



NORTH CAROLINA LAW REVIEW

Volume 51 | Number 4

Article 1

3-1-1973

Beyond Desegregation -- What Ought to Be Done

Richardson Preyer

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>

 Part of the [Law Commons](#)

Recommended Citation

Richardson Preyer, *Beyond Desegregation -- What Ought to Be Done*, 51 N.C. L. REV. 657 (1973).

Available at: <http://scholarship.law.unc.edu/nclr/vol51/iss4/1>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

BEYOND DESEGREGATION—WHAT OUGHT TO BE DONE?

RICHARDSON PREYER†

In many respects the Civil Rights revolution of the 1960's was a striking success. But in the area of education we have largely had a psychological victory and practical failure. Many of our southern friends told us that things were not all so simple, and that there would be different reactions when the tough school integration problem came north. We know now that much of what they said was right.

—Congressman Morris K. Udall¹

A main concern of American public life in the last century has been to bring the black man from slavery into the mainstream of American society. In the long view of history, our country will be judged to have made a great effort, unprecedented in the history of mankind, to achieve this goal.

The capstone of this effort was to have been the integrated school system. It was thought that the integration of schools would work out very much like the integration of athletic teams and of restaurants, motels, movie houses and other public facilities. Once the discriminatory laws and customs were broken down and blacks, even if only a few, were admitted to formerly all white schools, integration would follow naturally and relatively painlessly. Everyone would realize how unfair the past practices had been and would welcome the new dispensation as lifting a great load of guilt from the national conscience. It has not worked out that way, because the desegregation of schools, unlike the desegregation of sports and lunch counters, involves the restructuring of educational institutions and conflicts with other important values.

It is difficult for liberal and progressive people to admit that integration is not working, for they have invested an enormous amount of emotional capital in the ideal of integrated schools, and they continue to see the difficulties as being caused primarily by white racism. While a small number of parents may be die-hard segregationists, I submit that the majority of them are conscientious and sincere and are concerned for the welfare of their children. They are good citizens who, by

†Member of the United States House of Representatives.

¹118 CONG. REC. H1883 (daily ed. Mar. 8, 1972).

and large, have faithfully supported public education and who have provided the resources to nourish it. They have also accepted integration as right and just. But they are heartsick to see the deterioration in discipline and in the quality of education in our schools and what this means for the future of their children. They see the education and life chances of their children being jeopardized in the interest of improving others. They do not object to leveling up, but violently resist leveling down.

Actually, the effort to bring the black man into the mainstream of society through school desegregation has been both a success and a failure. It has been a success in that the principle of legal, official segregation has been denied everywhere. The legal structure of segregated schools has been destroyed and the idea repudiated. For moral as well as historical reasons, all of the United States stand firmly for the principles of racial equality. This has been a considerable achievement. But it has been a failure in that dismantling the legal, official structure of segregation has not automatically integrated schools.

The extent of the failure can be illustrated by two points on which there is a reasonable degree of consensus: (1) there is a high degree of racial segregation in the nation's public schools despite *Brown v. Board of Education*;² and (2) there is a substantial gap between Negro and white educational achievement levels.³

The exclusive response of courts to these two problems has been to order more actual integration of schools. To the question of how much further we should push beyond the abolition of official segregation (and thereby increase actual integration in schools), the courts have answered that the objective is "the greatest possible degree of actual desegregation."⁴ In practice this works out as the effort to approximate racial balance as closely as possible through the use of cross-busing. This is where the trouble begins.

²A few excerpts from a survey taken during the fall of 1971 by the Office of Civil Rights, U.S. Department of Health, Education and Welfare revealed the following percentages of blacks within various school systems attending 80-100 percent black schools: Atlanta, 85.9%; Boston, 63.2%; Cleveland, 91.3%; Dallas, 83.4%; Denver, 36.5%; Detroit, 78.6%; Houston, 86.0%; Indianapolis, 60.1%; Kansas City, 86.4%; Los Angeles, 86.6%; Louisville, 82.3%; Milwaukee, 78.8%; Newark, 91.3%; Oakland, 73.1%; New Orleans, 80.8%; St. Louis, 89.8%; Washington D.C., 97.6%. Office of Civil Rights, HEW, Press Release (Jan. 16, 1972).

³1 U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 73-74 (1967). Similar findings are contained in U.S. DEP'T OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966) [hereinafter cited as COLEMAN REPORT].

⁴Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971).

Racial balance as a remedy for illegal segregation derives a logical and idealistic appeal from being the opposite of official segregation. The black columnist for the *Washington Post*, William Raspberry, has said: "Racial segregation in public schools is both foolish and wrong, which has led a lot of us to suppose that school integration must, therefore, be wise and just. It ain't necessarily so." We now realize, as Professor Bickel says, that "The actual integration of schools on a significant scale is an enormously difficult undertaking, if a possible one at all. Certainly it creates as many problems as it purports to solve, and no one can be sure that even if accomplished, it would yield an educational return."⁶

The courts have been unable to achieve the best educational results using this racial balance approach because courts cannot control all the conditions necessary to bring about educationally effective integration. We do not have much evidence on what makes for educationally effective integration, but the evidence we do have, primarily the *Coleman Report*, indicates that improving the education of low-income students requires integration with middle-income students in a proportion that assures a majority of middle-income students. There is no benefit derived from mixing low-low-income students with other low-income students, and if low-income students constitute a majority when mixed with middle-income students, the education of both groups suffers.⁷ This means that educationally effective integration requires a delicate balancing of low-income and middle-income students.

The courts, however, are unable to control this balance because people are free to live wherever they choose and are free to send their children to private schools. As a result, we get the phenomenon of

⁶Raspberry, *Concentration on Integration Is Doing Little for Education*, *Washington Post*, Feb. 20, 1970, § A, at 31, col. 6.

⁷Bickel, *Where Do We Go From Here?*, *THE NEW REPUBLIC*, Feb. 7, 1970, at 20.

⁷COLEMAN REPORT. The *Coleman Report* was the result of a gigantic social science research project mandated by the Civil Rights Act of 1964, Pub. L. No. 88-352, § 402, 78 Stat. 247: "The Commissioner (of the U.S. Office of Education) shall conduct a survey and make a report to the President and the Congress, within two years . . . of the enactment of this title, concerning the lack of availability of equal educational opportunities for individuals by reason of race, color, religion, or national origin in public educational institutions at all levels in the United States, its territories and possessions, and the District of Columbia." Heading the team of researchers was James S. Coleman of Johns Hopkins University. The findings of the *Coleman Report* were essentially confirmed by a series of published essays following a faculty symposium on the report at Harvard University: *ON EQUALITY OF EDUCATIONAL OPPORTUNITY* (F. MOSTELLER & D. MOYNIHAN ed. 1972).

“white flight” from the public schools and “resegregation,” and the educationally effective balance is continually disturbed.⁸

It is difficult to condemn any parent, rich or poor, for seeking the best schooling for his child that he can find and afford. But parents with lower incomes have much less choice, and this has an invidious consequence, because where the integration of schools is possible, the burden of bringing it about falls heaviest on low-income whites. Many low-income parents have chosen their place of residence largely on the basis of the schools available, exercising almost the only degree of choice they have. It is small wonder that they explode emotionally when they are told that their children must be sent elsewhere to further what they consider a vague sociological goal rather than the interests of their children. They resent this as an unfair restriction on their freedom of choice, rather than being concerned with busing as such.

In some areas of the country, especially the large cities of the North and East, integration by racial balance seems a practical impossibility. For example, it is hard to see how the twenty-square-mile black area of Chicago can be integrated in any practicable way. This situation creates two consequences. It leads to a discriminatory legal double standard whereby law and school policy are applied differently in different areas of the country. Furthermore, it begs the question of what is to be done about the black inner-city schools of our large cities, for they should not be left in isolation while we turn our attention to integrating those schools in which integration is possible.

The controversy over school integration has, of course, led to demands on Congress to “do something.” Congressional response has been reluctant and uncertain. As might be expected, there has been considerable posturing, with attacks on the courts and statements on the evils of busing, often without the suggestion of constructive alternatives. There have been piecemeal legislative attacks on the problems in the form of amendments to education legislation to prevent the use of federal funds for busing or to provide some form of moratorium on court orders.⁹ Only in the past year has Congress considered comprehensive

⁸The problem is illustrated in a recent letter from the Chairman of the Norfolk, Va., City School Board: “The pupil assignments in Norfolk are now governed by the extreme and counter-productive plan of court ordered integration involving racial balance through extensive cross busing. Our public transportation system is completely inadequate to take care of the load placed upon it and we have suffered the loss of approximately 20 percent of our white pupils over the last two school years.” Letter from Vincent J. Thomas to Richardson Preyer, March 7, 1972.

⁹Amendments to the Education Amendments of 1971 offered by Congressman John Ashbrook,

legislation to deal with the problems as a whole or attempted to express a national policy on the subject. The objective of these comprehensive bills, with different degrees of emphasis, is to formulate a national policy designed to encourage a reduction of *de facto* (unofficial) school segregation and to deal constructively with the problem of achievement disparities in those situations in which racial concentration remains. The comprehensive bills fall into three major categories.¹⁰

COMPENSATORY SPENDING

The first category of proposed legislation is based on "improving the schools where they are." It appeals to those who want no further integration in our schools. An example of this type of bill is H.R. 12367.¹¹ The instrument for improving schools where they are is compensatory spending. The difficulty with this approach, apart from its overtones of a return to the "separate but equal" doctrine, is that there is a great deal of evidence to indicate that compensatory spending has no measurable effect in improving the educational achievements of the recipients.¹²

Congresswoman Edith Green and Congressman William Broomfield were adopted by the House of Representatives on Nov. 4, 1971. 117 CONG. REC. H10437-79 (daily ed. Nov. 4, 1971) (Ashbrook amendment). Although weakened by the House-Senate Conference Committee, these amendments are now public law. See 118 CONG. REC. S8374-404 (daily ed. May 24, 1972) (Education Amendments of 1972 Conference Report). The Ashbrook and Green amendments were attempts to restrict the use of federal and state funds for the transportation of students. Education Amendments of 1972, §§ 802-03, 86 Stat. 371-72, *to be codified at* 20 U.S.C. §§ 1652-53. The Broomfield amendment would postpone the implementation of district court busing orders designed "for the purposes of achieving a balance among students with respect to race, sex, religion, or socioeconomic status . . . until all appeals in connection with such an order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired." The section expires at midnight on January 1, 1974. Education Amendments of 1972, § 803, 86 Stat. 372, *to be codified at* 20 U.S.C. § 1653.

In spite of the Broomfield amendment, the Supreme Court has thus far refused to stay any district court busing order pursuant to the provisions of the amendment. On September 1, 1972, Mr. Justice Powell denied a stay of a district court order which embraced a plan for the desegregation of twenty-nine elementary schools in Augusta, Georgia. Justice Powell ruled that the moratorium provision of the Higher Education Amendments applied only to plans to correct *de facto* segregation and not, as in Augusta, to desegregation orders within the remedial power of a district court under the *Swann* decision. *Drummond v. Acree*, 93 S. Ct. 18 (Powell, Circuit Justice, 1972).

¹⁰The present article deals only with legislative solutions to the problem of equal educational opportunity. Discussion of the various proposed constitutional amendments to limit busing is omitted.

¹¹92d Cong., 1st Sess. (1971). Congressman William D. Ford of Michigan was the principal sponsor of the bill.

¹²The U.S. Office of Education has recently published a review of data regarding the effective-

Educational achievement appears to depend not on the quality of the school itself but "largely on a single input, the characteristics of the entering children."¹³ These characteristics are determined by a number of factors, including genetics, environment (especially the first four years), family background (including the nutrition of the mother when pregnant with the child), and the influence of television. Compensatory spending on schools touches none of these factors.

Compensatory spending as the sole answer to our school problem is no answer. But despite the findings that compensatory programs have no effect on achievement, compensatory spending should not be ruled out as a part of the answer. For one thing, schools deserve adequate financing, if only on the theory that most people spend a sixth of their lives in schools, which therefore should be pleasant places. For another, it is possible that there is a dollar and program threshold that must be reached before compensatory spending begins to register an achievement effect. There has probably been much "Mickey Mouse" business in compensatory programming which is being eliminated, such as taking children to the zoo to broaden their cultural horizons. Furthermore, expenditures per pupil have been increasing in the program established under Title I of the Elementary and Secondary Education Act of 1965,¹⁴ and there is evidence that this increased spending may show more positive results after current evaluations.¹⁵

LIMITING COURT REMEDIES

The second category of comprehensive legislation is addressed to court remedies. An example is H.R. 13915, recently passed by the House of Representatives.¹⁶ This bill also includes compensatory spend-

ness of compensatory education, including information from private research studies. The review was undertaken by the American Institute for Research in the Behavioral Sciences. U.S. DEP'T OF HEALTH, EDUC. & WELFARE, ESEA TITLE I: A REANALYSIS AND SYNTHESIS OF EVALUATION DATA FROM FISCAL YEARS 1965 THROUGH 1970 (1972).

¹³C. JENCKS, *INEQUALITY*, 256 (1972). The author was a participant in the Harvard symposium referred to in note 6 *supra*.

¹⁴20 U.S.C. §§ 241(a)-(m) (1970).

¹⁵Statistics obtained from the Division of Compensatory Education, Office of Education, U.S. Dep't of Health, Education and Welfare, show that the average expenditure per pupil under Title I was \$131.00 in fiscal year 1969, \$145.00 in fiscal year 1970, and \$188.00 in fiscal year 1971. One report has predicted that an average expenditure of \$300 per pupil would be necessary before significant improvements in educational achievement could be attained. U.S. DEP'T OF HEALTH, EDUC. & WELFARE, *THE EFFECTIVENESS OF COMPENSATORY EDUCATION* 11 (1972).

¹⁶H.R. 13915, 92d Cong., 2d Sess. (1972). The bill is entitled the "Equal Educational Oppor-

ing features,¹⁷ but its main thrust is directed at limiting the remedies courts may apply when discrimination has been found.¹⁸

Bills of this type have strong political appeal for they appear to punish the courts, which are regarded by the man in the street as the villains that brought about the turmoil in the first place. Such bills endorse the principle of an integrated school system, but would limit the remedies the courts can apply to bring an integrated system into existence. They do not ban all busing, but tightly circumscribe busing remedies that may be ordered in *de jure* cases, that is, cases in which officially sanctioned segregation exists. H.R. 13915, for example, directs that a court may not resort to busing until it has first sought to bring about an integrated school system by attempting other specified remedies.¹⁹ If the goal of a unitary school system is not achieved in this fashion and if it then becomes necessary to bus, such busing is limited to the school nearest or next nearest to the student's residence.²⁰

There are several serious practical and constitutional problems with this category of legislation. In addressing itself primarily to the question of excessive busing remedies, it is largely silent on the question of reducing racial concentration in unitary school systems. Its positive legislative policy toward *de facto* school segregation is weak, putting all its eggs (and old eggs at that) in the basket of compensatory education. The inner-city school is left largely untouched.

Another practical problem with H.R. 13915 is its inflexibility. We would need to have a great deal of factual information about different school districts to know how seriously H.R. 13915 would disrupt existing school operations. For example, the remedies that must be applied in *de jure* situations before using the remedy of busing are set out in rigid hierarchical order.²¹ Remedy number two can only be considered after

tunities Act." It was reported from the House Education and Labor Committee on August 14, 1972 (H.R. REP. NO. 92-1335, 92d Cong., 2d Sess.) and passed the House of Representatives on August 19, 1972. A Senate filibuster during the closing days of the 92d Congress killed the measure on October 14, after three attempts to cut off debate.

¹⁷H.R. 13915, 92d Cong., 2d Sess. § 101 (1972).

¹⁸*Id.* §§ 401-05.

¹⁹*Id.* § 402. The remedies include assigning students to schools closest to their residence, permitting "majority-minority" transfer, revision of attendance zones, construction of new schools and the establishment of magnet schools or educational parks.

²⁰*Id.* § 403. As originally written, section 403 would have limited busing by prohibiting transportation of students which exceeded the average time or distance traveled during the preceding year. The "next-nearest-school" language was substituted by the Committee.

²¹*Id.* § 402.

first exhausting remedy number one, and so on. Furthermore, the list of remedies is exclusive. It does not include such innovative approaches as voucher plans or community-controlled schools. Why should not a school district be left free to explore any combination of remedies which might enable it to achieve a unitary school system? After all, any remedies utilized would always be subject to judicial approval, so subterfuge would be avoided. What might prove satisfactory in one school district might be totally unworkable in another.

There is also a practical difficulty with the "next nearest school" provision of H.R. 13915. In most cities of fifty thousand or above in population, blacks tend to live together in one or more sections of the city. These sections are often bordered by low-income white areas. As a result, busing to the next nearest school will usually result in mixing two low-income groups, since middle-income sections are often further removed geographically from black sections. The educationally effective mix of middle-income students with low-income students, as recommended by the *Coleman Report*, is not achieved, and the low-income white is further embittered.

The most serious problem with this type of legislation is the constitutional one, an issue that has been thoroughly canvassed by Professor Daniel Pollitt and Representative Frank Thompson in a recent article appearing in this publication.²² Briefly, the strongest proposition supporting the constitutionality of these provisions²³ is that even when individual constitutional rights are in question, Congress, though it cannot overrule the judicial definition of the substances of those rights, has the power to prescribe appropriate remedies for effectuating them and to forbid courts to employ other remedies.

The difficulty is that there is no clear line between substance and remedy. In cases where a court determines that the *only* effective remedy for school segregation is to order busing of children,²⁴ foreclosing the remedy of busing is, in effect, to deny the substantive right of deseg-

²²Thompson & Pollitt, *Congressional Control of Judicial Remedies: President Nixon's Proposed Moratorium on "Busing" Orders*, 50 N.C.L. REV. 809 (1972).

²³Specifically, there are three provisions of H.R. 13915 that raise constitutional doubts: section 403, as reported by the Committee, which would in effect legislate the neighborhood, if not the walk-in school; section 404, which prohibits the altering of most school district lines; and, finally, section 406, which was an amendment to the Committee bill offered by Congresswoman Edith Green and adopted by the House of Representatives. 118 CONG. REC. H7875 (daily ed. August 17, 1972). The Green amendment would allow the reopening of past court decrees.

²⁴*E.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30 (1971): "Desegregation plans cannot be limited to the walk-in school."

regated schools. The denial of all effective remedies is very different from "the denial of one remedy while another is left open, or the substitution of one for another."²⁵ As Professor Bickel has stated, should the Supreme Court "accept the command of Congress that it may not administer what it regards as the essential remedy [busing], the Court will have accepted a more far-reaching limitation on judicial power, a greater qualification of the power of judicial review established by *Marbury v. Madison* than ever before in its history."²⁶

These constitutional problems can be avoided. Congress unquestionably has the authority to deal at large with the problems of education, but it is treading on dangerous ground whenever it attempts to control judicial decrees in an area in which the courts are applying the Constitution. H.R. 13915, and other bills in the second category of legislation, seek to stop the courts from granting certain remedies but do not attack the problems at which these remedies are directed. Congress' goal should be to use its legislative power to reduce the *need* for busing in achieving a unitary school system. This is much better than creating false hopes by attempting to foreclose the remedies of the courts.

REORDERING THE EDUCATIONAL SYSTEM

The third category of pending legislation before Congress attempts to address the problems rather than the courts. An example of this type of legislation is the Preyer-Udall Bill.²⁷ The principal draftsman of this bill is Professor Alexander Bickel, Chancellor Kent Professor of Law and Legal History at Yale Law School. The bill does not seek to give a categorical answer to the problems of schools, because in our judgment, the problems of unequal and inadequate educational results and of racial concentration in some schools are not susceptible of resolution by a categorical national policy.

The bill also recognizes that the courts are poor instruments for bringing about specific reforms in education. When confronted with racial isolation in a school district that is doing little on its own to attack the problem, a court will order busing because there is little else it can do that will have much impact. A court may well decide that it is

²⁵H. M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 313 (1953).

²⁶Address by Alexander M. Bickel, Currie Lecture, Duke University, Apr. 8, 1972.

²⁷H.R. 13552, 92d Cong., 2d Sess. (1972).

foolhardy to insist on racial balance, which busing promises but all too often fails to achieve, as the sole or even the principal means of solving the problem of racial isolation in a particular school district. But what else is the court to do? We need to assist the courts by offering them alternatives to busing rather than just prohibiting the use of busing, a prohibition which they could accept only by permitting a major impairment of their power first recognized in *Marbury v. Madison*.²⁸

If . . . instead of trying to order the courts to stop granting a remedy, we attack the problem that they are attempting to deal with, we address the reality to which the courts are reacting, and manage to present courts in the future with school districts embarked on concerted long-range efforts of educational reform, then, without needing to renege on prior decisions and without any impairment of the general function of judicial review, courts will be able to say that they are now confronting a new reality, which no longer calls for the old remedies. In sum, trying to ward off busing by lashing out against it negatively can at best be only partly effective—and then at the cost of damage to our educational system—because busing is only a symbol of what we wish to ward off and change. What is needed is the affirmative provision of constructive alternatives to busing.²⁹

The goal should be to present courts with school districts all over the country using innovative educational techniques to break down racial isolation in schools and to equalize and improve educational results so that courts will not have to resort to busing. But such innovative educational techniques can never be explored if our school systems are committed to racial busing as the sole method of integrating schools. We need to give society its head to seek creative solutions.

How can we bring about this new educational reality and develop constructive alternatives for the courts' consideration? Such alternatives will appear only when the reins of education control are handed back to local officials. Otherwise, embittered communities will continue to watch from the sidelines as the courts administer clumsy and drastic remedies to their educational ailments. Community involvement and community control might become a reality if local school districts were required to take a hard, organized look at their problems and then to devise a comprehensive ten-year plan for improvement. Such a plan

²⁸5 U.S. (1 Cranch) 137 (1803).

²⁹Testimony of Alexander M. Bickel, *Hearings on H.R. 13915 and Related Measures Before the House Committee on Education and Labor*, 92d Cong., 2d Sess. (1972).

would be more than a simple desegregation scheme. It would necessarily include methods to reduce racial concentrations, but it would also include any number of innovative techniques to improve the educational process as a whole.

No one knows the answer to our educational problems, although several new approaches have been tried.³⁰ This is all the more reason why local communities should use their own ingenuity in developing ways to meet their particular educational needs. Existing federal programs have utilized a scattergun approach in trying to meet these needs and often have missed the mark. Categorical school aid programs flow from Washington in a mile-wide, inch-deep stream. The revenue being spent in this fashion might be consolidated and used as block grants to support educational plans. Supervision by the Department of Health, Education and Welfare would still be necessary, of course, but meticulous bureaucratic scrutiny would cease and the initiative for planning would shift to local school districts. More importantly, there is every reason to believe that school districts in the process of charting their own educational course might be viewed differently by federal judges who so often in the past have had only a choice of either issuing a busing decree or seeing nothing done.³¹

The Preyer-Udall bill carries out this suggestion. It would require that each state within two years of enactment submit a plan to carry out the objectives of the act, that is, to improve and equalize educational results throughout the nation and to alleviate racial isolation.³² Federal financial assistance would vary not only in accordance with the population of a state, but also in accordance with the number of minority families.³³ Plans would be reviewable annually³⁴ and would be geared to achieve their objectives in ten years.³⁵ Acceptable plans would in-

³⁰See generally Graubard, *The Free School Movement*, 42 HARV. EDUC. REV. 351 (1972).

³¹The extent of judicial restraint that might be expected in cases where localities have assumed the initiative in educational planning is to some degree problematical. However, Chief Justice Burger's discussion in the *Swann* case of the remedial power of the courts may be prophetic:

"In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. *Judicial authority enters only when local authority defaults.*"

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (emphasis added).

³²H.R. 13552, 92d Cong., 2d Sess. §§ 3(a)-(b) (1972).

³³*Id.* § 204(a)(2).

³⁴*Id.* § 203(j).

³⁵*Id.* § 203(c)(1).

clude one or more of such features as magnet schools, educational parks, cooperative exchanges, and joint participation programs for minority-group and nonminority-group children who attend different schools, whether public or private.³⁶ The list contained in the bill is not exclusive. Its purpose is to give examples of techniques that might be included in a state plan.

Failure to produce a plan or to develop it annually in approved fashion would result in the cutoff of funds provided by Titles I³⁷ and III³⁸ of the Elementary and Secondary Education Act of 1965 and other educational enrichment or desegregation assistance programs.³⁹ It would not, however, result in the cutoff of federal funds for programs such as those involving school lunches.⁴⁰

Once plans were approved, new federal funds would be regularly appropriated for implementation as the plans matured. In addition, all sums appropriated under the Elementary and Secondary Education Act of 1965⁴¹ and all other federal funds appropriated for educational enrichment or for desegregation assistance would be allotted to implement the approved plans.⁴² Thus, the present array of federal programs scattered throughout various titles would be coordinated through a systematic statewide plan.

Each plan would be developed in consultation with local educational agencies, a local advisory committee, including parents of students, and a state advisory council.⁴³ A National Advisory Council, appointed by the President, would work with the Secretary of Health, Education and Welfare in developing criteria for the approval of plans and in reviewing the operation of the plans.⁴⁴

The bill also includes a "majority transfer" provision which gives a student a right at the beginning of the school year to transfer from a school in which his race is in a majority to a school in which his race is in a minority, with transportation furnished.⁴⁵ This is a first step and

³⁶*Id.* § 203(c)(2).

³⁷42 U.S.C. §§ 241a-1 (1970).

³⁸42 U.S.C. §§ 841-47a (1970).

³⁹H.R. 13552, 92d Cong., 2d Sess. § 205(b) (1972).

⁴⁰National School Lunch Act, 42 U.S.C. §§ 1751-63 (1970).

⁴¹Pub. L. 89-10, 79 Stat. 27 (codified in scattered sections of 20 U.S.C.).

⁴²H.R. 13552, 92d Cong., 2d Sess. § 204(d) (1972).

⁴³*Id.* §§ 202, 203(b).

⁴⁴*Id.* § 303(a).

⁴⁵*Id.* § 101.

would result in siphoning off some students from inner city schools to the suburbs, thus relieving racial isolation. Experience indicates, however, that it would not result in any mass exodus.

Another feature of the bill is an "equalization of resources" provision which directs local educational agencies to eliminate disparities in educational practices between schools that result in unequal educational opportunities. Eight examples of such disparities are listed, such as comparative overcrowding of facilities, higher pupil-teacher ratios, provision for fewer student services and inadequate buildings.⁴⁶ This provision could be easily coordinated with new tax law to provide a structure through which new financing plans for schools⁴⁷ could be channeled. Rather than the hit-or-miss system of each school district applying for grants, it would provide for a coordinated statewide program for the use of such funds.

It should be pointed out that the Preyer-Udall bill does not require busing. It sets up national standards for desegregation and allows local boards, assisted by local advisory committees, to find the best ways of achieving desegregation. Many communities could achieve desegregation through a program of locating new schools where desegregation would be naturally increased, closing old schools whose location prevents desegregation without busing, or setting up education parks and special schools of such high quality that many parents of both races would voluntarily choose to have their children go there.

It is to be expected that desegregation under the Preyer-Udall bill could be achieved in most cases without requiring additional transportation. There may be some instances, even after enactment of the bill, in which the courts might determine that desegregation would be impossible without some busing of students. There is no way that such a result could be constitutionally avoided.

Our real range of action probably involves modest and limited busing, together with the use of other techniques, such as redrawing of

⁴⁶*Id.* § 102.

⁴⁷Reference is made to a series of recent decisions holding that public school financing systems that rely heavily on property taxes discriminate against the poor and violate the equal protection clause of the fourteenth amendment. The first of the cases was *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). Another case has reached the Supreme Court: *Rodriguez v. San Antonio Independent School Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971), *prob. juris. noted*, 92 S. Ct. 2414 (1972). Daniel P. Moynihan discusses the ramifications of equalizing expenditures in a recent article: Moynihan, *Equalizing Education: In Whose Benefit?*, 29 PUB. INTEREST 69 (1972).

neighborhood attendance zones, magnet schools and majority-minority transfers. The recent Lambda study⁴⁸ indicates that we can revise the more extensive busing plans and still carry forward desegregation.

It could be argued that the Preyer-Udall approach is utopian and will only provide an excuse for more delay and foot-dragging. However, it must be conceded that very little is being done at present in most school districts, partly because of the incoherence and over-administration from Washington of federal programs. Under the bill these programs would be coordinated into a single, long-range plan. Moreover, there are two powerful inducements for the states to submit plans for approval.

The first inducement is federal financial support for needed educational programs. The second is the threat of a court takeover, with the probable imposition of a mathematical racial balance decree if no good faith effort is made to achieve the objectives of reducing racial concentrations and reducing the disparities of educational achievements among schools.

THE QUESTION OF A MORATORIUM

The action recommended to Congress by President Nixon in the last session of Congress involved the enactment of two bills. The first bill was the "moratorium bill," which for a period of a little more than one year, would stay any court decree that required, "directly or indirectly," the busing of a student who was not being bused immediately prior to the entry of the decree.⁴⁹ The purpose was to freeze the status quo while Congress considered the second, comprehensive reform bill.

The moratorium bill, standing alone, would appear clearly unconstitutional since it would amount to an assertion of congressional power to suspend enforcement of constitutional rights. Any moratorium provision, to be valid, should be attached to the very legislation that renders it urgent in the view of Congress. The constitutionality of the moratorium provision would then depend on the constitutionality of the legislation to which it was attached. As noted earlier, the President's compre-

⁴⁸G. Pugh & J. Krasnakevich, *School Desegregation with Minimum Busing: A Report to the Assistant Secretary for Planning and Education, U.S. Department of Health, Education and Welfare*, Dec. 10, 1971 (published on microfilm by U.S. Office of Education, Educational Resources Information Center, No. E.D. 063 423). The study was carried out jointly by the Lambda Corporation and the Concord Research Corporation.

⁴⁹H.R. 13916, 92d Cong., 2d Sess. (1972).

hensive bill, H.R. 13915, has raised serious constitutional questions.⁵⁰ Therefore, the moratorium itself was of doubtful constitutionality.

But it would be possible, and probably useful, to attach a moratorium provision to the Preyer-Udall bill. A moratorium designed to give Congress time to act on measures that are themselves unconstitutional is simply an attack on judicial review. A moratorium, however, aimed at preserving the status quo while Congress exercises its powers to deal with the problems of education is a different matter. We are familiar with the idea of a "stay" of judicial procedures. As Professor Bickel has pointed out,

It seems to me a perfectly proper development of our system of separation of powers that Congress should be able to stay the hand of the courts so as to maintain a status quo that makes it possible for Congress to exercise legislative powers with respect to a problem that has been the subject of adjudication. No substantial clash between legislative and judicial powers is involved, no general enlargement of the one or constriction of the latter. After the period of the moratorium enabling Congress to exercise its powers has run, the courts will as usual be in a position to discharge their own function and adjudicate the constitutionality of whatever Congress has brought into being. Their power to discharge the judicial function will be undiminished and unaltered.⁵¹

Such a moratorium would have the effect of staying proposed court actions such as those in Detroit,⁵² Richmond,⁵³ and Atlanta⁵⁴ until more

⁵⁰Comm. on Federal Legislation & Comm. on Civil Rights, *The Administration's Proposed "Anti-Busing" Legislation*, in NEW YORK CITY BAR ASS'N, REPORTS OF COMMITTEES OF THE ASSOCIATION OF THE BAR CONCERNED WITH FEDERAL LEGISLATION 1 (1972).

⁵¹Bickel, *What's Wrong with Nixon's Busing Bills?*, THE NEW REPUBLIC, Apr. 22, 1972, at 22.

⁵²In October of 1971 the Detroit School Board was ordered to submit desegregation plans involving both city schools alone as well as suburban and city schools combined. *Bradley v. Milliken*, 338 F. Supp. 582 (E.D. Mich. 1971). On June 14, 1972, the court ordered that the city implement a desegregation plan which combined the city and fifty-two suburban school districts. *Bradley v. Milliken*, 345 F. Supp. 914 (E.D. Mich. 1972). The district court's actions were sustained in a December 8, 1972 decision by a three-judge panel of the Court of Appeals for the Sixth Circuit. *Bradley v. Milliken*, Nos. 72-1809, 72-1814 (6th Cir. 1972). On January 16, 1973, the Court of Appeals set aside the decision of the three-judge panel and ordered a rehearing by the full court to be held on February 8, 1973. It should be noted that the three-judge panel had expressly refused to follow the decision by the Fourth Circuit in the Richmond case.

⁵³In *Bradley v. School Bd.*, 338 F. Supp. 67 (E.D. Va. 1972), the court held that the political boundaries between Richmond and the counties surrounding the city could be disregarded in an effort to desegregate the public schools of the area. On January 10, 1972, Judge Merhige ordered

thoughtful measures can be taken. It is difficult to see how a moratorium could be constitutionally applied to school districts already being operated under court order, of course, such as the Charlotte-Mecklenburg school district.⁵⁵ However, once school systems such as these have been declared unitary, further court intervention would probably cease,⁵⁶ particularly if the state had in the meantime adopted a plan as required by the Preyer-Udall bill.

In other cities, problems need to be dealt with immediately and cannot wait the two years necessary for action to begin under the contemplated Preyer-Udall bill. For example, if some of the proposed restrictions on busing are carried out in the Atlanta school system at this time, we can almost be assured that the system will become all black.⁵⁷

the creation of a single school district from the school systems of the city of Richmond and the two adjoining counties. *Id.* This order was stayed by the Fourth Circuit pending review. 456 F.2d 6 (4th Cir. 1972). On June 5, 1972, in *Bradley v. School Bd.*, 462 F.2d 1058 (4th Cir. 1972), the Fourth Circuit reversed, finding in effect that the Richmond situation was not a case of *de jure* segregation and that Judge Merhige had exceeded his power of intervention. The Supreme Court has noted probable jurisdiction. *School Bd. v. State Bd. of Educ.*, 93 S. Ct. 936 (1973) (No. 72-549).

⁵⁴See note 57 *infra*.

⁵⁵See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). On February 18, 1972, the Fourth Circuit upheld the district court's modified desegregation plan, entered upon remand from the Supreme Court, for the Charlotte-Mecklenburg school district. This latter plan required the school board to eliminate every all-black school in the system and provided for the assignment and transportation of students from groups of elementary to designated junior and senior high schools. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 453 F.2d 1377 (4th Cir. 1972).

⁵⁶Neither 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 patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31-32 (1971).

⁵⁷On July 28, 1971, a district court rejected massive busing as the only effective method of desegregating the Atlanta schools. The court stated, "Atlanta now stands on the brink of becoming an all-black city. A fruit-basket turnover through busing to create a 30% white—70% black uniformity throughout the system would unquestionably cause such a result in a few months time." *Calhoun v. Cook*, 332 F. Supp. 804, 808 (N.D. Ga. 1971). On appeal, the Fifth Circuit reversed and remanded, ordering the district court to afford plaintiffs-appellants a reasonable opportunity to present and support an alternative and superior plan for the desegregation of the Atlanta school system, which plaintiffs indicated could be and was being developed. *Calhoun v. Cook*, 451 F.2d 583 (5th Cir. 1971). On June 8, 1972 the district court again expressed doubt that any remedy short of massive busing "would have any effect on the racial ratio of Atlanta schools, and that solution would simply speed up the transition of Atlanta to an all black school system." *Calhoun v. Cook*,

If extreme court orders are allowed to stand, we are inviting legislation aimed directly at restricting judicial remedies. A moratorium is infinitely better than having Congress lock horns with the Supreme Court; it would give us breathing space to think through our problems.

CONCLUSION

All three branches of the federal government can share the blame for the emotional controversy over busing. Lower courts have issued sweeping decrees in areas where judicial remedy is neither effective nor appropriate. Congress and the executive branch have failed to deal sensibly with the very real educational problems to which busing is a cumbersome and disruptive response. As Morris Udall has said,

The plain fact is that a fair share of that desperately needed moral leadership burden has not been assumed by the White House, or by the Congress. Instead, both branches have unloaded on the courts the problem of coping with complex, emotional and deadly serious social problems. . . . The time has now come for Congress to stop second-guessing the courts and harassing them from the sidelines; the time has come for us to provide some sensible guidelines and responsible leadership in the field of education and racial relations.⁵⁸

Our educational system is not working. People feel alienated from it, except in private schools where parents have a sense of control over the school. Some school systems are slipping into bankruptcy, ballot proposals for more school funding are routinely defeated, and a taxpayer revolt is building against the schools. There is a widespread feeling that schools are not doing their jobs well and that we are throwing good money after bad.

Clearly, something must be done. But it is important that the balance to be struck be morally and intellectually right. Congress should act in cooperation with the courts and not in conflict with them.

The question is one not of goals but of the wisest choice of alternative means to achieve racial desegregation in the schools. The courts have adjudged proportional racial balancing, achieved by busing, as the

N.Y. Times, June 9, 1972, at 16, col. 4 (N.D. Ga.). The court refused to grant further remedial relief finding that the segregated conditions existing in Atlanta schools since 1967 are *de facto* in nature and beyond the control of the school board to correct. On October 7, 1972, the Court of Appeals ordered the city to have a desegregation plan in operation within seven weeks. *Calhoun v. Cook*, No. 72-2453, at 2 (5th Cir., Nov. 24, 1972).

⁵⁸118 CONG. REC. H1883 (daily ed. Mar. 8, 1972).

best temporary answer. But this is a bad long-term answer. It is disruptive to society. It damages our educational system. It results in resegregation and therefore is futile by its own terms. Proportional racial balance, as ordered by the courts, is not the best and only way to reach the goals of improving our schools, providing equal educational opportunity and overcoming racial concentration. Rather, we should put our funds and energies into developing new educational plans, locally evolved and locally administered.

In the years immediately ahead we will be entering a period of school tax reform and school educational reform. The idea that educational expenditures are unconstitutional if they are a function of school district wealth⁵⁹ will revolutionize the way we finance our schools. Let us hope this will lead to a burgeoning of educational reforms and experiments, perhaps no one of which alone will solve the problems of our schools, but which will result in the outpouring of energies, resources, and attention in a creative rather than defensive way toward our schools and our children.

⁵⁹See note 41 *supra*.