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T. A. Smedley

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Developments in the Law of School Desegregation

*T. A. Smedley**

I. INTRODUCTION

Eighteen years after the *Brown* decision declared that racially dual school systems violate constitutional rights of students and therefore must be abolished,[1] the developments in this area of life and law still primarily involve efforts to find an answer to the practical problem which arose immediately after the *Brown* ruling: *How* does one abolish a dual school system? Today, relatively few people openly contend that public schools ought to be operated on a racially segregated basis, but the problem of identifying and implementing acceptable means of achieving desegregation has proved to be virtually unsolvable. Although the federal courts initially displayed an understandable reluctance to assume the burden of providing an effective solution, some of them lately have searched for answers to this problem with so much imagination and resolution that large segments of the public have been driven into near hysteria and many persons in the executive and legislative branches of the federal government have suffered acute political apprehension.

II. IDENTIFICATION OF THE REQUIREMENTS FOR A UNITARY SCHOOL SYSTEM

As an inescapable consequence of attempting to determine how to abolish a dual school system, the federal courts have had to grapple with the problem of what constitutes a "desegregated" or "unitary" sehool system which satisfies the requirements of the equal protection clause of the Constitution. After some thousand decisions handed down by a

* Professor of Law, Vanderbilt University. B.A. 1935, Illinois College; J.D. 1938, Northwestern University.

1. Brown v. Board of Educ., 347 U.S. 483 (1954).

hundred or more judges over a period of nearly two decades, the applicable standard still is unclear, because the concept of desegregation in the constitutional context keeps changing as new objectives are conceived, debated, and accepted by the decision-making bodies which determine the prevalent values and the nature of our social system. The courts, moreover, have rejected broad generalizations of the kind promulgated in early decisions which maintained that, according to the *Brown* decision, "[t]he Constitution . . . does not require integration. . . . [but] merely forbids discrimination."[2] In addition, some early attempts to establish more precise guidelines for desegregation have been repudiated on the ground that they failed to reflect accurately the developing standards for a constitutionally operated school system—for example, the assertion that "[The *Brown* decision] has not decided that the states must mix persons of different races in the schools . . . or must deprive them of the right of choosing the schools they attend."[3]

Perhaps the first calculated attempt to define what constitutes a nonracial, unitary school system was made in 1967 by the Fifth Circuit in the *Jefferson County* case.[4] Although this decision applied specifically only to seven school districts in Alabama and Louisiana, it established a formula which was used, with variations made to fit local situations, in dozens of subsequent decisions in which the courts in the Fifth Circuit required other school systems to desegregate. In the *Jefferson County* case, the court of appeals announced four fundamental policies which foreshadowed the doom of the popular, but ineffectual, freedom-of-choice method of desegregating schools. First, in states which had operated de jure segregated school systems at the time of the *Brown* decision, public school officials were declared to have an "affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools."[5] Secondly, "[t]he only school desegregation plan that meets constitutional standards is one that works"[6]—one that actually produces desegregated student bodies in the schools. Thirdly, courts can "take race into consideration in establishing standards for desegregation

2. Briggs v. Elliottt, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

3. *Id.*

4. United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir. 1967) (en banc), *aff'g on rehearing* 372 F.2d 836 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967).

5. 380 F.2d at 389. The court continued: "Expressions in our earlier opinions distinguishing between integration and desegregation must yield to this affirmative duty we now recognize. In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools." *Id.*

6. 372 F.2d at 847.

. . . [that will] prevent discrimination being perpetuated and . . . undo the effects of past discrimination."[7] Finally, "[t]he necessity of overcoming the effects of the dual school system . . . requires integration of faculties, facilities, and activities, as well as students."[8]

One year later, these fundamental principles were reaffirmed by the Supreme Court in a trilogy of decisions[9] in which the Court gave further directions regarding *what* must be done to satisfy constitutional requirements and regarding *how* these objectives may be achieved. In the *New Kent County* case,[10] the Court declared that "transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about" in implementing the rule announced in the *Brown* case.[11] The defendant school board's contention that it had fulfilled its constitutional obligation by instituting a freedom-of-choice plan in the district was rejected, because "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."[12] The freedom-of-choice approach, however, was not held to be invalid per se as a method of desegregating schools. Rather, the Court maintained that its validity in a given case would depend on whether it proves to be an effective "means to a constitutionally required end—the abolition of the system of segregation and its effects."[13] Furthermore, the Court explained that, "if there are reasonably available other ways . . . promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice'

7. *Id.* at 876.

8. 380 F.2d at 389. As a means of further implementing these policies, the court drew up a comprehensive decree which required: that all grades be desegregated by the beginning of the next school year; that any freedom-of-choice student assignment system be operated under strict, specified regulations designed to provide actual freedom for a student to choose to attend a school in which his race is in the minority; that school bus transportation be operated on a completely desegregated basis; that students be given the right to transfer to schools from which they have been excluded because of race; that faculties and administrative staffs of all schools be integrated; that all services, facilities, activities, and programs conducted or sponsored by the schools be free of racial segregation and discrimination in all respects; and that inferior, formerly all-Negro schools be improved to equal quality with white schools.

9. The 3 cases were: Green v. County School Bd., 391 U.S. 430 (1968) (the *New Kent County* case); Raney v. Board of Educ., 391 U.S. 443 (1968) (the *Gould, Arkansas* case); Monroe v. Board of Comm'rs, 391 U.S. 450 (1968) (the *Jackson, Tennessee* case).

10. Green v. County School Bd., 391 U.S. 430 (1968).

11. *Id.* at 436.

12. *Id.* at 439.

13. *Id.* at 440, *quoting* Bowman v. County School Bd., 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring). Without noting the similarity of language used by the Fifth Circuit in the *Jefferson County* case, the Supreme Court ruled that the school board must adopt a plan "to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." 391 U.S. at 442.

must be held unacceptable."[14] The freedom-of-choice plan was declared invalid in *New Kent County* because, after three years of operation, no white students were attending the Negro schools and only fifteen percent of the Negro students were attending white schools. The Supreme Court also struck down a freedom-of-choice plan in the *Gould, Arkansas* case[15] on the same grounds. The opinion in *New Kent County* indicated that geographical zoning and school pairing were possible methods of eliminating the dual system, and quoted with approval the broad assertion of a federal circuit judge that "school officials have the continuing duty to take whatever action may be necessary to create a 'unitary, nonracial system.' "[16] In the *Jackson, Tennessee* case,[17] however, the school board's geographical zoning plan was declared invalid because, although it would have produced integrated student bodies in a number of schools, its desegregatory effect was neutralized, to a great degree, by a "free transfer" provision under which any student could choose to attend a school outside his prescribed attendance zone. Quoting its own opinion in the *New Kent County* case, the Court declared that "[p]lainly, the plan does not meet respondent's '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.' "[18]

During the next three years, the Supreme Court, although it reiterated earlier warnings that desegregation must be achieved without further delay,[19] provided very little further guidance concerning what constitutes a desegregated system. In the *Holmes County* case,[20] decided in 1969, defendant school districts were ordered "to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color."[21] Less than six months later,

14. 391 U.S. at 441.

15. Raney v. Board of Educ., 391 U.S. 443 (1968). In regard to both the *Gould* and the *New Kent County* districts, the Court declared: "[T]he school system remains a dual system." *Id.* at 447.

16. Green v. County School Bd., 391 U.S. 430, 440 (1968), *quoting* Bowman v. County School Bd., 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring). Interestingly enough, the Supreme Court was quoting from the concurring opinion of Judge Sobeloff in Bowman v. County School Bd., 382 F.2d 326, 333 (4th Cir. 1967), rather than from the majority opinion in that case.

17. Monroe v. Board of Comm'rs, 391 U.S. 450 (1968). In *Monroe*, all white students assigned to predominantly Negro school zones transferred to white schools, and many Negroes assigned to predominantly white schools transferred to Negro schools.

18. *Id.* at 458, *quoting* Green v. County School Bd., 391 U.S. 430, 437-38 (1968).

19. Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969). For earlier such warnings see Green v. County School Bd., 391 U.S. 430, 439 (1968); Bradley v. School Bd., 382 U.S. 103, 105 (1965); Griffin v. County School Bd., 377 U.S. 218, 234 (1964).

20. Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969).

21. *Id.* at 20.

however, the Court conceded that this definition of a unitary system was "perhaps too cryptically" stated.[22] This standard is obviously inadequate since, according to its terms, a district operating under the freedom-of-choice method could claim to be a "unitary system" without a single white student being enrolled in its Negro schools and without a single Negro student being enrolled in its white schools.

Not until April of 1971, in its decision in *Swann v. Charlotte-Mecklenburg Board of Education*,[23] did the Supreme Court consciously attempt to formulate a set of specific guidelines for identifying and achieving a unitary, nonracial school system.[24] Chief Justice Burger, writing the opinion for the unanimous Court, declared that "[t]he objective today remains to eliminate from the public schools all vestiges of state-imposed segregation" and reaffirmed the proposition, announced in the *New Kent County* case, that school authorities must "take whatever steps might be necessary" to convert to a unitary system.[25] At a later point, however, he carefully noted that this opinion applied only to school segregation which originated in a state-imposed policy carried out by school officials, and not to school segregation which developed as a result of racial residential patterns.[26]

In what may be regarded as a ten-point guide to school desegregation, the Court specified:[27] (1) with regard to educational facilities and equipment, maintenance of buildings, provision of student transportation, and operation of extracurricular activities, there must be no "invidious racial distinctions"; (2) faculties and administrative staffs in all schools in a system must be integrated, the goal—but not the inflexible requirement—being that in each school the racial ratio of the faculty and staff shall be approximately the same as that of the faculty and staff in the system as a whole; (3) the location and construction of new schools and the abandonment of old ones must not be carried out in a manner which will serve to perpetuate or re-establish the dual system;

22. Northcross v. Board of Educ., 397 U.S. 232, 237 (1970) (Burger, C.J., concurring).

23. 402 U.S. 1 (1971).

24. Regarding the *Swann* case and the 3 other school cases decided the same day, the Court stated: "These cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing *Brown I* and the mandate to eliminate dual systems and establish unitary systems at once . . . . This Court, in *Brown I*, appropriately dealt with the large constitutional principles; other federal courts had to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands. Their efforts, of necessity, embraced a process of 'trial and error,' and our effort to formulate guidelines must take into account their experience." *Id.* at 6.

25. *Id.* at 15.

26. *Id.* at 22-23.

27. *Id.* at 18-32.

(4) the Constitution does not require that the student body of each school in the system reflect the racial composition of the system as a whole;[28] (5) the continued presence of "some small number" of one-race or substantially one-race schools in a district does not necessarily mean that the system still is practicing state-imposed segregation, but there is "a presumption against schools that are substantially disproportionate in their racial composition," and school authorities must bear the burden of proving that such schools are not "the result of present or past discriminatory action"; (6) a "majority-to-minority transfer" provision, which would provide the transferring students with transportation to and space priority in the schools to which they choose to transfer, should be included in every desegregation plan; (7) a court has the power to require the gerrymandering of school attendance zones, the inclusion of noncontiguous areas in the same zone, and the pairing, clustering, or grouping of schools if such action is necessary to establish integrated student bodies in the school system; (8) although racially neutral on its face, the practice of assigning students to the school which is nearest to their home and which serves their grade level—the "neighborhood school" system—is not a valid basis for operating a school district if it, in fact, "fails to counteract the continuing effects of past school segregation"; (9) busing students is a permissible method of achieving desegregation, although the extent to which busing may be properly used "cannot be defined with precision," and "[a]n objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process";[29] (10) once a school system has been desegregated adequately and a valid unitary system has been achieved, school officials are not under any constitutional obligation to make yearly revisions of student assignments in order to counteract the effects of interim population shifts within the district. On the basis of these generalizations, it seems safe to say only that, in essence,

28. The Charlotte-Mecklenburg system had a white-black ratio of 71-29. The federal district court's order required the board to make an effort to attain approximately that racial ratio in the various constituent schools. The Supreme Court, however, found that the district court had used ratio only as a desirable "norm," and that such use of the over-all ratio as "a starting point in the process of shaping a remedy, rather than as an inflexible requirement," was a proper procedure. *Id.* at 23-25.

29. Although the district court's plan for the Charlotte-Mecklenburg elementary schools probably required the transportation of more students to schools out of their neighborhood than any other plan ordered by the federal courts prior to 1969, the Supreme Court reversed the Fourth Circuit and approved the plan. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138 (4th Cir. 1970). In doing so, the Court approved the finding that bus trips of elementary school students would average about 7 miles and would not take more than 35 minutes. 402 U.S. at 30.

a "unitary" or "desegregated" school system is one in which there is a sufficient degree of racial balance in a sufficient number of the schools in the district. What constitutes "sufficiency" in this regard depends on the circumstances of the individual case as evaluated by the court making the decision.

Neither in laying down these general guidelines nor in deciding the specific controversy before it did the Supreme Court formulate any new law or make any novel applications of pre-existing law. Nevertheless, the *Swann* decision was a momentous one. First, it constituted an affirmation by the nation's highest judicial authority of a number of the most effective desegregation techniques worked out by the lower federal courts during the preceeding years. Even more significantly, it demonstrated that the Supreme Court, in spite of changing personnel and the pressure of popular opinion, was still firm and unanimous in its determination to eliminate racial segregation from public education insofar as that objective could be achieved by judicial means. Two subsequent developments may be traced to this decision. First, some lower federal courts, encouraged by the Supreme Court's renewed dedication to the desegregation principle and strong endorsement of drastic desegregation methods, have devised new ways to combat racial separation in the public schools in different sections of the nation. Second, in view of the resolute stance of the judiciary, many individuals and agencies who oppose further revision of the traditional manner of operating the school systems have concluded that they must act through the executive and legislative branches of the federal government if their opposition is to be effective. These two phenomena largely account for the most significant recent "developments in the law of school desegregation" at the time of the writing of this Article.

III. New Methods and Theories for Achieving Integrated School Systems

In the past few years, federal courts seeking to achieve a greater degree of integration in the public schools have begun to adopt several innovative approaches[30] to the segregation problem in the situation that is proving to be the most difficult with which to deal—a large metropolitan area with a substantial percentage of Negro students, who are mainly concentrated in compact, well-defined residential sections in the

30. These approaches will be discussed in this Article under the following 3 headings: A. crossing political subdivision boundaries to merge adjacent school districts; B. extending the scope of "de jure" segregation by expanding the concept of "state action;" C. redefining the constitutional requirement in order to emphasize the factor of "equal educational opportunity."

central part of the city, and with most of the white students living in virtually all-white residential sections being developed in the outer sections of the area.

A. Crossing Political Subdivision Boundaries To Merge Adjacent School Districts

The approach which has had the most dramatic impact on public opinion and which has aroused the strongest opposition provides for the abandonment of traditional political subdivisions as the basis for establishing the operative units of the public school systems and for the merging of all or parts of two or more school districts, previously operating under different political subdivisions, into a single consolidated system. The urban segregation problem which this approach is designed to remedy is the product of the massive flight of white families from the city to suburban communities located outside of the territory covered by the city school district. Various economic, political, social, and psychological factors combine to cause this movement, not the least of which is the desire of whites to avoid substantial racial integration in housing and in schools. Regardless of the cause, the result of this movement is that the remaining city public school population becomes predominantly black. When this process has occurred, no amount of attendance zone revision, pairing and clustering of schools, and busing of students within the city school district could achieve substantially integrated student bodies in the schools, because there simply are not enough white students left in the city system.

The two most notorious merger cases have arisen in Richmond, Virginia, and Detroit, Michigan. After more than a decade of litigation concerning the desegregation of the Richmond school system, a federal district judge concluded, in January 1972, that no further progress toward achieving desegregation could be accomplished merely by additional revision of the organization of the city's schools, and that the only effective means of removing the vestiges of the racially dual system from the schools was to merge the city system with the separate school systems of the adjacent two counties, in which the school population was predominantly white.[31] Therefore, he decreed that a metropolitan area

31. *See* Bradley v. School Bd., 338 F. Supp. 67 (E.D. Va.) (Merhige, J.), *rev'd*, 462 F.2d 1058 (4th Cir. 1972), *cert. granted*, 93 S. Ct. 936 (1973). The first complaint was filed in the *Richmond* case in September 1961, and the first desegregation in the system took place during the same month, with the assignment of 37 Negro students to previously all-white schools. In July 1962, in the first district court order in the case, 10 Negro students won the right to transfer to white schools, but the court refused to order the school board to submit a plan for general desegregation of the system on the ground that "the defendants have made a reasonable start

desegregation plan be implemented for the operation of a single school system covering the city and the two counties—an area of about 750 square miles with a public school population of some 105,000 students, of whom about one-third were black and two-thirds were white. The merged area was to be divided into six sectors for student assignment purposes. One sector would spread across the large, rural southern part of one of the counties, while the other five sectors would radiate from the core of the city at the northern end of the district, and each would have within its boundaries a relatively small city area and a broader suburban area covering one or the other of the counties. It was estimated that about 78,000 students would be transported to their schools by buses—some 10,000 more than the total transported in the separate city and county systems during the 1971-72 term—and that the percentage of Negro students assigned to the schools in the six sectors would range from twenty to forty.[32]

The court based its authority to require this action on a series of specific findings explained in detail in a 172-page opinion. These findings may be inadequately summarized as follows: (1) public officials of the state, city, and counties had for many years diligently and deliberately worked, in conscious resistance to the *Brown* case rulings,[33] to preserve as much of the dual school system as could be maintained; (2) there was no apparent means of eliminating the discriminatory effects of the continuing aspects of past racial segregation in the operation of the city schools other than by combining the city and county systems;[34] (3) Virginia officials, in past years, had often combined territories in

toward a non-discriminatory school system resulting in the attendance of 127 Negro students in white schools for the 1962-1963 school term." Bradley v. School Bd., 317 F.2d 429, 434 n.5 (4th Cir. 1963). By the start of the 1971-1972 term, the Richmond system had about 52,000 students, with a black-white ratio of 3 to 2, and the city school board conceded that even the drastic reorganization plan recently approved by the federal district court would not eliminate the racial identifiability of most schools. 338 F. Supp. at 71-72.

32. Bradley v. School Bd., 462 F.2d 1058, 1073 (4th Cir. 1972) (Winter, J., dissenting).

33. *See* 338 F. Supp. at 93. The court noted: "For the major part of this seventeen year period [since the *Brown* decision] the State's primary and subordinate agencies with authority over educational matters have devoted themselves to the perpetuation of the policy of racial separation. They have been assisted in this effort by new legislation creating such programs as the tuition grant and pupil scholarship systems, the pupil placement procedures, and, by enactment passed while this case was pending, placing new limitations on the power of the State Board to modify school division boundaries. They have employed established techniques and powers as well to perpetuate segregation." *See id.* at 94-96.

34. *See id.* at 100. The court noted: "Here long years of maintenance of the dual system, many subsequent to formal legal declaration of its invalidity, . . . produced a community system divided into racially identifiable sectors by political boundaries . . . . At present the disparities are so great that the only remedy promising of immediate success—not to speak of stable solutions—involves crossing these lines."

different political subdivisions or carried on governmental functions across subdivision boundaries when that procedure served a desired financial or social purpose;[35] (4) the obligation to abolish dual school systems and to operate unitary systems rests on the *state* itself and not merely on its separate political subdivisions, since the fourteenth amendment declares that "no *state* shall . . . deny to any person within its jurisdiction the equal protection of the laws."[36]

Five months later, the court of appeals reversed this judgment on the ground that a federal court does not have the power "to compel one of the Statcs of the Union to restructure its internal government for the purpose of achieving balance in the assignment of pupils to the public schools," unless there was "invidious discrimination in the establishment or maintenance of local governmental units . . . ."[37] Disregarding the district judge's long chronicle of the actions, attitudes, practices, and policies of Virginia governmental officials which were calculated to prevent integration of the public schools, the appellate court emphasized that (1) the boundaries of the city and the two counties had not been originally established or subsequently maintained for the purpose of perpetuating racial segregation in the schools, and (2) each of the three governmental units, acting either under court orders or the persuasion of the Department of Health, Education, and Welfare, had eliminated the racially dual school system within the confines of its own territory to the extent that this result feasibly could be attained. Furthermore, the district court's references to actions and policies of county officials designed to keep black residents of the city from migrating to the suburban areas were held not to be of sufficient weight to establish invidious state action causing the unbalanced racial composition of the school population in the three districts.[38] Consequently, no violation of the

35. *See id.* at 103. The court noted that "past events in the metropolitan area and in Virginia betoken a willingness—indeed an enthusiasm—to disregard political boundaries when needful to serve state educational policies, among them racial segregation." *See id.* at 83-84.

36. *See id.* at 102. The court noted: "The State cannot escape its constitutional obligations by relinquishing or delegating to local officials the authority to discriminate, nor can it escape such obligations by dividing such power between them and others of statewide authority. It is axiomatic that if the power to violate constitutional rights cannot be conferred on a faceless electoral majority, it cannot with impunity be placed upon local elective or appointive bodies."

37. Bradley v. School Bd., 462 F.2d 1058, 1060 (4th Cir. 1972) (en banc). Judge Craven wrote the opinion for the majority, whieh consisted of Chief Judge Haynsworth and Judges Craven, Bryan, Field and Russell. Judge Winter dissented.

38. The court of appeals stated: "We think that the root causes of the concentration of blacks in the inner cities of America are simply not known and that the district court could not realistically place on the counties the responsibility for the effect that inner city decay has had on the public schools of Richmond. We are convinced that what little action, if any, the counties may seem to have taken to keep blacks out is slight indeed compared to the myriad reasons, economic, political and social, for the concentration of blacks in Richmond . . . ." *Id.* at 1066.

fourteenth amendment was found to be involved; and, therefore, under the powers reserved to the states by the tenth amendment, Virginia had the power to maintain its school districts on the basis of city and county boundaries.[39] Since the court of appeals expressly found that each of the three separate governmental subdivisions was operating its school system on a constitutional unitary basis, the reversal of the lower court's judgment permitted the city and counties to maintain their current arrangements. The Supreme Court, however, has granted plaintiffs' petition for a writ of certiorari[40] and presumably will decide the case before the present session ends in June 1973.

While the *Richmond* case was progressing through the court system, another merger decision—possibly more significant because it involves a larger metropolitan population[41] and schools located in the northern section of the nation—was developing along comparable lines in Detroit, Michigan. Faced with the problem of a predominantly black city system and predominantly white surrounding suburban systems, District Judge Roth concluded that the desegregation of the city schools in a manner which would satisfy constitutional requirements could be achieved only by combining urban and suburban areas into a single system. In the course of two years of complex litigation,[42] the court ruled that the schools in the Detroit system were being operated on a racially segregated basis, that various practices and policies of the city school board and state education officials had contributed substantially to the

39. The court of appeals also expressed the opinion that the district court had violated a rule laid down in the *Swann* case by imposing a fixed racial quota for the student bodies of all schools. *Id.* at 1064. *See* note 28 *supra*. The district court, however, explicitly denied that it was attempting to require the same racial balance in all schools; and under the court-ordered plan, the Negro complement of the different student bodies was expected to vary from 20 to 40%. *See* 338 F. Supp. at 230. In light of the Supreme Court's handling of the racial balance problem in the *Swann* case, it seems unlikely that the district court's plan was invalid in this respect.

40. 93 S. Ct. 936 (1973).

41. The public school population of Detroit is about 285,000 students, of whom about 65% are blacks.

42. Following a series of conflicting maneuvers by the Detroit school board, the Michigan legislature, and the city's electorate, suit was filed on August 18, 1970, to require desegregation of the Detroit city school system. *See* Bradley v. Milliken, 433 F.2d 897, 898-901 (6th Cir. 1970). Only after the district court had ruled on numerous preliminary motions and the case had gone up to the court of appeals twice was a trial on the merits of the case begun on April 6, 1971. It was concluded on July 22, 1971. *See* Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971). The district court did not issue its consolidation ruling until June 14, 1972. *See* Bradley v. Milliken, 345 F. Supp. 914 (E.D. Mich. 1972). The court of appeals affirmed that decision on December 8, 1972, but vacated its judgment on January 16, 1973, pending an en banc rehearing of the case, set for February 8. *See* Bradley v. Milliken, Civil Nos. 72-1809 & 72-1814 (6th Cir., Dec. 8, 1972). The 3-judge court of appeals panel consisted of Chief Judge Phillips, and Judges Edwards and Peek.

creation and perpetuation of the segregated condition of the schools,[43] that none of the plans submitted by any of the parties to or intervenors in the desegregation suit would meet constitutional requirements, and that effective desegregation of the city schools could be accomplished only by consolidating the city system and a number of the suburban school districts.[44] Regarding its power to remedy this situation, the court declared: "[W]here the State, and named defendants, are substantially implicated in the segregation violation found and are ultimately responsible for public schooling throughout the state, the consistent application of constitutional principles requires that this court take all steps necessary and essential to require them to desegregate the Detroit public schools effectively and maintain, now and hereafter, a racially unified, non-discriminatory system in the absence of a showing that the judicial intervention here contemplated will frustrate the promotion of a legitimate and compelling state policy or interest."[45] Thereupon, Judge Roth proceeded to appoint a panel of nine members charged with the responsibility of developing a plan for the assignment of students within a designated metropolitan territory for the purpose of achieving "maximum actual desegregation" of the schools in that area. In general, the panel was directed to arrange the various schools in clusters in such manner that "no school, grade or classroom [shall] be substantially disproportionate to the overall pupil racial composition" in the cluster area in which the school is located.[46] On December 8, 1972, the Court of Appeals for the Sixth Circuit sustained the district court's rulings on the existence and causes of racial segregation in the Detroit schools, the necessity of crossing political subdivision boundaries to remedy the situation, and the federal judiciary's authority to require the type of remedial action ordered in the instant case. In relation to this final point, the appellate court declared: "This record reflects a present and expanding pattern of all black schools in Detroit (resulting in part from State action) separated only by school district boundaries from nearby all white schools. We cannot see how such segregation can be any less

43. These 2 rulings are contained in the September 27, 1971 decision. 338 F. Supp. 582 (E.D. Mich. 1971).

44. 345 F. Supp. 914 (E.D. Mich. 1972).

45. *Id.* at 940.

46. *Id.* at 917-18. The court pointed out a variety of student assignment methods which might appropriately be used: "Pairing, grouping, and clustering of schools; various strip, skip, island, and noncontiguous zoning; various lotteries based on combinations of present school assignment, geographic location, name, or birthday. Judicious use of these techniques—coupled with reasonable staggering of school hours and maximizing use of existing transportation facilities—can lead to maximum actual desegregation with a minimum of additional transportation." *Id.* at 929.

harmful to the minority students than if the same result were accomplished within one school district. . . . Like the District Judge, we see no validity to an argument which asserts that the constitutional right to equality before the law is hemmed in by the boundaries of a school district."[47] "In the instant case the only feasible desegregation plan involves the crossing of boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan. The power to disregard such artificial barriers is all the more clear where, as here, the State has been guilty of discrimination which had the effect of creating and maintaining racial segregation along school district lines. . . . Big city school systems for blacks surrounded by suburban school systems for whites cannot represent equal protection of the law."[48] Defendants' petition for a rehearing before the entire Court of Appeals was granted and the rehearing was conducted on February 8, 1973.[49]

Presumably, the Supreme Court eventually will be asked to review this case. In view of the conflict between the decisions of the Fourth and Sixth Circuits, it seems likely that the High Court will grant certiorari, hear the *Richmond* and *Detroit* appeals together, and decide the issue whether the federal courts have the power to require the merging of school districts when merging is necessary to achieve desegregation of the schools. If the Court finds that the federal judiciary lacks that power, the *Richmond* decision apparently will be affirmed and the *Detroit* decision reversed. On the other hand, if the judiciary's power to order the merging of two or more school districts is upheld, both decisions logically could be affirmed, on the basis of the divergent holdings of the two circuit courts on whether the governmental agencies of the respective states were substantially responsible for the segregated conditions in the schools.[50]

Other courts have dealt with the merger issue and have reached varied results. Early in 1971, a federal district court sustained a complaint filed by minority ethnic group members challenging the constitutionality of a Connecticut statute which requires each town to maintain a separate school district covering the area within the town's bounda-

47. Bradley v. Milliken, Nos. 72-1809 to 72-1814, at 57 (6th Cir. Dec. 8, 1972).

48. *Id.* at 64-65.

49. At the time of this writing, no decision has been announced.

50. It should also be noted that the Fourth Circuit Court in the *Richmond* case further concluded that the city and the 2 counties were all operating constitutionally valid unitary school systems. If the Supreme Court accepts this ruling, it may determine that there is no basis for reversing the appellate court's decision, even if the power to require mergers to achieve desegregation is recognized.

ries.[51] Plaintiffs contended that the statute created "unnatural legal barriers to the desegregation of the Hartford schools," since it prevented the formation of school districts combining territory within the town, where the school population was 62 percent black and Puerto Rican, and territory in adjacent communities, which were predominantly white.[52] In ruling that the complaint stated a cause of action, the court observed: "Although the legal issues surrounding situations which create de facto as opposed to de jure segregation are by no means clear, there is case law which suggests that since the primary responsibility for education and educational facilities lies with the state, . . . the courts may, in some circumstances, examine the problem of segregation in the schools on a state-wide basis even though there is no reason to believe that the presently existing school districts were established for racially related reasons."[53]

In a suit brought by the Department of Justice, a federal district court found, in August, 1971, that the Indianapolis school system was operating on an unconstitutional racially segregated basis, and ordered the city education officials to take various steps, including extensive reassignment and transportation of students to different schools, as a move toward the establishment of a unitary system.[54] District Judge Dillin recognized, however, that student reassignment among the city schools was only a temporary expedient and that resegregation soon would occur because of the accelerating "white flight" to the surrounding suburban areas. In light of this development, he stipulated that the officials of the state and of the school districts operated by the smaller cities and the counties in the Indianapolis metropolitan area be joined as parties to the suit, so that consideration could be given to the creation of a metropolitan school district which would cover the city and some of the surrounding territory, as a means of achieving desegregation of the schools in the area. The question whether the federal judiciary has the power to require the consolidation of school systems which are under the jurisdiction of different political subdivisions was raised but not answered. The court observed, however, that the ultimate responsibility for providing a valid system of public education rests on the state rather than on the individual political units,[55] that the court has the power to issue such decrees as are necessary to eliminate unconstitutional segre-

51. Lumpkin v. Dempsey, Civil No. 13,716 (D. Conn., Jan. 22, 1971).
52. *Id.*
53. *Id.* The case apparently has not been decided on the merits.
54. United States v. Board of School Comm'rs, 332 F. Supp. 655 (S.D. Ind. 1971).
55. *Id.* at 659.

gation, and that "revisions of local laws and regulations and . . . school districts may be necessary to solve the problem."[56]

Prior to the most recent decision in the *Richmond* case, two federal district courts in the eastern part of the nation had taken the position, subsequently adopted by the Fourth Circuit in the *Richmond* case, that the federal judiciary has no power to order consolidation of city and suburban school systems to eliminate racial segregation when the segregated conditions are de facto in character, not having been created or perpetuated by governmental actions or policies. Both of these decisions arose in the context of complaints against state laws which require separate school systems to be operated on the basis of municipal boundaries. In the case challenging a New Jersey statute,[57] black complainants contended that the statute caused severe racial imbalance in the schools because generally the city populations were predominantly black and the suburban populations were predominantly white and that the state had an affirmative constitutional duty to alleviate this racial imbalance. In denying the requested relief, the court declared:

> This designation of school district zones is . . . based on the geographic limitations of the various municipalities throughout the State. Nowhere in the drawing of school district lines are considerations of race, creed, color or national origin made. The setting of municipalities as local school districts is a reasonable standard especially in light of the municipal taxing authority. The system as provided by the various legislative enactments is unitary in nature and intent and any purported racial imbalance within a local school district results from an imbalance in the population of that municipality-school district. Racially balanced municipalities are beyond the pale of either judicial or legislative intervention.[58]

In the case challenging a Maryland law, the complaint was filed by white parents who were protesting against having to send their children to city schools with very predominantly black enrollments.[59] Plaintiffs sought, not consolidation of the city and county school systems, but rather an order allowing their children to attend predominantly white schools in suburban areas. Since no constitutional rights of plaintiffs were found to be violated and since the order sought obviously would

56. *Id.* at 678. In a case which dealt, not with metropolitan areas in which segregated schools resulted partly from massive population shifting, but rather with segregated school districts which originally were set up to establish a racially dual system, federal courts in Texas have required state education officials to revise school district boundaries radically and to consolidate parts of separate districts in order to create unitary school systems and to eliminate the effects of dualism. *See* United States v. Texas, 321 F. Supp. 1043 (E.D. Tex. 1970), *enforced*, 330 F. Supp. 235 (E.D. Tex.), *modified in part*, 447 F.2d 441 (5th Cir. 1971).

57. Spencer v. Kugler, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd mem.*, 404 U.S. 1027 (1972) (Douglas, J., dissenting).

58. 326 F. Supp. at 1240.

59. Starr v. Parks, 345 F. Supp. 795 (D. Md. 1972).

result in aggravating the already segregated condition of the city schools, the complaint was dismissed. The court, however, observed that the school segregation existing in the Baltimore area was de facto in nature, and that therefore a federal court had no authority to require a combination of city and county school systems in order to improve racial balance in the schools. Since the district court's decision in the *Richmond* case was based on findings of de jure segregation in Virginia, that decision was held to be inapplicable to the *Baltimore* case.[60]

A series of cases in which federal courts have refused to permit the subdivision of a school district into two separate districts when the effect would be the perpetuation of racial segregation relates, at least tangentially, to the consolidation issue. These cases usually involved a rural county which constituted a single school district and which had one town or small city as the principal population center, with most of the county's white population living in the town and most of the black population living in the country. Acting under a court desegregation order, the school board had adopted a reorganization plan under which many more black students would be assigned to schools located in the town and some white students living in the town would be assigned to schools located in the country. Faced with this prospect, the citizens of the town have attempted to form, with state administrative or legislative authorization, a separate school district covering only the municipal area, thereby leaving the original county school district with only the rural territory. In virtually every reported instance in which judicial relief has been sought against this type of subdivision, the federal court which had ordered desegregation of the single county-wide district prohibited the establishment of a separate town district, because the subdividing process necessarily would result in the obstruction of the court's desegregation decree by concentrating most of the whites in the town schools and leaving most of the blacks in the rural schools.[61] The Fourth Circuit, however, reversed the district court decisions in two of the cases, the *Emporia* and *Scotland Neck* cases,[62] on findings that in those

60. The Maryland federal district court relied heavily on the reasoning and holding of Spencer v. Kugler, 326 F. Supp. 1235 (D.N.J. 1971).

61. *See* Lee v. Macon County Bd. of Educ., 448 F.2d 746 (5th Cir. 1971); Stout v. United States, 448 F.2d 403 (5th Cir. 1971); Aytch v. Mitchell, 320 F. Supp. 1372 (E.D. Ark. 1971); United States v. Halifax County Bd. of Educ., 314 F. Supp. 65 (E.D.N.C. 1970); Turner v. Warren County Bd. of Educ., 313 F. Supp. 380 (E.D.N.C. 1970); Wright v. County School Bd., 309 F. Supp. 671 (E.D. Va. 1970); Burleson v. County Bd. of Election Comm'rs, 308 F. Supp. 352 (E.D. Ark. 1970).

62. United States v. Scotland Neck City Bd. of Educ., 442 F.2d 575 (4th Cir. 1970); Wright v. Council of the City of Emporia, 442 F.2d 570 (4th Cir. 1971). In Turner v. Littleton-Lake Gaston School Dist., 442 F.2d 584 (4th Cir. 1971), however, an injunction against the division of the old district was sustained.

instances the division of the old district was justifiable on grounds not related to racial factors and that the change would not seriously affect the racial composition of the remaining county systems. These decisions were, in turn, reversed by the Supreme Court, which declared: "Under the principles of *Green* and *Monroe*, such a proposal [to subdivide a school district in which a dual system had been operating] must be judged according to whether it hinders or furthers the process of school desegregation. If the proposal would impede the dismantling of the dual system, then a district court, in the exercise of its remedial discretion, may enjoin it from being carried out."[63] The relevance of these decisions to the matter of consolidation of school districts to achieve desegregation was aptly expressed by the Sixth Circuit in the *Detroit* case: "If school boundary lines cannot be changed for an unconstitutional purpose, it follows logically that existing boundaries cannot be frozen for an unconstitutional purpose."[64]

B. *Extending the Scope of "De Jure" Segregation By Expanding the Concept of "State Action"*

The general flexibility of the "state action" concept and the lack of certainty regarding when state action may be found in segregated school situations are the factors which provide the basis for a second significant judicial technique developed in recent years to achieve further desegregation—the expansion of the scope of "de jure" segregation. Since all four of the school districts specifically covered by the 1954 *Brown* decision were located in states in which statutes either required or permitted local school officials to operate racially dual systems, there was, of course, no doubt about state involvement in those situations. Consequently, it was widely assumed in the beginning that the *Brown* principle applied only to school segregation which was required by, or at least authorized by, positive state law.[65] According to a specially devised terminology, the view was adopted that the equal protection clause is violated only by such de jure segregation, but not by de facto

63. Wright v. Council of the City of Emporia, 407 U.S. 451, 460 (1972); *see* United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 489 (1972). One may wonder whether it is significant that the 4 Justices most recently appointed to the Supreme Court dissented in one of these cases and joined in a special concurring opinion in the other case.

64. Bradley v. Milliken, Civil Nos. 72-1809 & 72-1814, at 66-67 (6th Cir., Dec. 8, 1972).

65. Lending credence to this point of view is the Supreme Court's express approval, in the first *Brown* case, of an assertion in the lower court's opinion in one of the cases: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater *when it has the sanction of law*; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro [sic] group." Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (emphasis added).

segregation. As used in this context, the term "de facto" segregation describes the condition in which most of the white students in a school district attend all-white or very predominantly white schools and most of the Negro students in the same district attend all-Negro or very predominantly Negro schools, not because the law requires separation of students on the basis of race, but because the traditional policy of assigning students to the schools nearest their homes generally is followed and, under prevailing racial residential patterns, most Negro family residencies are concentrated in certain parts of the district and most white family residences are located in the other parts of the district. The lower federal courts, almost without exception, have adhered to this distinction and the Supreme Court, until very recently, has steadfastly refused to review lower court decisions which have held that de facto segregation does not violate constitutional rights.[66]

One of the earliest cases ruling that de jure segregation may exist in the absence of a state law specifically authorizing the operation of racially dual systems involved the New Rochelle, New York, schools.[67] In 1961, the federal courts found that, concurrently with the influx into the city several decades earlier of a substantial Negro population, the school board deliberately had fixed school attendance boundaries so

66. Among the few decisions to the contrary are: Blocker v. Board of Educ., 226 F. Supp. 208 (E.D.N.Y. 1964); Branche v. Board of Educ., 204 F. Supp. 150 (E.D.N.Y. 1962); Pasadena City School Dist., 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963). The 4 leading decisions demonstrating the majority view are: Keyes v. School Dist. No. 1, 445 F.2d 990 (10th Cir. 1971), *cert. granted*, 404 U.S. 1036 (1972); Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); Downs v. Board of Educ., 336 F.2d 988 (5th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); Bell v. School City, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964). The Supreme Court presumably will hand down its ruling in the *Keyes* case during the current term. It should be noted that the district court made 2 distinct rulings in the *Keyes* case: (1) that de jure segregation existed in the schools in the northeast sector of Denver and a desegregation plan must be implemented to eliminate the dual system there; and (2) that because de facto segregation in the core city schools resulted in unequal educational opportunity for black students, those schools must be desegregated. *See* Keyes v. School Dist. No. 1, 313 F. Supp. 61 (D. Colo. 1970); Keyes v. School Dist. No. 1, 303 F. Supp. 279 (D. Colo. 1969). The court of appeals affirmed the judgment on the first point but reversed on the second point. *See* Keyes v. School Dist. No. 1, 445 F.2d 990 (10th Cir. 1971).

67. *See* Taylor v. Board of Educ., 195 F. Supp. 231 (S.D.N.Y.); 191 F. Supp. 181 (S.D.N.Y.), *aff'd*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961). After reviewing the statements in the *Brown* opinion concerning the prejudicial effects on children who are required to attend segregated schools, the district court observed: "With these principles clear in mind, I see no basis to draw a distinction, legal or moral, between segregation established by the formality of a dual system of education, as in Brown, and that created by gerrymandering of school district lines and transferring of white children as in the instant case. The result is the same in each case: the conduct of responsible school officials has operated to deny to Negro children the opportunities for a full and meaningful educational experience guaranteed to them by the Fourteenth Amendment." 191 F. Supp. at 192-93.

that nearly all of the Negro students lived in the zone served by one school and nearly all of the white students lived in the other zones. Furthermore, it was determined that, as the Negro residential area gradually shifted in location, the school officials continued to revise the zone lines in order to maintain the racially separate schools. Seven years later, similar developments in a Cook County, Illinois, school district also were held to involve discriminatory state action violative of the fourteenth amendment.[68] In each of these cases, the evidence apparently indicated that the local officials had carried out a consciously designed plan to achieve the obvious purpose of establishing substantially segregated schools.

During the past three years, a number of courts have determined that de jure segregation existed in various school districts as a result of action by state and local educational officials in situations in which it was conceded that the segregation originated as a de facto condition and that the school officials had not adopted a specific plan or policy deliberately designed to establish segregated schools. Any attempt to make a generalized analysis of these decisions is a difficult and hazardous venture, because the factual situations in the various school districts differed in each case and the court's rationale must be considered in relation to these variant circumstances. Enough similarities, however, exist both in the factual situations and in the judicial rulings to disclose a common pattern in the approach taken by the courts. At least three courts have attempted to delineate precisely the essentials of de jure desegregation in the following terms: "1. The State, through its officers and agencies, and usually, the school administration, must have taken some action or actions with a purpose of segregation. 2. This action or these actions must have created or aggravated segregation in the schools in question. 3. A current condition of segregation exists."[69] In most cases dealing with this matter, it was recognized that racial concentrations in the various residential areas of the district constituted a substantial factor in causing the segregated condition of the schools.[70] In addition,

68. *See* United States v. School Dist. 151, 301 F. Supp. 201 (N.D. Ill. 1969), *aff'd*, 432 F.2d 1147 (7th Cir. 1970); United States v. School Dist., 286 F. Supp. 786 (N.D. Ill. 1968), *aff'd*, 404 F.2d 1125 (7th Cir. 1969), *cert. denied*, 402 U.S. 943 (1971).

69. Bradley v. Milliken, 338 F. Supp. 582, 592 (E.D. Mich. 1971). In Keyes v. School Dist. No. 1, 313 F. Supp. 61, 73 (D. Colo. 1970), these 3 factors are stated in terms almost identical to those quoted in text, but a fourth factor is also listed: "[T]here must be a causal connection between the acts of the school administration complained of and the current condition of segregation." This causal connection seems to be implied necessarily in the second factor listed in the *Bradley* opinion. *See also* Booker v. Special School Dist. No. 1, 351 F. Supp. 799, 809 (D. Minn. 1972).

70. *See, e.g.*, Bradley v. Milliken, 338 F. Supp. 582, 592 (E.D. Mich. 1971); Davis v. School Dist., 309 F. Supp. 734, 736 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971).

it generally was conceded that school officials are not under a constitutional duty to take affirmative action to eliminate purely de facto segregation.[71] In each of these cases, however, the court determined that state or local educational officials had purposefully engaged, over a period of time, in practices and policies which significantly contributed to the aggravation of the segregation problem in the schools and that the existing segregation was de jure in nature.[72] In the words of the only state court involved in this series of decisions, "extant de facto segregation intentionally maintained and perpetuated by racially motivated state action [became] constitutionally proscribed de jure segregation."[73] Although the offending practices and policies varied somewhat in the different cases, compositely they included the following: revision of attendance zone boundaries as population shifts with racial implications occurred; failure to revise boundaries to alleviate overcrowding of schools with student bodies of predominantly one race and to prevent under usage of schools with student bodies of predominantly the other race; location of new school buildings, construction of additions to existing buildings, and use of portable classrooms in a manner resulting in the minimization of integration of student bodies; fixing the size of new buildings so that they had the capacity to serve only the uniracial residential area surrounding them; assignment of teachers and administrators in a way which indicated that certain schools were intended primarily for white students and certain other schools were intended primarily for black students; establishing bus transportation routes which tended to take black students to predominantly black schools rather than to predominantly white schools nearer to their homes; allowance of voluntary student transfers in situations which enabled white students to avoid attending predominantly black schools; use of optional attendance zones for racially changing residential areas, thus allowing students to choose not to attend a school in which they would be in a racial minority; failure to adopt recommended school reorganization plans which

71. *See, e.g.*, Kelly v. Guinn, 456 F.2d 100, 105 (9th Cir. 1972); Keyes v. School Dist. No. 1, 313 F. Supp. 61, 73 (D. Colo. 1970); People v. San Diego Unified School Dist., 19 Cal. App. 3d 252, 261, 96 Cal. Rptr. 658, 663 (Ct. App. 1971), *cert. denied*, 405 U.S. 1016 (1972).

72. Kelly v. Guinn, 456 F.2d 100 (9th Cir. 1972); Booker v. Special School Dist. No. 1, 351 F. Supp. 799, 809 (D. Minn. 1972); Oliver v. Kalamazoo Bd. of Educ., 346 F. Supp. 766 (W.D. Mich. 1972); Johnson v. San Francisco Unified School Dist., 339 F. Supp. 1315 (N.D. Cal. 1971); Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971); Soria v. Oxnard School Dist. Bd. of Trustees, 328 F. Supp. 155 (C.D. Cal. 1971); Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501 (C.D. Cal. 1970); Davis v. School Dist., 309 F. Supp. 734 (E.D. Mich. 1970); Keyes v. School Dist. No. 1, 303 F. Supp. 279 (D. Colo. 1969); People v. San Diego Unified School Dist., 19 Cal. App. 3d 252, 96 Cal. Rptr. 658 (Ct. App. 1971).

73. People v. San Diego Unified School Dist., 19 Cal. App. 3d 252, 261-62, 96 Cal. Rptr. 658, 663 (Ct. App. 1971).

would have resulted in greater desegregation of student bodies; and allocation of school operating and maintenance funds in a way which perpetuated the inferior quality of predominantly black schools and thereby discouraged white students from attending them.[74]

Varying combinations of these elements of state action have formed the basis on which courts in the northern and western sections of the nation are increasingly inclined to find the existence of de jure segregation, even when no state law requiring or permitting the operation of racially dual school systems has been in effect for half a century or more. Since very similar conditions undoubtedly exist in many other cities outside the South, it seems highly probable that the reorganization of numerous other school systems will be required as the validity of the basis of their segregated operation is tested in federal court litigation, unless the Supreme Court adopts a more restricted view of what constitutes de jure segregation when it hands down its decisions in the *Denver*, *Richmond*, and *Detroit* cases.

C. *Redefining the Constitutional Requirement In Order To Emphasize the Factor of "Equal Educational Opportunity"*

The third noteworthy innovation in recent judicial efforts to achieve further school integration involves not so much a new idea as a new emphasis regarding the precise nature of the constitutional right which is to be protected. The proposition that the fourteenth amendment guarantee of equal protection of the laws includes protection against being subjected to unequal educational opportunity was stated definitely, of course, in the first *Brown* case. In that decision, the Supreme Court strongly stressed the importance of a good education as a necessity for successful participation in mid-twentieth century American life and noted the prejudicial effects of the inferior schools to which Negro

74. Several courts have intimated, but apparently not held, that public school officials have an affirmative duty to take all feasible action necessary to eliminate segregation in the schools which has resulted from de facto residential segregation, and that failure to take such action constitutes, in itself, state action which perpetuates the school segregation. *See* Bradley v. Milliken, 338 F. Supp. 582, 593 (E.D. Mich. 1971); Davis v. School Dist., 309 F. Supp. 734, 741-42 (E.D. Mich. 1970); People v. San Diego Unified School Dist., 19 Cal. App. 3d 252, 262-63, 265, 96 Cal. Rptr. 658, 664, 666 (Ct. App. 1971). These statements, however, must be read in connection with findings in the cases that the school officials involved had pursued active practices and policies contributing to the aggravation of the segregated condition of the schools.

In the *Detroit* case, Judge Roth called attention to actions by noneducational governmental agencies which, combined with the operations of private business organizations, significantly aggravated residential segregation in the metropolitan area, and thereby directly contributed to the development of school desegregation in the city system. The segregative policies of the FHA and VA, private lending institutions, real estate organizations, and brokerage firms were all found to be related to the school situation. Bradley v. Milliken, 338 F. Supp. 582, 587 (E.D. Mich. 1971).

students customarily were assigned. The Court proceeded to pose "the question presented" by the case as follows: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"[75] The Court concluded that it does.

Referring back even further than 1954, some persons have suggested that even the now-discarded separate-but-equal concept of equal protection incorporated the requirement of equal educational opportunity, in legal theory although not in practical application.[76] The current emphasis on this factor, however, obviously refers to something quite different from merely the assurance that black schools will be equal in terms of buildings, faculties, and equipment to schools attended by white students, since the *Brown* case settled the point that, constitutionally speaking, "separate educational facilities are inherently unequal."[77]

Because the controversy in the *Brown* case was focused on state-imposed racially dual systems, however, it generally was assumed for a number of years that the heart of the Supreme Court's decision was that dual school systems violated the equal protection clause for the reason that they compelled Negro students to go to different schools than those attended by white students. Thus, the dual system had to be eliminated on constitutional grounds simply because it specifically maintained separate black schools and white schools. In the mid-sixties, the courts took the position that school officials have an affirmative duty, not merely to allow some blacks to attend formerly all-white schools, but actively to establish unitary, nonracial systems in which both black and white students would be assigned to the schools that they would attend if they all were members of the same race. The emphasis, however, was still on establishing racially integrated student bodies, faculties, administrative staffs, transportation facilities, academic programs, and extracurricular activities, so that no schools in the system could be identified as intended primarily for students of one race.

As early as 1965, one federal district court declared that the essence of the right protected by the *Brown* interpretation of the fourteenth amendment is "equal educational opportunities for all children within the [school] system," rather than merely freedom from having to attend

75. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

76. *See* Keyes v. School Dist. No. 1, 313 F. Supp. 61, 83 (D. Colo. 1970); Hobson v. Hansen, 269 F. Supp. 401, 496-97 (D.D.C. 1967); 2 T. EMERSON, D. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1779-80 (3d ed. 1967).

77. Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

racially segregated schools.[78] The influence of this early declaration was blunted somewhat by a subsequent court of appeals decision vacating the lower court's judgment on grounds other than the equal opportunity ruling.[79] After a lapse of five years, however, other courts, particularly in nothern and western parts of the country, began to emphasize that truly equal educational opportunities must be offered to all students, regardless of race.[80] Perhaps the most positive expression of this right was made by District Judge Pregerson: "The maintenance of unequal educational opportunities in the Oxnard Elementary Schools through racial imbalance denies plaintiffs their rights to equal protection of the laws, guaranteed by the Fourteenth Amendment; and to redress this denial, this court holds, the defendants have an affirmative duty to provide plaintiffs with a racially balanced school system."[81] All of the courts adopting this position appear to rely, at least impliedly, on the *Brown* case as their primary authority, and several of them expressly have referred to that decision as the source of the equal educational opportunity constitutional requirement.[82]

This shifting of emphasis may be of substantial significance in at least two respects. First, it provides what is probably a more generally acceptable justification for desegregating the public schools. Under this

78. Barksdale v. Springfield School Comm., 237 F. Supp. 543, 546 (D. Mass. 1965).

79. Barksdale v. Springfield School Comm., 348 F.2d 261 (1st Cir. 1965). The appellate court ruled that the district court's desegregation order was inappropriately issued because defendant school officials already had taken all desegregation steps which properly could be required of them. The court of appeals also repudiated statements in the lower court's opinion to the effect that the Constitution requires elimination of de facto segregation as well as de jure segregation.

80. The executive department seems to have been expressing a similar point of view in a March 24, 1970, statement by President Nixon. "Progress toward school desegregation is part of two larger processes, each equally essential:

—The improvement of educational opportunities for all of America's children.

—The lowering of artificial racial barriers in all aspects of American life." Statement by the President on Elementary and Secondary School Desegregation, White House Press Release 9 (Mar. 24, 1970).

81. Soria v. Oxnard School Dist. Bd. of Trustees, 328 F. Supp. 155, 157 (C.D. Cal. 1971); *see* United States v. Texas Educ. Agency, 467 F.2d 848, 869 (5th Cir. 1972); Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142, 148 (5th Cir. 1972); Oliver v. Kalamazoo Bd. of Educ., 346 F. Supp. 766, 782 (W.D. Mich.), *aff'd*, 448 F.2d 635 (6th Cir. 1971); United States v. Texas, 321 F. Supp. 1043, 1056 (E.D. Tex. 1970); Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501, 523-24 (C.D. Cal. 1970); Berry v. School Dist., Civil No. 9 (W.D. Mich., Feb. 17, 1970); Keyes v. School Dist. No. 1, 303 F. Supp. 279, 287 (D. Colo. 1969), *aff'd in part*, 445 F.2d 990, 1003-04 (10th Cir. 1971); People v. San Diego Unified School Dist., 19 Cal. App. 3d 252, 262-63, 96 Cal. Rptr. 658, 664 (Ct. App. 1971).

82. *See, e.g.*, Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142, 148 (5th Cir. 1972); Barksdale v. Springfield School Comm., 237 F. Supp. 543, 546 (D. Mass. 1965); People v. San Diego Unified School Dist., 19 Cal. App. 3d 252, 263-64, 96 Cal. Rptr. 658, 664-65 (Ct. App. 1971).

approach, school desegregation becomes a means of achieving the worthy goal of higher quality education for *all* children in all parts of the nation, rather than merely a means of "mixing the races" as an end in itself. This would seem to be an objective which many whites who are not especially enthusiastic about racial integration can accept as justifying the added expense, inconveniences, and disruptions which usually accompany the substantial integration of racially imbalanced school systems. Secondly, the constitutional right to equal educational opportunity provides a valid basis for ordering the reorganization of a school system without a finding that de jure segregation exists. Even if the racial imbalance in the schools is deemed to be solely the result of racial residential patterns not produced or maintained by governmental authority, the operation of a system containing racially unbalanced schools may be found to be unconstitutional.[83] The line of reasoning leading to this conclusion, although not specifically spelled out in this form in any single decision, is as follows: (1) the equal protection clause guarantee includes the right of equal educational opportunity; (2) under the *Brown* case, all-black or very predominantly black schools are inherently unequal to white or predominantly white schools; (3) adherence by public school officials to the neighborhood school plan requires many black children to attend all-black or very predominantly black schools instead of higher quality white or predominantly white schools; (4) thus, by state action, (of the school officials), black children are denied the equal educational opportunity which is their constitutional right. Under this view, the state action which infringes constitutional rights is not the deliberate assignment of students by school boards to particular schools on the basis of race (de jure segregation), but rather the implementation by school officials of the neighborhood school policy in situations in which that policy results in black students being required to attend inferior schools. At the time of the writing of this Article, no appellate federal court has utilized this line of reasoning to require a de facto segregated system to desegregate. The Tenth Circuit appears to have rejected the argument in a case which is presently pending before the Supreme Court.[84]

It is appropriate to note that several courts recently have held that

83. A few courts have expressly noted that desegregation of de facto segregated systems may be ordered on this basis. *See, e.g.*, Berry v. School Dist., Civil No. 9 (W.D. Mich., Feb. 17, 1970); Keyes v. School Dist. No. 1, 303 F. Supp. 279 (D. Colo. 1969), *aff'd in part*, 445 F.2d 990 (10th Cir. 1971), *cert. granted*, 404 U.S. 1036 (1972); People v. San Diego Unified School Dist., 19 Cal. App. 3d 252, 96 Cal. Rptr. 658 (Ct. App. 1971).

84. Keyes v. School Dist. No. 1, 445 F.2d 990, 1002-07 (10th Cir. 1971), *cert. granted*, 404 U.S. 1036 (1972) (dealing with the core city schools).

the system of financing public schools primarily on the basis of local property taxes is unconstitutional because it discriminates against children who live in school districts with low property valuations.[85] In explaining its ruling in such a case, the California Supreme Court referred to statements of the federal Supreme Court that "[classifications] drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored,"[86] and that "lines . . . drawn on the basis of wealth or race . . . render a classification highly suspect and thereby demand a more exacting judicial scrutiny."[87] Having investigated the actual effects of the use of local property taxes for financing the state's public educational system, the California court held that "this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors." Since no "compelling state purpose" necessitating that method of financing was found to exist, the system was held to be violative of the equal protection clause of the fourteenth amendment.[88] In reaching the same conclusion regarding the Texas public schools, a federal district court declared that a school financing program must "not make the quality of public education a function of wealth other than the wealth of the state as a whole."[89]

In the context of this discussion of new approaches to school desegregation, these decisions are significant because the three courts appear to have accepted two propositions: (1) the equal protection clause prohibits a state from operating its public school system in a manner which prevents any class of students from having educational opportunities equal to the opportunities offered to the other students; and (2) the duty not to discriminate invidiously between different classes of students is a duty of the state and not merely a duty of each local school district. Thus, although these decisions are not directly related to racial discrimi-

85. *E.g.*, Rodriguez v. San Antonio Independent School Dist., 337 F. Supp. 280 (W.D. Tex. 1972), *rev'd*, 93 S. Ct. 1278 (1973); Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

86. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966).

87. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969).

88. Serrano v. Priest, 5 Cal. 3d 584, 589, 487 P.2d 1241, 1244, 96 Cal. Rptr. 601, 604 (1971).

89. Rodriguez v. San Antonio Independent School Dist., 337 F. Supp. 280, 285 (W.D. Tex. 1972), *rev'd*, 93 S. Ct. 1278 (1973). The opinion of the federal district court in the Minnesota case contains statements very similar to those quoted above from the California and Texas cases. *See* Van Dusartz v. Hatfield, 334 F. Supp. 870, 872 (D. Minn. 1971). After this Article was completed, the Supreme Court, by a 5 to 4 decision, reversed the decision of the federal district court in the *Rodriguez* case. Part of the reasoning contained in the majority opinion seems to cast doubt on the view that equal educational opportunity is a requirement under the federal Constitution. *See* San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973).

nation problems, they provide indirect support for the cases which hold that equal educational opportunity is the basic constitutional right to be protected in requiring school desegregation and that school districts can be required to merge when such action is necessary to eliminate continuing discriminatory effects of formerly operated dual school systems.

IV. THE "BUSING" CONTROVERSY

A. The Development of the "Busing" Requirement

One result of the Supreme Court's refusal in the *Swann* case to soften its school desegregation stance and of the lower federal courts' adoption of innovative approaches designed to achieve substantial desegregation of the school systems is the emergence of the "busing" controversy as a volatile, national issue—if not a national mania.[90] The busing problem in school desegregation context did not originate, of course, with the *Swann* decision or any other development in the 1970's, but rather dates back at least six or seven years to the time when several lower federal courts initially recognized that half-way measures were never going to eliminate dual school systems and that few school boards could be expected to do the job without specific judicial coercion. Although the district court in which the *Charlotte-Mecklenburg* case[91] was litigated was among the first of the lower federal courts to react strongly to this situation, the Fifth Circuit's decision in 1967 in the *Jefferson County* case[92] properly may be viewed as the source of the busing requirement.

At that juncture in history, the courts in the Fifth Circuit[93] had borne the heaviest share of the desegregation litigation and had dealt with some of the bitterest hostility to school integration. Nevertheless, they had made only nominal progress in attempting to implement the *Brown* principle.[94] On the other hand, the Department of Health, Educa-

90. I use the word "mania" advisedly. My dictionary defines "mania" as "[m]adness . . . characterized by disordered speech and thinking, by impulsive movements, and by excessive emotion." WEBSTER'S NEW COLLEGIATE DICTIONARY 511 (2d ed. 1949).

91. Swann v. Charlotte-Mecklenburg Bd. of Educ., 300 F. Supp. 1358 (W.D.N.C. 1969).

92. United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir.) (en banc), *cert. denied*, 389 U.S. 840 (1967).

93. The Fifth Circuit covers the states of Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas.

94. In the *Jefferson County* decision, the court found that, as of 1965, of the 59,361 Negro students in the 7 school districts involved, only 110 were attending formerly all-white schools and there was no faculty desegregation, even though all 7 districts were operating under court-approved desegregation plans. During the 1963-64 school year, in the 11 states of the old Confederacy, only 1.17% of the Negro public school students were attending schools with white students. In 1964-65, only 2.25% were doing so. Moreover, in 1965, no Negro teachers were serving on faculties with

tion, and Welfare's use of the fund cut-off provision of Title VI of the 1964 Civil Rights Act to induce school districts to desegregate "voluntarily" was beginning to show encouraging results. Confronted with this situation, the Fifth Circuit apparently concluded that the time had come for establishing a comprehensive formula to be applied as the basis for solving school desegregation controversies throughout the circuit.[95] This formula, together with the HEW guidelines promulgated in 1965 and 1966,[96] provided a single standard for the combined judicial-administrative effort to accomplish a substantial degree of meaningful desegregation in school systems all over the South during the years 1967 to 1970.[97]

Although the *Jefferson County* decree did not specifically order extensive reassignment and transportation of students to out-of-neighborhood schools, it immediately was apparent that in many districts only that type of action could satisfy the affirmative duty of school officials to establish unitary school systems by means which would produce substantially integrated student bodies in most of the schools and overcome the effects of past discrimination which had arisen from the operation of the dual systems. As was to be demonstrated repeatedly in subsequent cases, few populous school districts with a significant percentage of Negro students concentrated in one or two predominantly Negro residential areas could operate a constitutionally valid system under these standards by merely rearranging attendance zones around neighborhood schools. In order to have the needed degree of integration in the student bodies of enough schools, it was necessary to assign many black students to formerly white schools located in distant white residential areas and to assign many white students to formerly Negro schools located in distant black residential areas. Further, the students who were assigned to schools a considerable distance from their homes had to be provided with transportation to and from school.[98] In this

white teachers in the public schools of Alabama, Louisiana, or Mississippi. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 853-54 (5th Cir. 1966).

95. "We read Title VI [of the 1964 Civil Rights Act] as a congressional mandate for change—change in pace and method of enforcing desegregation." *Id.* at 852.

96. *See* 31 Fed. Reg. 5623 (1966); 30 Fed. Reg. 10,163 (1965); 30 Fed. 9981 (1965).

97. For a discussion of the *Jefferson County* decision, see notes 4-8 *supra* and accompanying text.

98. *See* Brewer v. School Bd., 456 F.2d 943 (4th Cir.), *cert. denied*, 406 U.S. 933 (1972). The court stated that unless free transportation to distant schools is provided, "the whole plan of desegregation becomes a futile gesture and will represent for the disadvantaged child, intended to be protected thereby in his constitutional rights, a cruel hoax. . . . [I]f reassignment is mandated constitutionally, it must be effective and meaningful and 'more than a matter of words.' To repeat, the Court cannot compel the student to attend a distant school and then fail to provide him with

manner, the ground was laid for a strange development in semantics, as a new meaning suddenly became attached to a familiar word. For the word "busing" no longer pertains primarily to a student riding to school on a bus. Instead, it refers to the court-ordered assignment of relatively large numbers of students to schools other than those they would attend under the traditional "neighborhood school concept," in order to establish a racially integrated school system. It is merely incidental that these students ride yellow buses to reach their assigned schools, since the "busing" controversy would remain even if they were transported in their family Volkswagen or Rolls-Royce each day. It is also to be noted that no one refers to a student who rides a bus for a long distance to reach his chosen private school as being "bused." As someone has aptly observed: "It's not the *bus* ride that matters; it's what's at the *end* of the ride"—a school which is not located in the student's residential neighborhood and which has a student body of a different racial composition than the old neighborhood school would have had.[99]

Protests against court-ordered busing rose in intensity as more urban school districts, especially those in states outside the South, were subjected to or threatened with decrees requiring very substantial revisions of student assignment policies and practices. The lower federal courts, however, remained firm in their view that busing was a legitimate desegregation device in situations in which it was the only feasible method of eliminating the effects of the dual school system and establishing a unitary system. Even the Fourth Circuit, noted for its lenient position on the constitutional requirements for school desegregation,[100] conceded in the *Swann* case that "bussing is a permissible tool for achieving integration," though in that case the court held that the

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the means to reach that school." *Id.* at 946-47. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30-31 (1971); Copeland v. School Bd., 464 F.2d 932, 933 (4th Cir. 1972); United States v. Greenwood Municipal Separate School Dist., 460 F.2d 1205, 1207 (5th Cir. 1972); Sando v. Alexandria City School Bd., 330 F. Supp. 773, 775 (E.D. Va. 1971).

99. "For school authorities or private citizens to now object to such transportation practices raises the inference not of hostility to pupil transportation but rather racially motivated hostility to the desegregated school at the end of the ride." Bradley v. Milliken, 345 F. Supp. 914, 926 (E.D. Mich. 1972).

100. Six school desegregation decisions of the Fourth Circuit have been reviewed by the Supreme Court, and, in *every* instance, the Court of Appeals' decision has been reversed. *See* United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972), *rev'g* 442 F.2d 575 (4th Cir. 1971); Wright v. Council of the City of Emporia, 407 U.S. 451 (1972), *rev'g* 442 F.2d 570 (4th Cir. 1971); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), *rev'g in part* 431 F.2d 138 (4th Cir. 1970); Green v. County School Bd., 391 U.S. 430 (1968), *vacating in part* 382 F.2d 338 (4th Cir. 1967); Bradley v. School Bd., 382 U.S. 103, *vacating* 345 F.2d 310 (4th Cir. 1965); Griffin v. County School Bd., 377 U.S. 218 (1964), *rev'g* Griffin v. Board of Supervisors, 322 F.2d 332 (4th Cir. 1963).

amount of busing necessary to implement the district court's desegregation plan for the Charlotte-Mecklenburg elementary schools did not satisfy "the test of reasonableness" and would be unduly burdensome on the school district.[101]

The Supreme Court's reversal in 1971 of the Fourth Circuit's decision in this case appears to have erased any reasonable doubt about the validity of busing when it is necessary to achieve a constitutional, unitary system. The desegregation plan which had been ordered by the district court for the Charlotte-Mecklenburg system was approved by the Supreme Court even though it required very extensive reassignment of students at all grade levels to schools far outside their residential areas, and transportation of these students to their assigned schools by buses. Regarding the permissible scope of busing, Chief Justice Burger, writing for a unanimous Court, stated:

> The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision.
>
> . . . The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.
>
> Thus the remedial techniques used in the District Court's order were within that court's power to provide equitable relief; implementation of the decree is well within the capacity of the school authority.
>
> . . . In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school.
>
> An objection to transportation may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process. District Courts must weigh the soundness of any transportation plan in light of [these and other relevant considerations].[102]

On the same day that the *Swann* decision was handed down, the Supreme Court upheld a district court decision that the North Carolina antibusing statute was unconstitutional.[103] Reflecting the essence of the usual objections to busing, the statute in question declared that "[n]o student shall be assigned or compelled to attend any school on account of race, creed, color, or national origin, or for the purpose of creating

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101. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138, 145, 147 (4th Cir. 1970), *rev'd in part*, 402 U.S. 1 (1971).

102. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 329-31 (1971). For other cases indicating that it may be necessary for courts to order busing as the only effective means of desegregating a school system, see McDaniel v. Barresi, 402 U.S. 39 (1971); Davis v. Board of School Comm'rs, 402 U.S. 33 (1971); Johnson v. San Francisco Unified School Dist., 339 F. Supp. 1315 (N.D. Cal. 1971).

103. North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971), *aff'g* 312 F. Supp. 503 (W.D.N.C. 1970).

a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing."[104] In a brief, unanimous opinion, the Court invalidated the legislation and stated:

> The prohibition [against assignments on the basis of race] is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court in the *Swann* case. But more important the statute exploits an apparently neutral form to control school assignment plans by directing that they be "color blind"; that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education*. . . . 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.
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> . . . 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* . . . , 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.[105]

Another matter dealt with specifically in the *Swann* case continues to have a prominent place in the busing controversy—the distinction between assignment and transportation of students to certain schools with the objective, on the one hand, of desegregating the school system and, on the other hand, of creating a racial balance in the schools of the system. The distinction is a vital one, because, under the present construction of the equal protection clause, school officials are under an affirmative, constitutional duty to achieve the former objeetive but they are under no obligation to achieve the latter. In the *Swann* case, the school board challenged the validity of the district court's order on the ground that it required a 71-29 white-black ratio in the student bodies of all of the elementary schools. In response to this contention, the

104. N.C. GEN. STAT. § 176.1 (Supp. 1969).

105. North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45-46 (1971). Federal district courts in 2 other states previously had declared similar antibusing statutes—sometimes locally called "Freedom-of-Choice Acts"—of New York and Alabama unconstitutional. *See* Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971); Alabama v. United States, 314 F. Supp. 1319 (S.D. Ala.), *appeal dismissed*, 400 U.S. 954 (1970). Although neither of these statutes expressly prohibited transportation of students, both included exactly the same prohibition against assignment of students to schools on account of race as is stated in the North Carolina statute quoted in text, and both included similar provisions forbidding assignment of students to achieve racial balance in schools. Subsequently, the Oklahoma antibusing statute, similar in wording to the North Carolina statute, also was held to be unconstitutional. *See* Dowell v. Board of Educ., 338 F. Supp. 1256 (W.D. Okla. 1972). *See also* Stell v. Board of Pub. Educ., 334 F. Supp. 909 (S.D. Ga. 1971), which declared unconstitutional a similar freedom-of-choice statute enacted by the Georgia legislature especially on behalf of the Savannah-Chatham County school system.

Supreme Court declared: "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."[106] Examination of the district court's decree led the Supreme Court to conclude that the decree did not purport to require an exact 71-29 racial ratio in all schools, but rather that "the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement."[107] Thus, in formulating plans for accomplishing the constitutional requirement of dismantling a racially dual school system and establishing a nonracial unitary one, the courts may regard the composition of the entire system as something of a norm for the composition of the various schools; but apparently a court cannot demand that extensive busing be undertaken to assure that all, or even substantially all, schools in a system have student bodies which reflect exactly, or even closely, the racial ratio of the district's school population.

It should be noted, however, that the Supreme Court, on the same day on which it was making these observations about "racial balance" not being constitutionally required, pointed out "that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements."[108] In addition, in the *Clarke County* case,[109] the Court sustained the school board's voluntary program of radically revising school attendance zones to create substantially biracial student bodies in all schools, and ruled that the assignment of students to schools on the basis of race to eliminate the vestiges of the dual system was within the power of the school officials.

One argument against the legality of court-ordered busing which has been reasserted persistently, especially by candidates for elective office, is that section 407(a) of the Civil Rights Act of 1964 declares busing to be illegal by specifying that "nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district

106. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971).
107. *Id.* at 25.
108. North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971).
109. McDaniel v. Barresi, 402 U.S. 39 (1971).

to another in order to achieve such racial balance . . . ."[110] On its face, this provision may appear to be a blanket prohibition against requiring busing in a racial context. The *Congressional Record*, however, definitely indicates that the legislative intent behind the enactment of this provision was specifically to prohibit court orders which would require racial balance in the student bodies of schools in lawfully organized systems, rather than to forbid orders drawn to eliminate unconstitutional racial segregation.[111] In addition, several federal courts clearly have stated that the section 407(a) proviso was inserted into the statute to declare that the powers of the federal courts to regulate public school operation were not being expanded beyond those already existing. This limitation does not affect the courts' authority to order the elimination of unconstitutional, racially dual school systems, because the federal courts already possessed that power by virtue of the inherent power vested in the judiciary to protect the individual rights which are guaranteed by the fourteenth amendment against infringement by the states; and in 1964, no one seems to have assumed that Congress had the authority to take that power away from the courts. In fact, the proviso was intended only to preclude the interpretation that the statute conferred on the courts the authority to require the reassignment of students to establish a better racial balance in the schools of constitutional, unitary systems.[112]

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110. 42 U.S.C. § 2000c-6(a) (1970).

111. 110 CONG. REC. 12,715 (1964) (remarks of Senator Humphrey); *see* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 881 (5th Cir. 1966). Section 401 of the 1964 Civil Rights Act, in defining terms to be used in Title IV of the statute, specifically distinguishes between "desegregation" and "overcoming racial imbalance." *See* 42 U.S.C. § 2000c(b) (1970).

112. The Supreme Court in *Swann* stated: "The proviso in § 2000c-6 is in terms designed to foreclose any interpretation of the Act as expanding the *existing* powers of federal courts to enforce the Equal Protection Clause. There is no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers. The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called 'de facto segregation,' where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities. In short, there is nothing in the Act that provides us material assistance in answering the question of remedy for state-imposed segregation in violation of *Brown I*." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17-18 (1971). *See also* McDaniel v. Barresi, 402 U.S. 39, 41-42 (1971). The same construction of the § 407 proviso previously had been announced by 3 different courts of appeals. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138, 146 (4th Cir. 1970); United States v. School Dist. 151, 404 F.2d 1125, 1130 (7th Cir. 1969); United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 852-53 (5th Cir. 1966). *See* Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971), in which the court stated: "It is, the Court believes, unfortunate that we cannot deal with public school segregation on a no-fault basis, for if racial segregation in our public schools is an evil, then it should make no difference whether we classify it de jure or de facto. Our objective, logically, it seems to us, should be to remedy a condition which we believe needs correction. . . . There is enough blame for everyone to share." *Id.* at 592.

B. *Proposed Antibusing Legislation*

As the public furor over busing accelerated following the 1971 decisions in the *Charlotte-Mecklenburg*, *Richmond*, and *Detroit* cases, it became obvious that school desegregation—under the "busing" misnomer—was to becomc an important political issue of the 1972 elections.[113] Consequently, a number of antibusing bills were submitted hurriedly for congressional consideration, and several constitutional amendments prohibiting busing were proposed. The main interest and action has been directed toward the Nixon Administration bills: the Student Transportation Moratorium Bill (H.R. 13916) and the Equal Educational Opportunities Bill (H.R. 13915).[114]

The Student Transportation Moratorium Bill, as its name suggests, was intended temporarily to prevent the extension of court-imposed busing for the implementation of school desegregation plans in order to give the Congress time to debate and adopt a law which would place permanent limitations on the extent to which busing of students could be used as a means of desegregating school systems.[115] The moratorium period was to start with the enactment of the bill into law and to extend until July 1, 1973 or, if earlier, the date on which Congress adopted legislation establishing a uniform standard regarding the extent to which students must be reassigned and transported to achieve desegregated school systems.[116] The bill provided that implementation of any court school desegregation order would be stayed to the extent that the order required any transportation of students to assigned schools which was

113. Testifying before a House subcommittee on March 3, 1972, regarding constitutional amendments designed to prevent extensive reassignment and transportation of public school students as a means of achieving desegregation, Burke Marshall, Deputy Dean of the Yale Law School, observed that "there is no factual showing of a need to interfere with the orderly process of litigation in the matter, even by legislation, much less by such a drastic step as tampering with the Constitution. There is no evidence that the Federal judiciary has suddenly, in recent years, become peopled with wild men, arbitrarily ordering indiscriminate and massive busing of children.

"This is an issue grown out of political rhetoric, out of inflamed fear of steps that have not been taken and never will be as far as the cases now on the books are concerned, out of imagined rather than real threats to family life and family ties to communities. This is, therefore, the worst possible of atmospheres in which serious men should seriously consider changing the Constitution." *Hearings on Proposed Amendments to the Constitution and Legislation Relating to Transportation and Assignment of Public School Pupils Before a Subcomm. of the House Comm. on the Judiciary*, 92d Cong., 2d Sess., ser. 32, pt. 1, at 405 (1972).

114. H.R. 13916, 92d Cong., 2d Sess. (1972); H.R. 13915, 92d Cong., 2d Sess. (1972).

115. In § 2(a)(3), the "Findings and Purpose" Section, the Bill declared: "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." H.R. 13916, 92d Cong., 2d Sess. § 2(a)(3) (1972).

116. *Id.* § 3(a).

not carried on prior to the order.[117] Further, the same limitation was placed on enforcement of any plan submitted by a local school board to a federal agency pursuant to Title VI of the Civil Rights Act of 1964.[118] Additional busing voluntarily proposed and implemented by local boards, however, was not prohibited.[119] In support of the moratorium on busing, the bill made the following "finding": "In many cases these reorganizations [made for the purpose of desegregating school systems], 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."[120] It should be noted that any court-ordered plan which actually contained either of the latter two faults mentioned would have been subject to reversal on appeal, under the criteria set forth in the Supreme Court's opinion in the *Swann* case.[121]

The Nixon proposal was discussed at length, but was set aside by Congress in favor of the plan incorporated into the Higher Education Act of 1972, which the President signed on June 23, 1972, while protesting that it did not go far enough. The key antibusing provision is section 803, which provides:

> Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, religion or socioeconomic status, the effectiveness of such order shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals have expired. This section shall expire at midnight on January 1, 1974.[122]

In addition, section 802 of the Act prohibits the use of federal funds for "transportation of students or teachers . . . in order to overcome racial imbalance in any school or school system, or . . . in order to carry out a plan of racial desegregation of any school or school system," unless local school officials consent to the use of federal funds in that manner.[123]

Quite naturally, serious doubts have been expressed regarding

117. *Id.* §§ 3(a)(1)-(2).
118. *Id.* § 3(b).
119. *Id.* § 3(c).
120. *Id.* § 2(a)(2).
121. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24, 30-31 (1971).
122. Pub. L. No. 92-318, § 803 (June 23, 1972).
123. *Id.* § 802(a).

whether Congress has the power to require a delay in the enforcement of a judicial order granting relief from an impairment of a constitutional right. On the one hand, it is argued that Congress validly may provide for a delay because time is needed to enact a permanent measure which would establish a uniform standard for administering remedies for infringements of the constitutional right to be free from racial discrimination in public schools.[124] In rebuttal, however, it is maintained that, in light of the Supreme Court's repeated declarations since 1968 that unconstitutional racial segregation must be eliminated from public school systems immediately,[125] Congress would be aiding and perpetuating racial discrimination in violation of the due process clause of the fifth amendment if it provided for a moratorium in the desegregation process.[126] Others contend that the moratorium is justifiable only: (1) if there is an actual need for a delay in the enforcement of further busing plans during the period in which permanent regulatory legislation is being drafted, debated, and enacted by Congress, and (2) if the permanent legislation will provide for effective remedies for desegregating school systems which federal courts find are being operated on an unconstitutional basis. Although the findings which introduced H.R. 13916 were offered as proof of the need for temporary delay, the reasons given in that bill seem inadequate to justify the deliberate withholding of vindication of constitutional rights.[127] Moreover, the ultimate test of

124. *See* H.R. 13916, 92d Cong., 2d Sess. § 2 (1972).

125. *See* Carter v. West Feliciana Parish School Bd., 396 U.S. 290, 293 (1970); Dowell v. Board of Educ., 396 U.S. 269, 270 (1969); Green v. County School Bd., 391 U.S. 430, 439 (1968).

126. The Supreme Court has held that operation of racially segregated schools under federal authority (in the District of Columbia) violates the fifth amendment. *See* Bolling v. Sharpe, 347 U.S. 497 (1954). *See also* Gautreaux v. Romney, 448 F.2d 731, 737-40 (7th Cir. 1971).

127. *See* H.R. 13916, 92d Cong., 2d Sess. § 2 (1972). The need for the delay is declared to arise from the "findings" that "[i]n many cases" courts have required school officials to do more transporting of students than was "necessary to accomplish desegregation" and that there is "a substantial likelihood that, pending enactment of [the proposed permanent] legislation, many local educational agencies will be required to implement desegregation plans that impose a greater obligation than required by the fourteenth amendment. . . ." *Id.* §§ 2(a)(2), (5). These "findings" are questionable on several bases. First, if these are regarded as findings of *fact*, the drafters of the bill will have difficulty in citing cases in which the courts have demanded *more* desegregation than is necessary to satisfy constitutional requirements. On the contrary, the lower courts generally have been reluctant to require *enough* desegregation by Supreme Court standards, as is evidenced by the 18-year struggle to achieve compliance with the principles of the *Brown* case. Secondly, if a lower court orders more than the Constitution requires, that decision would be subject to reversal on appeal; and therefore, the unjustified demand on the school officials could be avoided through judicial process without congressional interference. Thirdly, these findings actually cannot be findings of *fact*, because the question what constitutes "enough" desegregation to satisfy the constitutional obligation of school boards to eliminate dual systems is a question of *law*—a question to be decided by interpretation of the fourteenth amendment, which is a judicial, not a legislative, function. In effect, the findings amount to a proposed congressional declaration of

the validity of the moratorium would still turn on the constitutionality of the permanent legislation, a matter about which very serious doubts exist.[128]

The mandatory postponement of busing orders required by section 803 of the Higher Education Act quickly proved to be only an illusory source of relief from the implementation of new desegregation plans. Ignoring the crucial distinction specifically drawn by the courts between achieving *racial balance* in schools and achieving *desegregation* of schools, the drafters of the section chose to impose its restraints against the transfer or transportation of students for the purpose of "achieving a balance among students with respect to race, sex, religion, or socio-economic status." Relying on section 803, several school boards promptly sought to stay the enforcement of new desegregation orders which required a greater degree of busing than had been carried on in those school systems during the previous year. After having been denied this relief by the lower federal courts, some school officials appealed to individual Supreme Court Justices while the Court itself was not in session. Late in the summer, Justice Rehnquist denied the stays sought by the Nashville, Tennessee and Oklahoma City, Oklahoma school officials, and Justice Powell refused to grant a stay to the Richmond County, Georgia school officials.[129] Although Justice Rehnquist did not give any supporting reasons for his decisions, Justice Powell explained that, in his view, the lower court order requiring the Richmond County school board to take further busing action did not fall within the scope of section 803 because that order called for the transfer or transportation of students, not to achieve racial balance in the schools, but rather to eliminate unconstitutional racial segregation from the school system.[130] In light of the positive claims of proponents of the moratorium

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disapproval of the conclusions of law which various courts have reached in exercising their authority as instruments of the judicial branch of the government. If the legislative branch—elected by the majority element of the population—had the power to render ineffective the rights which the judicial branch determines are guaranteed by the Constitution for the protection of minority elements in the population, constitutional rights of members of minority groups quickly would become illusory.

128. For a discussion of the basic antibusing provisions of H.R. 13915 and the revised bill adopted by the House of Representatives see text accompanying note 135 *infra*.

129. *See* Drummond v. Acree, 93 S. Ct. 18 (1972); Washington Post, Sept. 2, 1972, § A, at 1, col. 8.

130. Justice Powell's statement included the following reasoning: "By its terms, the statute requires that the effectiveness of a district court order be postponed pending appeal only if the order requires the 'transfer or transportation' of students 'for the purposes of achieving a balance among students with respect to race.' It does not purport to block all desegregation orders which require the transportation of students. If Congress had desired to stay all such orders it could have used clear and explicit language appropriate to that result." Drummond v. Acree, 93 S. Ct. 18, 20 (1972).

statute that it would relieve school authorities from having to undertake any further busing of students during the time their cases were being appealed, Justice Powell's conclusion that Congress intended to limit the scope of the stay provision may seem open to question. His position, however, is well supported by at least two traditional principles of statutory construction: (1) in construing a statute, the words used by the legislature are to be given their usual, accepted meaning in the context of the subject matter of the statute,[131] and (2) if the language of a statute is susceptible to two constructions, one creating serious questions regarding the law's constitutionality and the other not raising such doubts, the court should adopt the latter construction in order to avoid subjecting the statute to a constitutional challenge.[132] Applying these principles to section 803 of the Higher Education Act, it is clear that, in the context of the law concerning school desegregation, the phrase "racially balanced schools" has a meaning quite different from the phrase "desegregated schools."[133] Furthermore, since the constitutionality of a law which interferes with the enforcement of a court decree requiring action to eliminate a violation of a constitutional right is questionable, the broad interpretation of the scope of section 803 advocated by antibusing proponents should be avoided by the courts. Justice Powell's interpretation of the section's coverage destroys the effectiveness of the antibusing prohibition, because school desegregation orders are nearly always couched in terms of eliminating the vestiges of racially dual systems rather than in terms of achieving actual racial balance in the schools.[134]

Further, Justice Powell noted that in § 802(a) the prohibition against use of federal funds to transport students applied expressly to both transportation "to overcome racial imbalance" in schools and transportation "to carry out a plan of racial desegregation" in schools. *Id.* The absence of the latter phraseology in § 803 was taken as a clear indication of legislative intent that the stay provision should not relate to busing to achieve desegregation.

In Soria v. Oxnard School Dist. Bd. of Trustees, 467 F.2d 59 (9th Cir. 1972), a stay petition was denied in regard to a desegregation plan which had been in operation during the 1971-72 school year. The court ruled: "As we construe § 803 it has no application to a case pending at the time of its effective date in which transportation of students pursuant to [an] integration plan, is already in operation." *Id.* at 60.

131. *See, e.g.*, Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 618 (1944); Palmer v. Spaulding, 299 N.Y. 368, 371, 87 N.E.2d 301, 302 (1949); J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4919, at 429-37 (3d ed. 1943).

132. *See, e.g.*, McCullough v. Virginia, 172 U.S. 102, 112 (1898); Wade v. Board of School Comm'rs, 336 F. Supp. 519, 522 (S.D. Ala. 1971); F. MCCAFFREY, STATUTORY CONSTRUCTION § 64 (1953).

133. *See* text accompanying notes 106 & 110 *supra*.

134. The district court order in *Swann* appeared to imply the necessity of nearly an exact 71-29 ratio in all schools. In affirming the district court, however, the Supreme Court stated that the ratio was not prescribed as an absolute requirement, but was merely a starting point for achieving desegregation of the school system. *See* text accompanying note 106 *supra*.

Turning now to an examination of the constitutionality of the proposed legislation which would place a permanent restriction on the busing of students as a means of establishing desegregated, unitary school systems,[135] it appears that the proponents of such laws rely on two basic sources of congressional authority for enacting these statutes. One such source is section 5 of the fourteenth amendment, which states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article"—that is, the provisions of sections 1 to 4 of the amendment. The contention has been made that this section empowers Congress to specify what kinds of measures may be taken and what kinds of remedies may be applied to enforce the equal protection clause guarantee that students shall not be subjected to racial discrimination in the operation of the public schools. Furthermore, it is maintained that

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It should be noted here that the Higher Education Act contains another provision which is rendered meaningless by the apparent determination of the political mind to regard the terms "racial balance" and "desegregation" as synonymous in the student assignment context. Section 806 (Pub. L. No. 92-138, § 806, June 23, 1972) declares that the provision in § 407(a) of the Civil Rights Act of 1964 [42 U.S.C. § 2000c-6(a) (1970)] which disclaims any purpose to empower the federal courts to order the transportation of students from one school to another to achieve "racial balance" shall apply to all schools and school systems in every state in every part of the nation. One might well ask why Congress in 1972 should take this trouble to enact into express law the legislative intent with which Congress acted in 1964, for the 1964 statute nowhere states or implies that § 407(a) is less than nationwide in application, and no federal court has ever ruled or even suggested, so far as this writer has been able to discover, that its restrictions apply only to certain states or sections of the country. As already noted, the proviso was not intended to apply to "de jure" segregation but only to "de facto" segregation; and it is, of course, true that the former situation most commonly exists in the South, while the latter situation most commonly exists in the other parts of the nation. However, it does not appear that any court has failed to understand that when a case involves de facto segregation, be it in the North, East, West or South, the statutory prohibition against busing to achieve racial balance applies to that case. More than a decade ago de jure segregation was held to exist in the New Rochelle, New York, school system. *See* Taylor v. Board of Educ., 191 F. Supp. 181 (S.D.N.Y. 1961). Such findings of de jure segregation in schools in northern and western states have been made more frequently in the last several years, and busing of students to overcome this type of segregation has been ordered in these cases without any serious objection based on § 407 even being raised. *See, e.g.*, Kelly v. Guinn, 456 F.2d 100 (9th Cir. 1972); Johnson v. San Francisco Unified School Dist., 339 F. Supp. 1315 (N.D. Cal. 1971); Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971); Soria v. Oxnard School Dist., 328 F. Supp. 155 (C.D. Cal. 1971); Keyes v. School Dist. No. 1, 303 F. Supp. 279 (D. Colo. 1969), 313 F. Supp. 61 (D. Colo. 1970), *aff'd on this point*, 445 F.2d 990 (10th Cir. 1971); United States v. School District 151, 268 F. Supp. 786 (N.D. Ill. 1968), *aff'd*, 404 F.2d 1125 (7th Cir. 1968).

135. The antibusing provisions in H.R. 13915 are contained in Title IV—Remedies. *See* H.R. 13915, 92d Cong., 2d Sess. §§ 401-09 (1972). The House-passed revision of Title IV differed from the original proposal mainly in that the absolute prohibition against busing of students in the sixth grade or below, contained in § 403(a), was extended through all 12 grades, and the House provision permits transportation of students—busing—to "the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student." Title IV of the revised bill may be found in 118 CONG. REC. 14015-16 (daily ed. Aug. 18, 1972).

this power to specify the measures and remedies to be used includes the power to limit the extent of their uses, when such limitation aids in the establishing of a national standard for desegregation of school systems in accordance with constitutional requirements.

The very stating of this proposition discloses its weakness. Authority to *enforce* constitutional provisions would not seem to include the authority to *reduce* the scope of the rights conferred or the protection guaranteed by those provisions. The Supreme Court already has spoken on that point in a decision regarding the validity of the Voting Rights Act of 1965: "[Section 5] does not grant Congress power to exercise discretion in the other direction [from expanding Fourteenth Amendment rights] 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."[136] The fourteenth amendment having been adopted for the purpose of extending new rights to persons who previously had been denied equal protection of the laws, statutes having the effect of reducing the scope of the enjoyment of these rights hardly could be considered "appropriate legislation" for enforcing the amendment. Since the right not to be required to attend racially segregated public schools is an element of equal protection of the laws, and since, in some situations, the courts have found that racial segregation can be eliminated from the school systems only by means of reassigning and transporting students to certain schools, legislation which prohibits the use of busing in those situations prohibits the only feasible means of desegregating the schools and therefore prevents the vindication of the students' constitutional rights. In addition, section 5 is part of an amendment which was designed to give federal protection to individual rights from interference by state actions. Its purpose is, thus, to enable Congress to regulate *federal-state relationships*. Therefore, it seems inappropriate to use this provision as a basis for congressional authority to restrict the powers of the *federal judiciary*.

Furthermore, it is simply inconceivable that Congress, or any other agency, will be able to contrive one specific definition of a constitution-

136. Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966); *see* Oregon v. Mitchell, 400 U.S. 112 (1970). The Court in *Mitchell* stated: "As broad as the congressional enforcement power is, it is not unlimited. Specifically, there are at least three limitations on Congress' power to enforce the guarantees of the Civil War Amendments . . . . Third, Congress may only 'enforce' the provisions of the amendments and may do so only by 'appropriate legislation.' Congress has no power under the enforcement sections to undercut the amendments' guarantees of personal equality and freedom from discrimination . . . ." *Id.* at 128.

ally desegregated school system which could be applied meaningfully to all the diverse school districts spread across the entire United States.[137] No workable, single standard ever could be set up for both (1) a large northern city school system with several hundred separate schools attended by more than 100,000 students, a high percentage of whom are blacks who live in inner city Negro residential areas while the white students reside mostly in outer city and suburban areas, and (2) a rural southern county system which had for many years been operating a pair of 12-grade schools for about two thousand students living throughout the county, one school being attended by the blacks and the other by the whites. In the 1955 *School Desegregation* decisions, the Supreme Court emphasized the necessity of adopting flexible desegregation requirements and procedures for each individual case, and observed:

> Full implementation of these constitutional principles may require solution of varied local school problems . . . . Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform [the judicial supervision necessary to procure compliance with the Supreme Court order] . . . . To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas . . . and revision of local laws and regulations which may be necessary in solving the foregoing problems.[138]

The events of the passing years appear to have increased, rather than decreased, the complexity of the problems involved in achieving desegregation in the nation's public schools; and I know of no informed person who actually believes that a single clear and workable standard which would cover all cases ever can be drafted.

The second possible source of congressional authority for adopting antibusing legislation lies in the first sentence of article III, section 1 of the Constitution: "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 antibusing proponents reason that the power to establish lower federal courts in-

137. In *Swann*, the Supreme Court stated: "No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29 (1971). The Fourth Circuit stated: "It is, of course, axiomatic that every plan must take into consideration the unique characteristics of the school district to be served. What may be practical in one district may not be applicable in another." Thompson v. School Bd., 465 F.2d 83, 86 (4th Cir. 1972). The Tenth Circuit stated: "The long line of court decisions pertaining to desegregation handed down since 1954 is conclusive proof that no single formula provides the sole remedy to cure the unconstitutional and intolerable evil of racial discrimination. The appropriate remedy in each instance depends upon the variant facts and circumstances." Board of Educ. v. Dowell, 375 F.2d 158, 168 (10th Cir. 1967).

138. Brown v. Board of Educ., 349 U.S. 294, 299-301 (1955).

cludes the power to fix the scope of their jurisdiction; and therefore, if Congress has the power to confer jurisdiction on the courts which it establishes, it also has the power to remove jurisdiction from them. Prohibiting a court from ordering busing of students is regarded as merely equivalent to limiting its jurisdiction. The antibusing proponents maintain that specific congressional authority for restricting the power of the federal courts in this manner was recognized by the Supreme Court in its 1868 decision in *Ex parte McCardle*.[139] That case dealt with the effect of a statute enacted by Congress in 1868 which expressly repealed a provision in an 1867 statute which had conferred power on the Supreme Court to hear appeals from judgments of circuit courts in certain types of habeas corpus cases.[140] A person whose petition for a writ of habeas corpus had been denied by a circuit court appealed the decision to the Supreme Court, but the appeal was dismissed for want of jurisdiction. Referring to the 1868 statute, the Supreme Court declared: "What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[141] In the antibusing context, it is argued that, if Congress, under the authority of article III, section 2, can validly remove certain kinds of cases from the appellate jurisdiction of the Supreme Court, Congress also can prevent the lower federal courts, for which it has prescribed jurisdiction, from issuing busing orders in school desegregation cases.

It also is maintained that the Norris-La Guardia Act, which validly deprives the federal district courts of the power to issue injunctions against picketing growing out of labor disputes,[142] provides further support for the position that Congress has the authority to withdraw from the federal courts the power to issue busing orders. Prohibiting a busing order is regarded as the equivalent of prohibiting a strike injunction, insofar as the power of Congress to regulate the jurisdiction of the federal courts is concerned.

Those who challenge the validity of the permanent antibusing restrictions rely on a variety of arguments to demonstrate that such legis-

139. 74 U.S. (7 Wall.) 506 (1868).

140. The power of Congress to enact the statute before the Court in *McCardle* arose from article III, § 2, ¶ 2, which states that, as to designated types of cases, "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."

141. 74 U.S. (7 Wall.) at 514.

142. 29 U.S.C. § 101 (1970).

lation is beyond the power of Congress. Initially, they contend that the section 403 prohibition against ordering implementation of a school desegregation plan which would involve an increase in the busing of students does not fall within the ambit of any article III congressional power to limit the jurisdiction of congressionally established courts, because, instead of dealing with the *jurisdiction* of the courts, the statute deals with the *remedies* to be provided in cases in which the courts already have exercised admittedly existent jurisdiction. The statute obviously does not withdraw school desegregation cases from the area of the jurisdiction of the lower federal courts; rather, by indicating that orders to implement desegregation plans may be entered, it clearly recognizes the courts' power to decide those cases. What the section does purport to do is to restrict the manner in which the courts shall fix the remedies for violations of constitutional rights found to be occurring through racial discrimination in the operation of school systems. Old and eminent authority supports the view that, once jurisdiction is conferred on a court to decide a particular case, the separation-of-powers doctrine commands that the court be free to determine the rights involved and to specify the relief needed, without interference from either the executive or the legislative branch of the government.[143]

The second basic argument against the validity of the proposed antibusing statute is that, even if Congress in enacting such legislation were acting within the scope of the authority granted to it by article III, that authority must be exercised in a manner which will not conflict with provisions added to the Constitution subsequent to the adoption of article III. The Constitution has been extended a number of times since its adoption to provide specific protection for designated personal liberties from infringement through either state action or private action. Since these amendments were approved by a majority of the citizens of the nation, speaking through their state legislatures or special conventions, the establishment and protection of the rights conferred by these amendments are matters of basic public policy. Yet, if Congress can prevent the federal courts from hearing cases involving those rights or

143. *See* Gordon v. United States, 117 U.S. 697 (1864); Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792). In *Sterling v. Constantin*, the Supreme Court stated: "The suggestion confuses the question of judicial power with that of judicial remedy. If the matter is one of judicial cognizance, it is because of an alleged invasion of a right, and the judicial power necessarily extends to the granting of the relief found to be appropriate according to the circumstances of the case." 287 U.S. 378, 403 (1932). Later, in *Schneiderman v. United States*, the Court stated: "Congress has, with limited exceptions, plenary power over the jurisdiction of the federal courts. But to confer the jurisdiction and at the same time nullify entirely the effects of its exercise are not matters heretofore thought, when squarely faced, within its authority." 320 U.S. 118, 168-69 (1943) (footnotes omitted).

from applying remedies necessary to protect those rights, then a bare majority of the national legislature has the power to nullify the fundamental law of the land and to withdraw from individual citizens and minority groups the very rights which the Constitution assures them. Thus, since the equal protection clause of the fourteenth amendment establishes guarantees against racial discrimination in the operation of the public schools,[144] since school officials are under a constitutionally mandated obligation to take whatever action may be necessary to eliminate discriminatory dual school systems,[145] and since, in some situations, there is no feasible way of desegregating the schools and establishing nonracial unitary systems other than by busing students,[146] the federal courts must be able to exercise their judicial power to order recalcitrant school officials to carry out busing programs. Otherwise, students who attend segregated schools will have no effective means of avoiding the discriminatory aspects of these systems, and their constitutional rights will be violated.[147]

It is meaningless to argue that the proposed antibusing law does not prevent the courts from determining that constitutional rights are being violated, but merely prevents the use of one remedy as a means of protecting those rights. If the forbidden busing remedy is the only means of desegregating the school system, the prevention of its use necessarily amounts, in effect, to a denial of the constitutional right itself. Furthermore, a statute which prohibits the use of a remedy necessary for the vindication of the right to be free from racial discrimination affirmatively contributes to such discrimination and, in so doing, places the federal government itself in violation of the fifth amendment due process clause.[148]

144. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

145. *See* Green v. County School Bd., 391 U.S. 430 (1968).

146. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

147. The prospect that the busing restrictions included in the version of H.R. 13915 approved by the House of Representatives on August 17, 1972, would place the measure in violation of the Constitution apparently did not greatly concern most of the congressmen during the final debates on the Bill. At that stage of the proceedings, 2 amendments were offered. One stated: "Nothing in this Act is intended to be inconsistent with or violative of any provision of the Constitution." This amendment was *rejected* by a vote of 197 to 178. *See* 118 CONG. REC. 7882-83 (daily ed. Aug. 17, 1972). Another stated: "The limitations on student transportation contained in this section shall not preclude any court, department or agency of the United States from ordering an adequate remedy for denial of equal protection of the laws." This amendment was *rejected* by a vote of 223 to 154. Regarding the latter proposal, Congressman Pucinski declared his opposition by stating: "This amendment totally negates everything we have been doing here all evening. It negates completely the provisions of the act and the limitations we have carefully written into the act. It seems to me that if we adopt this amendment we will just undo everything that has been done here so far, so I urge the rejection of this amendment." *See id.* at 7876.

148. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954). Since state statutes prohibiting busing of students to achieve desgregation of school systems are unconstitutional because they may

In addition, the *McCardle* case[149] does not actually provide support for the type of congressional interference with constitutional rights which is involved in the antibusing legislation. The statute questioned in the *McCardle* case restricted the jurisdiction of the Supreme Court only by preventing direct appeals to that Tribunal in habeas corpus cases. It did not deprive the Court of the power to decide the habeas corpus cases which would come within the Court's original jurisdiction or which could come before the Court through the grant of a writ of certiorari, nor did it preclude resort to the lower federal courts for habeas corpus relief. Thus, individuals who were deprived of constitutional rights by being held in custody illegally still could pursue the habeas corpus remedy in the district courts, could appeal adverse judgments to the circuit courts, and could seek Supreme Court review through filing a writ of certiorari. Given this narrow reach, the holding in *McCardle* can hardly be regarded as a basis for upholding the constitutionality of a statute depriving all federal courts of the power to employ the only effective remedy available for protecting a constitutional right which the courts have found to be infringed. In fact, in the *McCardle* opinion, the Court expressly noted that the question before it was different in principle from the question which arose from situations in which state courts had invalidated "the exercise of judicial power by the legislature, or . . . legislative interference with courts in the exercising of continuing jurisdiction."[150]

Similarly, the Norris-LaGuardia Act provision which prohibits the granting of injunctions against picketing in labor disputes does not deprive the courts of the use of a remedy to protect constitutional rights, because the employer who would be seeking a labor injunction would have no constitutional right to be free from picketing. On the other hand, the public school student does have a constitutional right to be free from racial discrimination. Moreover, in several cases in which other federal statutes prohibiting the lower courts from granting injunctions in specified situations have been sustained, the Supreme Court has

"deprive school authorities of the one tool absolutely essential to the fulfillment of their constitutional obligation to eliminate existing dual school systems" which violate the equal protection clause of the fourteenth amendment, it seems that a federal statute with the same effect would violate the due process clause of the fifth amendment. *See* North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971).

149. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868). *See* notes 139-41 *supra* and accompanying text.

150. 74 U.S. (7 Wall.) at 514. The state cases cited were: Lanier v. Gallatas, 13 La. Ann. 175 (1858); Lewis v. Webb, 3 Me. 326 (1825); De Chastellux v. Fairchild, 15 Pa. 18 (1850); State v. Fleming, 26 Tenn. 152 (1846).

emphasized that other adequate remedies were available to protect the rights of the parties seeking the injunctions.[151]

Proposals for amending the Constitution in a manner which will prevent extensive reassignment and transportation of public school students present different kinds of problems than those presented by the proposed statutes. The *validity* of such a constitutional amendment is not in question, provided that one of the amendatory procedures prescribed in article V is followed. Though it has not been used frequently for such purpose, the amendatory power clearly extends to repealing or revising existing constitutional provisions. One of the serious problems concerning an antibusing amendment is that of drafting the amendment in language which will prevent highly objectionable "busing" and, at the same time, not frustrate fundamental integration goals. For example, the proposed "Lent Amendment" provided: "No public school student shall, because of his race, creed, or color, be assigned to or required to attend a particular school."[152] Even if the proponents of this amendment in good faith intend it to be used only to eliminate the evils of extensive transportation of public schools students, the eventual effect of the provision would be the general resegregation of the public schools in most large and medium-sized cities—including many systems which already have desegregated voluntarily and with good educational results. This type of measure also could seriously obstruct attempts to provide for better use of school resources, to equalize educational opportunity, and to improve generally the quality of education in a community. Among the practices which immediately could be questioned if this amendment were adopted would be the allowance of voluntary majority-to-minority transfers, the redrawing of attendance zones or the pairing or clustering of schools in biracial school districts, and the establishment of educational parks, magnet schools, and similar arrangements. Beyond the educational area, this amendment could have adverse social effects by aggravating racial segregation in residential patterns and by increasing the oppression from racial discrimination in housing opportunities. Any chance of achieving a long-range solution to the national racial problem

151. In *Phillips v. Commissioner*, a provision of the Revenue Act of 1926 which prohibited the granting of injunctive relief against collection of taxes was upheld, because 2 alternative methods of eventual judicial review of the validity of the tax were available to the objecting taxpayer. 283 U.S. 589, 597 (1931). The Supreme Court later upheld a federal statute which prohibited federal courts from enjoining criminal proceedings in state courts (except under designated conditions), because it appeared that the rights of the accused parties would be protected fully in the state proceedings. *See* Douglas v. City of Jeannette, 319 U.S. 157, 164 (1943).

152. Testimony of Burke Marshall, Deputy Dean of Yale University School of Law, before a Subcommittee of the Committee on the Judiciary, U.S. House of Representatives, at 3 (March 3, 1972) (text of this testimony on file with the author at Vanderbilt University School of Law).

by gradual dispersal of minority group residences throughout the community would be dealt a crippling blow by this amendment, since it would have the practical effect of perpetuating school segregation.

Utilization of the constitutional amendment procedure to prevent busing also raises a significant policy question regarding the wisdom of the practice of revising the fundamental law of the nation merely to serve a narrow and temporary purpose, especially in a context in which emotional and political considerations may be unfortunately influential. This process of "trivializing the Constitution" by changing its terms to meet the wishes of a highly vocal minority, or even a current majority, of the people regarding a transient issue surely will deprive that document of the very character which has enabled it to endure, with so little change, as the basic law of the United States for nearly two centuries.

C. Conclusion

Although a substantial difference of opinion exists about the validity of the proposed legislation and the advisability of the proposed amendments to prohibit busing, there appears to be little disagreement regarding the effect that these measures, if enacted, will have. The busing restriction, which is made retroactive by section 406 of H.R. 13915 and therefore applicable to all school desegregation plans previously implemented, "will condone and indeed foster continued segregation in the schools. In many cases, it will remove the only effective remedy for violation of an individual student's constitutional rights."[153] A group of lawyers issued a statement in September, 1972, declaring that, among other things, the proposed bill will "remove a remedy for the vindication of minority students' constitutional rights, even when that remedy is constitutionally required; and open to relitigation nearly two decades of judicial desegregation decisions, many of which involve no busing whatsoever, thus leading to divisiveness and confusion in many communities already satisfactorily operating under school desegregation plans."[154] Regarding the proposed "Lent Amendment," Dean

153. Leadership Conference on Civil Rights, Memorandum on H.R. 13915, at 10, Aug. 31, 1972 (publication of Leadership Conference on Civil Rights, 2027 Mass. Ave., N.W., Wash., D.C. 20036).

154. Senators Javits, Humphrey, Brooke, Kennedy, Hart, Weicker, and Mondale, Statement RE: H.R. 13915, The Equal Opportunities Act of 1972, Sept. 29, 1972 (issued from the offices of the 7 named Senators). The New York City Bar Association Committee on Federal Legislation and Civil Rights stated that § 406 "is in fact an invitation to reverse the school desegregation of the past eighteen years, particularly in school districts where desegregation has long been achieved. . . . It is cynical in the extreme, therefore, to permit new rounds of litigation where successful adjustment to constitutional order exists." 118 CONG. REC. 13139, 13141 (daily ed. Aug. 9, 1972).

Burke Marshall testified: "[I]t seems plain that whatever the intent of the sponsors of the Lent and similar amendments . . . their net effect would be to destroy court implementation of the *Brown* rule. The amendment on its face does not deal only with the transportation of students—that is, busing; it is nothing less than a resegregation amendment."[155] A Common Cause report observes that "a Constitutional Amendment on school busing cannot be drafted which does not . . . , in effect, reverse the 1954 Supreme Court decision on desegregation. Its psychological impact upon race relations in this country would be unimaginable."[156]

Though these statements must be recognized as opinions of persons or organizations vigorously opposing the adoption of such measures, the opinions expressed do not appear to have been seriously disputed by proponents of the legislation. Anyone who carefully evaluates the case-reopening provision and the busing prohibition in light of both the past eighteen years of tenacious resistance to the elimination of racial segregation and the current near-hysteria in metropolitan areas faced with meaningful school desegregation, must realize that the effect of these measures would be as drastic today as the Supreme Court's decision in *Plessy v. Ferguson*[157] was in 1896, in terms of the prospects for developing a racially integrated society in the United States. It may be that the prime significance of the antibusing movement is the real possibility that it is the harbinger of a general anti-integration, anti-civil-rights trend in the nation, analogous to the national reaction of the late nineteenth century. Anyone who looks closely at the situation may conclude that history has already begun to repeat itself. In 1877, Rutherford B. Hayes, under severe political pressure, assured his party's succession in the White House by making compromises which presaged the end of the post-war civil rights movement. Very recently, another Republican president, also under the pressure of an imminent national election, proposed drastic legislation designed to postpone and eventually deny the exercise of individual constitutional rights of minority group citizens. In 1883, the Supreme Court, undergoing a revision in personnel, began to weave a web of constitutional interpretation which became the basis for restricting the very principles of political and civil equality the national

155. *Hearings on Proposed Amendments and Legislation Relating to Transportation and Assignment of Public School Pupils Before a Subcomm. of the House Comm. on the Judiciary*, 92d Cong., 2d Sess., ser. 32, pt. 1, at 405 (1972).

156. 2 COMMON CAUSE, WASHINGTON REPORT, no. 4, at 2, Mar. 1972.

157. 163 U.S. 537 (1896). The *Plessy* case established the "separate-but-equal" doctrine, which served as the legal foundation for racial discrimination against Negroes for a period of over half a century.

legislature recently had proclaimed in the post-war civil rights acts and amendments.[158] During the summer of 1972, the Supreme Court, again in a period of changing personnel, declined the chance to strike a significant blow against racial discrimination in the operation of semipublic organizations,[159] and also, for the first time, was sharply divided in a school desegregation decision.[160] Congress, having passed a half-dozen civil rights statutes in a period of nine years during the Reconstruction Era, thereafter became so engrossed with more material matters that it gave no further consideration to civil rights legislation for over seventy years. The most recent Congress, against a background of the adoption of a half-dozen civil rights statutes between 1957 and 1970, was moved by public clamor in the summer and fall of 1972 to enact a law which authorizes the denial of fourteenth amendment rights for as long a period as eighteen months, and the House approved a bill which would have restricted those rights indefinitely. Most ominous of all, just as the ardent civil rights fervor of northerners cooled quickly after the Civil War, we now see how millions of citizens in the northern and western sections of the nation, who had appeared to be staunch advocates of racial equality while the South was being desegregated, have turned lately into fierce and sometimes violent opponents of racial integration when it became an imminent reality in their own schools and neighborhoods. One only can speculate, with genuine apprehension, about how far this swing of the pendulum of reaction will extend.

158. In the Civil Rights Cases, 109 U.S. 3 (1883), the Supreme Court restricted the fourteenth amendment to protection against state action only and refused to apply the thirteenth amendment to protect Negroes from discrimination by private individuals.

159. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

160. *See* Wright v. City of Emporia, 407 U.S. 451 (1972); text accompanying notes 61-63 *supra*. In *Wright*, the Court divided 5 to 4 in reaching its decision. This marked the first time that a Supreme Court decision on the merits in a school desegregation case has not been unanimous.