The Burger Court Opinion Writing Database

Dayton Board of Education v. Brinkman

443 U.S. 526 (1979)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

April 30, 1979

MEMORANDUM TO THE CONFERENCE:

Re: 78-627 Dayton Board of Education v. Brinkman

I will vote to reverse.

Regards,

WEB

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 30, 1979

RE: No. 78-627 Dayton Board of Education v. Brinkman

Dear Byron:

I agree.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-627

Dayton Board of Education et al., Petitioners, *v.* Mark Brinkman et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1979]

MR. JUSTICE WHITE delivered the opinion of the Court.

This litigation has a protracted history in the courts below and has already resulted in one judgment and opinion by this Court, 433 U. S. 406 (1977). In its most recent opinion, the United States Court of Appeals for the Sixth Circuit approved a systemwide plan for desegregating the public schools of Dayton, Ohio. *Brinkman* v. *Gilligan,* 583 F. 2d 243 (CA6 1978). The Court of Appeals found that the Dayton Board of Education had operated a racially segregated, dual school system at the time of *Brown* v. *Board of Education* (*I*), 347 U. S. 483 (1954), and that "[t]he evidence of record demonstrates convincingly that defendants have failed to eliminate the continuing systemwide effects of their prior discrimination" and "actually have exacerbated the racial separation existing at the time of *Brown I.*" 583 F. 2d, at 253. We granted certiorari, — U. S. — (1979), and heard argument in this case in tandem with *Columbus Board of Education* v. *Penick, ante,* p. —. We now affirm the judgment of the Court of Appeals.

I

The public schools of Dayton are highly segregated by race. In the year the complaint was filed, 43% of the students in the Dayton system were black, but 51 of the 69 schools in the

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

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 3, 6-7, 9-12, 14

From: Mr. Justice White

Circulated: _____

Recirculated: 31 MAY 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–627

Dayton Board of Education et al., Petitioners, *v.* Mark Brinkman et al. } On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1979]

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pp. 3, 7-8, 14
footnotes renumbered

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

3rd DRAFT

From: Mr. Justice White

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: 25 JUN 1979

No. 78-627

Dayton Board of Education et al., Petitioners, *v.* Mark Brinkman et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1979]

MR. JUSTICE WHITE delivered the opinion of the Court.

This litigation has a protracted history in the courts below and has already resulted in one judgment and opinion by this Court, 433 U. S. 406 (1977). In its most recent opinion, the United States Court of Appeals for the Sixth Circuit approved a systemwide plan for desegregating the public schools of Dayton, Ohio. *Brinkman* v. *Gilligan,* 583 F. 2d 243 (CA6 1978). The Court of Appeals found that the Dayton Board of Education had operated a racially segregated, dual school system at the time of *Brown* v. *Board of Education* (*I*), 347 U. S. 483 (1954), and that "[t]he evidence of record demonstrates convincingly that defendants have failed to eliminate the continuing systemwide effects of their prior discrimination" and "actually have exacerbated the racial separation existing at the time of *Brown I.*" 583 F. 2d, at 253. We granted certiorari, — U. S. — (1979), and heard argument in this case in tandem with *Columbus Board of Education* v. *Penick, ante,* p. —. We now affirm the judgment of the Court of Appeals.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 29, 1979

Re: No. 78-627 - Dayton Board of Education v. Brinkman

Dear Byron:

Please join me.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 4, 1979

Re: No. 78-627 - Dayton Board of Education v. Brinkman

Dear Byron:

Please join me.

Sincerely,

H.A.B.

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 22, 1979

No. 78-627 Dayton Board of Education v. Brinkman

Dear Bill:

Please join me in your dissenting opinion.

Sincerely,

Lewis

Mr. Justice Rehnquist

Copies to the Conference

LFP/lab

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 29, 1979

Re: No. 78-627 Dayton Board of Education v. Brinkman

Dear Byron:

In due course I will circulate a dissent in this case.

Sincerely,

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 21, 1979

MEMORANDUM TO THE CONFERENCE

Re: No. 78-627 Dayton Board of Education v. Brinkman

Enclosed is a xerox copy of my proposed dissent in this case, which I have today sent to the printer.

Sincerely,

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

Re: No. 78-627 - Dayton Board of Education v. Brinkman

From: Mr. Justice Rehnquist

MR. JUSTICE REHNQUIST, dissenting.

Circulated: 21 JUN 1979

Recirculated: _____

For the reasons set out in my dissent in Columbus Board of Education v. Penick, No. 78-610 (1979), I cannot join the Court's opinion in this case. Both the Court of Appeals for the Sixth Circuit and this Court used their respective Columbus opinions as a roadmap, and for the reasons I could not subscribe to the affirmative duty, the foreseeability test, the cavalier treatment of causality, and the false hope of Keyes and Swann rebuttal in Columbus, I cannot subscribe to them here. Little would be gained by another "blow-by-blow" recitation in dissent of how the Court's cascade of presumptions in this case sweeps away the distinction between de facto and de jure segregation.

In its haste to affirm the Court of Appeals, the Court

P. 1

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–627

Dayton Board of Education et al., Petitioners, *v.* Mark Brinkman et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1979]

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE POWELL joins, dissenting.

For the reasons set out in my dissent in *Columbus Board of Education* v. *Penick*, No. 78–610 (1979), I cannot join the Court's opinion in this case. Both the Court of Appeals for the Sixth Circuit and this Court used their respective *Columbus* opinions as a roadmap, and for the reasons I could not subscribe to the affirmative duty, the foreseeability test, the cavalier treatment of causality, and the false hope of *Keyes* and *Swann* rebuttal in *Columbus*, I cannot subscribe to them here. Little would be gained by another "blow-by-blow" recitation in dissent of how the Court's cascade of presumptions in this case sweeps away the distinction between *de facto* and *de jure* segregation.

In its haste to affirm the Court of Appeals, the Court barely breaks stride to note that there were some "overreading of *Swann*" in the Court of Appeals conclusion that there was a "dual" school system at the time of *Brown I*, and that the court had the wrong conception of segregative intent, *i. e.*, the mysterious *Oliver* standard which this Court thinks the Court of Appeals talks a lot about but never really applies. *Ante*, at 8–9, n. 8. But as the Court more candidly recognizes in this case, the affirmative duty renders any discussion of segregative intent after 1954 gratuitous anyway. The Court is also more honest about the stringency of the standard by which all post-1954 conduct is to be judged: "The Board has a

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 29, 1979

Re: 78-627 - Dayton Board of Education
v. Brinkman

Dear Byron:

Please join me.

Respectfully,

John

Mr. Justice White

Copies to the Conference