EFFECTIVE DESEGREGATION WITHOUT BUSING: THE CONSTITUTIONALITY OF ANTI-INJUNCTION LEGISLATION

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Existing laws and proposed statutes that limit the power of federal courts to bus school children to achieve school desegregation present serious constitutional issues. The power of the judiciary to enforce and protect constitutionally guaranteed rights must be reconciled with the power of Congress to exercise its limited control over the judiciary and enforce the fourteenth amendment with "appropriate legislation." This paper, however, is restricted to an analysis of statutory limitations on the injunctive power and does not consider other anti-busing measures such as limitations on the federal spending power or proposed constitutional amendments. In particular, this paper will focus on whether proposed anti-busing statutes may be validly enacted and, if so, whether they may be applied constitutionally. Significantly, these determinations may ultimately turn on questions of fact that can only be resolved in the federal courts.

I. The Busing Dilemma

The present busing controversy can be described as a delayed reaction to *Brown v. Board of Education (Brown I)*[1] in which the Supreme Court declared racial segregation in public schools unconstitutional. The Court's subsequent decision in *Brown v. Board of Education (Brown II)*[2] gave to the lower courts only broad guidelines requiring that school boards desegregate "with all deliberate speed."[3]

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1. 347 U.S. 483 (1954).

2. 349 U.S. 294 (1955).

3. *Id.* at 301. But Chief Justice Warren also added that:

> [T]he courts may consider problems related to administration, arising from the physical condition of the school plant, *the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis,* and revision of local laws and regulations which may be necessary in solving the foregoing problems.

Id. at 300-01 (emphasis added).

Sixteen years later, the Supreme Court noted that this enumeration was only

Consequently, desegregation over the next thirteen years was delayed by dilatory tactics and hindered by urban growth and shifting population.[4] To ensure desegregation, Congress later enacted the Civil Rights Act of 1964[5] which, *inter alia,* authorized suits by the federal government to protect the constitutional right to equal education. In spite of this measure, subsequent litigation illustrated that satisfactory desegregation was not achieved.

The implementation of *Brown I* continued "with all deliberate speed" until 1968 when the Supreme Court in *Green v. County School Board*[6] declared that desegregation plans must "realistically . . . work *now*."[7] In *Green,* defendant school board sought to achieve desegregation with a "freedom of choice" plan by which students could choose to attend schools where they would be in a racial minority. The Court struck down this arrangement because it failed to observe immediate desegregation. Furthermore, the Court remarked that "unitary" school systems were the ultimate end of desegregation and that discrimination must be "eliminated root and branch."[8] The Court reiterated this position in *Alexander v. Holmes County Board of Education*[9] where it refused to grant additional time to implement a district court order. In so holding, the Court remarked that the "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."[10] Pursuant to these new standards, the Court in *United States v. Montgomery County Board of Education*[11] upheld a plan assign-

"suggestive rather than exhaustive." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 27 n.10 (1971).

4. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 14 (1971). This trend is aptly characterized by the famous dictum in Briggs v. Elliot, 132 F. Supp. 776, 777 (E.D.S.C. 1955), where the required "desegregation" was distinguished from "integration."

5. 42 U.S.C. §§ 2000a to c-9 (1964). Section 2000c-6 prohibited busing of school children to achieve racial balance. In Swann v. Charlotte-Mecklenburg Bd. of Educ., this was construed to apply to de facto segregration only. 402 U.S. 1, 17 (1971).

6. 391 U.S. 430 (1968).

7. *Id.* at 439.

8. *Id.* at 437-38. The Court has not actually defined the word "unitary."

9. 396 U.S. 19 (1969).

10. *Id.* at 20.

11. 395 U.S. 225 (1969).

ing teachers to various schools on the basis of a mathematical ratio similar to that of whites to blacks in the surrounding community. This, the Court maintained, would "expedite, by means of specific commands, the day when a completely unified, unitary, nondiscriminatory school system becomes a reality instead of a hope."[12]

The mathematical ratio approach was soon extended to students in *Swann v. Charlotte-Mecklenburg Board of Education (Swann I),*[13] where the school district in question was 70% white and 29% black with more than half of the black students assigned to schools 99% black.[14] This arrangement was attacked on the theory that *Green* required a "unitary" system unlike that of the school board in *Swann I.* After determining that desegregation efforts were insufficient,[15] the district court ordered the restructuring of attendance zones, desegregation of school buses and faculties, an optional majority to minority transfer plan, and the zoning, pairing and grouping of elementary schools.[16] To achieve a 71 to 29 ratio of students in most schools, similar to that of whites to blacks throughout the district, students would be assigned to the appropriate school and bused an average

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12. *Id.* at 235.

13. 311 F. Supp. 265 (W.D.N.C.), *rev'd in part and aff'd in part,* 431 F.2d 138 (4th Cir. 1970), *district court order aff'd,* 402 U.S. 1 (1971). *See generally* Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation,* 38 U. CHI. L. REV. 697 (1971); May, *Busing, Swann v. Charlotte-Mecklenburg and the Future of Desegregation in the Fifth Circuit,* 49 TEXAS L. REV. 884 (1971); Note, *Swann v. Charlotte-Mecklenburg Board of Education: Roadblock to the Implementation of Brown,* 12 WM. & MARY L. REV. 838 (1971); 20 KAN. L. REV. 165 (1971).

14. 402 U.S. at 6-7.

15. 306 F. Supp. 1299 (W.D.N.C. 1969).

16. 311 F. Supp. 265 (W.D.N.C. 1970). Attendance zone lines are "restructured" so that children may be forced to attend a school not previously within their zone. *See, e.g.,* Pate v. Dade County School Bd., 434 F.2d 1151 (5th Cir. 1970); Conley v. Lake Charles School Bd., 434 F.2d 35 (5th Cir. 1970). "Pairing" is the reorganization of one black school with one white school. One school would serve children of both races in the lower grades while the other would serve the integrated higher grades. "Grouping" is the same practice applied to three or more schools. Usually the schools paired are contiguous, but this is not required. *See, e.g.,* Allen v. Board of Pub. Instruction, 432 F.2d 362 (5th Cir. 1970); Brown v. Board of Educ., 432 F.2d 21 (5th Cir. 1970). Majority-to-minority transfer plans allow students to voluntarily transfer from a school in which they are in a racial majority to one in which they are in a racial minority. *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971).

distance of seven miles for no more than 35 minutes.[17] The Court of Appeals for the Fourth Circuit partially reversed the busing order, but the Supreme Court unanimously upheld the district court.[18] The Court held that the equitable remedial powers of the federal courts were broad enough to encompass the forced busing of students.[19] Since *Green* and *Brown II* required immediate desegregation and the creation of a unitary system, the "task is to correct by a balancing of the individual and collective interests the condition that offends the Constitution."[20]In a companion case to *Swann I, Davis v. Board of School Commissioners,*[21] the Court held that in balancing those interests "all available techniques" should be considered to achieve the greatest possible desegregation.[22] In *Swann I* the interests were such that busing was both reasonable and necessary in order to bring the school system into compliance with *Brown I.* The existence of racially identifiable schools, the earmark of de jure segregation, could be eliminated only by the assignment of students on a racial basis. Significantly, however, the Court placed the following limitations on its equitable power: 1) busing is only appropriate to correct de jure segregation;[23] 2) the use of mathematical formulae in assigning students is only a "starting point," and not every school within the district must reflect the approved ratio;[24] and 3) the forced busing must be "reasonable" and cannot "risk either the health of the children or significantly impinge on the educational process."[25] In spite

17. 402 U.S. at 30. Before the desegregation order, the school board bused children of all grades an average distance of fifteen miles. *Id.* at 30 n.12.

18. 431 F.2d 138 (4th Cir. 1970), *aff'd in part,* 402 U.S. 1 (1971).

19. 402 U.S. at 30.

20. *Id.* at 16.

21. 402 U.S. 33 (1971).

22. *Id.* at 37.

23. *Id.* at 28. De facto segregation is constitutionally allowed. *See* Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied,* 389 U.S. 847 (1967); Spencer v. Kugler, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd,* 404 U.S. 1027 (1972); Bell v. School City, 213 F. Supp. 819 (N.D. Ind.), *aff'd,* 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964). But there are arguments that de facto segregation is causally related to earlier de jure segregation. This may yet become an actionable violation of the fourteenth amendment. The role of busing would then be expanded considerably. *See* Note, *Civil Rights v. Individual Liberty: Swann, and Other Monsters of Impetuous Justice,* 5 IND. LEGAL F. 368, 372 (1972).

24. 402 U.S. at 24-26.

25. *Id.* at 30-31. Age is a primary factor to be considered in evaluating reasonableness. Busing was rejected in Mims v. Duval County School Bd., 329 F.

of these limitations, however, other courts have extended the remedy by consolidating adjacent school districts and busing students throughout the unified district.[26]

The objections to busing are numerous.[27] The most basic stems from the familiar criticism that the Supreme Court is legislating in areas that are better left to Congress.[28] Implicit in "judicial legislation," such as court-ordered busing, are "result-oriented mandates which impinge upon individual liberties."[29] These abuses are magnified by the vague guidelines provided in *Swann I*.[30] The most vocal objections to busing, however, appear in defense of the "neighborhood school" concept.[31] Critics of busing argue that the health and education of small children are endangered by long bus rides to unfamiliar surroundings, frequently in unsafe ghetto areas.[32] Further-

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Supp. 123, 133 (M.D. Fla.), *aff'd*, 447 F.2d 1330 (5th Cir. 1971), because it involved excessive travel time.

26. *See, e.g.*, Bradley v. Milliken, 345 F. Supp. 914 (E.D. Mich. 1972); Bradley v. School Bd., 338 F. Supp. 67 (E.D. Va.), *rev'd*, 462 F.2d 1058 (4th Cir. 1972).

27. *See generally* 118 CONG. REC. H7792-7867 (1972); U.S. CODE CONG. & ADM. NEWS, 92d Cong., 2d Sess. 1080-84 (1972) in which President Nixon articulates most of the objections to busing. Other criticisms are less rational:

> But if by busing you mean that heartless and inhuman doctrine whereby young people—infants, mere babes—are snatched from their mother's bosoms against their will to be hauled like cattle from before the break of dawn until after dark over countless miles to strange surroundings far from their own neighborhoods and playmates for the mere purpose of satisfying some sociologist's statistical need—then I oppose it.

118 CONG. REC. H7836 (daily ed. August 17, 1972) (remarks by Rep. William Hungate, D. Mo.).

28. *See generally* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT (1970).

29. *Civil Rights v. Individual Liberty: Swann, and Other Monsters of Impetuous Justice, supra* note 23, at 368. *See also* Watt, *The Divine Right of Government by Judiciary*, 14 U. CHI. L. REV. 409 (1947).

30. The Supreme Court admitted in *Swann I* that: "The scope of permissible transportation of students as an implement of a remedial decree has never been defined... with precision." 402 U.S. at 29. Dissatisfaction with this vagueness is reflected in the Equal Educational Opportunities Act of 1972, § 3(a), H.R. 13,915, 92d Cong., 2d Sess. (1972) (reprinted at note 119 *infra*). *See also* May, *supra* note 13, at 903-08.

31. *See* U.S. CODE CONG. & ADM. NEWS, 92d Cong., 2d Sess. 1080-84 (1972) (President Nixon's message to Congress, March 17, 1972).

32. To the proponents of busing this argument is hypocritical. Had blacks not been segregated, more money might have been spent on improving the quality of ghetto schools and making the neighborhood schools safer. Such an argument against busing begs the ultimate questions. Busing adherents also point

more, massive busing is expensive and prevents school boards from spending tax money on better education. Similarly, it is argued that pupils are forced to spend less time in class and more time in buses. The arguments in favor of busing, set forth in *Swann I*, are reflected in existing law and rely on tested principles of equity and constitutional law. The objections, however, are largely sociological and philosophical and rest on values, such as neighborhood schools, not yet protected or even recognized by the federal judiciary.

To correct what is viewed as an imbalance in the "reconciliation of competing values,"[33] Congress has extended its existing prohibitions against court-ordered busing by supplementing Title IV of the Civil Rights Act of 1964, with the anti-busing provisions of the Educational Amendments Act of 1972.[34] Although numerous other anti-busing bills, some considerably more drastic, have been introduced, only two, the Equal Educational Opportunities Act of 1972[35] and the Student Transportation Moratorium Act of 1972,[36] have received widespread support. Clearly, it appears that in the future, Congress and the judiciary will have to reconcile their "competing" solutions to the problem of school desegregation. The constitutional authority by which Congress could enact more restrictive, alternative solutions is, however, not altogether clear.

II. Constitutional Limitations

A. *Separation of Powers*

Perhaps no principle of constitutional law is so basic, yet so incapable of exact definition, as that of separation of powers. The Supreme Court has, on occasion, defined the outer limits of the

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out that busing is actually safer than walking to schools in the neighborhood. In 1968-69, the accident rate for boys riding buses per 100,000 was 0.03 compared to 0.09 for boys who walked. Girls who were bused had an accident rate of 0.03 compared to 0.07 for those who walked. 118 Cong. Rec. H7806 (daily ed. August 17, 1972) (Rep. Mitchell). In 1970-71 43.5% or 19,000,000 of the pupils in the United States were bused to School. *Id.* at H7834 (Rep. Celler). Only 3% of children bused were bused under court order. 118 Cong. Rec. H5415 (daily ed. June 18, 1972) (Rep. Hawkins).

33. 402 U.S. at 31.

34. 20 U.S.C. §§ 1651-1656 (1972).

35. H.R. 13,915, 92d Cong., 2d Sess. (1972).

36. H.R. 13,916, 92d Cong., 2d Sess. (1972).

powers exercised by the three branches of government.[37] Yet the existence of congressional power to interfere with inherent equitable remedies is not clear.

1. Inherent Powers of Equity

The equity jurisdiction conferred on the federal courts by the Constitution is the same as that of the English Courts of Chancery that existed in 1776.[38] Implicit in the adoption of English equity jurisprudence by the Supreme Court is the constitutional recognition of the inherent powers of equity.[39] The Supreme Court early recognized that chancery jurisdiction is "inherent and original."[40]

37. *See, e.g.,* Powell v. McCormack, 395 U.S. 486 (1969) (judicial control over Congress); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (congressional control over presidential power); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869) (legislative control over court jurisdiction); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867) (judicial power over the executive).

38. *See* Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164 (1939); Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563, 568 (1939); Matthews v. Rodgers, 284 U.S. 521, 529 (1932); Borer v. Chapman, 119 U.S. 587, 600 (1887); Payne v. Hook, 74 U.S. (7 Wall.) 425, 430 (1869); Barber v. Barber, 62 U.S. (21 How.) 582, 592 (1859); Meade v. Beale, 16 F. Cas. 1283, 1291 (No. 9371) (C.C. Md. 1850) (Taney, C.J., Circuit Justice). *See also* T. SPELLING & J. LEWIS, A TREATISE ON THE LAW GOVERNING INJUNCTIONS (1926) [hereinafter cited as SPELLING & LEWIS]: "Where a constitution vests in certain courts jurisdiction of cases in equity and at law without reservation, they become vested with the jurisdiction as an entirety according to the course of the common law, and as defined and applied in practice, since the origin thereof in England." *Id.* at 5.

39. *See, e.g.,* Williamson v. Berry, 49 U.S. (8 How.) 495, 533 (1850); Bodley v. Taylor, 9 U.S. (5 Cranch) 191, 222 (1809). *See also* Miles Laboratories, Inc. v. Seignious, 30 F. Supp. 549 (E.D.S.C. 1939), where the court stated:

> A statute normally creates or defines a right, it may or may not provide a remedy; but the courts are never powerless to enforce a right because of doubt as to the nature of a just remedy. The entire process of injunction in equity, and in fact the courts of chancery themselves, first grew out of the inability of courts of common law of England to grant appropriate relief in certain cases, thereby suggesting to litigants, who were possessed of a right without a remedy, to apply to the King for relief; and thereupon the King delegated to his chancellor the power to grant equitable remedies, including injunction. When any right exists, and . . . is without adequate remedy at law, he has the privilege of seeking equitable relief, and this is true regardless of whether the right has its origins in the common law, or in a statute. The power to administer injunctive relief stems back to the peculiar origin and development of the courts of chancery; it is not ordinarily a statutory grant of power to the court.

Id. at 555.

40. Williamson v. Berry, 49 U.S. (8 How.) 495, 536 (1850). For a more contemporary statement see Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).

Indeed, in *Swann I* the Supreme Court remarked that "a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[41]

The inherent powers of equity can, undoubtedly, be enlarged. As early as 1850 it was recognized that Congress could create a "new power from legislation for the court to act upon particular subjects of a like kind as occasions for doing so may occur."[42] A statute may also create "extraordinary" jurisdiction allowing injunctive relief where it was not previously allowed, even in equity.[43]

Some statutes, however, merely recognize and codify the inherent equitable powers, such as the All Writs Act[44] which provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[45] Similarly, the Bankruptcy Act[46] created courts of bankruptcy with "the power to issue an injunction when necessary to prevent the defeat or impairment of . . . jurisdiction . . . inherent . . . in a duly established court of equity."[47] In the context of school desegregation, the Civil Rights Act of 1871 authorized injunctions to redress violations of constitutional rights.[48] Other statutes go beyond mere codification and specify the manner of issuance of injunctions.[49]

Statutes affecting the equity jurisdiction of federal courts, however,

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41. 402 U.S. at 15.

42. Williamson v. Berry, 49 U.S. (8 How.) 495, 536 (1850). *See also* W. WALSH, A TREATISE ON EQUITY 49-50 (1930).

43. 49 U.S. (8 How.) at 536. *See also* Grand Rapids & I.R. Co. v. Sparrow, 36 F. 210 (W.D. Mich. 1888).

44. 28 U.S.C. § 1651(a) (1948).

45. *Id. See* Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry., 294 U.S. 648, 675 (1935); United States v. Louisiana, 229 F. Supp. 14, 17 (W.D. La. 1964).

46. 11 U.S.C. § 11 (1970).

47. Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry., 294 U.S. 648, 675 (1935).

48. 42 U.S.C. § 1983 (1875) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, *suit in equity,* or other proper proceeding for redress. (emphasis added).

49. *See, e.g.,* The Three-Judge Court Act, 28 U.S.C. § 2281 (1948).

are to be strictly construed.[50] Courts may not be stripped of their equity powers by implication,[51] nor may the

> [C]omprehensiveness of this equitable jurisdiction . . . be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.[52]

Equity jurisdiction is properly invoked and its injunctive relief becomes appropriate when there is no adequate remedy at law.[53] To be adequate, the legal remedy must be "speedy, plain, and complete [and] not an impracticable or theoretical remedy which does not reasonably and fairly meet the situation to accomplish the purposes of justice."[54] In accordance with these standards, equitable remedies are frequently and justifiably used in school desegregation cases such as *Swann I*.[55] Moreover, if equity has jurisdiction over a certain type of

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50. SPELLING & LEWIS 63. *See* J. POMEROY, EQUITY JURISPRUDENCE 227-29 (3d ed. 1905).

51. United States v. Fletcher, 8 F. Supp. 233, 235 (D. Id. 1934).

52. Porter v. Warner Holding Co., 328 U.S. 395, 398. The power of Congress to restrict equitable remedies is considered more fully, *infra*. Note that the Supreme Court required a valid statute and speaks only of jurisdiction. The distinction between jurisdiction and equitable powers exercised within that jurisdiction is not always clear. *See* Smith v. Apple, 264 U.S. 274, 278 (1924). Congress could withdraw jurisdiction to hear school desegregation cases, leaving the state courts jurisdiction. But it is perhaps a different thing to tell the courts they may hear a certain type of case but cannot decide it in a certain manner. Congress may indeed have this power, but strictly speaking it is not an exercise of jurisdictional control, but rather, of its control over judicial remedies.

53. For a general discussion of this requirement in the context of equity's history see R. MEGARRY & P. BAKER, SNELL'S PRINCIPLES OF EQUITY 3-36 (1954); SPELLING & LEWIS 26-52; W. WALSH, *supra* note 42, at 41-95.

54. Clark v. Pigeon River Improvement Slide & Boom Co., 52 F.2d 550, 557 (8th Cir. 1931). Before the Federal Rules of Civil Procedure were enacted in 1938, this principle was reflected in the Judiciary Act of 1789, Act of Sept. 24, 1789, ch. 20, § 16, 1 Stat. 73, which read: "[S]uits in equity shall not be had at law." Although this statute was superseded in 1939 by the Federal Rules of Civil Procedure which abolished distinctions between law and equity, and repealed in 1948, it was merely declarative of the rule already existing. *See* Kellogg v. Schaueble, 273 F. 1012, 1019 (S.D. Miss. 1921); Grauman v. City of New York, 31 F. Supp. 172, 174 (S.D.N.Y. 1939).

55. In *Swann I* the Supreme Court noted: "As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad powers to fashion a remedy that will assure a unitary school system." 402 U.S. at 16.

case, the subsequent creation of an adequate legal remedy will not deprive equity of its original jurisdiction.[56] State legislation, of course, may not affect a federal court's equitable powers of jurisdiction at all.[57] In any event, the equity court makes its own determination of adequacy[58] and resolves any doubts in favor of its jurisdiction.[59]

There is also considerable authority that the powers of a federal court to issue injunctions can be restricted to some degree. There is nothing so inherent in the powers of equity that a statute may not limit its powers.[60] Pomeroy has stated that:

> If the statute is expressly prohibitory upon the equity courts, or if it shows a clear and certain intent that the equitable jurisdiction is no longer to be exercised over the matters within the scope of the enactment, then such jurisdiction of equity in the particular class of cases must be considered as virtually abrogated.[61]

2. Regulatory Power of Congress

It is well settled that Congress has power to limit or remove jurisdiction of the federal courts.[62] Article III, section one of the Constitution provides that: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[63] This is supplemented by section two which provides that "[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such

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56. Kellogg v. Schaueble, 273 F. 1012, 1018 (S.D. Miss. 1921); Illinois Cent. R.R. v. Mississippi Pub. Serv. Comm'n, 135 F. Supp. 304, 307 (S.D. Miss. 1955). But in *Illinois Central* there is dictum that Congress can subsequently change the original jurisdiction of equity. 135 F. Supp. at 307. For a thorough explanation of concurrent jurisdiction see J. POMEROY, *supra* note 50, at 226-30.

57. *See, e.g.,* Guaranty Trust Co. v. York, 326 U.S. 99, 106 (1945); Mississippi Mills v. Cohn, 150 U.S. 202, 204 (1893); Scott v. Neely, 140 U.S. 106, 114 (1891). *See generally* Morse, *The Substantive Equity Historically Applied by the U.S. Courts,* 54 DICK. L. REV. 10 (1949).

58. Schaefer v. Gunzburg, 246 F.2d 11 (9th Cir.), *cert. denied,* 355 U.S. 831 (1957).

59. Illinois Cent. R.R. v. Mississippi Pub. Serv. Comm'n, 135 F. Supp. 304, 307 (S.D. Miss. 1955).

60. J. POMEROY, *supra* note 50, at 229.

61. *Id.*

62. Kline v. Burke Constr. Co., 260 U.S. 226 (1922); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). Congress could abolish all lower federal courts so long as it left the original jurisdiction of the Supreme Court intact. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 10 (2d ed. 1970).

63. U.S. CONST. art. III, § 1.

Exception, and under such Regulations as the Congress shall make."[64] By these provisions, Congress can expand, to a limited extent, or restrict the jurisdiction of all federal courts to hear certain kinds of cases and can make their jurisdiction exclusive of, or concurrent with, that of state courts.[65] Professor Bork of Yale University has even suggested that Congress could completely remove the jurisdiction of lower federal courts to issue busing decrees.[66]

Just as Congress can create substantive rights under its Article I powers, it may also create, modify or destroy remedies under its Article III powers as it has, in fact, done in several situations by denying injunctive relief.[67] For example, the Norris-LaGuardia Act of 1932[68] restricted the power of the federal courts to issue injunctions in labor disputes, purportedly as a limitation on jurisdiction.[69] Similarly, in the Emergency Price Control Act of 1942,[70] Congress provided that only an Emergency Court of Appeals had equity jurisdiction to restrain enforcement of other provisions of the Act. Significantly, neither statute completely restricted the right to issue injunctions, but only predicated its issuance upon certain requirements or specified what court was to issue it. Furthermore, the courts were not prevented from enjoining violations of constitutional rights.

Most efforts at regulation by Congress have restricted federal in-

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64. U.S. CONST. art. III, § 2.

65. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869). *See* R. BORK, CONSTITUTIONALITY OF THE PRESIDENT'S BUSING PROPOSALS, May 1972 (Special Analysis No. 24 of the American Enterprise Institute for Public Policy Research) [hereinafter cited as BORK]; C. WRIGHT, *supra* note 62. For general background see R. BERGER, CONGRESS V. THE SUPREME COURT (1969); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 HARV. L. REV. 1362 (1953); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court,* 109 U. PA. L. REV. 157 (1960); Wechsler, *The Courts and the Constitution,* 65 COLUM. L. REV. 1001 (1965).

66. BORK 6. Professor Bork points out that this would still allow review by the Supreme Court of busing orders issued by state courts. *Id.*

67. *See generally* H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 313-16 (1953) [hereinafter cited as HART & WECHSLER]; BORK 11-13.

68. 29 U.S.C. §§ 101-16 (1932).

69. Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938) (constitutionality upheld); United Elec. Coal Cos. v. Rice, 80 F.2d 1 (7th Cir. 1935), *cert. denied,* 297 U.S. 714 (1936); Cinderella Theatre Co. v. Sign Writers' Local Union No. 591, 6 F. Supp. 164 (E.D. Mich. 1934).

70. 56 Stat. 23 (1942).

junctions of state proceedings. The Anti-Injunction Act[71] forbids federal courts from enjoining state court proceedings except under certain circumstances. The Johnson Act of 1934[72] precludes a federal court from enjoining state rate-fixing orders when several conditions are met, including the existence of an adequate legal or equitable remedy under state law. Similarly, the Tax Injunction Act of 1937[73] prevents a federal court from enjoining the collection of state taxes so long as there is an adequate remedy in state courts. Under the latter two statutes, injunctive relief is barred to the extent that there is an adequate remedy under state law, even though the federal equity courts might otherwise have jurisdiction because the federal legal remedy is inadequate.[74] These statutory limitations could be viewed, however, as attempts to restore the balance of federalism existing before *Ex parte Young*,[75] in which the Supreme Court permitted a federal injunction against a state official.[76] An "incidental impairment" of injunctive power is certainly justified by the counter-

71. 28 U.S.C. § 2283 (1948) provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction or to protect or effectuate its judgments."

72. 28 U.S.C. § 1342 (1934) provides:

[T]he district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
(2) The order does not interfere with interstate commerce; and,
(3) The order has been made after reasonable notice and hearing; and,
(4) A plain, speedy, and efficient remedy may be had in the courts of such State.

73. 28 U.S.C. § 1341 (1937) provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law when a plain, speedy, and efficient remedy may be had in the courts of such State."

74. HART & WECHSLER 855-57. These statutes overturn, within their limited scope, the long-accepted principle that a federal court of equity may act when the federal legal remedy is inadequate irrespective of what relief state courts might give. *See* Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563, 569 (1939); Di Giovanni v. Camden Fire Ins. Ass'n, 296 U.S. 64, 69 (1935); Illinois Cent. R.R. v. Mississippi Pub. Serv. Comm'n, 135 F. Supp. 304, 307 (S.D. Miss. 1955).

75. 209 U.S. 123 (1908).

76. *Id.* Injunctions ordering busing, however, are similarly directed against state officials.

vailing need to preserve the federal system.[77] Whether similar subordinating interests exist to justify anti-busing statutes may be determinative of their constitutionality. The Supreme Court, however, purported to consider such possibilities in *Swann I* when it upheld busing.[78]

The foregoing limitations on injunctive power have usually been justified under the theory that in "[e]xercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies."[79] These anti-injunction statutes, involve statutory rights created by Congress, not civil rights guaranteed by the Constitution which do not depend upon Congress for their existence and likewise cannot be taken away by legislation.[80] This exemplifies the fundamental distinction between legal rights and constitutional rights. Implicit in this distinction is the recognition that the "power to issue an injunction is not *necessarily* within the class of inherent attributes" of a court of equity.[81] One lower federal court has said in dictum that Congress may destroy remedies if there is not an "absolute constitutional right to have a federal court take jurisdiction."[82] Another federal court,[83] and a state court[84] as well, has held that an equitable remedy cannot be denied unless the legislature

77. Goldberg, *The Administration's Anti-Busing Proposals—Politics Makes Bad Law*, 67 Nw. U.L. Rev. 319, 355 (1972) [hereinafter cited as Goldberg]. *See also* Atlantic Coast Line R.R. v. International Bhd. of Locomotive Eng'rs, 398 U.S. 281 (1970).

78. 402 U.S. at 16.

79. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937) (upholding the constitutionality of declaratory judgments).

80. *See* notes 68, 70, 71, 72, and 73 *supra* and accompanying text. The right to equal educational opportunities to be provided by the state is a good example of such a constitutional right. Certainly, Congress could not authorize segregated schools through its legislation. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966).

81. Levering & Garrigues Co. v. Morrin, 71 F.2d 284, 287 (2d Cir.), *cert. denied*, 293 U.S. 595 (1934) (emphasis added).

82. *Id.* at 288.

83. Versluis v. Town of Haskell, 154 F.2d 935 (10th Cir. 1946); Meyer v. City of Eufaula, 154 F.2d 943 (10th Cir. 1946). Both cases require that the new remedy be only "substantially equivalent" to the old and noted that this is measured by the "law of equivalents and not absolutes." Neither case, however, involved the denial of injunctive power.

84. Lougee v. New Mexico Bureau of Revenue Comm'r, 42 N.M. 115, 76 P.2d 6 (1937). The state constitution, however, contained a specific provision that was relied upon in reaching this result.

substitutes an adequate legal remedy. Other federal courts have held that Congress can limit equitable rights except for those arising under the Constitution,[85] and that Congress may not dilute constitutional rights under the guise of jurisdictional regulation.[86] The only statement to this effect by the Supreme Court, however, is in the dissenting opinion of Justice Rutledge in *Yakus v. United States*:[87]

> 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 .... There are limits to the judicial power .... But whenever 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 powers of government and ... of the judicial process ....[88]

A basic issue, then, to be determined under anti-injunction legislation, is whether a particular type of injunctive order is a remedy or a right.[89] Professor Bork believes that busing orders are merely a discretionary remedy and not a constitutional right.[90] Goldberg, however, maintains that there is no right-remedy distinction in desegregation cases.[91] Indeed, in *North Carolina State Board of Education v. Swann (Swann II)*[92] the Supreme Court held unconstitutional a state statute completely prohibiting busing on account of race and noted 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."[93]

The precise nature of constitutional limitations of the exercise of jurisdictional control is unclear. In *Ex parte McCardle*[94] the Supreme

85. *In re* Cleveland & Sandusky Brewing Co., 11 F. Supp. 198, 206 (N.D. Ohio 1935).

86. Peterson v. Clark, 285 F. Supp. 700 (N.D. Cal. 1968).

87. 321 U.S. 414 (1944).

88. *Id.* at 468.

89. 52 BOSTON U.L. REV. 321, 322 n.8 (1972).

90. BORK 14.

91. Goldberg 359.

92. 402 U.S. 43 (1971).

93. *Id.* at 46.

94. 74 U.S. (7 Wall.) 506 (1869).

Court recognized the congressional power to take away part of the federal court's jurisdiction.[95] Shortly thereafter, in *United States v. Klein*,[96] the Court retreated from this position and held an attempted withdrawal of jurisdiction unconstitutional because it infringed on executive and judicial functions.[97]

It has been suggested that the "exceptions" clause of Article III cannot be used to destroy the "essential role of the Supreme Court in the constitutional plan."[98] This view has some support in *Ex parte Yerger*,[99] in which the Supreme Court upheld its power to issue original writs of certiorari and habeas corpus, in spite of a congressional withdrawal of such jurisdiction.[100] Indeed, *Marbury v. Madison*[101] established that the Supreme Court, not Congress, is the ultimate arbiter of the Constitution.[102] Furthermore, the very nature of the judicial power requires that its judgments and constitutional determinations be enforceable.[103] If the *McCardle* case were construed broadly, Congress could destroy the very concept of judicial review.[104] For this reason, Professor Bork disapproves of anti-busing legislation based on *McCardle* and the "exceptions" clause; it poses a threat to judicial review and encourages a confrontation between the legislature and the judiciary.[105] Other writers have even suggested that the

95. *Id.* at 513-14.

96. 80 U.S. (13 Wall.) 128 (1871). The Court never distinguished or even mentioned *McCardle*. Justice Douglas, in a dissent to Glidden Co. v. Zdanok, 370 U.S. 530, 605 n.11 (1962), later remarked, "[T]here is a serious question whether the McCardle case could command a majority view today."

97. 80 U.S. (13 Wall.) at 147.

98. HART & WECHSLER 312. *See also* Hart, *supra* note 65; Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962); Ratner, *supra* note 65.

99. 75 U.S. (8 Wall.) 85 (1869).

100. *Id.* at 102-03.

101. 5 U.S. (1 Cranch) 137 (1803).

102. *Id.* at 177.

103. *See, e.g.*, Michaelson v. United States *ex rel.* Chicago, St. P., M. & O. Ry., 266 U.S. 42, 65-66 (1924) (contempt power of the courts cannot be completely abrogated); Muskrat v. United States, 219 U.S. 346, 362 (1911) (federal courts cannot give advisory opinions in the form of judgments that cannot be enforced). *See also* Goldberg 336.

104. BORK 7. *See* C. WRIGHT, *supra* note 62, at 23. To prevent such an occurrence, former Justice Roberts proposed a constitutional amendment guaranteeing jurisdiction of constitutional cases. *See* Roberts, *Now is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A.J. 1 (1949).

105. BORK 8.

"exceptions" power cannot bar access to judicial protection of constitutional rights.[106] If busing orders are essential to the enforcement of fourteenth amendment rights, any statute restricting such orders might be unconstitutional unless another source of congressional power can be found.

B. *Section Five Powers*

The balance of power existing under Article III may have been altered by section five of the fourteenth amendment which provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[107] The Supreme Court has interpreted this section and its counterpart, section two of the fifteenth amendment, to be watersheds of congressional power. In *South Carolina v. Katzenbach*[108] the Court held that Congress, in enforcing the fifteenth amendment, was not limited to merely forbidding violations of the amendment in general terms but could regulate state voting procedures, an area previously reserved to the states.[109] The same standard was applied to the fourteenth amendment in *United States v. Guest,*[110] in which the Court held that Congress could make the fourteenth amendment applicable to private individuals through its enforcement legislation.[111] But the most startling development was *Katzenbach v. Morgan.*[112] In *Morgan,* section 4(e) of the Voting Rights Act of 1965[113] was attacked on grounds that Congress had exceeded its section five powers.[114] The Act provided that Puerto Rican citizens could not be deprived of their voting rights if they met certain Spanish literacy requirements.[115] This congressional attempt at enforcement of the equal protection clause conflicted with a New York state statute denying citizens the right to vote if they

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106. R. BERGER, *supra* note 65; 52 BOSTON U.L. REV. 321, 324, 326 (1972).

107. U.S. CONST. amend. XIV, § 5.

108. 383 U.S. 301 (1966).

109. *Id.* at 327, 337.

110. 383 U.S. 745 (1966).

111. *Id.* at 762, 782. The majority holding this view is expressed in the concurring opinions of Justices Clark and Brennan. The opinion of the Court is in the minority on this issue.

112. 384 U.S. 641 (1966).

113. 42 U.S.C. § 1973b(e) (1965).

114. 384 U.S. at 648.

115. 42 U.S.C. § 1973b(e) (1965).

were not proficient in English.[116] In upholding the constitutionality of the federal statute, the Court held that:

> Section 4(e) may be readily seen as "plainly adapted to furthering these aims of the Equal Protection Clause . . . . It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations . . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.[117]

This statement, if left unqualified, would seem to make Congress a co-partner in constitutional interpretation. Indeed, one writer has interpreted *Morgan* as exempting section five legislation from the principles of judicial review set forth in *Marbury v. Madison*.[118] Implied in this exception, if indeed it is one, is the judicial recognition of Congress' superior fact-finding ability which enables it to assess conflicting information and determine what measures will best enforce the fourteenth amendment.[119] It follows that the con-

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116. 384 U.S. at 644-45.

117. *Id.* at 652-53.

118. Burt, *Miranda and Title II: A Morganatic Marriage,* 1969 SUP. CT. REV. 81, 84.

119. Bork 11. Congress has made such a determination in the Equal Educational Opportunities Act of 1972, § 3(a), H.R. 13,915, 92d Cong., 2d Sess. (1972), which provides:

> The Congress finds that—
>
> (1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment;
>
> (2) the abolition of dual school systems has been virtually completed and great progress has been made and is being made toward the elimination of the vestiges of those systems;
>
> (3) for the purpose of abolishing dual school systems and eliminating the vestiges thereof, many local educational agencies have been required to reorganize their school systems, to reassign students, and to engage in the extensive transportation of students;
>
> (4) the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large amounts of funds, thereby depleting their financial resources available for the maintenance or improvement of the quality of educational facilities and instruction provided;
>
> (5) excessive transportation of students creates serious risks to their health and safety, disrupts the educational process carried out with respect

gressional determination is valid even though the Supreme Court might not find the same facts to be a violation of the amendment.[120] It has been suggested that the determination of the necessity of busing and the degree to which it would be used are the types of issues that are best resolved by Congress through its fact-finding powers.[121]

The mandate given to Congress by *Morgan,* however, is not without limitation. In his dissent, Justice Harlan warned that unless the congressional enforcement power was predicated on a prior judicial determination of a violation of the equal protection clause, Congress could dilute the fourteenth amendment in addition to expanding it.[122] In response to this criticism, the majority, in a footnote to its opinion, stated:

> Contrary to the suggestion of the dissent . . . § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure to "enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.[123]

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to such students, and impinges significantly on their educational opportunity;

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

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

120. Cox, *The Role of Congress in Constitutional Determinations,* 40 U. CIN. L. REV. 199, 228 (1971). Professor Cox has suggested that Congress could make de facto segregation illegal or enact a uniform code of criminal procedure for the states, even though the Supreme Court has not held these determinations to be constitutionally required. *See* Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91, 108 (1966). Former Justice Goldberg, however, has suggested that Congress may not freeze the meaning of the fourteenth amendment and that the Supreme Court can still expand its meaning. Goldberg 343 n.127. Consider, however, that this view presupposes that Congress can only restate or expand the scope of the amendment, leaving its final interpretation to the Supreme Court. If Congress can restrict its scope, it would be anomalous if the Court could expand it at the same time.

121. BORK 11, 16.

122. 384 U.S. at 668 (Harlan, J., dissenting).

123. *Id.* at 651-52 n.10.

Professor Cox, however, considers this footnote to be something of an afterthought that cannot overcome the logic of the main body of the opinion: "It is hard to see how the Court can consistently give weight to the congressional judgment in expanding the definition of equal protection in the area of human rights but refuse to give it weight in narrowing the definition where the definition depends upon appraisal of the facts."[124] Professor Bork has further suggested that Congress could restrict constitutional rights guaranteed by the equal protection clause, but only if the right depends on a "judgment of diverse facts and competing values."[125] Other critics have interpreted *Morgan* as recognizing only a "congressional revisory authority" with power to redefine constitutional standards to a limited, but uncertain extent.[126] Thus, the Court could uphold "reforms" and strike down restrictions, depending on its own independent characterization of the legislation.[127] Similarly, it has been suggested that Title II of the Omnibus Crime Control Act of 1968[128] could be viewed as a constitutional exercise of section five powers.[129]

Other interpretations of *Morgan* offer different resolutions of the footnote with its accompanying text. The Supreme Court's deferral to Congress might only be temporary so as to afford a reasonable time for congressional remedies to prove their effectiveness.[130] Another view takes the *Morgan* footnote literally and regards the equal protection clause as an "irreducible minimum."[131] Even Professor Cox has recently admitted that the Supreme Court's role in the enforcement of constitutional rights, at least arguably, might not permit a congressional dilution of the fourteenth amendment.[132] Moreover, the most recent statement of section five powers in *Oregon v.*

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124. Cox, *Foreword, supra* note 120, at 106 n.86.

125. BORK 11. Professor Bork confesses, however, that this approach does not mitigate the holding in *Morgan* since most constitutional judgments involve diverse facts.

126. Burt, *supra* note 118, at 121.

127. *Id.*

128. 18 U.S.C. § 3501(b) (1968).

129. Burt, *supra* note 118, at 132.

130. 52 BOSTON U.L. REV. 321, 325 (1972). This approach, however, would be inconsistent with *Green* and *Alexander* to the extent that these decisions require immediate implementation of *Brown I.*

131. *Id.* at 328-29.

132. Cox, *The Role of Congress, supra* note 120, at 250, 254.

Mitchell[133] seems to uphold the *Morgan* footnote. In *Mitchell,* the Court held that the section of the Voting Rights Act of 1970 that lowered the voting age in state elections[134] was an invalid exercise of section five powers since there was no substantial evidence that states utilized age requirements to discriminate in violation of the equal protection clause.[135] In reaching this decision, the Court remarked in dictum that:

> As broad as the congressional enforcement power is, it is not unlimited. Specifically, there are at least three limitations upon Congress' power to enforce the guarantees of the Civil War Amendments. First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the States of their power . . . . Third, *Congress may only "enforce" the provisions of the amendments and may do so only by "appropriate legislation." Congress has no power under the enforcement sections to undercut the amendments' guarantees of personal equality and freedom from discrimination . . . .*[136]

Even this more recent statement, however, may not be entirely consistent with the logic of *Morgan.* Nevertheless, to whatever extent this view is correct, anti-busing legislation might be a dilution of equal protection if busing orders are proven to be essential to the enforcement of that clause.

Professor Bork does not rely on *Morgan* to justify anti-busing legislation because that decision improperly turns section five powers into a "general police power for the nation."[137] Instead, he maintains that section five "taken at the minimum weight that must be allotted it, confirms and reinforces Congress' historic power to deal with remedies employed by federal courts."[138] This legislative control is analogous to that conferred on Congress by the exceptions clause of Article III except that it is derived from section five. Under this theory, congressional power over remedies would seem almost limitless. Professor Cox has even remarked, "it seems irrelevant whether

133. 400 U.S. 112 (1970).

134. 42 U.S.C. § 1973bb-1 (1970). This statute was followed by the twenty-sixth amendment in 1972, rendering such legislation unnecessary.

135. 400 U.S. at 130. The dissent felt there was sufficient evidence of discrimination to support enforcement legislation. *Id.* at 240.

136. *Id.* at 128-29 (emphasis added).

137. BORK 10.

138. *Id.* at 11.

the relief is greater or lesser than the courts would order. In either event the relief is not part of the Constitution."[139] But if there is only one remedy by which a constitutional right may be protected, denial of that remedy under the guise of enforcing the equal protection clause might well be a violation of due process.[140] Indeed, the Supreme Court has already recognized in *Swann II*[141] that busing may be indispensable.

C. *Due Process Limitations*

Whenever Congress exceeds its constitutional powers to enact legislation the resulting statute may be unreasonable and thereby violate the due process clause of the fifth amendment.[142] If Congress enacted anti-busing legislation but violated the separation of powers doctrine or exceeded its enforcement powers under section five, the application of the resulting statutes would violate due process. But even if Congress' legislative power were upheld, it is arguable that application of anti-busing statutes might violate the fifth amendment because they might destroy the only effective remedy in that particular desegregation suit.[143]

It is well established that Congress may destroy or restrict remedies.[144] In *Gibbes v. Zimmerman,*[145] the Supreme Court held that a state statute prohibiting the equitable appointment of a receiver in certain situations did not violate due process because there is "no property [right], in the constitutional sense, in any particular form of remedy; all that . . . is guaranteed by the Fourteenth amendment is the preservation of his substantial right to redress by some effec-

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139. Cox, *The Role of Congress, supra* note 120, at 259.

140. 52 BOSTON U.L. REV. 321, 324 (1972); HART & WECHSLER 318, 332, 334.

141. 402 U.S. 43 (1971).

142. *See, e.g.,* Nebbia v. New York, 291 U.S. 502 (1934):

> [T]he function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority . . . . If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary or discriminatory, the requirements of due process are satisfied . . . .

Id. at 536-37.

143. 52 BOSTON U.L. REV. 321, 324 (1972).

144. *See* note 67 *supra* and accompanying text.

145. 290 U.S. 326 (1933).

tive procedure."[146] Similarly, the due process clause restricts the control of Congress over the federal courts' jurisdiction.[147] If busing is essential to elimination of segregated schools, the denial of that remedy or substitution of an inadequate alternative might violate the standards of *Zimmerman*. One critic of anti-busing laws has suggested that desegregation must be immediately effective in order to comply with *Green* and *Alexander*.[148] So long as this standard prevails, it can be soundly argued that any remaining desegregation remedies must be equally immediate or due process may be denied. Indeed, *Swann II* indicates that effective desegregation without busing may well be impossible.[149]

Even though busing orders have been issued to enforce the equal protection clause, which applies only to the states, the federal government is held to similar standards by the due process clause of the fifth amendment. In *Bolling v. Sharpe*[150] the Supreme Court held that the due process clause embodied some of the principles of equal protection. It would therefore be anomolous to hold the states to a higher standard of desegregation than the federal government. Since the Court in *Swann II* declared state anti-busing laws unconstitutional, the due process clause of the fifth amendment may arguably require the same result with regard to federal anti-busing legislation.[151] Thus the basic issue to be resolved with regard to due process, as with other constitutional limitations is: how essential is busing to the immediate desegregation of public schools?

III. The Congressional Reaction

The foregoing constitutional standards reveal that the powers of Congress to restrict injunctive orders in desegregation cases are so

146. *Id.* at 332. *See also* Swanson v. Bates, 170 F.2d 648 (10th Cir. 1948); Bowles v. Miller, 151 F.2d 992 (10th Cir. 1945); Ritholz v. March, 105 F.2d 937 (D.C. Cir. 1939). Hart and Wechsler suggest that due process requires that the courts always be open to pass on constitutional claims. Hart & Wechsler 317-18.

147. Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied,* 335 U.S. 887 (1948).

148. Goldberg 331, 349. *See* notes 6-10 *supra* and accompanying text.

149. 402 U.S. at 46.

150. 347 U.S. 497 (1954).

151. Goldberg 331-32. It is not clear, however, that *Swann II* was based on equal protection. The decision could arguably be based on the supremacy clause because of a conflict between the state statute and 42 U.S.C. § 1983, *supra* note 48.

uncertain that the constitutionality of anti-busing legislation is, at best, speculative. Even if these statutes were held to be constitutional on their face, they may well be unconstitutional in their application to given desegregation plans.

A. *Degrees of Prohibition*

1. Limitations on Expansion

Congress has attempted to restrict the expansion of busing orders by limiting the remedy to violations of existing constitutional standards.[152] Such restrictions are necessarily futile since the federal courts determine the scope of constitutional rights and the existence of violations of those rights.[153] The earliest such attempt was Title IV of the Civil Rights Act of 1964 (CRA) which defined "desegregation" as the "assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."[154] Furthermore, the Act provided that:

> [N]othing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, *or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.*[155]

These sections, however, were given a very limited interpretation in *Swann I*. The Supreme Court held that Title IV was intended only to "foreclose" the possibility of an expansion of existing equitable powers.[156] Congress feared that other provisions of the CRA might be interpreted as granting broader equitable powers to the federal courts. Indeed, the legislative history reveals that Congress sought

152. 42 U.S.C. §§ 2000a to c-9 (1964); 20 U.S.C. § 1653 (1972).

153. This has certainly been true in the past. The enforcement power of Congress under section five of the fourteenth amendment may, however, permit Congress to define the distinction between de jure and de facto segregation so as to contradict Supreme Court decisions; anti-busing statutes construed in terms of de jure and de facto segregation may take on new vitality.

154. 42 U.S.C. § 2000c(b) (1964).

155. *Id.* § 2000c-6 (emphasis added).

156. 402 U.S. at 17.

only to limit court-ordered busing as a remedy for de facto segregation because the Act did not create a cause of action for the existence of de facto segregation.[157]

The Education Amendments Act of 1972 (EAA) restated this provision of the CRA and added that it applied to all public school systems in all sections of the country.[158] Presumably, this restatement is subject to the same construction given the CRA in *Swann I*. The EAA also cautioned that none of its provisions require court-ordered busing[159] and prohibited the use of federal funds to assist the implementation of busing orders, except under certain conditions.[160]

As a result of *Swann I* these provisions are of little effect so long as the courts remain within the limitations of the fourteenth amendment. If the courts purported to order busing of school children as a remedy for de facto segregation or to eliminate segregation that was incorrectly classified as de jure, then the CRA and the EAA might well be valid restrictions. There is not yet, however, a constitutional right to the elimination of de facto segregation.[161] If the Supreme Court should expand the scope of de jure segregation and the lower courts order busing to remedy what is now classified as de facto, these anti-busing statutes might become completely meaningless. Clearly, the force of these limitations depends on the distinction between de jure and de facto segregation. Consequently, the Congress has not created a true restriction on federal equity powers insofar as the operative terms of the statutes are still the subject of judicial definition. Moreover, these statutes present no real constitutional issues since they, in effect, only duplicate the refusal by the judiciary to remedy de facto segregation through busing or any other means.[162]

2. Temporary Restrictions

Congress has already enacted several temporary restrictions on the issuance of busing orders in the EAA.[163] Section 804 of the Act authorizes parents or guardians to reopen or interfere in the further

157. *See* U.S. CODE CONG. & ADM. NEWS, 88th Cong., 2d Sess. 2355 (1964).

158. 20 U.S.C. § 1656 (1972).

159. *Id.* § 1651.

160. *Id.* § 1652. The constitutionality of this provision is beyond the scope of this paper. *But see* Goldberg 362-68.

161. *See* note 23 *supra.*

162. *See* note 153 *supra.*

163. *See* notes 164, 167, 170 and 171 *infra* and accompanying text.

implementation of the court order if the time or distance of travel is so great that it endangers the health of the student or interferes in the educational process.[164] This section is not a true limitation on valid busing orders. *Swann I* explicitly limits busing to those situations in which the health and education of children will not suffer.[165] If a court has exceeded this judicial restriction, the reopening of the order under this statute would not interfere with desegregation since the court order would be invalid under *Swann I.* Furthermore, the section is temporary insofar as a reopening or intervention by parents would only delay the implementation of a valid order later determined to be within the guidelines of *Swann I.* It is arguable that the delay caused by a reopening or even that of an intervention before judgment is a violation of due process because the unconstitutional injury is prolonged.[166] Since, however, the Supreme Court itself has conditioned the legality of a busing order on its compliance with standards of "reasonableness" it is proper that parents have the opportunity to participate in the determination of what is reasonable.

A much more severe restriction is presented by section 803 of the EAA which provides:

> Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, religion, or socioeconomic status, the effectiveness of such order shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeal has expired. This section shall expire at midnight January 1, 1974.[167]

The time limitation severely restricts the applicability of this section. It is apparent that Congress anticipated a permanent solution to the busing issue by the expiration date. Even if no permanent anti-busing law is enacted by January 1, 1974, the time may be extended or other similar provisions enacted. The lower courts have so far managed to avoid the application of section 803 by several means. One court

164. 20 U.S.C. § 1654 (1972).
165. 402 U.S. at 30-31.
166. *See* Goldberg 332.
167. 20 U.S.C. § 1653 (1972).

has held that the section applies only prospectively, even though the legislative history is uncertain in that respect.[168] Another has avoided the section on grounds that the busing order in question was based on a school board proposal and only "approved" by the district court.[169]

A provision similar to section 803 of the EAA is section 403 (b) (2) of the original Equal Educational Opportunities Act of 1972 (EEOA).[170] Like section 803 it calls for a stay of district court busing orders. But unlike section 803, EEOA specifically applies to de jure segregation cases. If the moratorium imposed by section 803 were interpreted to apply in de jure situations, it might be attacked on the same grounds that section 403 (b) (2) of the original EEOA and the more severe Student Transportation Moratorium Act of 1972 (STMA) are criticized.

The STMA provides that any court order requiring busing entered after the statute's enactment, and before July 1, 1973, will be stayed until that date to the extent the ordered busing was not previously utilized by the school boards.[171] Like section 803 of the EAA, this

168. Soria v. Oxnard School Dist., 467 F.2d 59 (9th Cir.), *application for stay denied,* 409 U.S. 945 (1972).

169. Clark v. Board of Educ., 465 F.2d 1044 (8th Cir. 1972), *cert. denied,* 93 S. Ct. 3054 (1973).

170. Equal Educational Opportunities Act [hereinafter cited as EEOA] § 403(b)(2), H.R. 13,915, 92d Cong., 2d Sess. (1972). The original version was introduced in the House of Representatives on March 20, 1972, by Rep. McColluch (R. Ohio) and cosponsored by Rep. Ford (R. Mich.). An amended version was passed by the House on August 18, 1972. Section 403(b)(2) reads in part: "If a United States district court orders implementation of a plan requiring an increase in transportation, . . . the appropriate court of appeals shall, upon timely application by a defendant educational agency, grant a stay of such order until it has reviewed such order."

171. Student Transportation Moratorium Act [hereinafter cited as STMA] § 3, H.R. 13,916, 92d Cong., 2d Sess. (1972) provides:

> (a) During the period beginning with the day after the date of enactment of this Act and ending with July 1, 1973, or the date of enactment of legislation which the Congress declares to be that contemplated by section 2(a) (4), whichever is earlier, the implementation of any order of a court of the United States entered during such period shall be stayed to the extent it requires, directly or indirectly, a local educational agency—
>
> (1) to transport a student who was not being transported by such local educational agency immediately prior to the entry of such order; or
>
> (2) to transport a student to or from a school to which or from which such student was not being transported by such local educational agency immediately prior to the entry of such order.
>
> (b) During the period described in subsection (a) of this section, a local educational agency shall not be required to implement a desegregation plan

statute is shortlived since it contemplates permanent restrictions on busing before its expiration date.[172] The time limits could easily be extended by amendment or other moratoria enacted. But unlike section 803, STMA imposes a stay on the implementation of all orders for a specific time. Section 803 stays orders only while an appeal is pending. Significantly, STMA does not stay orders entered before enactment of the statutes and does not purport to deny district courts the power to enter such orders. The purpose of STMA is to preserve the status quo while Congress considers and enacts EEOA. Professor Bork points out that Congress may do so only to the extent that it can prohibit busing permanently.[173]

Because STMA does not forbid busing orders it is obviously not an exercise of jurisdictional control under Article III. It is arguable that state education and desegregation are proper subjects for federal legislation under section five of the fourteenth amendment. But while STMA is in effect, the rights secured by the equal protection clause are arguably limited or diluted by the absence of forced transportation of students. As already suggested, resolution of this issue depends on how essential busing is to equal protection rights. A better theory in support of STMA is that a moratorium on busing orders is "necessary and proper" to the essential regulation of remedies under Article III on a more permanent basis.[174] The case law in support of this theory, however, is virtually nonexistent, except for *Home Building & Loan v. Blaisdell*[175] in which the Supreme Court upheld a Min-

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submitted to a department or agency of the United States during such period pursuant to title VI of the Civil Rights Act of 1964 to the extent that such plan provides for such local educational agency to carry out any action described in clauses (1) or (2) of subsection (a) of this section.
(c) Nothing in this Act shall prohibit an educational agency from proposing, adopting, requiring, or implementing any desegregation plan, otherwise lawful, that exceeds the limitations specified in subsection (a) of this section, nor shall any court of the United States or department or agency of the Federal Government be prohibited from approving implementation of a plan that exceeds the limitations specified in subsection (a) of this section if the plan is voluntarily proposed by the appropriate educational agency.

172. *Id.*

173. BORK 17.

174. *Id.*

175. 290 U.S. 398 (1934). Mortgagees were forced to find remedies other than foreclosure. This was attacked as violative of the contract clause, the due process clause, and the equal protection clause. The Court upheld the moratorium, but added that such legislation must be: 1) justified by an emergency; 2) appropriate to that emergency; 3) temporary; 4) not unreasonable; and 5) a legitimate legislative end. *Id.* at 444-48.

nesota moratorium that extended the period of mortgage redemption beyond the ordinary statutory period for a "just and equitable" period.[176] *Blaisdell* is, at best, a weak precedent since it involved economic regulation by a state in the midst of a depression and is based on a distinction between contract rights and remedies not present in the busing issue.[177]

It is not altogether certain, however, that a moratorium is necessary and proper to the enactment of EEOA. Former Justice Goldberg finds three infirmities in the theory.[178] Section 2(a) (5) of STMA states that "there is a substantial likelihood" that interim busing orders would exceed fourteenth amendment standards prescribed by EEOA.[179] "History, however, shows that, if anything, court orders will fall short of judicial desegregation standards rather than exceed them."[180] Furthermore, there is no need for a moratorium since court orders may be reopened under EEOA, and orders exceeding *Swann I* guidelines may be stayed by the Supreme Court.[181] Moreover, EEOA would permit residual busing levels in limited situations while STMA would prohibit them altogether.[182] Whichever view is correct, the constitutionality of such a moratorium would depend on the ability of Congress to establish a factual need for the temporary restrictions.[183]

Whether the moratorium created by EAA, and that proposed by STMA and the original EEOA, are subject to due process objections is also largely a factual determination. Speaking of STMA, former Justice Goldberg stated that:

176. *Id.*

177. Goldberg 337.

178. *Id.* at 338-39.

179. STMA § 2(a)(5) provides:

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

180. Goldberg 338-39.

181. *Id.* at 339.

182. *Id.*

183. BORK 19. Under such a burden, Congress might be expected to prove that large expenditures of funds, administrative confusion, and inconvenience to students and families would interfere in the educational process. In addition, school systems would later have to "undo" the complicated efforts to comply with orders that might have been stayed, had there been a moratorium.

> [T]his moratorium would stay busing which federal courts had ordered as an indispensable element of effective and immediate desegregation relief. By so delaying the implementation of a remedy and prolonging the constitutional injury, Congress is acting in aid of continued racial segregation and, therefore, in violation of the due process clause of the fifth amendment.[184]

There is considerable authority that stays of desegregation orders should not be granted while appeals are pending unless the theory of relief granted is genuinely novel and might easily be reversed.[185] How "indispensable" busing is to immediate desegregation is essentially a factual issue that may not be capable of resolution in general or universal terms.

3. Permanent Restrictions

The various moratoria temporarily restricting busing orders contemplate the passage of EEOA. Not all of this Act can be characterized as an anti-busing statute, though that is its central feature. Title II recites fundamental legal principles reflecting the congressional interpretation of the equal protection clause.[186] Title IV, how-

184. Goldberg 332.

185. To obtain a stay, the petitioner must generally show: 1) that he will probably prevail on appeal; 2) that he will be irreparably injured if the stay is denied; 3) that other parties to the suit will not be substantially harmed; and 4) that a stay would advance the public interest. *See* Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970). Stays of district court injunctions in desegregation cases are usually denied. *See, e.g.*, Dowell v. Board of Educ., 396 U.S. 269 (1969) (stay denied); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) (stay denied); Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211, 1216 (5th Cir. 1969) (stay denied), *rev'd on other grounds sub nom.* Carter v. West Feliciana Parish School Bd., 396 U.S. 290 (1970); Bradley v. Richmond School Bd., 338 F. Supp. 67 (E.D. Va.), *stay granted*, 456 F.2d 6 (4th Cir.), *rev'd*, 462 F.2d 1058 (4th Cir. 1972).

186. EEOA § 201 provides:

> No State shall deny equal educational opportunity to an individual on account of his race, color, or national origin, by—
> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;
> (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with title IV of this Act, to remove the vestiges of a dual school system;
> (c) the assignment by an educational agency of a student to a school, other than the one closest to his place of residence within the school district in which he resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

ever, deals with remedies and constitutes the permanent limitation on busing orders. Significantly, no provision of the EEOA recites that the Act is an exercise of jurisdictional control.[187]

The substantive restrictions on Title IV are found in section 402, which specifies the remedies available for desegregation, and in section 403, which limits the extent to which section 402 may be implemented through transportation. Briefly, section 402 provides that a district court must consider specified remedies and apply them in the order listed, if practical.[188] The court must first assign students to the appropriate school nearest their homes, considering school capacities and physical obstacles. If this is impractical, assignment should be made without regard to physical barriers. Should this be unacceptable, the court must then consider, in the following order: majority-to-minority transfers, creation or revision of attendance zones, construction of new schools or closing of inferior schools, construction of magnet schools, and any other plans "educationally sound

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(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignments to schools of its faculty or staff . . . ;
(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or
(f) the failure by an educational agency to take appropriate action to overcome barriers that impede equal participation by its students in its instructional programs.

187. Equally significant, other statutes restricting equitable powers have included such statements. *See, e.g.,* Norris-LaGuardia Act, 29 U.S.C. §§ 101, 104, 107 (1970); Emergency Price Control Act, Act of Jan. 3, 1942, ch. 26, § 204(d), 56 Stat. 32-33.

188. EEOA § 402 provides:
In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, which may involve directly or indirectly the transportation of students, a court, department, or agency of the United States shall consider and make specific findings on the efficacy in correcting such denial of the following remedies and shall require implementation of the first of the remedies set out below, or on the first combination thereof, which would remedy such denial:
(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;
(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;
(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;
(d) the creation or revision of attendance zones or grade structures without

and administratively feasible."[189] Implicit in this "checklist" is the desire of Congress to insure that busing is never ordered until it is absolutely necessary.[190] Section 402 may only be implemented, however, within the transportation restrictions of section 403. This section of the amended EEOA is so severe, that the choices given the courts by section 402 are diminished considerably.

The original section 403 (a) provided that no court may order the busing of elementary students if such order would increase the average daily travel (in time or distance) over the comparable averages for the preceding year or the average daily number of such students who are presently bused.[191] Section 403 (b) applies the same standards to secondary students, but allows increased busing if no other method in section 402 would be adequate.[192] Any such increase

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exceeding the transportation limits set forth in section 403;
(e) the construction of new schools or the closing of inferior schools;
(f) the construction or establishment of magnet schools or educational parks; or
(g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 403 and 404 of this Act.

189. *Id.*

190. BORK 22.

191. EEOA § 403(a) provides:
No court, department, or agency of the United States shall pursuant to section 402, order the implementation of a plan that would require an increase for any school year in—
(1) either the average daily distance to be traveled by, or the average daily time of travel for, all students in the sixth grade or below transported by an educational agency over the comparable averages for the preceding school year; or
(2) the average daily number of students in the sixth grade or below transported by an educational agency over the comparable average for the preceding school year, disregarding the transportation of any student which results from a change in such student's residence, his advancement to a higher level of education, or his attendance at a school operated by an educational agency for the first time.

192. EEOA § 403(b) provides in part:
No court, department, or agency of the United States shall, pursuant to section 402, order the implementation of a plan which would require an increase for any school year in—
(1) either the average daily distance to be traveled by, or the average daily time of travel for, all students in the seventh grade or above transported by an educational agency over the comparable averages for the preceding school year; or
(2) the average daily number of students in the seventh grade or above transported by an educational agency over the comparable average for the preceding school year, disregarding the transportation of any student which results from a change in such student's residence, his advancement to a higher level of education, or his attendance at a school operated by an edu-

is only temporary and may be stayed by a court of appeals. Significantly, the measure of permissible busing is the amount of transportation used in the year previous to the court order. If children were bused to segregated schools in order to maintain segregation, they may be bused an equal distance under court order to accomplish desegregation.[193] Professor Bork argues that this would permit most examples of de jure segregation to be remedied since unitary systems may usually be achieved through existing bus routes and other less drastic remedies.[194] Moreover, secondary students may be bused even further if necessary.

It may be arguable that the original section 403 is constitutional because it does not completely abolish busing.[195] There may be situations in which a court would otherwise order more busing were it not for section 403.[196] But this may be the exception rather than the rule.[197] Professor Bork believes that these restrictions are within the congressional power to control remedies and would not interfere in the constitutional role of the courts. Indeed, if this were not true, then Congress' enforcement power under section five would be illusory.[198] Critics of section 403, however, argue that *Green, Davis* and *Alexander* require immediate desegregation by the most effective means.[199] When this standard requires a degree of busing greater than previous "averages," a limitation on that remedy might be a

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cational agency for the first time, unless it is demonstrated by clear and convincing evidence that no other method set out in section 402 will provide an adequate remedy for the denial of equal educational opportunity or equal protection of the laws that has been found by such court, department, or agency. The implementation of a plan calling for increased transportation, as described in clause (1) or (2) of this subsection shall be deemed a temporary measure.

193. BORK 21.

194. *Id.*

195. *Id.*

196. *Id. See* Clark v. Board of Educ., 449 F.2d 493, 498 (8th Cir. 1971) (court-ordered busing preceded by no busing at all); Lee v. Macon County Bd. of Educ., 448 F.2d 746, 754-55 (5th Cir. 1971) (court-ordered busing exceeding previous averages).

197. BORK 21.

198. Professor Bork considers the original section 403 to be little more than a congressional enactment of the judicial restriction of busing recognized in *Swann I*: "It hardly needs stating that limits on time of travel will vary with many factors, but probably with none more than the age of the students." 402 U.S. at 31.

199. Goldberg 346-47.

denial of due process.[200] Section 403 may also be viewed as a "dilution" of equal protection rights through Congress' enforcement power. Whether it endangers the role of the Supreme Court in the constitutional separation of powers may depend on how frequently the courts would otherwise exceed previous busing "averages."

The use of previous "averages" to limit busing orders may be only an academic question since the House of Representatives has passed an amended version of section 403 that is considerably stricter.[201] The amended section 403 (a) replaces the original sections 403 (a) - (b) by providing that:

> No court, department, or agency of the United States shall, pursuant to section 402, order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student.[202]

Under this statute, courts would be forbidden to order busing beyond the next closest school even though the school board had previously utilized busing over greater distances to achieve segregation. Furthermore, unlike the original section, no provision is made for busing secondary students further than elementary students. In addition, the amended statute introduces a new restriction preventing the federal courts from ordering renewed busing to compensate for shifts in residential population after a school system has once become unitary.[203] This has an effect similar to terminating a federal court's jurisdiction of a particular desegregation case once it has determined satisfactory compliance by the school board with constitutional requirements.

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200. *Id.* at 346.

201. *See* note 170 *supra.*

202. EEOA § 403(a), *as amended.*

203. EEOA § 403(c), *as amended,* provides:
When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has no vestiges of a dual system, and thereafter residential shifts in population occur which result in school population changes in any school within such a desegregated school system, no educational agency because of such shifts shall be required by any court, department, or agency of the United States to formulate, or implement any modification of the court approved desegregation plan, which would require transportation of students to compensate wholly or in part for such shifts in school population so occurring.

Assuming that the original section 403 might have been constitutional, the amended section is much more vulnerable to attack. The district courts would no longer be permitted to consider previous busing averages in reaching an effective remedy. Furthermore, its implementation of section 402 would be severely limited insofar as it could not use bus transportation beyond the child's own neighborhood. In some situations, the closest or next closest schools may be so far away that busing is required. This underscores the need for greater busing if these schools are segregated. Even Professor Bork recognizes that Congress could not completely eliminate busing as a remedy since some degree is required to secure the constitutional right to equal education.[204] Whether this new limitation would dilute equal protection rights, interfere in the essential role of the Supreme Court, or violate due process turns ultimately on how essential busing is to the implementation of *Brown I*. Certainly Congress has not completely prohibited busing. But the residue that remains may be so insufficient under the standards of *Green* and *Davis* that busing is effectively denied in most circumstances.

Other provisions of Title IV further limit the extent of forced busing. Section 404 forbids a federal court from ignoring or altering school district boundaries unless they were drawn with segregatory intent.[205] Although Professor Bork does not believe that the fourteenth amendment requires school district consolidation, absent a segregatory intent,[206] this section responds to lower court decisions that have consolidated adjoining school systems and required busing between the formerly separate districts.[207] It seems unlikely that many federal courts would issue busing orders within the narrow restrictions of section 403 that would require the consolidation of school districts and the crossing of old boundaries. But if this situation did arise, or if section 403 should be held unconstitutional, section 404

204. BORK 16.

205. EEOA § 404 provides:

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

206. BORK 23. The Supreme Court has not yet ruled on the issue of school consolidation. If it overturns lower court decisions requiring this remedy, Professor Bork may be correct.

207. *See* note 26 *supra*.

might well be subject to constitutional challenge. If such relief is constitutionally required, then section 404 may deny certain litigants a remedy indispensable to effective relief.

Other sections of Title IV placed time limitations on busing orders. The amended sections 407 and 408 require termination whenever the district court determines that no person is "effectively excluded" on account of race but provide that later segregatory action may be remedied.[208] These provisions find some support in the language of *Swann I*.[209] The amended sections are stricter than the original versions to the extent that termination may occur before the five and ten year periods are ended. Yet they are more liberal insofar as they provide for "revived" jurisdiction to issue further remedial orders if necessary. Furthermore, the courts retain the power to determine when and if persons are no longer "effectively excluded" by seg-

208. EEOA § 407, *as amended*, provides:

Any court order requiring, directly or indirectly, the transportation of students for the purpose of remedying a denial of the equal protection of the laws shall, to the extent of such transportation, be terminated if the court finds the defendant educational agency is not effectively excluding any person from any school because of race, color, or national origin, and this shall be so, whether or not the schools of such agency were in the past segregated de jure or de facto. No additional order requiring such educational agency to transport students for such purpose shall be entered unless such agency is found to be effectively excluding any person from any school because of race, color, or national origin, and this shall be so, whether or not the schools of such agency were in the past segregated de jure or de facto.

EEOA § 408, *as amended*, provides:

Any court order requiring the desegregation of a school system shall be terminated, if the court finds the schools of the defendant educational agency are a unitary school system, one within which no person is to be effectively excluded from any school because of race, color, or national origin, and this shall be so, whether or not such school system was in the past segregated de jure or de facto. No additional order shall be entered against such agency for such purpose unless the schools of such agency are no longer a unitary school system.

209. The Court remarked:

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

402 U.S. at 31-32.

regatory actions. Thus, they are not bound to surrender their jurisdiction until they determine that dual school systems are dismantled.

Former Justice Goldberg believes these provisions are unconstitutional because they perpetuate segregation.[210] Indeed, the Supreme Court in *Raney v. Board of Education*[211] has held that district courts should retain jurisdiction until dual school systems are completely dismantled. But the terms of both the original and amended sections require termination only when the courts determine that dual school systems are eliminated.

B. *Necessity of Busing*

It has already been suggested that the constitutionality of anti-busing legislation turns on the necessity of the prohibited busing orders. Implicit in a determination of necessity is the degree of distinction between rights and remedies in school desegregation cases. *Swann I* certainly did not hold that there is a constitutional right to busing. It is merely one of several remedies that may justifiably be used to eliminate dual school systems. *Green* and *Alexander* do require, however, immediate and effective desegregation. In some situations busing may be the only remedy by which these standards can be met. In those circumstances the right-remedy distinction disappears. The ultimate issue, then, is when do these circumstances arise?

Proponents of anti-busing legislation rely on *Swann I* as the "language of discretion and remedy rather than the language of basic constitutional right."[212] Certainly there is language in *Swann I* to support this position.[213] The Supreme Court has also indicated that the use of busing is tempered by other values upon which it might impinge.[214] But the arguments in favor of competing values, such as neighborhood schools, cannot overcome the need for busing if it is, in fact, the only effective remedy.

Supporters of anti-busing legislation argue that STMA and EEOA only affect federal court busing orders. Plaintiffs may still seek busing

210. Goldberg 356-57.

211. 391 U.S. 443 (1968).

212. Bork 14.

213. The Court stated: "Conditions in different localities will vary so widely that no rigid rules can be laid down to govern all situations. . . . No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations." 402 U.S. at 29.

214. *Id.* at 27.

orders in the state courts. Thus the remedy is not completely barred since only the forum has been changed. Certainly a complete prohibition of forced busing would have to apply to state courts as well.[215] The effectiveness of an alternative state remedy, however, depends on good faith enforcement of the equal protection clause and compliance with *Swann I*. The only remaining federal supervision would be review by the United States Supreme Court of carefully selected state supreme court decisions. This limited review could result in the "schizophrenic maintenance of abstract principles" and require a reassessment of the entire scope of Supreme Court review.[216] There is also a strong possibility that state courts would not be as receptive to busing as were the federal courts. Many state judges must face re-election; and equal protection rights could be denied federal review by the "adequate state ground" doctrine.[217] Under these limitations the remaining judicial review by the Supreme Court over busing cases may be so ineffective as to destroy the role of the Court in the constitutional plan.

It is not difficult to conceive of situations in which busing is indispensable to the achievement of a unitary system. Unless an attendance zone is composed of blacks and whites who are so close to a strategically located school that transporation is unnecessary, some busing will be inevitable to accomplish the minimum degree of racial mixing necessary to achieve unitary schools.[218] In view of segregated housing patterns this idyllic situation is not common. In *Northcross v. Board of Education*[219] the Court of Appeals for the Sixth Circuit noted that where one school is all black in a black neighborhood, and another is all white in a white neighborhood, but are miles apart, busing is the only remedy by which any desegregation can be accomplished.[220] Similarly, the Supreme Court recognized in *Swann I* that "[d]esegregation plans cannot be limited to the walk-in school."[221] In *Swann II* the Court found that:

> [A]n absolute prohibition against transportation of students assigned on the basis of race, "or for the purpose of creating a

215. 52 BOSTON U.L. REV. 321, 325 (1972).
216. *Id.* at 325 n.42.
217. *Id.* at 326 nn.43, 44.
218. *Id.* at 327.
219. 444 F.2d 1179 (6th Cir. 1971).
220. *Id.* at 1182.
221. 402 U.S. at 30.

> balance or ratio," will similarly hamper the ability of local authority to effectively remedy constitutional violations. As noted in *Swann [I]*, 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.*[222]

Swann II may arguably be distinguished since it involved a state statute that usurped Congress' power to control federal remedies.[223] But an explanation based on the Supremacy Clause creates a distinction without a difference. The necessity of busing to desegregate does not depend on which legislature might properly legislate on the subject. A more substantial distinction is in the degree of prohibition. North Carolina sought to completely prohibit busing,[224] while Congress has allowed a limited amount of school transportation.

A factual determination that busing is indispensable cannot be expressed in universal or general terms. Unless the Supreme Court later declares that in certain prescribed circumstances, busing must always be ordered, the district courts must continue to balance the equities and order busing if the facts before them require that remedy. Federal appellate courts may then review only the reasonableness of the order under *Swann I* guidelines. Thus, a determination of constitutionality will not be aided by generalizations disguised as findings of fact applicable to every school system.

Conclusion

The early history of STMA and EEOA indicates that Congress may not enact them into law. This does not, however, make the issues they present moot. Their constitutionality can only be conclusively determined by the Supreme Court. It is possible that other Congresses in the near future may revive these bills and enact them into law or enact similar legislation with the same purpose. Congress might also later enact legislation with similar effects but in other contexts, independent of the busing controversy.

The basic principles of equity and constitutional law do not pro-

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222. *Id.* at 46 (emphasis added).

223. Bork 16. *See* note 151 *supra.*

224. N.C. Gen. Stat. § 115-176.1 (1969) provides in part:
No student shall be assigned or compelled to attend any school on account of race, creed, color, or national origin, or for the purpose of creating a balance or ratio of race, religion, or national origin. Involuntary busing is prohibited, and public funds shall not be used for any such busing.

vide a simple resolution of the issues presented by anti-busing legislation because there is little case law in point. Since much depends on the factual necessity of busing, the constitutionality of these provisions can only be determined on a case-by-case basis. Even the extent of Congress' power to enact anti-busing laws turns on a factual determination. Since busing is not a universal requirement in every desegregation plan, a statutory limitation does not necessarily infringe on separation of powers or dilute the fourteenth amendment. Certainly, the statutes could not be declared patently unconstitutional as violations of due process since there are conceivable circumstances in which they might be constitutionally applied.[225] But whenever a federal court finds that busing in excess of that allowed by STMA or EEOA is indispensable to desegregation in the case at bar, these statutes may well be unconstitutional in their application. Thus the courts might construe the anti-busing laws to be valid restrictions applicable only in the limited cases in which busing is not deemed essential.[226] Such an interpretation would certainly defeat the intent of Congress.

A more permanent and predictable solution would be a constitutional amendment. This, however, is objectionable because an amendment might be so broad as to dilute the fourteenth amendment, or so narrow that it "trifles with the Constitution by dignifying as law the transient political slogan of an election year."[227]

A less drastic, but equally effective solution, would be the overruling of *Swann I* and *Swann II*.[228] The appropriateness of such an about-face by the Court may be influenced by the difficulty involved in accomplishing such a result.

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225. Certainly, in those situations where adequate relief may be formulated with busing within the limitations of EEOA or STMA or with no busing at all, the statutes would not deny due process.

226. In United States v. School Dist. 151, 404 F.2d 1125 (7th Cir. 1970), the Court of Appeals for the Seventh Circuit found that section 2000c-6 of the Civil Rights Act of 1964 did withhold from federal courts the power to order busing. But this restriction could not be exercised so as to "frustrate the constitutional prohibition [on segregation]." *Id.* at 1130. This view that section 2000c-6 actually "withheld" power from the courts was later rejected by the Supreme Court in *Swann I*, but the Seventh Circuit's approach to the issue may be useful in construing the EEOA.

227. *See* Goldberg 361. The implications of the many proposed constitutional amendments are beyond the scope of this paper.

228. *See Civil Rights v. Individual Liberty: Swann, and Other Monsters of Impetuous Justice, supra* note 23, at 382.