainly pay my respects to the radical nature of the decree approved by the courts below, requiring racial balance in "every school, grade and class". This is just about as absurd as any court decree I have ever read. Racial balance, even if it were constitutionally required, is difficult enough to achieve in each school. It is literally impossible to achieve it within a school in every grade and class. Moreover, even were it possible, the mix would change with each semester. In short, the school officials would spend a large portion of their time counting whites and blacks and juggling them around from grade to grade and class to class, all to no purpose except the neglect of quality education!

* * * * *

Forgive this long-winded and somewhat disjointed commentary. It may not be helpful, but at least I wanted to share these ideas with you promptly.

L.F.P.

June 10, 1974

No. 73-434

Detroit School Case

Dear Chief:

Perhaps you saw the article in Sunday's Washington Post to the effect that the liberal Republican Governor of Massachusetts has come out in favor of repeal of Massachusetts' racial balance statute, which would require extensive busing by next term.

The news story states that all other candidates for Governor - including a Republican and two Democrats - likewise urge repeal. Senator Brooke, however, still favors the law.

Sincerely,

The Chief Justice

lfp/ss

MEMORANDUM

TO: The Chief Justice DATE: June 14, 1974

FROM: Lewis F. Powell, Jr.

Bradley

I return herewith the revised pages which you gave me this afternoon. These include revised pages 20-25, and an unnumbered page commencing: "Underlying this case. . . ."

I have suggested a few changes of language, of no great consequence, on pages 23 and 25. I have added a rider to page 22, in substitution for the quotation that I originally used from Rodriguez. The rider embodies what seems to me to be a better quote from Rodriguez.

I do not know where you have in mind locating the unnumbered page. It would be out of place, if it followed page 25 and preceded page 26 (where it is now situated in the copy which you gave me). The first part of the single paragraph on the unnumbered page goes back to the "racial balance" question. I suggest - what you no doubt have in mind with respect to location - that certainly this part of the unnumbered page be consolidated with your discussion of racial balance on pages 20 and 21. The second half, roughly, of the unnumbered page comes from material which I gave you. It seems out of place on this page and, if used, should be tied in with the discussion of the disruptive effect

of inter-district remedies.

I hesitate to repeat what I said in my original memorandum to you, but I continue to feel that overemphasis of the racial balance aspect of the case is unnecessary to our decision and also detracts from the force of the inter-district remedy issue. Nevertheless, if Potter and your other constituents are willing to accept the degree of emphasis on racial balance which remains in your draft, I will, of course, be with you. I recognize in this connection that this draft was written late last night by you, without assistance and under very considerable pressure. As you said to me this afternoon, you recognize the necessity for considerable polishing and tying up, to assure a logically consistent flow of the opinion.

Finally, omit the last paragraph remaining on page 25, as it also reverts to racial balance. As noted above it is more effective, I think, to move directly from the discussion of the disruption of the school system to the discussion on page 26 of when an inter-district remedy may be decreed.

Finally, there are two points made in the SG's brief which I would certainly like to see included in our opinion - perhaps in footnotes if nowhere else:

1. On page 11 of his brief, the SG states:

> "The mere co-existence, within a State, of adjacent school districts having disparate racial compositions is not itself a constitutional violation. Spencer v. Kugler, 404 U.S. 1027, affirming 326 F. Supp. 1235 (D. N.J.)."

2. On page 13, there is the following statement:

> ". . . an interdistrict remedy, requiring the restructuring of state or local government entities, is appropriate only in the unusual circumstances where it is necessary to undo the interdistrict effect of a constitutional violation."

* * * *

Perhaps these suggestions will only add to your problems. Yet, after all you did invite them. If you think I can be of further assistance, please let me know.

L.F.P., Jr.

ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 24, 1974

No. 73-434 Miliken v. Bradley
No. 73-435 Allen Park v. Bradley
No. 73-436 Groose Point v. Bradley

Dear Chief:

Please join me in your draft of June 21.

I have not had an opportunity to review the draft of June 24 (which just came in), but I understand from your note that it merely embodies in type the penciled in changes reflected in the June 21 draft.

I do have a couple of word changes which I would like to suggest. I can give them either to you or to your clerk, as you prefer. Also, I suggest that you may wish to add, at an appropriate place, a citation to Spencer v. Kugler, cited at page 11 of the SG's brief.

Sincerely,

L.F.P.

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

July 2, 1974

73 434

DETROIT SCHOOL CASE

Dear Chief:

In my join note of June 24 I mentioned several word changes which I would like to suggest. Referring to the recirculated June 24th draft of your opinion, my suggestions are as follows:

Page 22, line 12: Should not the word "equality" be "quality"?

Page 23, line 9: Following the word "logistical" add "and other serious". The point here is that large scale transportation of students involves a variety of problems in addition to logistical, including financial, effect on local support, and the impact on other interests (of school administrators, parents and children) referred to generally in Swann.

Page 24, line 2: Should not the word "attend" be either "make" or "attend to".

Page 24, line 10: As no detailed plan has yet been adopted, should not the word "plan" be "remedy"? I think this would make the sentence consistent with terminology elsewhere.

Page 31, line 3: In the discussion between you, Potter, and me, I thought we had agreed - at Potter's suggestion - to eliminate the word "constitutional" so that the sentence would refer to "an erroneous standard".

None of the foregoing changes is of any great consequence, but perhaps they can be included - if you approve - in any final editing of the opinion.

Sincerely,

Lewis

The Chief Justice

CC: Mr. Justice Stewart
Mr. Justice Blackmun
Mr. Justice Rehnquist

LFP/gg

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 3, 1974

Re: No. 73-434 - Milliken v. Bradley

Dear Chief:

As I told you on the telephone, I am with you in this case, and the following suggestions are designed only to make even more clear what I think is the basic thrust of your opinion -- that without a cross-district violation, there cannot be a cross-district remedy. Your opening paragraph is very strong and persuasive, and I would be sorry to see you tinker with it and would not think of trying to tinker with it myself; but because it accurately describes the case as lacking all four of the elements which it sets forth, there is the possible implication, unless strongly negatived somewhere else in the opinion, that the presence of any one of the four elements now lacking might be sufficient to support a metropolitan remedy. The following suggestions are my tentative idea on how to make even clearer this basic point.

Page 24, first full paragraph, change the existing first sentence to read something like this: "Federal authority to impose cross-district remedies presupposes a fair and reasonable determination not only that each of the districts to be affected by the remedy has a school system that is segregated by law, but that they have disregarded their own boundaries in seeking to create or maintain such a segregated system."

Same paragraph, change fourth sentence to read as follows: "The District Court went beyond this theory of the case and

mandated a metropolitan area remedy before the intervenors were heard and without permitting any evidence on the intervenors' claim that they were guilty of no violation which had created or maintained unconstitutional discrimination in the Detroit system."

Same paragraph, insert new phrase in next sentence so that it reads as follows: "Thus, to approve the remedy imposed by the District Court on these facts would make racial balance the constitutional objective and standard; a result not even hinted at in Brown I and Brown II which held that the operation of dual school systems, not some hypothetical level of racial imbalance in a geographical metropolitan area consisting of more than one school district, is the constitutional violation to be remedied.

Page 25, first full sentence: Since we conclude that the "incidental findings" by the District Court do not afford a basis for multi-district relief, would it be a good idea to substitute "thought to afford" for "suggesting" in that sentence, in order to make it clear that it is the District Court, and not we, who think the findings afford a basis for such relief?

Page 27, last sentence, insert after the words "276,000 pupils" the phrase "and involving numerous districts which were not parties to the arrangement,".

Sincerely,

WEB

The Chief Justice

Blind copy to: Mr. Justice Powell

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 19, 1974

Re: Nos. 73-434, 73-435, and 73-436 - Milliken v. Bradley, et al.

Dear Chief:

I think you have made very substantial changes to accommodate the views expressed by the rest of us who voted with you at Conference on this case, and I am prepared to join the draft which you circulated on June 19th. I sincerely hope that we can come out with an opinion for the Court.

Sincerely,

WEB

Copy to: Mr. Justice Stewart
Mr. Justice Blackmun
Mr. Justice Powell

July 22, 1974

Re: Detroit School Cases

Dear Chief:

On page 3 of the changes which you circulated on Friday, line 4 of footnote 22 should read "57% Negro and 43% White. I regret that my draft had the incorrect percentage for White.

Sincerely,

WHR

The Chief Justice

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 24, 1974

Re: Nos. 73-434, 73-435, and 73-436 - Milliken v. Bradley, et al.

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to the Conference