BRAKING THE LAW: ANTIBUSING LEGISLATION AND THE CONSTITUTION

I. INTRODUCTION

The road to school desegregation began in 1954 with *Brown I*,[1] which struck down the separate-but-equal doctrine that *Plessy v. Ferguson*[2] had enunciated over half a century earlier. A year later, in Brown II,[3] the federal district courts were directed to use their equitable powers to fashion remedies for ending segregation.[4] Such remedies were to be implemented "with all deliberate speed,"[5] a term connoting a standard substantially less than immediacy. A great deal less than immediate desegregation followed, resulting in a new Court order that remedial action be implemented "at once."[6]

Having assumed the role of monitoring rather than promulgating particular remedial schemes, the Supreme Court has not sought uniform solutions to the problem of segregation. Rather, the Court has disapproved some remedies as ineffective in a particular factual setting,[7] while it has declared other remedies to be reasonable and effective. In *Swann v. Charlotte-Mecklenburg Board of Education*[8] the Court declared that bus transportation of pupils was a permissible tool of school desegregation.[9] In a companion case, *North Carolina State Board of Education v. Swann*,[10] the Court invalidated North Carolina's "Anti-Busing Law,"[11] which operated as a prohibition upon school busing to achieve desegregation. The Court stated that "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."[12]

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

2 Plessy v. Ferguson, 163 U.S. 537 (1896).

3 Brown v. Board of Educ., 349 U.S. 294 (1955).

4 Id. at 299-300.

5 Id. at 301.

6 "[C]ontinued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools." Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969). See Green v. New Kent County School Bd., 391 U.S. 430, 439 (1968). Cf. Watson v. City of Memphis, 373 U.S. 526 (1963).

The meaning of "at once" was elaborated upon in Carter v. West Feliciana School Bd., 396 U.S. 290 (1970). In *Carter*, the Fifth Circuit had ordered effective desegregation but had delayed implementation until the beginning of the next school year. 419 F.2d 1211 (1970). The Supreme Court summarily reversed, ordering implementation within two weeks. 396 U.S. at 291. Justice Harlan, in a concurring opinion joined by Justice White, suggested that under *Alexander* the maximum interval permissible between a finding of noncompliance with the requisites of *Green*, and the date adequate relief was to be operative, might be eight weeks. 396 U.S. at 293. Justices Black, Douglas, Brennan and Marshall disagreed, regarding Justice Harlan's position as a retreat from the requirement of *Alexander*. Id. at 294. Chief Justice Burger and Justice Stewart disagreed with the summary disposition of the case, expressing a willingness to gauge immediacy by circumstances of particular cases. 396 U.S. 293-94.

7 See, e.g., Green v. New Kent County School Bd., 391 U.S. 430, 439-40 (1968), in which a "freedom-of-choice" plan was found inadequate under the circumstances obtaining in that case.

8 402 U.S. 1 (1971) [hereinafter *Swann*].

9 Id. at 30.

10 402 U.S. 43 (1971).

11 N.C. Gen. Stat. § 115-176.1 (Supp. 1971).

12 402 U.S. at 46.

On March 17, 1972, the President presented Congress with a package of two bills.[13] The Student Transportation Moratorium Bill[14] was offered for immediate passage. The essence of this Bill is a provision which would stay the implementation of any federal court order requiring the transportation of a pupil to any school to which he or she was not being transported before the entry of the order. The stay would apply to orders entered after the date of the Bill's enactment and would last until July 1, 1973,[15] or until permanent antibusing legislation were passed, should that occur first.[16]

The second part of the President's package is the Equal Educational Opportunity Bill.[17] Section 403a of this Bill contains a remedial prohibition concerning the busing of children in the first six grades of school.[18] It provides that no busing order by a federal court, agency or department may require an increase in the average daily distance or time that children must travel, or in the average daily number of children transported as measured by the comparable averages for the preceding school year. In the case of pupils in the seventh grade or above, the limits set by section 403a could be exceeded, but only upon a "clear and convincing" showing that alternative relief

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[13] The President's proposals should not be confused with the very weak 'compromise' antibusing bill which has already been enacted. Section 803 of the Education Amendments of 1972, 20 U.S.C.A. § 1653 (Supp. 1973), imposes a moratorium upon district court orders which would require the transfer or transportation of students for the purpose of achieving a racial, sexual, religious, or socioeconomic balance. The stay is to extend until all appeals in connection with such orders have been exhausted or the time for such appeals has expired. The moratorium will cease on January 1, 1974.

This provision has been rendered ineffectual. The Supreme Court has never held that the Constitution compels racial balance. Rather, the Constitution compels desegregation – the dismantling of the vestiges of discriminatory state action. For a federal court to order busing for the mere sake of achieving a racial balance or fixed ratios would apparently be a reversible abuse of discretion. *Swann* at 24. Justice Powell has construed section 803 to apply only to such a busing order; busing to desegregate would fall outside the section's operation as not being for the purpose of achieving a racial balance. Drummond v. Acree, 409 U.S. 1228 (Powell, Circuit Justice), cert. denied, 409 U.S. 1006 (1972). See Comment, Interpreting the Anti-Busing Provisions of the Education Amendments of 1972, 10 Harv. J. Leg. 256, 269-74 (1973).

[14] S. 3388, H.R. 13916, 92d Cong., 2d Sess. (1972).

[15] The Student Transportation Moratorium Bill has been reintroduced. The expiration date has been changed to July 1, 1974. H.R. 4117, 93d Cong., 1st Sess. (1973).

[16] Section 401a of the Bill reads:

> The implementation of any order of a court of the United States entered during such period shall be stayed to the extent it requires, directly or indirectly, a local educational agency –
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> (1) to transport a student who was not being transported by such local educational agency immediately prior to the entry of such order; or
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> (2) to transport a student to or from a school to which or from which such student was not being transported by such local educational agency immediately prior to the entry of such order.

Section 401b imposes an identical moratorium upon the implementation of desegregation plans submitted to departments or agencies of the United States pursuant to Title VI of the Civil Rights Act of 1964. Section 403 declares the moratorium not to forbid the voluntary implementation of desegregation plans in excess of its limits.

[17] S. 3395, H.R. 13915, 92d Cong., 2d Sess. (1972).

[18] Section 403a reads:

> No court, department, or agency of the United States shall, pursuant to section 402, order the implementation of a plan that would require an increase for any school year in –
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> (1) either the average daily distance to be traveled by, or the average daily time of travel for, all students in the sixth grade or below transported by an educational agency over the comparable averages for the preceding school year; or
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> (2) the average daily number of students in the sixth grade or below transported by an educational agency over the comparable average for the preceding school year, disregarding the transportation of any student which results from a change in such student's residence, his advancement to a higher level of education, or his attendance at a school operated by an educational agency for the first time.

would be ineffective.[19] The appropriate court of appeals, pending review, would be required to stay such an order granting relief in excess of the section 403b limits. Section 405 states that the Bill does not prohibit the states from voluntarily adopting additional remedies.[20]

The House passed the Bill, having amended section 403 to forbid a federal order from requiring "the transportation of any student," regardless of grade level, "to a school other than the school closest or next closest his place of residence which provides the appropriate grade level and type of education for such student."[21]

The House version would forbid the crosstown busing which was found necessary and appropriate in *Swann*.[22] The President's proposal could actually foreclose all remedial busing for grade-school children in a community which had not bused such children in the previous year, and would place a substantial evidentiary burden upon anyone seeking remedial busing for older children. The Student Transportation Moratorium Bill could delay effective relief for over a year. The antibusing proposals appear to conflict with recent Supreme Court decisions concerning how desegregation is to be achieved. This Note will examine this apparent conflict in order to determine whether the proposed legislation is constitutionally permissible. The term 'forbidden busing' will be used throughout as shorthand for relief which the Supreme Court has declared may be both appropriate and required, but which either the Student Transportation Moratorium Bill or the Equal Educational Opportunity Bill would forbid the federal courts to order.

II. THE ANTIBUSING LEGISLATION AND THE CONSTITUTION

Two lines of argument have been advanced to uphold the constitutionality of the proposed antibusing legislation. The first proceeds from the observation that the antibusing legislation upon its face does no more than impose a limitation upon the remedial powers of the federal courts and maintains that such a limitation is a permissible exercise of Congress' constitutional power to regulate their jurisdiction.[23]

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[19] S. 3395, H.R. 13915, § 403b, 92d Cong., 2d Sess. (1972).

[20] There exists some possibility that the Equal Educational Opportunity Bill might be neutralized by an appropriate construction. Section 402 of the Bill requires a federal court to observe a scheme of priorities in selecting a remedy for a denial of equal protection of the laws "which *would* remedy such denial" (emphasis added). The remedial limitations of § 403 apply exclusively to remedial plans implemented "pursuant to section 402." See note 18 supra. Nowhere in the Bill is there a provision for the contingency that no remedy pursuant to §§ 402 and 403 "would remedy such denial," that is, the contingency that only 'forbidden busing' would be constitutionally adequate. In such an eventuality §§ 402 and 403 might be found inoperative, as the quoted language of § 402 can be read to predicate that section's applicability upon a finding that relief pursuant to it would be effective.

[21] 118 Cong. Rec. 952-53 (daily ed. Aug. 17, 1972). The President's version of the Bill has been reintroduced. H.R. 4116, 93d Cong., 1st Sess. (1973). The version passed by the House in 1972 has also been reintroduced. S. 416, 93d Cong., 1st Sess. (1973).

[22] 402 U.S. at 27-31.

[23] See, e.g., the testimony of former Attorney General Kleindienst in Hearings on School Busing before the House Comm. on the Judiciary, 92d Cong., 2d Sess. at 1141 (1972) [hereinafter Hearings]. From the viewpoint of the proponents of the antibusing proposals, the virtue of this interpretation is that it avoids the necessity of asserting that Congress has the power to change the substantive constitutional law of desegregation relief. If the proposals are truly jurisdictional, Congress would effect no such change at all by enacting them.

Whether § 406 of the Equal Educational Opportunity Bill can be read consistently with such an interpretation may be seriously questioned. Section 406 provides that federal desegregation orders currently in force may be reopened and modified to conform to the remedial strictures of §§ 402 and 403. Section 406 may not be regarded as a retroactive jurisdictional or remedial limitation. Congress cannot arrogate to itself the power to revise or nullify the judgments of federal courts, even when creating a statutory right, let alone where judicial supremacy in constitutional

The second acknowledges the antibusing legislation to be a declaration of how much busing is required for a constitutionally adequate remedy and of how rapidly busing must be implemented. This approach would meet the inevitable objections based on the doctrine of judicial supremacy in constitutional matters[24] by recourse to recent opinions concerning the scope of the power which the enforcement clause of the fourteenth amendment vests in Congress.[25]

A. The Antibusing Legislation and Article III

Antibusing legislation, seen as an exercise of the article III power, can be approached in two ways: in terms of the effect such legislation has in forcing plaintiffs, whose grievances cannot be redressed except by forbidden busing, to seek an original forum in the state courts; in terms of the legislation's effect upon the federal courts.

1. The Antibusing Legislation as a Grant of Exclusive Original Jurisdiction to the State Courts

There are several reasons for characterizing the antibusing proposals as an exclusive grant to the state courts of original jurisdiction to order forbidden busing. Foremost among these reasons is that plaintiffs whose constitutional injuries could be redressed only through forbidden busing would be forced to obtain relief in the state courts.[26] In addition, although the President's proposals are not explicitly

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matters would be threatened. See notes 49-56 infra and accompanying text. However, where it is in the power of Congress to alter the substantive law applicable to the dispute between the parties, Congress may, by so doing, effectively nullify a judgment. See Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856).

Where it is possible to provide constitutionally adequate relief without forbidden busing, it appears that there are no immediate constitutional impediments to the operation of section 406, which may then be regarded as establishing a set of priorities among adequate desegregation remedies, pursuant to the enforcement clause of the fourteenth amendment. But even in these circumstances the permissible (nonjurisdictional) interpretation of § 406 is seriously compromised by the fact that only *federal* orders may be reopened thereunder. One must strain to perceive what rational relation this distinction might bear to a valid nonjurisdictional objective. Cf. Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955).

Where only forbidden busing would constitute constitutionally adequate relief, the operation of § 406 would clearly be unconstitutional. Congress may not alter the substantive law of desegregation relief so as to incorporate therein the remedial limitations of § 403. See notes 96-140 infra and accompanying text.

[24] The classic statement of this doctrine is found in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). See also Cooper v. Aaron, 358 U.S. 1 (1958). For a concise discussion and useful bibliography relating to this fundamental question of constitutional law, see Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 Duke L.J. 1.

[25] See, e.g., testimony of former Attorney General Kleindienst, Hearings, supra note 23, at 1144-45.

[26] Section 403 of the Student Transportation Moratorium Bill and §405 of the Equal Educational Opportunity Bill, which permit the "voluntary" adoption of forbidden busing, need not necessarily be read as inconsistent with an assertion that forbidden busing may be required by federal right. In the context of the proposals as a whole, "voluntary" might be translated as "not at the behest of a federal court or agency." Indeed, a purely jurisdictional interpretation of the remedial prohibitions would require such a reading.

Although the President's proposals can survive side by side with a constitutional 'right' to busing which might be pursued in the state courts, whether those courts would be obligated to provide a forum at which forbidden busing might be obtained is not certain. The thrust of several cases suggests that the states are obliged to provide a forum for a federal right for which no federal forum exists. See Testa v. Katt, 330 U.S. 386 (1947); General Oil Co. v. Crain, 209 U.S. 211 (1908). See generally H. M. Hart & H. Wechsler, The Federal Courts and the Federal System, 330, 434-38 (2d ed. 1973) [hereinafter Hart & Wechsler].

The availability of a state forum empowered and obligated to order forbidden busing might be somewhat threatened by the removal provision of 28 U.S.C. § 1443(2) (1970). On the other

phrased as jurisdictional limitations, other antibusing proposals have been introduced in Congress which are so phrased.[27] Finally, a court might choose to characterize the President's proposals as jurisdictional rather than remedial limitations in an effort to shield them from constitutional attack.[28]

History does not support any contention that an original federal forum must be furnished for the assertion of federal rights.[29] The thesis that Congress might withdraw all the original jurisdiction presently conferred upon the lower federal courts over constitutional claims has recently been restated in Supreme Court dicta.[30] The antibusing legislation would amount to both less and more than a blanket withdrawal of original federal question jurisdiction. It would except only a small class of cases from original federal jurisdiction, but, in so doing, would affect a class of litigants composed largely of racial minorities.

Allocations of jurisdiction pursuant to article III are subject to constitutional limitations.[31] Although there is no federal equal protection clause, the due process clause of the fifth amendment is the source of a "federal equal protection" requirement which, when racial classifications are questioned, is as stringent as that imposed upon the states.[32] A classification adversely and principally affecting racial minorities or the vindication of their interests is prototypical of the sort of classification which has been subjected to strict constitutional scrutiny and invalidated unless supported by a compelling state interest.[33] The antibusing legislation would seem ripe for an equal protection attack; however, formidable obstacles lie in the path of such a challenge.

There is no authority squarely supporting an equal protection challenge to a federal jurisdictional allocation.[34] Nevertheless, under a strict equal protection

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hand, 28 U.S.C. 1447(c) (1970) provides that a case removed "improvidently and without jurisdiction" shall be remanded to the state court whence it came. This provision might be used to foreclose removal of state court actions involving forbidden busing.

However, the President's proposals would, technically speaking, deny remedial power rather than jurisdiction; § 1447 might be inapplicable. See Avco Co. v. Aero Lodge, 390 U.S. 557 (1968). In this eventuality, there is some precedent for regarding the remedial prohibitions themselves as inapplicable in removed cases. See Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970). But *Boys Markets* relied upon the establishment of a strong federal interest in labor matters postdating the enactment of the applicable remedial prohibitions. 398 U.S. at 250-51. The federal interest in the federal enforcement of civil rights evinced by the removal provisions of 28 U.S.C. § 1443(2) would antedate any antibusing legislation, and the possibility of judicial emasculation of such legislation by analogy to *Boys Markets* is remote.

27 Representative (now Senator) William L. Scott introduced a bill which would withdraw original federal jurisdiction from all controversies concerning the public schools. It would leave unaffected the Supreme Court's appellate jurisdiction over state court decisions concerning the public schools. H.R. 12817, H.R. 13176, 92d Cong., 2d Sess. (1972). See Hearings, supra note 23, at 457-58.

28 See notes 67-68 infra and accompanying text.

29 The federal courts were not given a general original jurisdiction over federal questions until the 1870's. For a history of the growth of original federal jurisdiction see Hart & Wechsler, supra note 26, at 844-50.

30 Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

31 Glidden Co. v. Zdanok, 370 U.S. 530, 568 (1962).

32 Bolling v. Sharpe, 347 U.S. 497 (1954).

33 Loving v. Virginia, 388 U.S. 1, 9, 11 (1967).

34 In Truax v. Corrigan, 257 U.S. 312 (1921), the Supreme Court invalidated a *state* remedial prohibition on equal protection grounds. See note 73 infra. Inconsistency with the allocatory provisions of article III has been one ground upon which a federal jurisdictional grant has been struck down. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Other federal jurisdictional allocations have been invalidated as not consonant with the exercise of the judicial power. See notes 50-51 infra and accompanying text. A jurisdictional provision which would operate as an abrogation of a constitutional right apparently would also be unconstitutional. See notes 58-65 infra and accompanying text. Nevertheless, when the procedural route to which a class of litigants has been relegated is found to satisfy due process of law, it is valid however much that class is inconvenienced relative to another class of litigants. See, e.g., Yakus v. United States, 321, U.S. 414 (1944), discussed in notes 80-86 infra and accompanying text.

standard, a procedure established for one class of litigants, satisfying independent conditions of due process and unobjectionable if established across-the-board, may amount to a constitutional violation when another class receives more favorable treatment.[35] Thus, the critical issue under recent constitutional doctrine is whether a particular classification merits strict scrutiny.[36]

In the case of jurisdictional legislation, a line might be drawn which would immunize from equal protection attack classifications which merely afforded diverse classes of cases or controversies different treatment, but which would permit such attack upon classifications predicated on the personal status of a litigant, as established by some suspect criterion.[37] It is unthinkable that the Supreme Court would sustain a provision singling out a racial minority and forbidding its members to assert a claim in the federal courts. To invalidate such a regulation it would be unnecessary to demonstrate that the state courts in which the minority litigants would be forced to seek redress were disadvantageous forums. Separate but equal forums would be impermissible.[38]

Even were the above analysis to prove useful, whether it exposes the President's proposals to attack is arguable. While it is true that the effect of those proposals would fall almost exclusively upon members of racial minority groups, the fact remains that the jurisdictional provisions of the antibusing legislation are drawn entirely around the nature of the controversy in issue. Whatever may be the motives of the legislation's proponents,[39] this is not a sham neutrality. The class of cases involved is not delineated arbitrarily to cover racial minority litigants, without any unifying considerations of the sort which ordinarily weigh in determining whether there shall be a state or federal forum. There are reasonable, if hitherto ill-received, arguments favoring an exclusive original state forum for busing cases, or for school desegregation cases generally. Determining what, if any, busing relief is required in a particular case demands a detailed examination of local conditions,[40] a task for which a state court might be better suited than a federal court. Perhaps more significantly, busing is a highly controversial and provocative issue; opponents of busing may be more willing to

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[35] See, e.g., Griffin v. Illinois, 351 U.S. 12 (1965), where the Supreme Court held that failure to provide impoverished defendants convicted of criminal charges with a free transcript for use in an appeal impermissibly discriminated against such persons. Yet the Supreme Court noted that due process did not require the state to provide appellate review at all. See also Hunter v. Erickson, 393 U.S. 386 (1969), discussed in note 46 infra, where the Court struck down a referendum requirement for fair housing legislation which certainly would have been held valid had it been applicable to legislation generally.

[36] For a sketch of current equal protection analysis see notes 107-115 infra and accompanying text.

[37] The possibility of any equal protection scrutiny of federal jurisdictional regulations would appear to be foreclosed by some Supreme Court dicta: "... Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies." Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850). See Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938). See also Hart & Wechsler, supra note 26, at 330. The development of a strict equal protection test is of relatively recent vintage, however, and the older cases may not be controlling.

In recent years, when equal protection has come to the aid of litigants *qua* litigants, it has been when they were prejudiced by a legislative classification which singled them out by personal status, rather than by the nature of the controversy which brought them to the courts. See, e.g., Griffin v. Illinois, 351 U.S. 12 (1956), discussed in note 35 supra. But see Truax v. Corrigan, 257 U.S. 312 (1921), as discussed in note 73 infra. In Skinner v. Oklahoma, 316 U.S. 535 (1942), the Supreme Court struck down a state statute which punished larcenists, but not embezzlers, with sterilization. The Court employed an equal protection rationale to invalidate a distinction in punishment keyed to the nature of the controversy. The controlling factor in that decision was, however, the fundamental nature of the right irrevocably affected through sterilization.

[38] Brown v. Board of Educ., 347 U.S. 483 (1954).

[39] The Supreme Court has repeatedly declined to consider legislative motvie in determining the constitutional validity of legislation. See, e.g., United States v. O'Brien, 391 U.S. 367 (1968); Flemming v. Nestor, 363 U.S. 603 (1960). But cf. Gomillion v. Lightfoot, 364 U.S. 339 (1960) (*semble*). For an analysis of this difficult area, see Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95.

[40] *Swann* at 29.

comply with a local determination than with a busing order seen as imposed by Washington.

When one considers the magnitude of the injury which the antibusing legislation would work upon litigants as a mere jurisdictional limitation, the reasons for sustaining that legislation against an equal protection attack become all the stronger. Analysis must begin with the assumption which federalism requires: the state courts will observe the decisions of the Supreme Court concerning federal questions.[41] The availability of Supreme Court review of state court decisions assures ultimate conformity with federal law.[42] Because constitutional rights are at stake, the Supreme Court may review the factual findings of state courts.[43] The advantages afforded by federal venue and process provisions are unlikely to be of much use in a suit against a state agency by state residents.[44] Some states' rules of evidence or procedure might prove burdensome.

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[41] See Dombrowski v. Pfister, 380 U.S. 479 (1965), which concerned discretionary abstention from the assertion of a jurisdiction conferred upon the federal courts by statute. See also Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). It has been argued recently that "the detritus of undefined notions of comity . . . and of states'-rights rhetoric" ought to be removed and replaced with a more sensitive analysis when the question arises whether to apply the judicially created federal abstention doctrine. Hufstedler, Comity and the Constitution: The Changing Role of the Federal Judiciary, 47 N.Y.U.L. Rev. 841, 867 (1972). Be that as it may, when a jurisdictional statute is in question the reasons for a strict adherence to a principle of comity are more compelling. A case-by-case approach is always available in the field of discretionary abstention. It is never available when a jurisdictional statute itself is questioned; to invalidate a grant of exclusive jurisdiction to the state courts would subject those courts to wholesale opprobrium. When abstention is at issue, Congress has posed no obstacle to the exercise of federal jurisdiction should the course of abstention be rejected. To invalidate the jurisdictional statute would be to reject the implicit congressional finding that state adjudication would be adequate.

[42] The viability of comity is partially predicated upon the availibility of ultimate Supreme Court review of state court judgments. See Ex parte Young, 209 U.S. 123, 176-77 (1908) (Harlan, J., dissenting). It has been argued, however, that the prohibition on implementation of all federal "orders" calling for forbidden busing would effectively deny Supreme Court appellate jurisdiction over state court decisions involving forbidden busing; if the Court's disposition of the case were to mandate forbidden busing, that mandate would be an impermissible federal busing "order." See Note, The Nixon Busing Bills and the Constitution, 81 Yale L.J. 1542, 1558 (1972). But it is not at all clear that the President's proposals would operate in this way. The usual practice of the Supreme Court, when it has reviewed a state court decision, is not to issue an "order" to the parties, but to remand the case to the state court with instructions either for the entry of an order or for further adjudication in conformance with the Court's opinion. See, e.g., NAACP v. Alabama, 377 U.S. 288, 310 (1964). A literal construction of the President's proposals would leave uncircumscribed the scope of such a remand, as opposed to an order. Secretary of Defense (then Secretary of HEW) Elliot Richardson explicitly endorsed this reading of the President's proposals which would preserve intact Supreme Court appellate jurisdiction over state court judgments. Hearings, supra note 23, at 1216-17.

There is no analogous way for the Supreme Court to circumvent the remedial prohibitions were it reviewing a *federal* court decision. No remand could prevent the job of issuing an order to the parties from ultimately devolving upon a federal court, itself subject to those prohibitions. (That the Supreme Court would be precluded in such a case from adjudicating a constitutional claim from which the lower court was similarly precluded does not by itself create constitutional infirmities. See Yakus v. United States, 321 U.S. 414 (1944), as discussed in notes 80-86 infra and accompanying text.)

Should the prohibitions against certain "orders" be construed broadly so as to effectively limit the appellate jurisdiction of the Supreme Court over state court decisions, serious constitutional questions would emerge. Displacing the Supreme Court as the ultimate arbiter of a particular constitutional question would certainly strengthen the argument that the jurisdictional provisions of the President's proposals would in fact alter the ultimate outcome of litigation. See note 46 infra. Indeed, it is unclear whether the scope of congressional power under article III §2 extends to making such an exception to the Supreme Court's power to review state court judgments. See Hart & Wechsler, supra note 26, at 439-41; Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 109 Pa. L. Rev. 157, 185-86 (1960). By Professor Ratner's thesis, the President's proposals, construed so as to limit the Court's appellate jurisdiction over *all* cases involving forbidden busing, would be unconstitutional, for they would preclude the Supreme Court from *ever* deciding whether forbidden busing was constitutionally required.

[43] Fiske v. Kansas, 274 U.S. 380 (1927).

[44] See, e.g., 28 U.S.C. 1391(b) (1970); Fed. R. Civ. P. 4(f).

But those states could be required to conform their rules to their federal correlatives in the face of the strong federal interest in the vindication of federal rights.[45] At least in theory, litigants in busing cases would hardly be prejudiced by being forced into the state courts.[46] In addition, principles of comity demand that any inconveniences putatively of constitutional dimension that litigants might actually suffer in the course of good-faith state proceedings be regarded as isolated instances, rather than as bases for an inference that future injury is probable.[47]

Finally, strong policy considerations suggest that so potent and potentially far-reaching a doctrine as equal protection be applied to article III legislation with a very sparing hand. Article III grants Congress a check upon the judiciary which is fundamental to the federal scheme of separation of powers. To allow the judiciary to exert a potentially pervasive control over the exercise of that check would defeat its purpose.[48]

2. The President's Proposals and "The Judicial Power of the United States"

The remedial prohibitions embodied by the President's antibusing proposals could put the federal courts in a rather unusual, if not awkward, situation. A federal court, exercising original jurisdiction or engaged in appellate review of the decision of a lower

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[45] Central Vt. Ry. v. White, 238 U.S. 507 (1915) (burden of proof); Brown v. Western Ry. of Ala., 338 U.S. 294 (1949) (pleading requirements). Cf. Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952). These cases concerned state court proceedings under the Federal Employer's Liability Act, 45 U.S.C. §§ 51 et seq. (1970), over which the state and federal courts exercise concurrent original jurisdiction. In contrast, the President's proposals would force rather than permit litigants seeking forbidden busing to accept a state forum. Thus they would present a more compelling case for requiring state courts to confrom to federal practice. Cf. Brown v. Western Ry. of Ala., 338 U.S. 294, 300 (1949) (Frankfurter, J., dissenting).

[46] Herein lies the principal distinction between the President's proposals and the legislation invalidated in Hunter v. Erickson, 393 U.S. 386 (1969), a case which has been used to challenge their constitutionality. See 118 Cong. Rec. 13142, Daily Ed., Aug. 9, 1972. *Hunter* dealt with legislation which did not directly alter or impinge upon minority rights but which established a burdensome route for their vindication. In *Hunter*, the Supreme Court invalidated a city charter provision which subjected fair housing laws passed by the city council to a general referendum. Ordinarily, council ordinances were so subject only upon petition of ten percent of the electorate. The Court recognized that the impact of the provision fell almost exclusively upon racial minorities and invalidated it as placing "special burdens on racial minorities within the governmental process." 393 U.S. at 391.

On its face, the difference in procedure which the *Hunter* legislation established for fair-housing ordinances appeared likely to be outcome-determinative. The same may be said for a procedure which permits some but not other defendants to appeal a criminal conviction. See Griffin v. Illinois, 351 U.S. 12 (1956), discussed in note 35 supra. Cf. Boddie v. Connecticut, 401 U.S. 371 (1971). Although access to the courts to contest a criminal conviction, as in *Griffin*, or to assert a constitutional right, as in a desegregation suit, may be a fundamental interest, it would make little sense blindly to extend the rationale of a case in which that interest had been cut off to legislation which merely established different routes whereby it could be asserted. See San Antonio Ind. School Dist. v. Rodriguez, 93 S. Ct. 1278, 1289-90 (1973).

[47] There is, however, one inconvenience which some litigants might suffer if the President's proposals should be enacted. Plaintiffs in federal suits pending at the time of their enactment would suffer delay and expense in relitigating in state court the appropriateness of any remedial plan which would require forbidden busing. Congress may deprive an article III court of jurisdiction over a pending case. Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869). Cf. District of Columbia v. Eslin, 183 U.S. 62 (1901). It appears that only if the constitutional requirement that desegregation relief by implemented speedily can be interpolated into a requirement that the adjudicatory process itself be speedy might the removal of a court's jurisdiction over a pending desegregation case raise constitutional difficulties. The *Alexander* and *Carter* cases do in fact suggest that if a court had already found a violation, delaying the implementation of a remedy by depriving that court of jurisdiction to do so would be unconstitutional. See note 9 supra. Certainly, in an extreme case, as where desegregation plaintiffs are whipsawed between courts by successive jurisdictional reallocations, a violation of due process would be found, since plaintiffs are, in effect, being deprived of all remedy for a constitutional right. See notes 57-65 infra and accompanying text.

[48] See generally Wechsler, The Courts and the Constitution, 65 Colum. L. Rev. 1001 (1965).

federal court, might determine in a desegregation case that forbidden busing was constitutionally required and yet be powerless to order such a remedy.

There is considerable authority for the proposition that an article III court may not exercise jurisdiction when impotent to effectuate its judgment. The question was surveyed fairly recently in *Glidden Co. v. Zdanok*.[49] Justice Harlan reviewed the "advisory opinion" cases[50] and concluded that, despite some famous language of Chief Justice Taney,[51] those cases stood with certainty only for the relatively narrow holding that Congress might not specify that adjudication pursuant to its enactments shall be subject to an extrajudicial revisory authority.[52] As to the general proposition that an article III court cannot exercise an impotent jurisdiction, Justice Harlan noted two exceptions. The Constitution vests in Congress alone the power to authorize disbursements from the Treasury, and no writ of execution may issue to the Secretary of the Treasury until an appropriation has been made. If the capacity to enforce a judgment were absolutely essential to its jurisdiction, no article III court could entertain a money claim against the United States.[53] Similarly, the Supreme Court may exercise original jurisdiction over money claims by one state against another despite federal judicial incapacity to enforce an award by judicial process.[54]

The proposition that an article III court must be empowered to effect its judgments is grounded in the principle of separation of powers.[55] Its salient thrust is that neither the executive nor legislative branches of the federal government shall tamper with the judicial function; the danger is slight that the judiciary would impose remedial impotence upon itself in a controversy over which it retained jurisdiction. The exceptions to the general proposition which *Glidden* noted are exceptions which prove the rule. The exception relating to money claims against the United States emanates from the respective constitutionally ordained roles of Congress and the judiciary. Analogous constitutional considerations of federalism underlie federal judicial incapacity to enforce a money claim against a state. The broad principle that the federal courts cannot exercise an impotent jurisdiction can hardly be said to have been swallowed by its exceptions. Therefore, this principle can be relied upon to exert some force in cases which deviate from the limiting factual configuration of the advisory opinion cases.

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49 370 U.S. 530 (1962) [hereinafter *Glidden*].

50 See, e.g., Chicago & Southern Air Lines v. Waterman S. S. Corp., 333 U.S. 103 (1948); Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865); United States v. Ferreira, 54 U.S. (13 How.) 40 (1852); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792). See generally Hart & Wechsler, supra note 26, at 66-70.

51 In Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865), it was decided that no appeal could lie to the Supreme Court from a judgment of the Court of Claims, because such judgments were by statute subject to revision by the Secretary of the Treasury. Chief Justice Taney died before the *Gordon* decision was announced, but he had prepared a draft opinion which was subsequently printed at 117 U.S. 697, as an appendix to that volume. Justice Taney wrote:

> The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this Court, in the exercise of its appellate jurisdiction: yet it is the whole power that the Court is allowed to exercise under this act of Congress.

117 U.S. at 702. Quoted in District of Colum. v. Eslin, 183 U.S. 62, 65-66 (1901).

52 *Glidden* at 567, citing United States v. Jones, 119 U.S. 477, 478 (1886).

53 *Glidden* at 570, citing Reeside v. Walker, 53 U.S. (11 How.) 272, 291 (1851).

54 *Glidden* at 571, citing South Dakota v. North Carolina, 192 U.S. 286, 318, 321 (1904).

55 Flast v. Cohen, 392 U.S. 83, 96 (1968).

The difficulty lies in determining what that force is, for, when applied to actual cases, the general rule can appear evanescent at best or question-begging at worst.[56]

A remedial prohibition or jurisdictional regulation which forcloses all or adequate opportunity to assert a constitutional right presents a relatively easy case. It would exalt form over substance not to regard this as equivalent to the direct abrogation which *Marbury v. Madison*[57] forbids. This issue was latent in challenges to the Portal-to-Portal Act of 1947.[58] The Supreme Court had given an unanticipated construction to the Fair Labor Standards Act of 1938,[59] and by doing so created numerous causes of action for back pay.[60] In response, Congress passed the Portal-to-Portal Act, which expressly and retroactively extinguished those causes of action.[61] Presumably for fear that this provision would be found to violate the fifth amendment, Congress appended an additional section which deprived all federal and state courts of jurisdiction to hear the claims.[62] The circuit courts of appeal did not permit the jurisdictional restriction to foreclose constitutional adjudication of the substantive provisions of the Portal-to-Portal Act, which were unanimously upheld.[63] In *Battaglia v. General Motors*,[64] the Second Circuit held that the substantive and jurisdictional segments of the Act stood or fell together. Congressional control of jurisdiction was held subject at least to the fifth amendment. If a jurisdictional regulation operated as would a substantive enactment which violated that amendment, it would have to fall.[65]

The President's proposals present a much more complicated problem than was latent in the Portal-to-Portal Act. The proposals contain restrictions which prohibit some, but not all, relief which might be demanded by adjudication of what could be termed the whole controversy. Moreover, these restrictions would not effectively abrogate the right to relief, because another court would remain empowered and obliged to provide it.[66] It is possible to focus on the position of the court whose power has been limited and say that an impermissible impotent jurisdiction has been conferred upon it. In answer, however, such a remedial prohibition can be transformed into a jurisdictional regulation which grants the court affected a limited jurisdiction, namely, jurisdiction over part of the controversy, with no jurisdiction to grant the remedy forbidden. The question becomes, then, whether a court is impermissibly granted jurisdiction over a controversy without power to effect its whole judgment, or whether it is permissibly granted jurisdiction over part of the controversy, with full power to effect the whole of the judgment that its limited jurisdiction requires.[67]

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56 See notes 67-68 infra and accompanying text.

57 5 U.S. (1 Cranch) 137 (1803).

58 29 U.S.C. §§ 251 et seq. (1970).

59 29 U.S.C. §§ 201 et seq. (1970).

60 Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946); Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590 (1944).

61 28 U.S.C. § 252a-c (1970).

62 28 U.S.C. § 252d (1970).

63 See, e.g., Thomas v. Carnegie-Illinois Steel Corp., 174 F.2d 711 (3d Cir. 1949); Seese v. Bethelehem Steel Co., 168 F.2d 58 (4th Cir. 1948).

64 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948).

65 Id. at 257.

66 See note 42 supra.

67 For example, the Student Transportation Moratorium Bill and § 403b of the Equal Educational Opportunity Bill would stay federal court orders even if the court had adjudged, on constitutional grounds, that the order was to be implemented immediately. This would certainly appear to be an attempt to render the courts powerless to effect an aspect of their judgment. But it is possible to view the stay provisions another way. A desegregation controversy may give rise to a variety of claims, one of which might be a demand for immediate busing. The stay provision could be regarded as merely withdrawing federal jurisdiction to hear that claim, much as the Norris-La Guardia Act withdrew federal jurisdiction to hear some but not all claims arising from a labor dispute. See notes 70-77 infra and accompanying text.

However a question concerning the validity of a jurisdictional or remedial regulation is resolved, such a conceptual distinction, unless grounded in further analysis, should be of no legal moment. But the temptation is great to proceed with a characterization and dispense with a consideration of the policy which supports it.[68]

That forbidden busing may be constitutionally mandated loses the controlling significance an analogous finding would have had in the Portal-to-Portal Act cases. The availability of the required relief in another court[69] saves the President's proposals from operating as a deprivation of a substantive right.

Apparently it was the continued availability of an unfettered state forum which led the Supreme Court, in *Lauf v. E. G. Shinner Co.*,[70] to sustain the remedial prohibitions which the Norris-La Guardia Act[71] placed upon the federal courts. The Act deprived the federal courts of much of their power to restrain or enjoin labor strikes; it also provided that "yellow-dog" contracts[72] should be completely unenforceable in the federal courts. At the time of the Act's passage similar state legislation had been declared unconstitutional by the United States Supreme Court,[73] and the right to enter into a "yellow-dog" contract had been held to be constitutionally protected.[74] Yet *Lauf* sustained the Act as a jurisdictional regulation with a minimum of analysis. At the time of the *Lauf* decision, the substantive due process rationale of the earlier cases was in serious disrepute,[75] although the cases themselves had not yet been expressly repudiated.[76] If *Lauf* is read as overruling those cases *sub silentio*, then the Norris-La Guardia Act is distinguishable from the President's proposals in that it did not restrict a constitutionally required remedy. Nevertheless, the Act still deprived the federal courts of power to order part of the relief appropriate for the controversy. That relief was still available in the state courts. The Act did not abrogate the right to obtain that relief, and so, in a sense, conferred a partially impotent jurisdiction on the federal courts. There is authority, however, for drawing a line where the remedy involved is constitutionally required.[77]

Unlike the Norris-La Guardia Act, the Emergency Price Control Act of 1942[78] clearly deprived the federal district courts of the power to consider the constitutional validity of price control regulations. The Act created the Emergency Court of Appeals, to which an aggrieved party could appeal an unfavorable administrative ruling on a price control regulation. The Act vested exclusive authority to consider the validity of price control regulations in that court and in the Supreme Court in review of its

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68 See, e.g., Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938), discussed in text accompanying notes 70-77 infra; Avco Co. v. Aero Lodge, 390 U.S. 557 (1968), discussed in note 26 supra, where the court construed as a remedial prohibition the very provisions *Lauf* had lightly dealt with as jurisdictional. 390 U.S. at 561.

69 See note 23 supra.

70 303 U.S. 323 (1938).

71 29 U.S.C. §§ 101-15 (1970).

72 A "yellow-dog" contract conditions employment upon nonmembership in a union.

73 Truax v. Corrigan, 257 U.S. 312 (1921), held that it was a denial of equal protection for a state to withhold equitable relief in labor disputes while granting it elsewhere. The equal protection analysis was based on the fundamental interest a litigant had in securing a contract right of a sort guaranteed by substantive due process. 257 U.S. at 333, 338. *Truax* declined to rely exclusively upon a due process analysis because it was unclear whether the state legislation in question still left constitutionally adequate legal relief available. 257 U.S. at 330.

74 Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908).

75 See, e.g., Nebbia v. New York, 291 U.S. 502 (1934); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

76 *Coppage* and *Adair* have not been formally overruled, but their due process philosophy has been "steadily neglected" by the Supreme Court in cases subsequent to *Lauf*. Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949).

77 See note 84 infra and accompanying text.

78 56 Stat. 23 (1942). 50 U.S.C. App. Supp. II, §§ 901 et seq. (1970), as amended by the Inflation Control Act of Oct. 2, 1942, 50 U.S.C. App. Supp. II, §§ 961 et seq. (1970).

decisions.[79] In *Yakus v. United States*,[80] the Court dealt with the status of a claim, asserted in defense to a criminal prosecution in federal district court, that one of the regulations was unconstitutional. The Court construed the Act to permit the constitutionality of the Act itself, but not of the regulation promulgated thereunder, to be challenged in the criminal prosecution.[81] In consequence, one aggrieved by an unconstitutional regulation had to have successfully attacked it in the Emergency Court of Appeals before he could violate it with impunity and defend upon constitutional grounds. The Court looked at the Act principally from a litigant's point of view and concerned itself with whether the procedure established satisfied due process. It found the procedure satisfactory, despite the burden it imposed in forcing compliance with an unconstitutional regulation until its validity had been decided.[82] The Court found "no novel constitutional issue" in "splitting the trial for violations of an administrative regulation" where there was "an adequate separate procedure for the adjudication of its validity. . . ."[83]

Justice Rutledge disagreed:

> It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them. . . . [W]henever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the separation of the powers of the government and of the constitutional integrity of the judicial process. . . .[84]

It is not certain that even Justice Rutledge's position would invalidate the jurisdictional provisions of the President's proposals.[85] The judgment rendered by a court laboring under the remedial prohibitions of that legislation would not be a criminal conviction under a possibly unconstitutional statute, but an order of inadequate relief for an existing constitutional violation. It would not require that a constitutional violation be continued, but that it be mitigated rather than obliterated. The state courts could finish the job.

If the question is ultimately how finely and along what lines the judicial function may be split, then to answer it by establishing an absolute requirement which would forbid severing constitutional questions from the body of a controversy would be inconsistent with normal practice. As the *Yakus* majority pointed out, courts effect such a severance themselves in refusing to consider valid constitutional claims which have not been properly raised.[86] To be sure this practice is distinguishable from a jurisdictional or remedial limitation. It is imposed by the judiciary itself and raises no question concerning the separation of federal powers. Its imposition is provoked by the litigant's own failure to exploit his opportunities fully, rather than by legislative fiat. Its operation is random, so that no specific class of constitutional claims is systematically withdrawn from the courts' purview. But the practice does give the lie to any assertion that the judicial function must inevitably comprise adjudication of all constitutional issues which might be presented by the controversy before it. There may

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79 Id. § 204a, c, d.

80 321 U.S. 414 (1944).

81 Id. at 430.

82 Id. at 437-46.

83 Id. at 444.

84 Id. at 468.

85 See Bowles v. Willingham, 321 U.S. 503, 526 (1944) (Rutledge, J., concurring).

86 321 U.S. at 444-46.

be sound reasons for discouraging the courts from deciding cases in disregard of constitutional questions, but the courts do so regularly.

An examination of what the antibusing legislation would actually call upon the federal courts to do and of what legitimate interests might be served thereby suggests that the antibusing legislation is quite different from those remedial or jurisdictional limitations which have been sustained. It seems true to say that such regulations have expected readily identifiable classes of cases or claims from a court's purview. The "yellow-dog" contract provision of the Norris-La Guardia Act excluded a well-defined class of cases. That Act's provisions with regard to equitable relief in labor disputes excepted a class of claims within a class of cases, as did the provisions of the Emergency Price Control Act. Certain courts were kept from rendering judgment upon a certain class of cases or claims, and from passing upon associated questions of law and fact. The restrictions which such legislation places upon judicial output are sufficiently well drawn that a court need not pass upon a question or claim which it is powerless to adjudicate and can dismiss at the outset any pleading that would have it do so.[87]

Several purposes are served by such discrete exceptions. Obviously, it is undesirable to dismiss a litigant's claim upon a jurisdictional point after burdening him with the labor of trying the merits of his case. Similarly, only a jurisdictional regulation which operates substantially before the merits of a case are decided can accomplish an efficient allocation of judicial resources, or can indeed achieve any real allocation at all. If a jurisdictional regulation does not come into play until after the merits are decided, the only judicial energies it conserves are those expended by the entry of judgment. And that is really the heart of the matter: a jurisdictional or remedial limitation which attaches *only* after all the questions of law and fact relevant to the greater controversy have been decided renders the judiciary impotent to effect a part or the whole of their judgment. Having no ascertainable legitimate purpose, it is a coercive vote of no confidence in the competence of the judiciary to reach a certain conclusion in a certain case.[88]

The President's proposals present an example of a jurisdictional regulation which attaches only after the merits have been decided.[89] In the critical cases in which only

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87 Inevitably, in a certain number of cases subject matter jurisdiction will be found wanting at the conclusion of litigation, or upon appeal. But a workable jurisdictional regulation ought to be drafted to avoid such eventualities. As case law develops, ambiguities are resolved and the likelihood of a delayed dismissal lessens.

88 Such legislation would appear superficially to work a less vicious interference with the courts than does the imposition of a revisory agency upon their judgments; the instrument by which a judgment might be nullified would be judicial – the court's own decision upon the merits. See text accompanying notes 49-56 supra. But a jurisdictional prohibition which can operate only when the merits have been decided poses a threat which a request for an advisory opinion does not. If the latter tells a court that any decision it might make upon a certain matter is not trustworthy enough to be final, the former tells a court that it will be trusted to decide a case one way, but not another. Depending upon whether a judge is possessed of a compliant or an independent disposition, such a provision may coerce him to decide the merits one way or the other. It is difficult to see how legislation which calls for a possibility of revision, whatever the outcome on the merits, can have a comparable effect, unless the court has reason to think it knows what action the revisory agency will take.

89 There is no precedent directly in point concerning such a regulation. In United States v. Klein, 80 U.S. (13 Wall.) 128 (1872), the Supreme Court dealt with a jurisdictional regulation applicable to suits to recover property seized by the United States during the Civil War. A previous Supreme Court decision had held that the condition of loyalty prerequisite to recovery was satisfied by a pardon for past disloyalty. United States v. Padelford, 76 U.S. (9 Wall.) 531 (1870). Klein's decedent has received such a pardon. After the Court of Claims had rendered judgment in Klein's favor, Congress passed a statute which made possession of a pardon conclusive evidence of *disloyalty*. In addition, upon proof of pardon, jurisdiction was to cease and plaintiffs to be nonsuited. 16 Stat. 235 (1870). In rejecting the government's appeal, the Supreme Court declared these provisions unconstitutional. 80 U.S. (13 Wall.) at 143-48. The Court regarded the statute as a legislative infringement upon the President's pardon power. Since the jurisdictional provision closed all forums for the assertion of the pardoned plaintiff's right to recover, it, like the evidentiary

forbidden busing could provide constitutionally adequate relief, a federal court could not avoid the anomaly of deciding the propriety of an ultimate remedy which it would be unable to effect. A court could not limit its inquiry to the relative merits of stopgap relief within the remedial limitations. Nor could it avoid the dilemma inherent in that approach by conducting an initial jurisdictional inquiry to determine whether fully effective relief might be formulated within the confines of the remedial limitations, and dismissing the case if it found that such a formulation was not possible.

Civil rights cases are not like money claims, which can be satisfied piecemeal through successive quasi-in-rem actions. The variety and complexity of possible remedial schemes makes formulating a partial remedy impossible without considering also what ultimate remedy will be required. For example, a court might choose to order the rapid construction of prefabricated schools as the most effective alternative to the "forbidden busing" it was powerless to order.[90] This would be unobjectionable should it prove possible to formulate fully effective relief in this fashion. But where only busing would ultimately suffice, the expenditure of what may be limited funds and what is certain to be considerable administrative effort to establish new schools, unneeded but for the limit upon the court's power, could actually hobble the school district in implementing ultimate relief.

It is not just where the stopgap relief might actually be detrimental that the courts, in good conscience, would have to decide what the essential features of ultimate relief would be. Any measure of effectiveness must put a premium on how *well* a partial remedy would facilitate the ultimate relief. For basically the same reason, an initial jurisdictional inquiry to determine whether effective relief could be formulated within the confines of the proposed legislation's remedial limitations could not be conducted without further inquiry into what result relief beyond those limitations might accomplish. What constitutes *effective* relief cannot be determined until reasonable alternative schemes are compared.[91] Relief within the remedial

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provision itself, prescribed an unconstitutional rule of decision. In so holding the Court used broad language to the effect that Congress had no power to alter the rule of decision in a pending case, language which it sought to limit but which if read literally is wrong. See United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) (law at time judgment entered is controlling); Carpenter v. Wabash Ry., 309 U.S. 23 (1940) (includes judgment on appeal). In addition, however, the *Klein* opinion took cognizance of the peculiarity that

> [T]he court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction. 80 U.S. (13 Wall.) at 146.

Whether or not Klein's decedent had a valid pardon, and thus whether the Court had jurisdiction under the statute, could have been decided apart from the rest of Klein's case. Therefore, *Klein* was not in the full sense a case in which a jurisdictional limitation could attach only upon a full decision of the merits. But the Supreme Court, in the context of the entire statute, appears to have regarded the jurisdictional provision as operating only after the Court had decided the merits in a certain way – that is, after the Court had found that a suitor had been pardoned, that a pardon was proof of loyalty, and that the suitor was otherwise entitled to a favorable judgment. 80 U.S. (13 Wall.) 145-47 (*semble*).

[90] Such a remedial scheme is specifically authorized by § 402 of the Equal Educational Opportunity Bill.

[91] In some cases it might, however, be possible to dismiss a prayer for desegregation relief on the pleadings, as necessarily entailing a request for forbidden busing. In such a dismissal a 'jurisdictional' inquiry into the merits is avoided. Such summary evaluation cannot, however, be made the rule. If jurisdiction over a broad class of school desegregation suits is to be retained in any meaningful way, plaintiffs cannot be offered a Hobson's choice of demanding in their pleadings the forbidden busing which compels dismissal, or being forever precluded from later asserting that that busing is required. In general, plaintiffs in desegregation suits are under no duty to specify the relief they seek; to so oblige them would burden them with a task which defendant school boards are in a much better position to assume. See Carter v. West Feliciana Parish School Bd., 396 U.S. 290, 291-92 (1970) (Harlan, J., concurring); Green v. County School Bd., 391 U.S. 430, 439 (1968). Cf. *Swann* at 7-10, 13.

limitations could not be considered acceptable ultimate relief if "forbidden busing" could achieve substantially more desegregation.[92]

The President's proposed legislation would require the federal courts to formulate all but the insignificant details of whatever relief would ultimately be required to desegregate a dual school system. Should that relief be forbidden busing, the federal courts would be left impotent to effect the judgment they had deemed constitutionally required. To avoid such an impermissible situation any desegregation suit in which there should exist even a colorable possibility that "forbidden busing" would be required would have to be dismissed at the outset. To save the President's proposals by thus construing them to withdraw entirely original federal jurisdiction from a broad class of school desegregation cases would not be "fairly possible."[93]

In the advisory opinion cases the Supreme Court consistently declined jurisdiction when its judgments were to be subject to revision.[94] The establishment of the revisory authority which threatened the integrity of the judicial function was made to operate as a total deprivation of jurisdiction, a deprivation not within the contemplation of Congress. But the Court's only alternative would have been to render a judgment and sua sponte enjoin or otherwise prospectively nullify revision. Such a course would have risked a serious confrontation between coordinate branches of the federal government; moveover, the statutory rights involved were clearly created in contemplation of an extrajudicial revisory authority's ultimate overview. In contrast, invalidating a congressional enactment threatens a far less acute and extraordinary disruption of the federal system than enjoining official action. And, indisputably, the ultimate power to decide the constitutional questions raised by desegregation cases must reside with the judiciary.[95] So long as the Constitution requires busing in excess of what the President's proposed remedial limitations would allow, the courts would have no alternative but to strike those limitations down.

B. The President's Proposals and the Enforcement Clause of the Fourteenth Amendment

Recent cases suggest that the enforcement clause of the fourteenth amendment may empower Congress to pass legislation which, in effect, decides a constitutional question differently than might a court.[96] The concluding portion of this Note considers whether the President's antibusing proposals might be construed as declaring that forbidden busing is not required by the Constitution. If such a construction is proper, then the President's proposals would not call upon the federal courts to exercise an impotent jurisdiction; the federal law which they would be applying would never require them to consider the imposition of remedies beyond their power.[97]

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92 North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971); Davis v. School Comm'rs of Mobile County, 402 U.S. 33, 37 (1971); Green v. County School Bd., 391 U.S. 430, 441 (1968). See also *Swann*, 402 U.S. at 22-25, 31; Brown v. Board of Educ., 349 U.S. 296, 298-301 (1955).

93 " 'When the validity of an act of the Congress is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' Cromwell v. Benson, 285 U.S. 22, 62." Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

94 See cases cited in note 50 supra.

95 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

96 Katzenbach v. Morgan, 384 U.S. 641 (1966) [hereinafter *Morgan*]; Oregon v. Mitchell, 400 U.S. 246-48 (1970) (Brennan, White and Marshall, JJ., concurring and dissenting).

97 State law might still require forbidden busing. Under the doctrine of United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966), a federal court might, when hearing a federal desegregation suit, assume pendent jurisdiction over the state law claim, as both claims "derive from a common nucleus of operative fact." 383 U.S. at 725. However, the exercise of pendent

The scope of congressional power under the enforcement clause of the fourteenth amendment has been given its broadest interpretation in *Katzenbach v. Morgan*.[98] In that case, the Supreme Court sustained a federal statute[99] which declared New York State's English literacy test for voting invalid, insofar as it applied to persons who had received a sixth-grade education in a language other than English in an American-flag school. The purpose and effect of the federal statute was to enfranchise the substantially disenfranchised Puerto Rican population of New York.[100] Several years earlier the Supreme Court had held that North Carolina's English literacy requirement, which was similar to New York's, did not violate the equal protection clause.[101] The Court had stated that "[l]iteracy and illiteracy are neutral on race, creed, color, and sex, . . ." and had concluded that North Carolina's requirement was rationally related to a legitimate state objective "to raise the standards for people of all races who cast the ballot."[102] In *Morgan*, the Court relied on two grounds in sustaining the federal statute. First, the measure could be viewed as an attempt by Congress "to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government — both in the imposition of voting qualifications and the provision or administration of governmental services. . . ."[103] Second, Congress might have determined that the New York English literacy test itself constituted an "invidious discrimination" in violation of the equal protection clause.[104] The power of Congress to invalidate New York's law on either of these grounds originates in the enforcement clause of the fourteenth amendment. The first ground was articulated in terms of *Morgan*'s factual context and, therefore, can be read quite narrowly. But the second ground is suggestive of a congressional power to declare substantive constitutional law.[105] At the very least it recognizes a congressional power to "override state laws on the ground that they were in fact used as instruments of invidious discrimination even though a court in an individual lawsuit might not have reached that factual conclusion"[106] — a power to apply constitutional principles independently of the courts.

This holding has generated a host of theoretical difficulties. In recent years the Court has been groping for a reasoned and coherent analytic framework in which to operate when asked to invalidate state action as a violation of the equal protection clause.[107] On the one hand the Court has not wanted to create a tool enabling it to sit as a super-legislature passing upon the wisdom of all legislation coming before it in accordance with its own whim.[108] On the other hand, the majority of the Court has

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jurisdiction is discretionary. 383 U.S. at 726-27. An assumption of pendent jurisdiction would not be appropriate in the given instance, should the President's proposals be enacted. But cf. Boys Markets, Inc. v. Retail Clerks, 398 U.S. 235 (1970), discussed in note 26 supra.

98 384 U.S. 641 (1966).

99 Section 4(e) of the Voting Rights Act of 1965, 42 U.S.C. 1973b(e) (1970).

100 384 U.S. at 644 and 645 n.3.

101 Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

102 Id. at 51-53.

103 384 U.S. at 652.

104 Id. at 654-56. See note 115 infra and accompanying text.

105 See generally Cox, The Role of Congress in Constitutional Determinations, 40 U. Cinn. L. Rev. 199 [hereinafter Cox]; Burt, Miranda and Title II: A Moranatic Marriage, 1969 Sup. Ct. Rev. 81. See note 116 infra.

106 Oregon v. Mitchell, 400 U.S. 112 (1970) (Stewart, J., concurring and dissenting).

107 For an extensive recent study of this area of constitutional law, see Developments in the Law — Equal Protection, 82 Harv. L. Rev. 1065 (1969) [hereinafter Developments]. The most recent developments are analyzed in Gunther, The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for the New Equal Protection, 86 Harv. L. Rev. 1 (1972).

108 See, e.g., Labine v. Vincent, 401 U.S. 532, 537-40 (1971); Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting).

felt judicial intervention to be warranted in the more outrageous cases.[109] To serve both masters, but perhaps serving neither well, the Court has evolved an analytical procedure which requires two stages. First, legislation is examined to see whether it classifies persons along suspect, notably racial, lines, differentially affects people in pursuit of their fundamental interests, or, does both.[110] Should legislation be found to fall into such a category, it is subject to "strike scrutiny" and invalidated unless supported by a compelling state interest.[111] If the legislation should involve neither a suspect class nor a fundamental interest, it is subjected to the "traditional" equal protection test and sustained if it bears a rational relationship to a permissible state objective.[112] From 1937, the year generally associated with the demise of the substantive due process doctrine by which the Court has assumed an active role in scrutinizing legislation, until 1971, only one state law had been overturned by the "traditional" test.[113] Recently that test has been applied with a new vigor and it appears to be approaching a more demanding "reasonableness" standard.[114]

The second ground of *Morgan* presents, in a novel form, the problem with which the Court has been struggling. The Court must develop reasoned criteria by which to decide whether to intervene once Congress has exercised the *Morgan* power to reach a different result than the Court itself would have reached. It is clear that none of the Justices has contemplated a complete abdication of the power to review congressional exercise of the *Morgan* power. Even those who have argued most strenuously in favor of a broad *Morgan* power have characterized legislation enacted pursuant to it as representing a reviewable congressional finding of fact, rather than an untrammeled power to declare constitutional law.[115] But this neat conceptual distinction may be illusory. When a finding of fact entirely determines how a constitutional principle will operate, then the less stringent the review to which that finding is subject, the more the power to make such a finding approximates the power to declare constitutional law. *Brown I* itself was ostensibly grounded in a factual finding that "separate-but-

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109 See, e.g., Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

110 See Developments, supra note 107, at 1120, for a discussion of how "strict scrutiny" might be triggered by a function comprising both the classification made and interest affected by legislation.

111 See, e.g., Graham v. Richardson, 403 U.S. 365, 371-72 (1971); Shapiro v. Thompson, 394 U.S. 618, 634, 638 (1969).

112 See, e.g., Dandridge v. Williams, 397 U.S. 471, 483-88 (1970); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

113 Morey v. Doud, 354 U.S. 457 (1957). Although substantive due process and the new equal protection mirror dissimilar social values, an expanded willingness to invalidate legislative judgments is common to both. See Developments, supra note 107, at 1131-32; Karst, Justice Douglas and the Return of the Natural-Law Due Process Formula, 16 U.C.L.A.L. Rev. 716, 739 (1969). Justice Stewart has explicitly rejected the notion that the equal protection clause confers substantive rights. San Antonio Ind. School Dist. v. Rodriguez, 93 S. Ct. 1278, 1310 (1973) (Stewart, J., concurring).

114 See, e.g., Reed v. Reed, 404 U.S. 71 (1971) (invalidating preference for male estate administrators). See *Gunther*, supra note 107, at 19-20. Justice Marshall has repeatedly objected to what he perceives as the disingenuous a priori nature of the Court's two-tiered analysis, calling for a more candid acknowledgment of the factors which have weighed in the development of equal protection case law. San Antonio Ind. School Dist. v. Rodriguez, 93 S. Ct. 1278, 1330-36 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting).

115 The phrase "invidious discrimination," which appeared in the second rationale of the *Morgan* opinion, is a conclusory term characterizing a finding of invalidity under either equal protection test. See, e.g., Shaprio v. Thompson, 394 U.S. 618, 627 (1969) (compelling interest test); Morey v. Doud, 354 U.S. 457, 463 (1957) (traditional test). Its use in *Morgan* should not be read as implying that Congress may declare as a matter of law what interests are fundamental or classifications suspect. Oregon v. Mitchell, 400 U.S. 112, 248-49 (1970) (Brennan, White and Marshall, JJ., concurring and dissenting), citing *Morgan* at 653, 654-56. But see the opinion of Justice Stewart, who rejected the three Justices' position, which he saw as granting Congress the power to declare substantive constitutional law. 400 U.S. at 295-96.

equal" was inherently unequal.[116] A sufficiently lax standard of review might allow a congressional 'reversal' of this 'finding' to stand unchallenged. Commen sense tells us that the Court would not idly let Congress undo its major work of the past nineteen years. But the President's proposals might constitute a much lesser and more easily accommodated 'reversal'.

Justice Brennan, the author of the *Morgan* opinion, has suggested a solution which has aptly been described as a "judicial ratchet."[117] When the effect of congressional legislation is to elevate constitutional rights through reform, the legislation would be subjected to the traditional, permissive equal protection standard of review.[118] Thus, in *Morgan* the Court was not prepared to inquire whether "conditioning the right to vote on achieving a certain level of education in an American-flag school (regardless of the language of instruction) discriminates invidiously against those educated in non-American-flag schools."[119] On the other hand, a congressional enactment restricting, abrogating or diluting fourteenth amendment rights would be struck down as readily as would an identical state statute.[120]

There is an inconsistency latent in Justice Brennan's position. If Congress is allowed to decide constitutional questions one way, it is hard to see why it should not equally be permitted to decide them another way, whether in deference to its presumed special competence as a fact-finder, or perhaps more candidly, pursuant to a policy determination that certain classes of controversies are best suited for legislative, rather than judicial, resolution.[121] And, as a practical matter, an initial characterization of legislation as "elevating" or "diluting," to determine how strictly it ought to be scrutinized, really begs the question when the effect of the legislation is itself unclear.[122]

Without attempting to resolve such difficulties, this Note will proceed upon an assumption: even if Justice Brennan's viewpoint does not prevail and *Morgan* emerges as authority for some "dilution" of the constitutional right to equal educational facilities, the Court would at the very least subject the President's proposals to a test of reasonableness.[123] Such a test would not recognize a congressional power to

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116 347 U.S. at 493-95.

117 Cox, supra note 105, at 255.

118 *Morgan* at 657; Oregon v. Mitchell, 400 U.S. at 248-49 (Brennan, White and Marshall, JJ., concurring and dissenting).

119 *Morgan* at 657.

120 "Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be — as required by § 5 — a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws." Id. at 651-52 n.10. See also Oregon v. Mitchell, 400 U.S. 112, 249 n.31 (Brennan, White and Marshall, JJ., concurring and dissenting).

121 *Morgan* at 666-68 (Harlan, J., dissenting); Oregon v. Mitchell, 400 U.S. at 205-07 (Harlan, J., concurring and dissenting). See Cox, The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 106 and n.86 (1966); Burt, Miranda and Title II: A Morganatic Marriage, 1969 Sup. Ct. Rev. 81, 116, 126. Former Attorney General Kleindienst has cited Professor Cox's articles as authority for the validity of the President's proposals. Hearings, supra note 23, at 1144.

122 For example, reasonable arguments may be advanced to the effect that benign or compensatory racial quotas either "dilute" or "elevate" constitutional rights. See Developments, supra note 107, at 1104-19. See generally Note, Race Quotas, 8 Harv. Civ. Rights — Civ. Lib. L. Rev. 128 (1973). Legislative reapportionment may present an analogous problem. See Cox, supra note 105, at 257.

123 There are several bases for this assumption. First, the *Morgan* majority expressly intended to permit no "dilution" whatsoever. See note 120 supra and accompanying text. (The stand against dilution was vigorously reaffirmed recently in San Antonio Ind. School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973). Justice Powell, in a majority opinion in which all of President Nixon's appointees joined, quoted passages from *Morgan* at length. 93 S. Ct. at 1299-1300. The reaffirmation of the *Morgan* position against dilution was, however, dicta of only marginal relevance to the decision of *Rodriguez*.) Second, for the past nineteen years the Court has unanimously subjected allegedly racially discriminatory legislation to an extremely intense scrutiny. A sudden break with this practice seems highly improbable. Third, only Justice Harlan has expressed, albeit

formulate new constitutional principles. But congressionally imposed remedial restrictions would stand, if they represented a reasonable resolution of the factual issues which the courts themselves have recognized as bearing upon the scope of permissible relief, even should that resolution differ from the resolution the courts might have made.[124] This position presupposes that the more fundamental Court holdings on the desegregation question would remain immune from congressional revision. Holdings such as the prohibition against separate-but-equal facilities have been cemented into the law as express constitutional commands.[125] Only where alternative means might reasonably be thought to satisfy constitutional ends might there be room for Congress to depart from the Court's path.

Busing is, of course, a means to an end and not an inherent goal of desegregation. There is no 'right' to be bused. The *Swann* Court made it clear that equitable considerations, not themselves founded upon specific constitutional provisions, limit the amount of busing which might be ordered in a particular situation. Among such considerations are the health and safety of children, and the danger that too much busing might injure the quality of education.[126]

That busing itself is a reasonable method of relief is undeniable, in view of its widespread and longstanding use in transporting children to school.[127] But at what point busing becomes dangerous is a question which Congress might be permitted to answer differently than a court. In this sense Congress might be able to "dilute" the holdings of specific cases by requiring less busing. Reasonable national busing standards would have to incorporate variations in local conditions by reference and operate accordingly, for *Swann* emphasizes that the desirable extent of busing may be different for each locale.[128] As passed by the House, the Equal Educational Opportunity Bill

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reluctantly, any willingness to tolerate some "dilution." He was willing to sustain, under a "reasonableness" standard, a complete ban on all literacy tests, as an exercise of the enforcement clause of the *fifteenth* amendment, notwithstanding that he perceived such a ban to be a dilution of the constitutional rights of literate voters. Oregon v. Mitchell, 400 U.S. at 216, 217 n.96. The right which Justice Harlan was willing to so dilute had been established in a decision from which he had dissented vigorously and to which he never became reconciled. Reynolds v. Sims, 377 U.S. 533, 589-625 (1964) (Harlan, J., dissenting); Whitcomb v. Chavis, 403 U.S. 124, 165-70 (1971) (separate opinion of Harlan, J.).

124 See Cox, supra note 105, at 234, 254-55.

125 Id. at 254.

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> An objection to the 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.... The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed. *Swann* at 30,31.

127 See note 1333 infra.

128 402 U.S. at 29. Besides health, safety, and educational quality, other local conditions may bear upon the question of how much busing is appropriate. For example, racial fear and racial prejudice may lead to a mass exodus of whites from a community, or at least from its public schools, where 'excessive' busing is ordered, thus altering the racial composition of a school district so that integration is not achieved, although desegregation may be accomplished in a technical sense. The extent to which the danger of "white flight" may properly be taken into account in formulating relief is unclear. See Wright v. Council of the City of Emporia, 407 U.S. 451, 464 (1972) (concern with "white flight" apposite); id. at 474-75 (Burger, C.J., dissenting) (concern apposite but findings in case speculative). But cf. *Swann* at 31-32 (once "unitary" system achieved, subsequent shifts in racial composition of school district will not warrant courts' intervention). See Note, Schools, Busing, and Desegregation: The Post-Swann Era, 46 N.Y.U.L. Rev. 1078, 1121-24 (1971).

If "white flight" is to be accorded weight in formulating relief, it is hard to see how legislation could reasonably take account of a phenomenon so elusive of prior measurement and so likely to vary as racial tensions ease or worsen. The President's proposals wholely fail to take reasonable account of "white flight." Within their confines some communities might achieve a complete racial balance far exceeding any 'tipping point', while others might achieve no balance at all. Insofar as "white flight" might be engendered by the injury children may suffer by the physical act of busing, the proposals fail by setting busing limits bearing no reasonable relation to children's welfare. See notes 130-35 infra and accompanying text.

would forbid pupil transportation to any but the school nearest or next nearest a pupil's residence.[129] It is difficult to view this rigid provision as embodying even an approximate index of the point at which busing becomes injurious to the health or education of a child.[130]

The President's version of the Bill is somewhat more sophisticated. It isolates three parameters of a local educational agency's past busing practice and declares that no one of these parameters may be exceeded in a busing order.[131] Arguably, past practice offers some indicia of what busing is or is not harmful, since it may reflect local weather and road conditions. But the President's proposal is so inflexible and unaccommodating that, when put to work, it would prove grossly defective.[132] Additionally, there are serious difficulties inherent in any scheme of remedial limitation which attempts to incorporate local conditions by reference to past practice. Such a scheme extrapolates its limits from the very pattern of past constitutional wrongs which it would correct.[133] Of all the indicia of how much busing can be safely required, the President's proposals have selected as a guide a closed class of constitutional violations[134] – a set of practices unlikely to reflect merely how much busing is safe, and very likely to embody a hidden charge on busing, namely, an impermissible policy determination that desegregation is bad. In some cases it may be possible to construct adequate remedies within limits derived from this source; indeed, a desire to perpetuate segregation may have led some communities to bus their children excessively. But in may instances the straitjacketing of present relief within the confines of past practice could be described not merely as authorizing, but as rewarding, a constitutional violation in accordance with its magnitude. For the less a community had been willing to engage in the busing necessary to desegregate, the less it could be required to do so.

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129 See text accompanying note 21 supra.

130 For example, in a suburban area three schools might be nearly equidistant from a pupil's residence, yet he could not be bused to the most distant, even if, because of local transportation conditions, getting to that most distant school was quickest and safest. See *Swann* at 27-29; Davis v. School Comm'rs of Mobile County, 402 U.S. 33, 37 (1971).

Additionally, a district court judge, finding effective desegregation impossible within the confines of the House provision, might choose to close neighborhood schools and order centralized schools constructed, pursuant to § 402 of the bill. In the end, pupils might be bused far more to the centralized school, then the school nearest their residence, than they would have been bused absent the remedial limitations.

131 See note 23 supra and accompanying text.

132 For example, a community which had bussed 10% of its children one hour daily per child, perhaps in an effort to maintain segregation, could not be ordered to bus 15% of its children twenty minutes per day to desegregate. One may toy with the standards of § 403 to arrive at any number of disquieting hypotheticals.

133 *Swann* did employ a reference to the past practice of the Charlotte-Mecklenburg school district. 402 U.S. at 29-30. However, past practice was not enlisted to set an upper limit to permissible busing, but to refute the allegation that the remedial plan approved was unreasonable. Implicit in the Court's use of past practice as a reference point is the view that for whatever reasons of administrative convenience or economy a school board may have burdened its pupils with busing in the past, it might not maintain that essentially the same busing would unduly burden either it or its pupils merely because it was now to serve the additional purpose of rectifying a constitutional wrong.

Congress, in incorporating past practice into remedial proscriptions, may not cross the fine line between determining fact and declaring constitutional law to reach the result which it was beyond the power of the Charlotte-Mecklenburg school board to reach. Only the courts may make the policy determination of how great or small a risk of resulting injury may counterbalance the benefits of sesegregation – a determination of substantive constitutional law. At the most, Congress might make a reviewable factual determination that a certain amount of busing does indeed risk more than the quantum of harm the courts are willing to hazard in the pursuit of desegregation. That factual finding would be subject to review. Its reasonableness could easily be impugned by a widespread willingness among local school boards to indulge in putatively "harmful" busing for nonremedial purposes.

134 That is, the past practices of defendant school boards. A court will only order busing once a constitutional violation has been found.

When the Equal Educational Opportunity Bill and the Student Transportation Moratorium Bill are considered in tandem, the immediacy of this last possibility becomes apparent. During the moratorium, a community which had not received a final busing order might reduce its busing to a minimum, or even cease busing entirely, with impunity. Thereupon it is quite conceivable that its practices during the moratorium would constitute the entire basis from which would be derived the limits which the Equal Educational Opportunity Bill would place upon the scope of ultimate relief. Together, the two bills would let a community write its own ticket insofar as busing is concerned. The end result could be to accomplish in two federal bills what the state statute invalidated in *North Carolina State Board of Education v. Swann*[135] sought to accomplish in one — a complete ban on remedial busing. Such a result hardly comports with a reasonable solution to the difficult question of how much busing may be appropriate in a particular case.[136]

The Student Transportation Moratorium Bill would impose even more stringent remedial restrictions based upon past practice than would the Equal Educational Opportunity Bill.[137] If imposed upon the scope of ultimate relief, the Moratorium Bill's restrictions would be clearly impermissible. However, the Moratorium Bill would merely impose a delay upon the implementation of relief. But delaying constitutionally required desegregation relief squarely conflicts with the requirement of immediacy which the Supreme Court has repeatedly set forth.[138] Only if the requirement of immediacy is not an absolute constitutional command, at least when busing is required, might it be possible to sustain the Moratorium Bill. But the history of the requirement of immediacy does not admit of such an interpretation. Unlike the factual determinations concerning what and how much relief may be appropriate, which have been left to the district courts to make, the requirement of immediacy has been established by the Supreme Court and operates uniformly in each case.[139] Even if such were not the rule, and the degree of immediacy required might be balanced against the type of relief contemplated in a given case, the Moratorium Bill would cut an unacceptably broad swath in delaying the busing of *any* child to *any* school to which he had not been bused before.[140]

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135 402 U.S. 43 (1971).

136 "Congress may not authorize the States to violate the Equal Protection Clause.... Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause." Shapiro v. Thompson, 394 U.S. 618, 641 (1969), quoting Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966).

137 As an illustration of the Moratorium's absurd operation, it would forbid a busing order which bused only children who had been bused before, and which bused each such child for less time, for a shorter distance, and over a safer route, but to a different school than that child had been bused to before. Student Transportation Moratorium Bill, § 401a.

138 See note 6 supra.

139 *Swann* explicitly approves the immediacy requirement of *Alexander* (quoted in note 6 supra). 402 U.S. at 13, 14. It is impossible to maintain that dual systems which must implement busing relief are somehow exempted from the "at once" requirement, and still remain consistent with *Swann*.

140 What has been said concerning the Moratorium Bill applies with equal force to the stay provisions of § 403b of the Equal Educational Opportunity Bill. (See text accompanying note 20 supra.) The requirement imposed by § 403b that alternative relief be shown ineffective by clear and convincing evidence before older children might be bused is also unconstitutional. Although ordinary changes in the rules of evidence may alter the outcome of constitutional cases in a random way, this outcome-determinative provision would serve only to tip the balance against the vindication of a constitutional right. See United States v. Klein, 80 U.S. (13 Wall.) 128, 146-48 (1872), discussed in note 89 supra. Moreoever, such a provision would single out and burden the vindication of minority interests exclusively. See Hunter v. Erickson, 393 U.S. 386 (1969), discussed in note 46 supra.

III. CONCLUSION

The heart of the President's proposed antibusing legislation is clearly unconstitutional, whether viewed as a remedial limitation upon the federal courts, or as a substantive declaration of how much busing the fourteenth amendment requires and how rapidly it compels it to be implemented. While Congress probably could deprive the federal district courts of original jurisdiction to hear school desegregation cases, the President's proposals would confer upon those courts a partial jurisdiction inconsistent with the exercise of the federal judicial power. This defect could be overcome were it possible to regard the proposals as declarations of substantive constitutional law. But as such they would directly conflict with Supreme Court decisions of a constitutional character. The scope of congressional authority to enact such legislation pursuant to the enforcement clause of the fourteenth amendment may not yet be clearly defined. The President's proposals, however, would exceed the outermost limits which might reasonably be expected to be placed on that authority.

NORMAN TRABULUS