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ABSTRACT

On March 17, 1972, President Nixon submitted two bills to Congress designed to deal with the increasingly troublesome issue of court-ordered busing of school children for the purpose of desegregating public schools. The first of these measures is the "Student Transportation Moratorium Act of 1972," which would freeze such court-ordered busing in its present position in order to give the Congress time to consider and adopt a long-range solution to the problem. The second measure is the President's proposal for such long-range solution: the "Equal Educational Opportunities Act of 1972." Because they represent new approaches, these proposed statutes raise questions of constitutionality for which there are no firm, clear answers. Discussions must proceed by taking bearings from a few more or less analogous matters in the past and, even more importantly, from considerations of sound constitutional policy. Such analysis indicates that Congress probably has the constitutional power to enact the statutes proposed by the President. These measures, properly construed, do not attempt to overturn the relationship between the legislature and the judiciary. They deal with remedies and do so in a limited way. Because there are few direct precedents in this area, any responsible legal judgment must necessarily be qualified. (Author/JM)

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CONSTITUTIONALITY OF THE PRESIDENT'S BUSING PROPOSALS

Robert H. Bork

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On March 17, 1972, President Nixon submitted two bills to Congress designed to deal with the increasingly troublesome issue of court-ordered busing of school children for the purpose of desegregating public schools. The first of these measures is the "Student Transportation Moratorium Act of 1972," which would freeze such court-ordered busing in its present position in order to give the Congress time to consider and adopt a long-range solution to the problem. The second measure is the President's proposal for such long-range solution: the "Equal Educational Opportunities Act of 1972."

The moratorium bill was introduced in the House (H.R. 13916) by Rep. William M. McCulloch, R.-Ohio, and Rep. Gerald R. Ford, R.-Mich., and in the Senate (S. 3388) by Senator Roman L. Hruska, R.-Neb. The equal educational opportunities bill was introduced on the House side (H.R. 13915) by Rep. McCulloch and is co-sponsored by Rep. Ford and Rep. Albert H. Quie, R.-Minn. The companion bill in the Senate is S. 3395 by Senator Peter H. Dominick, R.-Colo.

This analysis is confined to the constitutionality of the proposed legislation. It does not deal with any of the other controversies that surround the busing question.

1. The Substance of the Proposals

The two pieces of legislation proposed by the President are interrelated in the sense that a decision on the constitutionality of the moratorium on court-ordered school busing will be influenced by evidence that the moratorium is in fact designed, and is being used, to give Congress time to consider responsible solutions. The President's follow-up legislation is one such possible solution. The proposals are separate and distinct, however, because the particular provisions of the Nixon administration's long-range solution are not essential to the moratorium. Congress may modify that proposal in any of its details or even substitute its own measure. The provisions and constitutionality of the two bills are, therefore, discussed separately in this analysis.

Proposed Student Transportation Moratorium Act of 1972. The substantive provisions of Section 3 of the moratorium bill are designed to produce a standstill while Congress considers the entire problem. (For the full text of the bill, see Appendix A.) Existing busing orders would continue in force, but new busing orders would be prohibited, in effect, for the duration of the moratorium. Courts would be forbidden by Section 3(a)(1) to order the busing of any student who was not being bused prior to the entry of the order, and they would be further forbidden by Section 3(a)(2) to require that any student be bused to a school to which he was not being bused previously. These provisions would have the effect of preserving the status quo until the expiration of the moratorium.

The moratorium would also apply to plans submitted by local education authorities to any department or agency of the United States pursuant to Title VI of the Civil Rights Act of 1964. It thus applies to approval of desegregation plans by the Department of Health, Education and Welfare (HEW).

It is important to note what the moratorium bill would not do. It would not halt the entry or implementation of any desegregation orders other than busing orders. It would not interfere with the implementation of any busing orders in operation as of the date of the moratorium's enactment. It would not inhibit in any way any educational authority's voluntary adoption and implementation of any busing plan it desires. A local education authority that wishes to bus in order to achieve racial balance or for any other legitimate objective would remain free to do so.

The period of the moratorium would run from the date of its enactment to July 1, 1973, or to the adoption of substantive legislation to establish a policy concerning busing, whichever is earlier.

These substantive provisions of the moratorium bill are preceded by a statement of findings intended to describe the need for the temporary preservation of the status quo. The findings state that in many cases increased busing has caused substantial hardship to the children affected, has impinged upon educational processes, and has exceeded the amount necessary to accomplish required desegregation. These findings apparently refer to certain decisions of lower courts that are thought to go well beyond the authorization of the Fourteenth Amendment in striving for racial balance.

Next, the findings declare that there is a "need to establish a clear, rational, and uniform standard" to determine the obligation of local education agencies under the Fourteenth Amendment to reassign and bus students in order to desegregate. Congress is considering legislation to establish the standard and define the constitutional obligation.

To this point the findings in the bill are addressed to the current confusion in lower court orders and the need for Congress to participate in finding a solution to the problem. The findings then address the need for a moratorium while Congress deliberates. They state the probability that, before Congress can act on substantive legislation, many local educational authorities will be required to implement desegregation plans that exceed the obligations of the Fourteenth Amendment and that these plans will have to be modified after legislation is enacted. Local educa-

tional agencies, the bill states, will be required unnecessarily to expend large sums for buses and their operation, thus diverting money from improvements in educational facilities and instruction. The entry of new busing orders and their subsequent modification, moreover, would inflict unnecessary administrative burdens upon school systems and undue disruptions upon educational processes, the findings declare.

Proposed Equal Educational Opportunities Act of 1972. The equal educational opportunities bill is addressed to several topics besides busing. (For the full text of the bill see Appendix B.) It is, nonetheless, a unified bill that attempts to shift the focus of concern from busing to other measures for improving education for disadvantaged groups.

Title I deals with the "Concentration of Resources for Compensatory Education" and would provide assistance to school districts undertaking voluntary or required desegregation plans and to school districts with the heaviest concentration of poor children. The program of Title I envisages spending approximately $2.5 billion annually. Payments would be made to schools with substantial enrollments of poor children (more than 30 percent) for compensatory education programs. Such programs must be limited to basic schooling (such as reading and mathematics) and special services (such as counseling, nutrition, and health). An interesting feature of Title I is that the compensatory payments follow a child who transfers to a school serving predominantly non-poor children. This may make voluntary programs to achieve racial balance within school systems easier and more attractive. The constitutionality of Title I is not in doubt, so this analysis will treat it very briefly.

"Denials of equal educational opportunity" would be prohibited under Title II of the bill. These prohibitions appear to be declaratory of existing law under the equal protection clause of the Fourteenth Amendment. Section 201(d), for example, outlaws "discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff." Two subsections, (c) and (f), are capable of being read as going beyond the Fourteenth Amendment and imposing obligations on school systems that have not discriminated. Section 201(c) prohibits the assignment of a student to a school other than the one closest to his home if that would result in a greater degree of segregation by race, color, or national origin. Section 201(f) requires a school system to take action to overcome language barriers that impede students. These subsections can be interpreted as legislating for *de facto* situations. For reasons that will be discussed below, it seems preferable to interpret them, in keeping with the tenor of the rest of the bill, as applying only in cases where *de jure* segregation was intended.

Title III deals with enforcement and provides for civil actions both by private individuals and by the Attorney General of the United States to redress denials of equal educational opportunities as defined in Title II.

Title IV deals with busing and other remedies. The limitations on remedies provided apply not merely to remedies imposed for violation of the statute but

also to those imposed for violations of the equal protection clause of the Fourteenth Amendment. Section 401 requires courts and other agencies to "seek or impose only such remedies as are essential" to correct the violation. The interpretation of what is "essential" will vary with judges, of course; but the requirement expresses the mood of Congress and the feeling that some courts have taken violations of the Fourteenth Amendment as occasions to initiate reforms disproportionate to the extent of the violation.

The next two sections of the bill address themselves directly to busing as a remedy. Section 402 makes busing of students a remedy of last resort. It provides that a court may not order busing until it has exhausted a number of other listed remedies and specifically found that none of them, singly or in combination, is adequate to remedy the violation of law. These alternative remedies are listed in order of preference. Some of them—such as the construction of new schools, the closing of inferior schools, or the construction or establishment of magnet schools or educational parks—are quite severe and indicate that the intention underlying the statute is to regulate busing and not to oppose desegregation.

Should a court conclude, however, that none of the remedies of Section 402, singly or together, will suffice, it may order busing subject to the controls of Section 403. The strongest restraints are placed upon the busing of elementary school children. Thus, Section 403(a) states that children in the sixth grade and below cannot be ordered bused if the order results in an increase in either the average daily distance or time of travel for all such students in the system *or* an increase in the average daily number of such students bused. There will still be cases under this section in which busing may be used to desegregate the elementary grades because no net increase in busing will be required. That is likely to be true particularly where busing has previously been used by a school system to accomplish segregation.

The busing of junior high school and high school students is covered by Section 403(b). The courts are not prohibited from ordering increased busing for such students. No court is to order busing that increases average daily distance or time of travel or the average daily number of students bused, *unless* "it is demonstrated by clear and convincing evidence that no other method set out in Section 402 will provide an adequate remedy." Any such increase in busing found to be necessary is to be deemed a temporary measure and is to be ordered only in conjunction with the development of a long term plan involving the other remedies preferred by the statute.

The bill contains other limitations worth noting. Under Section 404, school district lines are not to be ignored or altered unless it is established that they were drawn for the purpose of accomplishing illegal segregation. Thus, school districts may not be merged by court decree in order to overcome the effects of segregation accomplished in other ways. The definition of the district must be tainted with an illegal segregatory intent before the court may change that definition or order busing between districts.

Time limits are set upon decrees. All busing decrees expire under Section 407 after five years of good faith compliance by the school system. No additional

busing decree may be entered unless the school system is shown subsequently to have engaged in deliberate segregation or to have denied equal educational opportunity. Moreover, all desegregation decrees of any nature expire under Section 408 after ten years of good faith compliance. Additional decrees are subject to the same limitations. These time limit sections may be premised upon the idea that a school system can purge itself of past illegal conduct, and that it is undesirable (and not required by the Constitution) for a violation of the Fourteenth Amendment to become the occasion for federal court supervision of school systems for indefinite periods of time. The time limits provided begin to run from the enactment of the statute.

Section 406 provides for the mandatory reopening of all desegregation decrees in effect at the date of the statute's enactment to conform such decrees to the provisions of the act.

2. The Power of Congress to Regulate Busing

General Considerations. Because they represent new approaches, these proposed statutes—the Student Transportation Moratorium Act and the Equal Educational Opportunities Act—raise questions of constitutionality for which there are no firm, clear answers. Discussion must proceed, as is often the case with innovative responses to troublesome social issues, by taking bearings from a few more or less analogous matters in the past and, even more importantly, from considerations of sound constitutional policy. Here the major consideration involved in any congressional attempt to play a role in the framing of busing remedies is the distribution of power between that body and the federal judiciary. This is a complex and delicate matter. The viewpoint expressed here is that Congress has a definite, though limited, role to play. The purpose of this analysis is to sketch the probable outlines of that role and to suggest that it is sufficient to support congressional enactment of the President's proposals.

The constitutionality of the two proposals depends upon the possession by Congress of power to regulate the use of the busing remedy. If Congress lacks authority to regulate busing, there can be no case for a moratorium while it considers such a regulation. We shall, therefore, first examine the general power of Congress in this area, then turn to the constitutionality of the proposed moratorium act, and finally examine the constitutionality of the major features of the follow-up legislation, the equal educational opportunities proposal.

It seems tolerably clear—or as clear as matters can be in an almost uncharted field of constitutional law—that Congress possesses significant power to regulate the use of busing as a remedy in desegregation decrees. It is also clear that that power is hedged about with limitations deriving from the Supreme Court's role as the ultimate arbiter of constitutional rules.

We will be discussing "power" and "authority" but it should be remembered that there is a place in the constitutional universe for influences more subtle than these words imply. The Court may defer to the judgment of a co-equal branch of government even when it believes that it need not. Or the

justices may be persuaded to a different view of a subject by the informed opinion of the legislature. At the very least, a deliberate judgment by Congress on constitutional matters is a powerful brief laid before the Court. A constitutional role of even such limited dimensions is not to be despised. It has the virtue of persuading Congress to play a fuller and more active part in constitutional questions without the inhibiting thought that every such occasion must provoke a confrontation between two great branches of government. We will continue to discuss "power," if only because that is the conventional phraseology, but the shadings of meaning in that word should be kept in mind.

The Source of Congress' Power. Public and professional discussions on proposals for legislation limiting the use of busing remedies have centered on two major sources of possible congressional power. These are Congress' power under Article III of the Constitution to prescribe the jurisdiction of the federal courts and Congress' power to enforce the Fourteenth Amendment. Analysis indicates that reliance on the second source is to be preferred.

Article III Power Over Jurisdiction. Senator Robert Griffin, R.-Mich., in his proposal to bar busing completely, suggests reliance upon Article III of the Constitution. He proposes, that is, that Congress stop all busing, not by dealing with the problem directly and substantively but by depriving the federal courts of jurisdiction to enter busing orders. Thus, what is asserted is not a limited power over some busing but an absolute power over all federal courts. The constitutional issues thereby raised are far more difficult and far less likely to be resolved in favor of Congress than would be the case if a more modest power were claimed.

Article III, Section 1 provides that "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The power to refuse to establish lower federal courts comprehends the power to limit or remove their jurisdiction. This proposition has been settled for over a century.[1] It would be entirely possible for Congress to remove the jurisdiction of the lower federal courts to issue busing decrees. By itself this would solve little, however, for cases under the Constitution could be heard in the state courts and ultimately appealed to the Supreme Court of the United States.

The Griffin amendment seeks to go further and to remove the jurisdiction of the Supreme Court as well: "No court . . . shall have jurisdiction . . . to issue any order . . . to require that pupils be transported to or from school on the basis of their race, color, religion or national origin." That tactic, if it succeeded, would still presumably leave desegregation cases under the Fourteenth Amendment in the state courts but without any avenue of appeal on busing remedies to the Supreme Court. The constitutional problem arises from the attempt to deprive the Supreme Court of jurisdiction. The senator believes power to do that is expressly conferred by Article III, Section 2: "In all the

[1] Sheldon v. Sill, 8 How. 440 (1850).

other Cases before mentioned [those in which the Court's jurisdiction is not original], the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*" (Emphasis added.)

The authority conferred by Article III is, however, far from clear. It is by no means obvious that Congress has power simply to remove jurisdiction over an important class of constitutional cases from the Supreme Court. The language of Article III itself gives pause. Would the framers have couched a general power to control the Court, to nullify its function as final interpreter of the law, in the language of "exceptions" and "regulations"? Or does that language more probably imply authority over relatively minor problems, matters of detail and convenience?

The argument that Article III, Section 2 vests constitutional supremacy in the Congress rather than the Court rests primarily upon *Ex parte McCardle.*[2] Under the Reconstruction Acts following the Civil War, Congress imposed military government on certain of the former Confederate states. McCardle was taken into custody for publishing "incendiary and libelous" articles in a Mississippi newspaper. He brought a habeas corpus petition, which was denied by the circuit court, and appealed to the Supreme Court. That Court sustained jurisdiction of the appeal and heard argument on the merits. Then, with the case awaiting decision, Congress passed a statute repealing that part of a prior statute which had given the Supreme Court jurisdiction to hear appeals from the circuit courts in such cases. The Supreme Court accepted the power of Congress to remove jurisdiction and dismissed McCardle's appeal.

McCardle is, however, a rather enigmatic precedent. If it stands for the proposition that Congress may take away any category of the Supreme Court's jurisdiction, it obviously is capable of destroying the entire institution of judicial review as we have known it since *Marbury* v. *Madison.*[3] So read, there is good reason to doubt *McCardle*'s vitality as a precedent today. Indeed, there was good reason to doubt *McCardle*'s meaning shortly after it was decided. In *United States* v. *Klein,*[4] the Court refused to give effect to a congressional exception to its jurisdiction and never even troubled to mention or distinguish *McCardle. Klein* arose after prior rulings had held that a presidential pardon satisfied the statutory requirement that a property claimant not have been a supporter of the Confederate cause. Klein, who held such a pardon, won a judgment in the court of claims. Congress then enacted a law providing that a pardon was to show a claimant had aided the "rebellion" and that courts must dismiss such claims for want of jurisdiction. The Supreme Court held this statute unconstitutional, saying that it would have upheld the statute as an exercise of the "exceptions" power if it merely "denied the right of appeal in a particular class of cases," but here the jurisdictional language was only "a means to an end." The end was "to deny pardons granted by the President the effect which this

[2] 7 Wall. 506 (1869).
[3] 1 Cranch 137 (1803).
[4] 13 Wall. 128 (1871).

court had adjudged them to have." The Court said that dismissing the appeal would allow Congress to prescribe the rules of decision for the courts in pending cases. Moreover, impairing the effect of the pardon violated the principle of separation of powers with respect to the President as well as the judiciary.

McCardle, *Klein*, and the extent of Congress' power to withdraw jurisdiction from the Supreme Court pose a puzzle that has engaged the best thought of scholars. But the result cannot be described as consensus.[5]

In the analysis of the present proposals to limit the use of busing remedies, Article III arguments may have some analogical force, particularly with respect to the law's effect upon lower courts, but it seems unwise to rely heavily upon the power to remove jurisdiction. In the first place, the statutes are not drafted as exercises of that power and a court may simply refuse to consider Article III on that ground alone. Second, a limited power derived from some other source will be seen as embodying a less dangerous principle than Article III. The latter poses a general threat to judicial review and its use in this instance would smack of a confrontation between Congress and the Supreme Court. There is no point in precipitating a possible constitutional crisis unnecessarily, and the effort to control busing decrees is surely not an occasion when it is necessary.

Section 5 Power to "Enforce" the Fourteenth Amendment. Desegregation cases are decided under the equal protection clause of Section 1 of the Fourteenth Amendment. Section 5 of that amendment provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"—that is, by its terms, a power to deal with remedies issued by courts in Fourteenth Amendment cases. The question is the breadth of that power.

There is a school of constitutional thought, which has prominent adherents both on the Supreme Court and among scholars, that holds Congress' powers under Section 5 to be extremely broad. Under this view of the Constitution, Congress has the power not merely to adjust remedies but, in substantial measure, to define the meaning of basic constitutional rights. Devotees of this position, if they adhere to its logic, should have no difficulty whatever in concluding that the President's busing proposals are constitutional; indeed, they should conclude that the proposals are so clearly within Congress' power that no real question of constitutionality arises.

The author of this analysis does not adopt that line of argument. It would, in the writer's opinion, be most unfortunate if the proposed statutes were enacted in reliance upon this theory, and would be still more unfortunate if they were upheld under it. It is necessary, nevertheless, to describe the theory in question because it has carried the Supreme Court upon occasion. The theory itself and its current standing are well described by Professor Archibald Cox:

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[5] See Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 *Harvard Law Review* 1362 (1953); Ratner, "Congressional Power Over the Appellate Jurisdiction of the Supreme Court," 109 *University of Pennsylvania Law Review* 157 (1960); Wechsler, "The Courts and the Constitution," 65 *Columbia Law Review* 1001 (1965); and Berger, *Congress, v. the Supreme Court* (1969).

> Today one of the major questions of constitutional theory and practice is whether the congressional power to make binding determinations upon questions of fact and degree, acknowledged under the commerce clause, applies to legislation enacted by Congress "to enforce" the fourteenth amendment. . . . The question has been litigated three times in the Supreme Court . . . but the upshot is uncertain.[6]

The crucial case is *Katzenbach* v. *Morgan*.[7] There the Court interpreted Section 5 as a grant of power so sweeping that Congress was authorized to define the scope and meaning of the equal protection clause. The Voting Rights Act of 1965 struck down English language literacy tests for any person who had completed sixth grade in Puerto Rico in a school where the language of instruction was not English. The case arose upon a challenge to the application of that provision to New York's literacy test. There was not here, as in the provision of the act upheld in *South Carolina* v. *Katzenbach*,[8] any attempt to relate the prohibition to any criterion indicating the discriminatory use of literacy tests. Not only was Congress not striking at suspected state discrimination but also the Court had rather recently held such nondiscriminatory tests not violative of the Fourteenth Amendment.[9] Despite that, the Court upheld the federal statute invalidating the New York requirement. The majority opinion said, "Correctly viewed, §5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[10] The Morgan opinion went on to argue that the legislation was "appropriate":

> The practical effect of §4(e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community. . . . This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community. [The Court was merely imagining a rational basis for the statute; there was no finding of discriminatory treatment in public services.] Section 4(e) thereby enables the Puerto Rican minority to obtain "perfect equality of civil rights and equal protection of the laws." It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. *It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk of pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interest that would be affected by the nullification of the English*

[6] Cox, "The Role of Congress in Constitutional Determinations," 40 *Cincinnati Law Review* 199. 258 (1971).
[7] 384 U.S. 641 (1966).
[8] 383 U.S. 301 (1966).
[9] Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959).
[10] 384 U.S. at 651.

literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.[11]

The Court turned the issue of a violation of the Fourteenth Amendment over to Congress because it could imagine that Congress had weighed competing considerations and "it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement . . . constituted an invidious discrimination in violation of the Equal Protection Clause." [12] As Professor Cox put it, "the Court held that the New York statute must yield even though Congress' decision might differ from that which the Court would have rendered. The net effect was that Congress effectively determined that a State law violated the Fourteenth Amendment and set it aside even though the Supreme Court—so often billed as the ultimate interpreter of the Constitution—would have sustained the same State law." [13]

Concerned with the dissent's charge that the decision would justify congressional cutbacks in the amendment's basic guarantees, the majority opinion included a footnote:

> Contrary to the suggestion of the dissent . . . § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.[14]

The *Morgan* decision embodies revolutionary constitutional doctrine, for it overturns the relationship between Congress and the Court. Under American constitutional theory, it is for the Court to say what constitutional commands mean and to what situations they apply. Congress may implement the Court's interpretation, as it is specifically empowered to do by Section 5 of the Fourteenth Amendment. But Section 5 was intended as a power to deal with implementations only. *Morgan* would also overturn the relationship between federal and state governments. Once Congress is conceded the power to determine what degree of equality is required by the equal protection clause, it can strike down any state law on the ground that its classifications deny the requisite degree of equality. *Morgan* thus improperly converts Section 5, which is a power to deal with remedies, into a general police power for the nation.

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[11] 384 U.S. at 652-653; emphasis added.
[12] 384 U.S. at 656.
[13] Cox, *supra* note 6, at 228.
[14] 384 U.S. at 651-652, n. 10.

This much is true whether or not the Court would be able to make good its footnote insistence that Congress may legislate in only one direction. But it is also improbable that the Court could make that gratuitous limit stick. The Court's own argument in *Morgan* requires a congressional free hand. Congress is assigned power because of its superior ability "to assess and weigh the various conflicting considerations." That competence, though the opinion does not spell the point out, resides in Congress' superior ability to gather information on a nationwide scale and to make the judgments of degree necessary to frame a general rule in certain areas. That being admitted as a reason to permit the Congress to extend the meaning of the constitutional guarantee, there is no case for denying Congress the power, on the same grounds, to say that its information and judgment indicate a Court-made rule is not necessary to the effectuation of the guarantee.

Perhaps *Morgan* and its footnote should be interpreted to mean that Congress may alter constitutional rights that are necessarily based upon factual data and the assessment and weighing of conflicting considerations. Under this view, Congress could not cut back a constitutional right that does not rest upon a judgment of diverse facts and competing values. Thus, as the footnote suggests, Congress could not authorize racially segregated schools. But this reading does little to rehabilitate *Morgan*, for many constitutional decisions involve such judgments. The case would still stand for a large degree of congressional supremacy over the Supreme Court and an almost unlimited congressional supremacy over state governments.

It is difficult to see how any judge or scholar committed to the principle of *Morgan* could fail to conclude that the President's busing proposals are constitutional. The decision whether or not to order busing, and how much busing, is, as we shall see, one that involves precisely that assessment and weighing of conflicting interests cited by *Morgan* as the reason for judicial deference to congressional judgment.[15]

If the case for a congressional power to regulate busing rested upon acceptance of all of *Morgan*—acceptance, that is, of a constitutional world in which Congress dictated the substance of many constitutional guarantees to the Court—this analysis would conclude that Congress is without the power in question. There is, however, a much more limited power in Congress that is adequate to support the regulation of busing decrees.

Section 5 of the Fourteenth Amendment, taken at the minimum weight that must be allotted it, confirms and reinforces Congress' historic power to deal with remedies employed by federal courts. There is doubt about Congress' power to deny all remedies for an established right but very little about its power to limit or even deny one among many. Professor Henry M. Hart, Jr., has summarized the argument:

> The denial of *any* remedy is one thing. . . . But the denial of one remedy while another is left open, or the substitution of one for another, is very different. It must be plain that Congress necessarily has a wide choice in the selection of remedies, and that a complaint about action of this kind

[15] See Cox, *supra* note 6, at 247-261.

> can rarely be of constitutional dimension. . . . [T]he basic reason, I suppose, is the great variety of possible remedies and the even greater variety of reasons why in different situations a legislature can fairly prefer one to another.[16]

Speaking of the desegregation cases, Professor Cox has concluded: "The scope and character of the relief to be afforded, however, seems well within the sphere open to congressional action under section 5."[17] While Professor Cox appears to accept the broad meaning of the *Morgan* case, his reasoning here rests upon the more narrow ground of general congressional power to affect remedies, and here he has little doubt of Congress' power to restrict as well as to expand: "It seems irrelevant whether the relief is greater or lesser than the courts would order. In either event the relief is not part of the Constitution."[18]

Judicial discussion of Congress' power over remedies appears to be rather sparse, but what there is acknowledges the power. The Supreme Court seems to have had little doubt on the subject from the beginning. In a case dealing with a state law giving corporations summary process over debtors, *Bank of Columbia* v. *Okeley*, the Court discussed Congress' authority:

> It is the remedy, and not the rights, and as such we have no doubt of its being subject to the will of Congress. The forms of administering justice and the duties and powers of courts as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will, and the power over them is unalienable, so as to bind subsequent legislatures.[19]

This language was quoted in its entirety by the Court in *United States* v. *Union Pacific R.R. Co.*,[20] a case involving a federal statute authorizing the attorney general to sue in equity against the defendant.

The power of Congress over remedies for violations of constitutional rights appears to be accepted. Last term the Court referred to it in *Bivens* v. *Six Unknown Agents*, in the course of holding that violation of the Fourth Amendment by federal agents gives rise to a cause of action for damages:

> [W]e have here no explicit congressional declaration that persons injured by a Federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in view of Congress.[21]

The chief justice's dissent to the conclusion that a damage action was proper suggested that Congress could eliminate the exclusionary rule if it "would provide some meaningful and effective remedy against unlawful conduct by government officials."[22]

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[16] Hart, *supra* note 5, at 1362, 1366; emphasis in the original.
[17] Cox, *supra* note 6, at 258.
[18] Ibid., at 259.
[19] 4 Wheat 235, 245 (1819).
[20] 98 U.S. 569 (1878).
[21] 403 U.S. 388, 397 (1971).
[22] 403 U.S. at 421.

In any case, Congress has from time to time undertaken successfully to regulate the remedies employed by federal courts. The Norris-LaGuardia Act bars the use of injunctions in certain cases involving labor disputes.[23] Though the injunctions in labor disputes were usually issued to enforce a statutory or common law right, some of them were granted under claims of constitutional right.

It seems beyond doubt, then, that Congress has substantial power over the remedies used by federal courts, even in constitutional cases, and that the source of that power in desegregation cases is located in Section 5 of the Fourteenth Amendment. We turn next to a more specific consideration of the nature of the busing remedy.

The Nature of the Busing Remedy. We have seen that Congress has substantial power over remedies. Something of the scope of that power in the desegregation area may be learned from a review of the leading cases. The basic case, of course, is *Brown* v. *Board of Education.*[24] In that case, the Supreme Court held that racial segregation in public schools, enforced by the state or its agencies, constitutes a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. That much of the holding is indisputable, but the rationale of the decision is not entirely clear. The question of the case's rationale is important because it affects the way subsequent developments are viewed..

Chief Justice Warren's opinion for the unanimous Court in *Brown I* placed special emphasis upon the damaging effects of state-sponsored school segregation upon black children. To that extent, the case may appear to be about the special position of public schools and young children under the Constitution. Yet the subsequent career of *Brown I* showed that it has a second, probably more basic, aspect. Soon afterward the Supreme Court found segregation unconstitutional in other kinds of facilities. Segregation was voided on beaches in *Mayor and City Council of Baltimore* v. *Dawson,*[25] on buses in *Gayle* v. *Browder,*[26] on golf courses in *Holmes* v. *City of Atlanta,*[27] and in parks in *New Orleans City Park Imp. Assn.* v. *Detiege.*[28] These cases were decided per curiam with only a citation to *Brown I.* This made it appear that the case stood for the more general principal of the unconstitutionality of any racial discrimination by government. The remedy in nonschool cases was simply an injunction against further discrimination.

Remedies for school segregation cases were taken up in *Brown* v. *Board of Education.*[29] The very fact that the Court dealt with the basic constitutional right in one opinion and the question of remedies in another, during different Court terms, emphasizes the important distinction between rights and remedies. That distinction is made even clearer by a comparison of the opinions. *Brown I* states an inflexible constitutional objection to *de jure* segregation. *Brown II* stresses the flexibility required in fashioning remedies. It remarks the need, not tolerated with

[23] 28 U.S.C. 101 et seq.
[24] 347 U.S. 483 (1954); hereafter referred to as *Brown I.*
[25] 350 U.S. 877 (1955).
[26] 352 U.S. 903 (1956).
[27] 350 U.S. 879 (1955).
[28] 358 U.S. 54 (1958).
[29] 349 U.S. 294 (1955); hereafter referred to as *Brown II.*

respect to the basic constitutional command, to adjust and reconcile conflicting interests. There can be no doubt from the Court's approach in *Brown II* that it entered a field where judgment, prudence, discretion, and awareness of differing situations and competing values were required. These factors sharply distinguish the problems of affirmative relief in desegregation cases from the issue, finally determined by *Brown I*, of the fundamental right. In *Brown II* the Court said:

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, *equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.* These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. [*Brown I*] Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them. [30]

These themes are prominent in the Court's most recent major pronouncement on remedies, *Swann* v. *Charlotte-Mecklenburg Board of Education.*[31] Chief Justice Warren Burger, writing for a unanimous Court, undertook to frame general guidelines for desegregation decrees. The chief justice's opinion notes that, since *Brown I*, "district courts and courts of appeals have struggled in hundreds of cases with a multitude and variety of problems under this Court's general directive. Understandably, in an area of evolving remedies, those courts had to improvise and experiment without detailed or specific guidelines." [32] The opinion thus recognizes that the cases on desegregation decrees deal essentially with questions of remedies and that the area does not involve a flat constitutional rule. Courts are obliged to "improvise and experiment without detailed or specific guidelines." That is obviously the language of discretion and remedy rather than the language of basic constitutional right.

Later in the opinion, the chief justice said that "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. *The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.*" [33] The opinion specifically recognizes that busing is a remedy that must be chosen and limited with regard to other values upon which it impinges.

> It hardly needs stating that the limits on time travel will vary with many factors, but probably with none more than the age of the students.

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[30] 349 U.S. at 300; emphasis added.
[31] 402 U.S. 1 (1971); hereafter referred to as *Swann I*.
[32] 402 U.S. at 2.
[33] 402 U.S. at 11; emphasis added.

> The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed. [34]

The need for judgment, discretion, and the balancing of conflicting interests does not, however, dispense with the affirmative obligation of school systems to dismantle the *de jure* segregation they have imposed. Though it must be read in the light of the later *Swann I*, the Court's decision in *Green* v. *County School Board of New Kent County, Virginia* [35] illustrates the point. The New Kent School Board, having been found to have maintained segregated schools, instituted a plan permitting every student to choose his school regardless of race. Though the plan resulted in very little desegregation, the board resisted the imposition of additional relief. Justice Brennan's opinion for the Court summarized the board's claim and rejected it:

> The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may "freely" choose the school he will attend. The Board attempts to cast the issue in its broadest form by arguing that its "freedom-of-choice" plan may be faulted only by reading the Fourteenth Amendment as universally requiring "compulsory integration," a reading it insists the wording of the Amendment will not support. But that argument ignores the thrust of Brown II. In the light of the command of that case, what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" Brown II held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. . . . *School boards such as the respondent then operating state-compelled dual systems were nevertheless 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. . . . The constitutional rights of Negro children articulated in* Brown I *permit no less than this. . . .* [36]

In short, a substantial measure of compulsory integration is required in a school system that formerly practiced deliberate segregation. We know from *Swann I*, however, that the obligation does not extend to achieving any particular racial balance in the school system or, indeed, even to eliminating all one-race schools. [37] The assessment of facts and the balancing of conflicting interests remain essential to defining the obligation as well as to shaping the remedy.

In some situations the constitutional obligation and the equitable remedy tend to coalesce. In *North Carolina State Board of Education* v. *Swann*, [38] the

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[34] 402 U.S. at 27.
[35] 391 U.S. 430 (1968).
[36] 391 U.S. at 437-438; emphasis added.
[37] 402 U.S. at 22-26.
[38] 402 U.S. 43 (1971); hereafter referred to as *Swann II*.

Supreme Court struck down a state law that forbade busing on account of race. The Court had little difficulty disposing of the law:

> Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems. . . .
>
> We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, "or for the purpose of creating a balance or ratio," will similarly hamper the ability of local authorities to effectively remedy constitutional violations. As noted in Swann, supra, at 29, bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it. [39]

Swann II, of course, struck down a state rather than a federal statute and is, therefore, not a controlling precedent in the present discussion. States have no authority to control federal court remedies in constitutional cases, but Congress does. North Carolina, moreover, attempted a complete ban on busing for purposes of desegregation rather than a regulation of its use. Nevertheless, the statement that it is unlikely that a truly effective remedy could be devised without continued reliance upon busing warns that the Court may well take the position that some busing is essential to the vindication of the constitutional right. It is very likely the Court would hold that Congress lacks the power to bar busing altogether as a desegregation remedy.

The cases make it clear, however, that over a fairly wide area there is room for the exercise of judgment and discretion in defining the affirmative obligation of school systems to desegregate and the equitable remedies that enforce the obligation. The law could not be otherwise; reality is too intractable to allow for an absolute rule of complete racial balance. The goal of complete dissipation of the effects of past *de jure* segregation must be balanced against its costs. These costs are measured not merely in dollars but in student inconvenience, administrative burden, and the consequent sacrifice of other educational values. At some point all courts would be willing to find the costs of additional racial balance too high.

The nature of the problem is one peculiarly suited to Congress' superior capacity for finding facts on a nationwide scale and making the detailed trade-off judgments required to frame a general rule applicable everywhere in the country. Courts, confined to particular fact situations and the record the litigants set before them, are less able to work out satisfactorily detailed legislative rules of the sort required here. That is the reason for the deference courts often show to congressional determinations of fact and to congressional alteration of remedies.

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[39] 402 U.S. at 46.

We may conclude that Congress possesses substantial power to regulate busing under Section 5 of the Fourteenth Amendment. That power is not absolute. The validity of any particular exercise of it will call for judgments of degree. We turn next to the President's specific proposals laid before Congress for its consideration.

3. Constitutionality: The Moratorium Proposal

The proposed moratorium act is an innovative piece of legislation for which no precise parallels appear to exist. A discussion of its constitutionality must enter an uncharted field of the law. There are, nevertheless, general principles available that suggest the probable constitutionality of the proposal.

A necessary premise for the constitutionality of the measure is the existence of a power in Congress to deal substantively with busing on a permanent basis. We have already seen that such a power exists. We have also concluded, however, that in all probability Congress lacks the power to ban busing completely. Because the moratorium proposal seeks to prevent any new busing orders, there is reason to doubt that Congress could validly enact its provisions as a permanent rule. There is also reason to believe, however, that the powers of Congress are correspondingly greater with respect to a short-term regulation than they are with respect to the Equal Educational Opportunities Act.

Congress' power to enact moratorium legislation in order to hold matters in status quo while it considers detailed regulation is probably best located in Article I, Section 8. Congress is there empowered "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States . . . ." The moratorium can be defended as necessary and proper for Congress to carry into execution its power to regulate remedies, a standstill in busing orders being required so that irreparable disruptions and impairments of education do not take place before Congress can act.

There is little case law dealing with moratoria of this sort. Perhaps the closest precedent is *Home Building & Loan Assn.* v. *Blaisdell*,[40] in which the Supreme Court upheld against constitutional challenge a moratorium on the remedy of mortgage foreclosure. The statute involved, the Minnesota Mortgage Moratorium Law, provided that state courts could extend the period of redemption from foreclosure sales beyond the statutory period "for such additional time as the court may deem just and equitable." The statute was passed April 18, 1933, and no such extension was to go beyond May 1, 1935. Mortgagees were rendered unable to obtain possession of land upon default and had to accept other remedies the courts might allow, such as payments of "rental value."

The challenge to the moratorium was made under the contract clause (Article I, Section 10) and the due process and equal protection clauses of the Fourteenth Amendment. At that time, these clauses were still taken seriously as constitutional

[40] 290 U.S. 398 (1934).

guarantees in the context of business and commercial regulation. The Supreme Court, dividing five to four, sustained the Minnesota statute. Writing the majority opinion in Blaisdell, Chief Justice Hughes quoted with approval from *Sturges* v. *Crowninshield*:[41]

> Chief Justice Marshall pointed out the distinction between obligation and remedy. Sturges v. Crowninshield, supra, p. 200. Said he: "The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct." [42]

Hughes also quoted Chief Justice Waite concerning the legislative alteration of judicial remedies: "In all such cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge." [43]

The Court majority approved the mortgage foreclosure moratorium and cited five criteria that are relevant to the issue raised by the busing moratorium proposed by President Nixon. These criteria are worth setting out in pertinent part:

> 1. An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community. . . .
>
> 2. The legislation was addressed to a legitimate end, that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society.
>
> 3. . . . [T]he relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency and could only be granted upon reasonable conditions.
>
> 4. The conditions upon which the period of redemption is extended do not appear to be unreasonable. [The opinion then summarized the rights of mortgagor and mortgagee. —] *It does not matter that there are, or may be, individual cases of another aspect. The legislature was entitled to deal with the general or typical situation. . . .*
>
> 5. *The legislation is temporary in operation. It is limited to the exigency which called it forth. . . .* [44]

It would be idle to pretend that *Blaisdell* is necessarily a controlling precedent for the proposed busing moratorium. We are living in different times with a different Court. But it should be remembered that at the time of *Blaisdell* the constitutional points raised against the moratorium were regarded as quite serious. The Court had not as yet abandoned its policy of protecting economic freedoms. And in one sense the moratorium act proposed by the President stands on stronger constitutional footing than the Minnesota moratorium. The latter was enacted for the

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[41] 4 Wheat 122 (1819).
[42] 290 U.S. at 430.
[43] Ibid.
[44] 290 U.S. at 444-448; emphasis added.

purpose of removing remedies for a period of time in order to favor mortgagors, while the busing moratorium is intended to preserve Congress' effective power to deal with the question of busing and would be significantly shorter than the Minnesota moratorium.

The constitutionality of the proposed moratorium act is likely to turn upon the factual showing by Congress that the freeze is "necessary and proper" to the exercise of the power to regulate remedies. To support the act Congress should show, if the facts warrant, that its attempt to frame an effective long-range solution will be significantly frustrated by developments that will occur in the interim, unless the status quo is maintained. This means, essentially, a showing of the likelihood of the entry of further large-scale busing orders with their concomitant heavy expenditure of funds, administrative disruption, and student inconvenience, all tending to disrupt and make less effective the educational process. Combined with such a showing should be an argument that there is reason to believe these orders go beyond the duty of affirmative dismantling of segregated school systems, and that the disruption and expense will have to be undergone a second time in order to comply with the further legislation contemplated by Congress.

In a word, if the moratorium act is adopted, its constitutionality is likely to depend upon the reasonableness of the factual case made that a temporary standstill is required to permit Congress to deliberate and to play its role under the Constitution.

4. Constitutionality: The Equal Educational Opportunities Proposal

The proposed Equal Educational Opportunities Act was advanced as a framework for discussion. Congress may wish to alter part or all of it, and a conclusion that one section or another raises close questions of constitutionality may provide a reason for amendment rather than for complete rejection. Some major portions of the bill seem clearly constitutional. As to others, reasonable men may and do differ.

This analysis will take up three major features of the proposed statute: (1) the prohibition on denials of equal educational opportunity contained in Section 201, (2) the various regulations of busing orders provided by Sections 402, 403, and 404 and (3) the time limits on busing orders and other desegregation decrees set by Sections 407 and 408.

Denials of Equal Educational Opportunity. Section 201's prohibition on state denials of equal educational opportunity on account of race, color, or national origin is, for the most part, obviously a restatement and enforcement of obligations already imposed upon the states by judicial interpretations of the Fourteenth Amendment. This enforcement of judicially defined constitutional commands raises no problems.

Two of the subsections of 201, however, may be read to impose obligations far beyond any the Supreme Court has seen fit to define. Section 201(c) prohibits the assignment of a student to a school other than the one closest to his home if the result is to increase the degree of segregation by race, color, or national origin.

Section 201(f) requires schools to take "appropriate action to overcome language barriers." Since these subsections do not explicitly refer to a forbidden segregatory intent, it would be possible to interpret them as imposing obligations upon schools that have never practiced *de jure* segregation. They could be seen, that is, as an attempt by Congress to legislate in the *de facto* area.

This reading of 201(c) and (f) would raise such grave issues of constitutional policy that it seems clearly preferable to interpret these subsections as prohibiting, in conformity with the rest of the bill, only a deliberate policy of discrimination. The Fourteenth Amendment is, by its terms, a prohibition of discriminatory governmental action: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." This prohibition seems to be limited to an affirmative policy of denial by the state, and that conclusion is buttressed by a consideration of what any other reading would mean. To say that the state acts when it merely fails to act to prevent private discrimination or when it fails to take affirmative steps to alleviate private disadvantages is to say that every private action and every social condition raises a problem to be decided under the Constitution. All such questions become referable to, and ultimately determinable by, the federal judiciary. That, in turn, means that the judiciary would become the legislature. In that event, the judicial arm may, in fact it would be required to, provide an exhaustive and detailed code of conduct for the nation. That result would dispense with representative democracy as the basic mode of government, an outcome hardly contemplated by the men who wrote, adopted, and ratified the Fourteenth Amendment.

This difficulty with any interpretation that applies the strictures of the Fourteenth Amendment to *de facto* cases has led to attempts to say that Congress' power under the amendment is broader than that of the courts. Thus, it is suggested, the Court may not reach *de facto* situations but the Congress may. That solution leaves the legislative power where it belongs, in the Congress. A few years ago the Supreme Court seemed ready to adopt this solution. Perhaps it still may. The solution seems improper, however, for it leaves the legislative power where it belongs only as between Congress and the Court, and shifts it impermissibly to Congress from the state legislatures. There is no warrant in the language or history of Section 5 to suppose that it is a national police power superior to that of the states. The power to "enforce" the Fourteenth Amendment is the power to provide and regulate remedies, not the power to define the scope of the amendment's command or to expand its reach indefinitely.

To read 201(c) and (f) of the equal opportunities bill as dispensing with the need for a forbidden discriminatory intent by an agency of government, therefore, is to impute a casual attempt to alter drastically the relation between the federal and state government and to raise a profound issue of constitutionality in the wrong way.

The suggestion that these subsections be interpreted to require a discriminatory intent is strengthened by the unfortunate practical results that would attend another interpretation. Subsection 201(c), if applied to *de facto* situations, would require that every school system in the country inquire into and keep records of the national

origin of all of its students. If, for entirely legitimate educational reasons, a boy of Polish or Italian or German extraction, wished to attend a school other than the one closest to his home, the school system would be required to calculate the percentages of students of the same national origin in each school and to deny the boy's request if there were more Polish, Italian, or German students in the school he wanted than in the one nearest his home. That would not only be cruel and unnecessary, but it would also call attention to group differences and create group tensions where none had previously existed. The same unfortunate results would also occur in communities without previous racial tensions. The unwisdom of reading 201(c) and (f) as applying to situations in which no one has discriminated seems, in itself, sufficient reason against such an interpretation.

Regulation of Busing Remedies. The regulation of busing as a remedy constitutes the most heatedly debated portion of the proposed Equal Educational Opportunities Act. The primary regulations are the strict control of busing for children in the sixth grade and below, the less severe control of busing for children in grades seven through twelve, and the prohibition against amalgamating school districts to achieve desegregation unless the district lines were drawn with segregatory intent.

Busing of students: sixth grade and below. Section 403(a) of the bill forbids the implementation of any plan that, as applied to students in the sixth grade or below, would require an increase in the average daily distance (or average daily time) of travel over the comparable averages for the preceding year in the school system *or* in the average daily number of such students being bused. It is important to stress that children in the sixth grade or below (hereafter "elementary school students") can be bused for desegregation purposes under Section 403(a). Where children have previously been bused to accomplish segregation, patterns of busing may be changed so as to accomplish integration without violating the statute. This permits a cure for the most flagrant examples of *de jure* segregation. Many other dual school systems can be unified with other forms of remedies, often in combination with some rearrangements of existing busing routes.

The purpose of the provision, however, is to limit the busing of elementary school children, and there may be cases in which a district judge, free of the inhibitions of this measure, would order more busing than it permits. It is the existence of this situation that some commentators believe renders the proposal unconstitutional. But such an analysis seems simplistic. We have seen that Congress has significant power to regulate remedies, and, by definition, that means the power to require courts to apply different remedies than they would have chosen if they were completely free.

The issue of constitutionality is not whether the proposed act would inhibit the use of busing (of course it would) but whether the inhibition is so great that the courts would be rendered unable to perform their constitutional function. We are necessarily dealing with a question of degree. There are good reasons to think that the degree of inhibition here is not so great as to interfere with the constitutional role of the courts. The constitutional per se rule of *Brown I* (a state or its agencies may not discriminate on grounds of race) is left entirely intact. The

affirmative duty of a *de jure* segregated school system to desegregate is left intact. That duty, as we have seen, cannot be an absolute, and has never been held to be an absolute, because other values must be taken into account. There are many remedies other than busing available to courts and a limitation upon busing for elementary school children hardly appears to be an exercise of judgment beyond the proper scope of Congress' powers. If it is, Congress has very little real power under Section 5 of the Fourteenth Amendment.

The constitutionality of this provision depends essentially upon the reasonableness of the judgments that busing is less appropriate for children in the elementary grades than it is for older students and that factors of time and distance as well as numbers of children involved are relevant criteria. Arguments for and against these propositions have often been made and there is no need to rehearse them here. Suffice it to say that reasonable men can conclude that the propositions are correct.

It may be possible to construct an example in which the regulation of busing elementary school children seems unduly restrictive, but that is not sufficient reason to discard the entire statute. As Chief Justice Hughes said after noting the reasonableness of the Minnesota mortgage law, "It does not matter that there are, or may be, individual cases of another aspect. The legislature was entitled to deal with the general or typical situation." [45]

Finally, Section 403(a) gains support from the fact that the Supreme Court has recognized as proper the type of distinction the law draws. In discussing the factors to be weighed in framing busing orders, Chief Justice Burger stated in *Swann I:* It hardly needs stating that limits on time of travel will vary with many factors, *but probably with none more than the age of the students.*" [46]

On balance, therefore, it appears that a good case can be made for the constitutionality of the President's proposal to limit busing of elementary school children.

Busing of students: seventh grade and above. There would appear to be very little constitutional problem with the restrictions on busing junior high school and high school children found in Sections 402 and 403(b) of the bill. These provisions make busing a remedy of last resort. Section 403(b) also prohibits a net increase in busing, but it contains an escape clause: The court may order an increase if the court finds "clear and convincing evidence" demonstrating that no other method will provide an adequate remedy. The other methods, specified by Section 402 in the order of their desirability, range from assigning students to the schools closest to their homes to constructing or establishing magnet schools or educational parks. The most that Congress can be said to have done is to indicate a clear disapproval of unnecessary busing and to require the court to go through a checklist of remedies to make absolutely certain that busing is necessary before it is decreed. It is difficult to believe that this is not well within Congress' power under the Constitution.

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[45] 290 U.S. at 446.

[46] 402 U.S. at 31; emphasis added.

Preservation of school district lines. Section 404 of the act requires that lines drawn by a state, subdividing its territory into separate school districts, shall not be ignored or altered unless it is established that the lines were drawn with segregatory intent and effect. This seems a perfectly reasonable requirement. If a school district has engaged in *de jure* segregation, it has separated pupils within the district. Completely adequate relief can be afforded by requiring the dismantling of the dual school system. There is hardly any justification for altering or ignoring district lines to bus in students from a neighboring district, particularly if that district has not engaged in racial segregation. To order busing across district lines in such circumstances is to treat students not segregated by governmental action as pools of racial resources available to cure racial imbalance. Nothing in the Fourteenth Amendment requires such judicial action.

Time Limits on Court Orders. Section 407 provides that any busing order shall expire after five years of good faith compliance by the school system involved. No additional busing order may be entered unless the system once more engages in *de jure* discrimination. Section 408 provides a ten-year limit for all desegregation orders and contains identical conditions for additional orders.

These time limits are premised on the idea that a school system should be permitted to purge itself of past *de jure* violations and thereafter to be treated like any other school system in the country. Aside from the obvious equity of such treatment, it is obviously unwise to treat a violation of the Fourteenth Amendment as an occasion for indefinite federal judicial supervision of local school systems. Limitations upon the period of equitable decrees are common in the law, and there is a strong case in this field for a uniform period of limitation established by Congress. It is not desirable to subject school systems to widely varying periods of remedy and supervision because of the accident of being located in different judicial districts.

The principle of a time limitation upon desegregation decrees, moreover, has been endorsed by the Supreme Court in *Swann I*:

> At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems will then be "unitary" in the sense required by our decisions in *Green* and *Alexander*.
>
> It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic pat-

terns to affect the racial composition of the schools, further intervention by a district court should not be necessary.[47]

There appears, therefore, to be little or no constitutional objection to the act's setting of time limits upon busing orders or other desegregation decrees.

5. Conclusion

This analysis indicates that Congress probably has the constitutional power to enact the student transportation moratorium and the equal educational opportunities bills proposed by the President. These measures, properly construed, do not attempt to overturn the relationship between the legislature and the judiciary. They deal with remedies and do so in a limited way. Because there are few direct precedents in this area, any responsible legal judgment must necessarily be qualified. Some highly reputable legal scholars have apparently concluded that the constitutionality of these measures is very doubtful. The considerations set forth here, however, point toward their constitutionality.

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[47] 402 U.S. at 32.

APPENDIX A

Text of Student Transportation Moratorium Bill, H. R. 13916

A bill to impose a moratorium on new and additional student transportation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
That this Act may be cited as the "Student Transportation Moratorium Act of 1972."

Findings and Purpose

Section 2. (a) The Congress finds that:

(1) For the purpose of desegregation, many local educational agencies have been required to reorganize their school systems, to reassign students, and to engage in the extensive transportation of students.

(2) In many cases these reorganizations, with attendant increases in student transportation, have caused substantial hardship to the children thereby affected, have impinged on the educational process in which they are involved, and have required increases in student transportation often in excess of that necessary to accomplish desegregation.

(3) There is a need to establish a clear, rational, and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in discharging its obligation under the fourteenth amendment to the United States Constitution to desegregate its schools.

(4) The Congress is presently considering legislation to establish such a standard and define that obligation.

(5) There is a substantial likelihood that, pending enactment of such legislation, many local educational agencies will be required to implement desegregation plans that impose a greater obligation than required by the fourteenth amendment and permitted by such pending legislation and that these plans will require modification in light of the legislation's requirements.

(6) Implementation of desegregation plans will in many cases require local educational agencies to expend large amounts of funds for transportation equipment, which may be utilized only temporarily, and for its operation, thus diverting those funds from improvements in educational facilities and instruction which otherwise would be provided.

(7) The modification of school schedules and student assignments resulting

[1] Introduced in the House of Representatives on March 20, 1972, by Rep. William M. McCulloch (R.-Ohio), with Rep. Gerald R. Ford (R.-Mich.) as co-sponsor, and referred to the Committee on Judiciary. A companion bill (S. 3388) was introduced in the Senate by Senator Roman L. Hruska (R.-Neb.).

from implementation of desegregation plans and any subsequent modification in light of the legislation's requirements would place substantial unnecessary administrative burdens on local educational agencies and unduly disrupt the educational process.

(b) It is, therefore, the purpose of this Act to impose a moratorium on the implementation of Federal court orders that require local educational agencies to transport students and on the implementation of certain desegregation plans under title VI of the Civil Rights Act of 1964, in order to provide Congress time to fashion such a standard, and to define such an obligation.

Moratorium on Orders and Plans

Section 3. (a) During the period beginning with the day after the date of enactment of this Act and ending with July 1, 1973, or the date of enactment of legislation which the Congress declares to be that contemplated by section 2(a) (4), whichever is earlier, the implementation of any order of a court of the United States entered during such period shall be stayed to the extent it requires, directly or indirectly, a local educational agency—

(1) to transport a student who was not being transported by such local educational agency immediately prior to the entry of such order; or

(2) to transport a student to or from a school to which or from which such student was not being transported by such local educational agency immediately prior to the entry of such order.

(b) During the period described in subsection (a) of this section, a local educational agency shall not be required to implement a desegregation plan submitted to a department or agency of the United States during such period pursuant to title VI of the Civil Rights Act of 1964 to the extent that such plan provides for such local educational agency to carry out any action described in clauses (1) or (2) of subsection (a) of this section.

(c) Nothing in this Act shall prohibit an educational agency from proposing, adopting, requiring, or implementing any desegregation plan, otherwise lawful, that exceeds the limitations specified in subsection (a) of this section, nor shall any court of the United States or department or agency of the Federal Government be prohibited from approving implementation of a plan that exceeds the limitations specified in subsection (a) of this section if the plan is voluntarily proposed by the appropriate educational agency.

Section 4. For purposes of this Act—

(a) The term "desegregation" means desegregation as defined by section 401(b) of the Civil Rights Act of 1964.

(b) The term "local educational agency" means a local educational agency as defined by section 801(f) of the Elementary and Secondary Education Act of 1965.

(c) A local educational agency shall be deemed to transport a student if it pays any part of the cost of such student's transportation, or otherwise provides such transportation.

APPENDIX B

Text of Equal Educational Opportunities Bill, H. R. 13915[1]

A bill to further the achievement of equal educational opportunities.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
That this Act may be cited as the "Equal Educational Opportunities Act of 1972".

Policy and Purpose

Section 2. (a) The Congress declares it to be the policy of the United States that—

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, or national origin; and

(2) the neighborhood is an appropriate basis for determining public school assignments.

(b) In order to carry out this policy, it is the purpose of this Act to provide Federal financial assistance for educationally deprived students and to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.

Findings

Section 3. (a) The Congress finds that—

(1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment;

(2) the abolition of dual school systems has been virtually completed and great progress has been made and is being made toward the elimination of the vestiges of those systems;

(3) for the purpose of abolishing dual school systems and eliminating the vestiges thereof, many local educational agencies have been required to reorganize their school systems, to reassign students, and to engage in the extensive transportation of students;

(4) the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies

[1] Introduced in the House of Representatives on March 20, 1972, by Rep. William M. McCulloch (R.-Ohio), with Reps. Albert Quie (R.-Minn.) and Gerald R. Ford (R.-Mich.) as co-sponsors, and referred to the Committee on Education and Labor. A companion bill (S. 3395) was introduced in the Senate by Senator Peter H. Dominick (R.-Colo.).

to expend large amounts of funds, thereby depleting their financial resources available for the maintenance or improvement of the quality of educational facilities and instruction provided;

(5) excessive transportation of students creates serious risks to their health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their educational opportunity;

(6) the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades; and

(7) the guidelines provided by the courts for fashioning remedies to dismantle dual school systems have been, as the Supreme Court of the United States has said, "incomplete and imperfect," and have failed to establish a clear, rational, and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.

(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems.

Declaration

Section 4. The Congress declares that this Act is the legislation contemplated by section 2(a)(4) of the "Student Transportation Moratorium Act of 1972."

TITLE I—ASSISTANCE

Concentration of Resources for Compensatory Education

Section 101. (a) The Secretary of Health, Education, and Welfare (hereinafter in this Act referred to as the "Secretary") and the Commissioner of Education shall—

(1) in the administration, consistent with the provisions thereof, of the program established by title I of the Elementary and Secondary Education Act of 1965; and

(2) in the administration of any program designed to assist local educational agencies in achieving desegregation or preventing, reducing, or eliminating isolation based on race, color, or national origin in the public schools;

take such action consistent with the provisions of this title, as the Secretary deems necessary to provide assistance under such programs (notwithstanding any provision of law which establishes a program described by clause (2) of this subsection) in such a manner as to concentrate, consistent with such criteria as the Secretary may prescribe by regulation, the funds available for carrying out such programs for the provision of basic instructional services and basic supportive services for educationally deprived students.

(b) A local educational agency shall be eligible for assistance during a fiscal year under any program described by clause (2) of subsection (a) of this section

(notwithstanding any provision of law which establishes such program) if it—

(1) is eligible for a basic grant for such fiscal year under title I of the Elementary and Secondary Education Act of 1965;

(2) operates a school during such fiscal year in which a substantial proportion of the students enrolled are from low-income families; and

(3) provides assurances satisfactory to the Secretary that services provided during such fiscal year from State and local funds with respect to each of the schools described in clause (2) of this subsection of such agency will be at least comparable to the services provided from such funds with respect to the other schools of such agency.

(c) In carrying out this section, the Secretary and the Commissioner of Education shall seek to provide assistance in such a manner that—

(1) the amount of funds available for the provision of basic instructional services and basic supportive services for educationally deprived students in the school districts of local educational agencies which receive assistance under any program described in clause (1) or (2) of subsection (a) of this section is adequate to meet the needs of such students for such services; and

(2) there will be adequate provision for meeting the needs for such services of students in such school districts who transfer from schools in which a higher proportion of the number of students enrolled are from low-income families to schools in which a lower proportion of the number of students enrolled are from such families;

except that nothing in this title shall authorize the provision of assistance in such a manner as to encourage or reward the transfer of a student from a school in which students of his race are in the minority to a school in which students of his race are in the majority or the transfer of a student which would increase the degree of racial impaction in the schools of any local education agency.

(d) The Secretary shall prescribe by regulation the proportions of students from low-income families to be used in the program established by this title and may prescribe a range of family incomes, taking into account family size, for the purpose of determining whether a family is a low-income family.

Effect on Entitlements and Allotment Formulas

Section 102. Nothing in this title shall be construed to authorize the Secretary or the Commissioner of Education to—

(1) alter the amount of a grant which any local educational agency is eligible to receive for a fiscal year under title I of the Elementary and Secondary Education Act of 1965; or

(2) alter the basis on which funds appropriated for carrying out a program described by section 101(a)(2) of this title would otherwise be allotted or apportioned among the States.

Section 103. Upon aproval of a grant to a local educational agency to carry out the provisions of this title, the assurances required by the Secretary or the Commissioner of Education pursuant thereto shall constitute the terms of a contract

between the United States and the local educational agency, which shall be specifically enforceable in action brought by the United States.

TITLE II—UNLAWFUL PRACTICES

Denial of Equal Educational Opportunity Prohibited

Section 201. No State shall deny equal educational opportunity to an individual on account of his race, color, or national origin, by—

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;

(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with title IV of this Act, to remove the vestiges of a dual school system;

(c) the assignment by an educational agency of a student to a school, other than the one closest to his place of residence within the school district in which he resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignments to schools of its faculty or staff;

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

Racial Balance not Required

Section 202. The failure of an educational agency to attain a balance, on the basis of race, color, or national origin, of students among its schools shall not constitute a denial of equal educational opportunity, or equal protection of the laws.

Assignment on Neighborhood Basis not a Denial of Equal Educational Opportunity

Section 203. Subject to the other provisions of this title, the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity unless such assignment is for the purpose of segregating students on the basis of race, color, or national origin, or the school to which such student is assigned was located on its site for the purpose of segregating students on such basis.

TITLE III—ENFORCEMENT

Civil Actions

Section 301. An individual denied an equal educational opportunity, as defined by this Act, may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this Act referred to as the "Attorney General"), for or in the name of the United States, may also institute such a civil action on behalf of such an individual.

Jurisdiction of District Courts

Section 302. The appropriate district court of the United States shall have and exercise jurisdiction of proceedings instituted under section 301.

Intervention by Attorney General

Section 303. Whenever a civil action is instituted under section 301 by an individual, the Attorney General may intervene in such action upon timely application.

Suits by the Attorney General

Section 304. The Attorney General shall not institute a civil action under section 301 before he—

(a) gives to the appropriate educational agency notice of the condition or conditions which, in his judgment, constitute a violation of title II of this Act; and

(b) certifies to the appropriate district court of the United States that he is satisfied that such educational agency has not, within a reasonable time after such notice, undertaken appropriate remedial action.

Attorneys' Fees

Section 305. In any civil action instituted under this Act, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs, and the United States shall be liable for costs to the same extent as a private person.

TITLE IV—REMEDIES

Formulating Remedies; Applicability

Section 401. In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws.

Section 402. In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, which may involve directly or indirectly the transportation of students, a court, department, or agency of the United States shall consider and make specific findings on the efficacy in correcting such denial of the following remedies and shall require implementation of the first of the remedies set out below, or on the first combination thereof, which would remedy such denial:

(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without exceeding the transportation limits set forth in section 403;

(e) the construction of new schools or the closing of inferior schools;

(f) the construction or establishment of magnet schools or educational parks; or

(g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 403 and 404 of this Act.

Transportation of Students

Section 403. (a) No court, department, or agency of the United States shall, pursuant to section 402, order the implementation of a plan that would require an increase for any school year in—

(1) either the average daily distance to be traveled by, or the average daily time of travel for, all students in the sixth grade or below transported by an educational agency over the comparable averages for the preceding school year; or

(2) the average daily number of students in the sixth grade or below transported by an educational agency over the comparable average for the preceding school year, disregarding the transportation of any student which results from a change in such student's residence, his advancement to a higher level of education, or his attendance at a school operated by an educational agency for the first time.

(b) No court, department, or agency of the United States shall, pursuant to section 402, order the implementation of a plan which would require an increase for any school year in—

(1) either the average daily distance to be traveled by, or the average daily time of travel for, all students in the seventh grade or above transported

by an educational agency over the comparable averages for the preceding school year; or

(2) the average daily number of students in the seventh grade or above transported by an educational agency over the comparable average for the preceding school year, disregarding the transportation of any student which results from a change in such student's residence, his advancement to a higher level of education, or his attendance at a school operated by an educational agency for the first time,

unless it is demonstrated by clear and convincing evidence that no other method set out in section 402 will provide an adequate remedy for the denial of equal educational opportunity or equal protection of the laws that has been found by such court, department, or agency. The implementation of a plan calling for increased transportation, as described in clause (1) or (2) of this subsection, shall be deemed a temporary measure. In any event such plan shall be subject to the limitation of section 407 of this Act and shall only be ordered in conjunction with the development of a long term plan involving one or more of the remedies set out in clauses (a) through (g) of section 402. If a United States district court orders implementation of a plan requiring an increase in transportation, as described in clause (1) or (2) of this subsection, the appropriate court of appeals shall, upon timely application by a defendant educational agency, grant a stay of such order until it has reviewed such order.

(c) No court, department, or agency of the United States shall require directly or indirectly the transportation of any student if such transportation poses a risk to the health of such student or constitutes a significant impingement on the educational process with respect to such student.

District Lines

Section 404. In the formulation of remedies under section 401 or 402 of this Act, the lines drawn by a State, subdividing its territory into separate school districts, shall not be ignored or altered except where it is established that the lines were drawn for the purpose, and had the effect, of segregating children among public schools on the basis of race, color, or national origin.

Voluntary Adoption of Remedies

Section 405. Nothing in this Act prohibits an educational agency from proposing, adopting, requiring, or implementing any plan of desegregation, otherwise lawful, that is at variance with the standards set out in this title, nor shall any court, department, or agency of the United States be prohibited from approving implementation of a plan which goes beyond what can be required under this title, if such plan is voluntarily proposed by the appropriate educational agency.

Reopening Proceedings

Section 406. On the application of an educational agency, court orders or desegregation plans under title VI of the Civil Rights Act of 1964 in effect on the

date of enactment of this Act and intended to end segregation of students on the basis of race, color, or national origin shall be reopened and modified to comply with the provisions of this Act.

Time Limitation on Orders

Section 407. Any court order requiring, directly or indirectly, the transportation of students for the purpose of remedying a denial of the equal protection of the laws shall, to the extent of such transportation, terminate after it has been in effect for five years if the defendant educational agency is found to have been in good faith compliance with such order for such period. No additional order requiring such educational agency to transport students for such purpose shall be entered unless such agency is found to have denied equal educational opportunity or the equal protection of the laws subsequent to such order, nor remain in effect for more than five years.

Section 408. Any court order requiring the desegregation of a school system shall terminate after it has been in effect for ten years if the defendant educational agency is found to have been in good faith compliance with such order for such period. No additional order shall be entered against such agency for such purpose unless such agency is found to have denied equal educational opportunity or the equal protection of the laws subsequent to such order, nor remain in effect for more than ten years.

Section 409. For the purposes of sections 407 and 408 of this Act, no period of time prior to the effective date of this Act, shall be included in determining the termination date of an order.

TITLE V—DEFINITIONS

Section 501. For the purposes of this Act—

(a) The term "educational agency" means a local educational agency or a "State educational agency" as defined by section 801 (k) of the Elementary and Secondary Education Act of 1965.

(b) The term "local educational agency" means a local educational agency as defined by section 801(f) of the Elementary and Secondary Education Act of 1965.

(c) The term "segregation" means the operation of a school system in which students are wholly or substantially separated among the schools of an educational agency or within a school on the basis of race, color, or national origin.

(d) The term "desegregation" means "desegregation" as defined by section 401(b) of the Civil Rights Act of 1964.

(e) An educational agency shall be deemed to transport a student if any part of the cost of such student's transportation is paid by such agency.

(f) The term "basic instructional services" means instructional services in the field of mathematics or language skills which meet such standards as the Secretary may prescribe.

(g) The term "basic supportive services" means non-instructional services, including health or nutritional services, as prescribed by the Secretary.

(h) Expenditures for basic instructional services or basic supportive services do not include expenditures for administration, operation and maintenance of plant, or for capital outlay, or such other expenditures as the Secretary may prescribe.