

1976

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### Recommended Citation

Edward P. Meyers, *Conflict Between the Judiciary and the Legislature in School Desegregation*, 44 Fordham L. Rev. 1206 (1976).

Available at: <https://ir.lawnet.fordham.edu/flr/vol44/iss6/7>

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# CONFLICT BETWEEN THE JUDICIARY AND THE LEGISLATURE IN SCHOOL DESEGREGATION

## I. INTRODUCTION

It has been more than twenty years since the landmark Supreme Court decision in *Brown v. Board of Education*,<sup>1</sup> declared that the "separate but equal" doctrine<sup>2</sup> had no place in the field of public education.<sup>3</sup> In that case, the Court abandoned its prior approach in considering whether the separation of the races was in fact equal,<sup>4</sup> and based its decision instead on "the effect of segregation itself on public education."<sup>5</sup> As to this effect, the Court opined:

Today, education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>6</sup>

The Court also considered the psychological effect of school segregation on the children themselves<sup>7</sup> and ruled on the basis of these factors that "[s]eparate educational facilities [were] inherently unequal."<sup>8</sup>

It has recently been pointed out, however, that throughout the country, particularly in the larger cities, black and white children continue to attend school primarily with members of their own race.<sup>9</sup> Thus, after two decades of time and effort invested by all branches of the federal government, the problems of segregation and racial isolation persist in the United States. It is the purpose of this Comment to analyze the efforts of the federal judiciary and legislature in attempting to achieve equal educational opportunity. Although

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1. 347 U.S. 483 (1954) [Brown I].

2. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court had condoned the forced separation of the races as long as the facilities accorded each were of an equal nature and quality.

3. 347 U.S. at 495.

4. See, e.g., *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

5. 347 U.S. at 492.

6. *Id.* at 493.

7. *Id.* at 494. This reasoning has been used more recently in *Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975), where the court held that "[i]dentifiably one-race schools in a school system are to be eliminated because of two sorts of injury that may be inflicted on the minority students in such a school system. First, racial or ethnic isolation is likely to be felt as an affront. The one-race identification of the school is a continual reminder of the past exclusionary practices of the school system. . . . Second, minority students assigned to identifiably minority schools are cut off from the majority culture which is widely reflected in the standards, explicit and implicit, that determine success in our society." *Id.* at 232.

8. 347 U.S. at 495.

9. Dell'Ario, *Remedies for School Segregation: A Limit on the Equity Power of the Federal Courts?*, 2 *Hastings Const. L.Q.* 113 (1975).

this term is subject to varied definitions and applications,<sup>10</sup> this analysis will use it to imply the broadest connotation, that of "universal education,"<sup>11</sup> or the ability of every child to receive a quality education regardless of race or social status.<sup>12</sup> Although some primary consideration must be given to the efforts of the courts, the major focus of this analysis concerns attempts by the legislature to deal with problems arising from the interest in providing equal educational opportunity. In considering the role of the courts and legislature in this area, it is important that the efforts of each of these branches of government be considered in light of its effect upon the other. Finally, there will be a brief consideration of the reactions of the public, those most affected by these federal actions.

## II. THE FEDERAL COURTS

In any consideration of the Supreme Court's efforts to eliminate school segregation, the primary basis of attaining jurisdiction and fashioning a remedy is the equal protection clause of the fourteenth amendment, which requires state action to trigger its effect.<sup>13</sup> This has led to the promulgation of a distinction between de jure and de facto segregation,<sup>14</sup> and the Court's refusal to intervene<sup>15</sup> in other than de jure instances.<sup>16</sup>

In *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>17</sup> the Court attempted to define more clearly and precisely the scope of the duties of school

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10. E.g., *Hobson v. Hansen*, 269 F. Supp. 401, 493 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (en banc) (equal educational opportunity referred to as "the equal protection clause in its application to public school education").

11. The Fund for the Advancement of Education, *Decade of Experiment 1951-1961*, at 71 (1961).

12. The scope of this Comment is confined to school attendance policies, and so does not consider related decisions dealing with the role of state and local governments in the financing of public primary and secondary schools. Thus, the decision in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), will not be considered.

13. *Civil Rights Cases*, 109 U.S. 3, 13 (1883).

14. *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (en banc) defined de jure segregation as that "specifically mandated by law or by public policy pursued under color of law," and de facto segregation as the situation resulting from "social or other conditions for which government cannot be held responsible." *Id.* at 493. It appears that the key phrase in these definitions is "for which government cannot be held responsible," since valid arguments can be made that all school segregation is a result of some form of state action. See notes 39-42 *infra* and accompanying text.

15. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971). In *Swann*, the Court warned that there would be no basis for judicially ordering assignment of students on a racial basis without first finding a constitutional violation of equal protection.

16. It has been held that three elements must exist in order to justify a finding of de jure segregation: "(1) action or inaction by public officials (2) with a segregative purpose (3) which actually results in increased or continued segregation in the public schools." *Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178, 182 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975); see *Higgins v. Board of Educ.*, 508 F.2d 779 (6th Cir. 1974).

17. 402 U.S. 1 (1971).

officials and district courts in implementing the mandate of *Brown I* to eliminate dual school systems and establish unitary ones.<sup>18</sup> There it was held that when the operation of a dual school system was found to exist,<sup>19</sup> "the first remedial responsibility of school authorities is to eliminate invidious racial distinctions."<sup>20</sup> The Court approved the use of bus transportation as a tool of school desegregation.<sup>21</sup> This seemed in keeping with the Court's stated policy to fashion relief in such a way as "will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."<sup>22</sup>

The apparent simplicity of this procedure is deceptive, however, as there are certain broad policy limitations involved which may have the effect of hampering judicial remedies. In the first place, there is the caveat that the efforts of the district judge and school authorities in achieving desegregation must be undertaken within the confines of "the practicalities of the situation."<sup>23</sup> The vagueness inherent in court desegregation orders can also have the effect of limiting the scope of application of a remedy.<sup>24</sup> A third possible limitation on the scope of available remedies may be discerned in the *Swann* dictum absolving school authorities of the responsibility of making annual adjustments to racial composition of schools once desegregation has been accomplished.<sup>25</sup>

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18. *Id.* at 6. The Court reiterated, however, that "[t]he objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." *Id.* at 15. "The task is to correct," it continued, "by a balancing of the individual and collective interests, the condition that offends the Constitution." *Id.* at 16.

19. The Court here referred to *Green v. County School Bd.*, 391 U.S. 430 (1968), where it previously held that when such factors as faculty, staff, transportation, extracurricular activities, and facilities are so arranged as to make possible the identification of a school as a "white school" or a "Negro school," then "a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971).

20. 402 U.S. at 18.

21. *Id.* at 29-31.

22. *Louisiana v. United States*, 380 U.S. 145, 154 (1965); accord, *Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975).

23. *Davis v. Board of School Comm'rs*, 402 U.S. 33, 37 (1971). These practicalities have recently been defined as "simply all the legitimate concerns of the community[, of which] [t]here can be no exhaustive list." 401 F. Supp. at 233.

24. The uncertainty, while ostensibly designed to allow some discretion to local authorities in executing the remedial order, has made it difficult for school authorities to know precisely what is required to comply with the decree. See Note, *School Desegregation: New Quandaries and Old Dilemmas*, 43 *Fordham L. Rev.* 273 (1974). But see *Keyes v. School Dist. No. 1*, 380 F. Supp. 673, 696-97 (D. Colo. 1974), *aff'd in part and rev'd in part*, 521 F.2d 465 (10th Cir. 1975), enforcing *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973).

25. 402 U.S. at 31-32. This restriction, however, has been given a limited interpretation in subsequent cases, and its effect is not of great consequence. See, e.g., *Spangler v. Pasadena City Bd. of Educ.*, 519 F.2d 430 (9th Cir.), cert. granted, 96 S. Ct. 355 (1975), where this has been held not to become operative until the affirmative duty to desegregate has been accomplished, and when racial discrimination has been eliminated from the system. *Id.* at 437.

In spite of these limitations, however, the Court, in keeping with its objective of eliminating the dual school system, has been emphatic in ordering an end to de jure segregation when it is found.<sup>26</sup> Among the plans which have been used to varying degrees of effectiveness are: freedom-of-choice,<sup>27</sup> geographic zoning,<sup>28</sup> and transportation.<sup>29</sup> The common result of these, and any other judicially imposed remedies, is that the school district is burdened with an affirmative duty "to come forward with a plan that promises realistically to work . . . now"<sup>30</sup> until it is clear that state imposed segregation has been completely removed.<sup>31</sup>

To assist in identifying the situations in which the Court will exercise its jurisdiction, a test for recognizing de jure as opposed to de facto segregation<sup>32</sup> has been formulated. The key element is identified as a "*purpose or intent to segregate.*"<sup>33</sup> This emphasis has changed the thrust of the Court's policy only

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26. "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. . . . The remedy for [deliberate] segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971).

27. Under the freedom-of-choice plan, students are given the opportunity to decide which particular school to attend in the district. See, e.g., *Green v. County School Bd.*, 391 U.S. 430, 433-34 (1968); *United States v. Indianola Municipal Separate School Dist.*, 410 F.2d 626, 628 (5th Cir. 1969), cert. denied, 396 U.S. 1011 (1970). This plan is generally held to be ineffective as doing little more than "simply . . . burden[ing] children and their parents with a responsibility which Brown II placed squarely on the School Board." *Green v. County School Bd.*, supra at 441-42. Thus its viability is restricted to situations where the court is convinced that desegregation can be achieved on a voluntary basis. E.g., *Spangler v. Pasadena City Bd. of Educ.*, 519 F.2d 430 (9th Cir.), cert. granted, 96 S. Ct. 355 (1975); *United States v. Georgia*, 466 F.2d 197 (5th Cir. 1972); *Brunson v. Board of Trustees*, 429 F.2d 820 (4th Cir. 1970); *Hall v. St. Helena Parish School Bd.*, 424 F.2d 320 (5th Cir. 1970); *Clark v. Board of Educ.*, 426 F.2d 1035 (8th Cir. 1970) (en banc), cert. denied, 402 U.S. 952 (1971).

28. Here, boundary lines are drawn on a nondiscriminatory basis, thus accommodating the concept of the neighborhood school within the desegregation plan. Usually, the first step in implementing such a plan is to have the local district make a survey of the area, and draw the lines on the basis of those findings, making certain that they are used to aid the desegregation process rather than to perpetuate segregation. E.g., *United States v. Indianola Municipal Separate School Dist.*, 410 F.2d 626, 629 (5th Cir. 1969), cert. denied, 396 U.S. 1011 (1970); *Davis v. Board of School Comm'rs*, 393 F.2d 690, 693 (5th Cir. 1968).

29. See parts III & IV *infra*. In using this method, the courts have attempted to minimize the inconvenience of excessive travel and leave the basic educational process unimpaired. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30-31 (1971). The district must also exercise care that the burden of transportation is shared equally by students of all races. *Clark v. Board of Educ.*, 449 F.2d 493 (8th Cir. 1971), cert. denied, 405 U.S. 936 (1972); *Allen v. Asheville City Bd. of Educ.*, 434 F.2d 902 (4th Cir. 1970). See generally Note, *School Desegregation: New Quandaries and Old Dilemmas*, 43 *Fordham L. Rev.* 273 (1974).

30. *Green v. County School Bd.*, 391 U.S. 430, 439 (1968).

31. *Id.*

32. See notes 14-16 *supra* and accompanying text.

33. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208 (1973).

one year after a decision that examination of the motivation of intent of the school authorities "is as irrelevant as it is fruitless,"<sup>34</sup> and that the controlling factor in determining whether a remedy is to be imposed is the effect of the school board's acts.<sup>35</sup> It has been observed that there is a basic problem inherent in differentiating between intent and effect, since the Court has never defined the elements which establish segregative intent.<sup>36</sup> Thus the Court, in attempting to set a national standard for solving school desegregation cases, has created more confusion and uncertainty in its insistence upon retaining a strict adherence to the *de jure-de facto* distinction.<sup>37</sup>

The Court has been urged to eliminate this distinction—the arguments sometimes based on logic<sup>38</sup> and in other instances supported by precedent.<sup>39</sup> Justice Douglas had consistently argued for the elimination of the distinction,<sup>40</sup> putting forth the proposition that *de facto* segregation is little more

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34. *Wright v. Council of the City of Emporia*, 407 U.S. 451, 462 (1972).

35. *Id.* The distinction between intent and effect is very fine and has been received by the lower courts with varying results. While some have had little difficulty applying the new standard to reinforce a refusal to consider issues involving *de facto* segregation, e.g., *Morgan v. Kerrigan*, 509 F.2d 580, 585 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975), at least one circuit has taken inconsistent approaches. Compare *Higgins v. Board of Educ.*, 508 F.2d 779 (6th Cir. 1974), with *Berry v. School Dist.*, 505 F.2d 238, 243 (6th Cir. 1974).

36. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 232-33 (1973) (Powell, J., concurring in part and dissenting in part). It is further argued that even if such a definition were available, "wide and unpredictable differences of opinion among judges would be inevitable when dealing with an issue as slippery as 'intent' or 'purpose,' especially when related to hundreds of decisions made by school authorities under varying conditions over many years." *Id.* at 233.

37. Cf. *United States v. Texas Educ. Agency*, 467 F.2d 848, 864 (5th Cir. 1972), where the court ruled that there was no need to "define the quantity of state participation which is a prerequisite to a finding of constitutional violation. Like the legal concepts of 'the reasonable man', 'due care', 'causation', 'preponderance of the evidence', and 'beyond a reasonable doubt', the necessary degree of state involvement is incapable of precise definition and must be defined on a case-by-case basis." See also Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 *Harv. L. Rev.* 564, 584 (1965).

38. "Public schools are creatures of the State, and whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle. The school board exercises pervasive and continuing responsibility over the long-range planning as well as the daily operations of the public school system. It sets policies on attendance zones, faculty employment and assignments, school construction, closings and consolidations, and myriad other matters." *Keyes v. School Dist. No. 1*, 413 U.S. 189, 227 (1973) (Powell, J., concurring in part and dissenting in part).

39. In *Cooper v. Aaron*, 358 U.S. 1 (1958), the Supreme Court held that members of the school board and the superintendent of schools were state officials from the point of view of the fourteenth amendment. *Id.* at 16. The Court added that "[t]he Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." *Id.* at 19. The Court further expanded the scope of state action to political subdivisions of the states. See *Reynolds v. Sims*, 377 U.S. 533, 575 (1964).

40. *Milliken v. Bradley*, 418 U.S. 717, 761 (1974) (Douglas, J., dissenting); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 216 (1973) (Douglas, J., concurring).

than subtle state action causing segregated schools through housing and zoning policies.<sup>41</sup> A majority of the Court has ruled otherwise.<sup>42</sup>

In *Milliken v. Bradley*,<sup>43</sup> the Court refused to expand the mandate to eliminate dual systems arising from de jure segregation to include those where segregation is not the direct result of state or local government action. It was there held that a court had no constitutional power to order relief causing the racially isolated Detroit school district to be balanced with the schools of surrounding districts when only the Detroit schools had been affected by de jure segregation.<sup>44</sup> The effect of this ruling appeared to be that now "the idiosyncrasies of school district boundary lines will determine the 'equality' reached in the schools in each area."<sup>45</sup> The strict adherence to this principle appears to revitalize the injustice elucidated by Justice Harlan's dissent in the *Civil Rights Cases*,<sup>46</sup> an early interpretation of the state action requirement of the fourteenth amendment:<sup>47</sup>

I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution [the 13th and 14th] have been sacrificed by a subtle and ingenious

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41. 413 U.S. at 216 (Douglas, J., concurring). Indeed, this seemingly was the position of a unanimous Court only two years prior to *Keyes* when it was held that: "The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. . . . The location of schools may . . . influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

"In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.' Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20-21 (1971).

42. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 211-13 (1973). The proponents of Justice Douglas' argument must now content themselves with expressing these views in dissenting opinions. It cannot be determined with any certainty why the Court has made this change; perhaps it is a reaction to the political consequences of such decisions. See text accompanying notes 152-53 *infra*. It could also be a reflection of the growing complexity of the issues involved in more recent cases. Levin & Moise, *School Desegregation Litigation in the Seventies and the Use of Social Science Evidence: An Annotated Guide*, 39 *Law & Contemp. Prob.* 50, 55 (1975).

43. 418 U.S. 717 (1974).

44. *Id.* at 745.

45. Dell'Ario, *Remedies for School Segregation: A Limit on the Equity Power of the Federal Courts?*, 2 *Hastings Const. L.Q.* 113, 150 (1975). The majority in *Milliken* expressly rejected this line of argument, however, declaring that a cross-district remedy could only be supported "by drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent." 418 U.S. at 747.

46. 109 U.S. 3, 26-62 (1883) (Harlan, J., dissenting).

47. *Id.* at 10-11.

verbal criticism. "It is not the words of the law but the internal sense of it that makes the law: the letter of the law is the body; the sense and reason of the law is the soul." . . . [T]he court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted.<sup>48</sup>

### III. THE CONGRESS

In light of the Court's stance with respect to busing to achieve school desegregation, it is appropriate to look into congressional attempts to legislate in this area. A relationship between the two branches of government exists in the constitutional provision giving Congress power to determine the jurisdiction of the federal courts.<sup>49</sup> Theoretically, the legislative effect on the problems of school segregation can range from providing a comprehensive remedy for all discrimination to the other extreme of denying jurisdiction to the Court in any such case.

The first important legislative attempt to provide equal educational opportunity came with the passage of Title IV of the Civil Rights Act of 1964.<sup>50</sup> The legislation contains basic provisions: a vesting of authority in the United States Attorney General to initiate or intervene in school desegregation cases after receiving a written complaint from students who are unable to sue on their own behalf;<sup>51</sup> and an authorization of funds to the United States Commissioner of Education for providing technical assistance, financial grants and training institutes to help communities prepare for school desegregation.<sup>52</sup> On their face, these provisions appear to enhance the remedy-granting power of the courts in dealing with problems of segregation by expanding the requirements of standing to bring suit and by providing assistance in the transition to a unitary school system.<sup>53</sup> Another feature of this legislation was that it provided, for the first time, a definition of desegregation as "the assignment of students to public schools and within such schools without regard to their race, color, religion, sex or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."<sup>54</sup>

It is apparent, however, that the provisions of Title IV are neither as clear-cut nor as expansive as one would believe. The definition of desegregation explicitly excludes the assignment of students "to overcome racial imbalance,"<sup>55</sup> and a subsequent section specifically warns that its provisions do not

48. *Id.* at 26 (Harlan, J., dissenting).

49. U.S. Const. art. III, § 2, cl. 2 ("[T]he supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make.")

50. 42 U.S.C. § 2000c (1970).

51. *Id.* § 2000c-6.

52. *Id.* §§ 2000c-2, -3.

53. See the discussion of judicial consideration of local problems in eliminating segregation in notes 20-24 *supra* and accompanying text.

54. 42 U.S.C. § 2000c(b) (1970), as amended, (Supp. II, 1972).

55. *Id.*



empower "any official or court of the United States . . . [to require] the transportation of . . . students . . . to achieve such racial balance . . . ."56

The guidelines for administration of this program<sup>57</sup> formulated by the Department of Health, Education and Welfare make explicit within its definition of desegregation that the Act is not meant to be imposed upon de facto segregated districts.<sup>58</sup> Criteria of eligibility for assistance are established, providing that a school board "may make application . . . for a grant to pay, in whole or in part, the cost of employing a specialist to advise in problems incident to desegregation . . . ."59

Both the terms of the Act itself and the regulations formulated to administer it pay considerable attention to the concept of student assignment in order to "overcome racial imbalance,"60 a concept which has considerable legal significance. An analysis of the legislative intent behind the passage of Title IV is useful in evaluating this phrase.

The intent of Title IV was to speed progress "toward eradicating significant areas of discrimination on a nationwide basis,"61 and thus the bill was "designed primarily to protect and provide more effective means to enforce the civil rights of persons within the jurisdiction of the United States."<sup>62</sup> Unfortunately, these general statements have not been shown to have the legal effect that accompanies substantive provisions of the legislation. Moreover, it appears that this limited effectiveness was intentional.

The original proposal for Title IV contained no reference to the concept of "racial imbalance" in its definition of desegregation.<sup>63</sup> The idea was only later introduced<sup>64</sup> to prevent any semblance of congressional intent to correct

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56. Id. § 2000c-6(a).

57. 45 C.F.R. § 180.01-.45 (1975).

58. The Department adopts the congressional definition in 42 U.S.C. § 2000c(b), as amended, (Supp. II, 1972), and adds that "[f]or purposes of this paragraph, overcoming racial imbalance means the assignment of students to correct conditions of segregation or separation . . . not resulting from State or local law or official action." 45 C.F.R. § 180.02(a)(1) (1975). Compare the definition of de facto segregation in note 14 supra.

59. 45 C.F.R. § 180.41 (1975). It is interesting to note that there is no longer a requirement that the applicant district be desegregating, nor does HEW give any definition of "problems incident to desegregation." Compare id. § 180.41 (1974).

60. See notes 56, 58 supra and accompanying text.

61. 2 U.S. Code Cong. & Ad. News 2393 (1964).

62. Id. at 2391. A further statement of policy and goals provides that: "Every segment of American life must bear a heavy burden in this epochal struggle. Congress must move rapidly—more rapidly than it has to date—to legislate intelligently and effectively in this critical area. The agencies of Government must strive more actively to enforce the law of the land. The courts—State and Federal—must exercise greater vigilance in guarding the interests of all the people. Each citizen must make a greater effort to respect the dignity of his fellow man." Id. at 2518-19.

63. Id. at 2452.

64. This amendment was attacked by southern legislators as a means of exempting northern cities, which had little de jure segregation, from their obligations under the legislation to provide for racial equality in the schools. See notes 71-72 infra and accompanying text.

conditions of de facto segregation.<sup>65</sup> That this reference was directed at the Supreme Court policy on desegregation is vividly pointed out by the comments of Senator Russell of Georgia:

We have been told over and over since 1954 that the Supreme Court has decided against segregation. It has said that the minds, the hearts, and the lives of the young colored people would be destroyed unless they could sit by the white children in school.

The proponents [of this amendment] say now: "When you threaten our school, we will build a fort that not even the Supreme Court of the United States can attack, because we will not let it have jurisdiction of this matter. It matters not what happens to the minds, the hearts, and the futures of the little colored children in Boston and New York, because we are not going to let the Court act there at all. We are going to give the Government every weapon, every device, every power that the mind of man can conceive to move into the Southern States and proceed against the same state of affairs."<sup>66</sup>

Thus the mandate to desegregate in *Brown I*<sup>67</sup> and *Brown II*<sup>68</sup> had been legislatively limited to de jure situations,<sup>69</sup> as rooted in the state action requirement of the fourteenth amendment.<sup>70</sup> The result of this aspect of the legislation was that "[t]hese provisions in title . . . IV create no new rights,"<sup>71</sup> and thus it was still impossible to "force 'integration' on those localities that make it possible for blacks to attend schools without discrimination."<sup>72</sup> So Congress had given the force of law to what was, at that time, the Court's interpretation of a constitutional limitation requiring that only what could be classified as de jure segregation would be remedied. This rationale has recently been criticized since these judicial interpretations were so unsettled as to make their value as building blocks questionable.<sup>73</sup> Obviously those who sought to limit the Court's interference in the affairs of local school districts had yet another point to rely on.

The courts have received this legislation without confronting problems of interpretation, and the Act has become yet another means of reaffirming the

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65. 110 Cong. Rec. 2280 (1964) (remarks of Representative Cramer). It has also been observed that Congress failed to extend assistance to include problems of "racial imbalance" because no adequate definition of the term could be provided. 2 U.S. Code Cong. & Ad. News 2508 (1964).

66. 110 Cong. Rec. 13821-22 (1964). Senator Humphrey responded to this by pointing out that there is no affirmative duty under the Constitution to seek racial balance, and urged Senators to maintain the distinction between de jure and de facto segregation. *Id.* at 13821.

67. 347 U.S. 483 (1954); see notes 1-8 *supra* and accompanying text.

68. 349 U.S. 294 (1955).

69. The decision in *Brown I* was based on the psychological effect of school segregation on the students. See notes 7-8 *supra* and accompanying text. On that basis, it could conceivably have been argued that this would require remedial action in de facto as well as de jure situations.

70. See notes 13-16 *supra* and accompanying text.

71. 110 Cong. Rec. 6539 (1964) (remarks of Senator Humphrey). This concession effectively resolved the bitter debate in which southern legislators objected that their part of the country would be burdened by a wave of new desegregation orders. *Id.* at 13820-22.

72. J. Bolner & R. Shanley, *Busing: The Political and Judicial Process* 57 (1974).

73. *Id.*

judicial policy of refusing to act in de facto situations.<sup>74</sup> The other legislative restriction, denying power to the courts to order transportation to achieve racial balance,<sup>75</sup> has been narrowly construed by the courts as a means of preventing further expansion of judicial power, rather than as a restriction or withdrawal of the court's broad equity powers.<sup>76</sup> Such interpretation is uniform throughout the federal court system,<sup>77</sup> giving rise to holdings affirming a district's self-initiated transportation plan to overcome racial imbalance,<sup>78</sup> as well as a transportation order to remedy de jure segregation.<sup>79</sup> It would seem then that in spite of congressional attempts to control the remedial jurisdiction of the federal courts, there exists an affirmative duty to bring about integrated, unitary school systems<sup>80</sup> if de jure segregation is proven to exist.<sup>81</sup>

In 1970, Congress enacted the Emergency School Assistance Program (ESAP)<sup>82</sup> to assist local school districts in efforts to desegregate.<sup>83</sup> Under this program, funds were made available to school districts to meet special needs incident to the elimination of segregation among students and faculty in elementary and secondary schools.<sup>84</sup> This legislation seemed to involve a more concentrated attack on school segregation in that it affirmatively proscribed certain actions on the part of a school district. None of the \$75,000,000 in funds could be used to assist any district which had aided a non-public school engaged in discrimination; nor to supplant non-federal grants that were reduced as a result of the desegregation; nor to carry out any program that denied funds to a school district because it was desegregating.<sup>85</sup> This approach seems to address directly the problems of discrimination within the school district itself, rather than the limitations on the courts and the Office of Education contained within Title IV of the Civil Rights Act of 1964.<sup>86</sup> It

74. See notes 14-16 *supra* and accompanying text.

75. 42 U.S.C. § 2000c-6(a) (1970), as amended, (Supp. IV, 1974).

76. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17 (1971).

77. E.g., *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 886 (5th Cir. 1966), cert. denied, 389 U.S. 840 (1967). In this decision, the court provided that "the equitable powers of the courts exist independently of the Civil Rights Act of 1964." *Id.* at 880. See also *United States v. School Dist. 151*, 404 F.2d 1125 (7th Cir. 1968).

78. *McDaniel v. Barresi*, 402 U.S. 39, 41-42 (1971); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 880 (5th Cir. 1966), cert. denied, 389 U.S. 840 (1967).

79. *Spangler v. Pasadena City Bd. of Educ.*, 311 F. Supp. 501, 524 (C.D. Cal. 1970).

80. See notes 30-31 *supra* and accompanying text.

81. This situation raises the question of whether Congress can really have a meaningful effect in the area of school desegregation unless it withdraws all court power to act; a possibility which the electoral pressures on Congress are likely to prevent. See also text accompanying notes 114, 122 *infra*.

82. Act of Aug. 18, 1970, Pub. L. No. 91-380, tit. I, 84 Stat. 800, 803.

83. *Id.*

84. 45 C.F.R. § 181.2 (1975). One helpful aspect of this act was the presentation of criteria for consideration in allocating assistance under these provisions. See *id.* § 181.10.

85. Act of Aug. 18, 1970, Pub. L. No. 91-380, tit. I, 84 Stat. 800, 804.

86. 42 U.S.C. § 2000c-6(a) (1970), as amended, (Supp. IV, 1974); see notes 55-56 *supra* and accompanying text.

appears that while Title IV emphasized the de facto-de jure distinction, ESAP looked beyond that issue to tangible improvements in the access to educational facilities for all races. Indeed the federal regulations governing the administration of this Act<sup>87</sup> establish that the purpose of the legislation, and the financial assistance it provided, was "to achieve successful desegregation and the elimination of all forms of discrimination in the schools on the basis of race, color, religion, or national origin."<sup>88</sup>

The confusion and controversy arising from this seemingly clear regulation is illustrated by *Kelley v. Metropolitan County Board of Education*.<sup>89</sup> The action was brought after the defendant school district was ordered by the court to use busing to achieve desegregation, and the district was subsequently refused federal assistance under the Emergency School Assistance Program. It was a third-party action by defendants to compel federal officials to provide the necessary funding.<sup>90</sup> In awarding relief to the school district,<sup>91</sup> the court provided an interesting insight into the administrative policies behind the Act. It appeared that a commissioner from the United States Office of Education had issued a letter stating that the policy of the Department of Health, Education and Welfare was to accord a low funding priority to transportation requests under ESAP.<sup>92</sup> This policy was endorsed by strong statements in opposition to busing by President Nixon,<sup>93</sup> leaving the entire issue in a precarious position. The court determined that the regulations for disbursement of funds under the Act lacked an affirmative statement on bus transportation, and that the restrictive policies resulted from negative reaction to the *Swann* decision which had ordered the transportation of students to achieve desegregation.<sup>94</sup> The court concluded that this informally enforced prohibition<sup>95</sup> was illegal in its operation.<sup>96</sup> It thus appears that the congressional intent to assist the courts and local educational agencies by the clear language of the Act was almost used as another means of minimizing the amount of change actually realized.<sup>97</sup> There was, on the one hand, a clear and explicit piece of legislation aimed at alleviating this national problem, while at the same time the arm of government charged with administration and execution of these laws was actively restricting its practical application.

In 1972, Congress superseded ESAP, enacting the Emergency School Aid Act (ESAA),<sup>98</sup> in order to meet the needs incident to desegregation; to encourage school districts to engage in voluntary efforts to eliminate, reduce,

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87. 45 C.F.R. § 181.1 (1975).

88. *Id.* § 181.2.

89. 372 F. Supp. 540 (M.D. Tenn. 1973).

90. *Id.* at 541-43.

91. *Id.* at 560-61.

92. *Id.* at 545.

93. *Id.* at 545-46.

94. *Id.* at 551-53.

95. *Id.* at 553.

96. *Id.* at 559.

97. See notes 85-88 *supra* and accompanying text.

98. 20 U.S.C. §§ 1601-19 (Supp. IV, 1974).

or prevent minority group isolation; and to aid the students themselves in overcoming the educational disadvantages of minority group isolation.<sup>99</sup> Under the guidelines for administration of the program,<sup>100</sup> districts were eligible for assistance whether they were desegregating under court order or voluntarily.<sup>101</sup> A detailed schedule of criteria for assistance was established<sup>102</sup> giving the greatest consideration to a school district's proposed "effective net reduction in minority group isolation."<sup>103</sup>

The congressional intent<sup>104</sup> becomes somewhat clouded by the statement that "[n]othing in this chapter shall be construed as requiring any local educational agency which assigns students to schools on the basis of geographic attendance areas drawn on a racially nondiscriminatory basis to adopt any other method of student assignment."<sup>105</sup> Since the areas must be drawn on a "racially nondiscriminatory basis," there appears to be a further reinforcement of the de jure-de facto distinction, as well as the immunity of de facto segregation from either judicial or legislative remedial action. When considered in relation to what the Court was doing at that time, the shift of positions that took place between the *Swann* and *Keyes* decisions becomes somewhat more comprehensible.<sup>106</sup> The Court apparently yielded to the design of the legislature, as extrapolated from this section of the Act. This in itself poses no problem, as it corresponds to the basic framework of our tripartite government.<sup>107</sup>

Thus, over the course of time Congress seems to be getting progressively more specific in enunciating its underlying intent; here, actually saying what it had previously referred to under the guise of "overcoming racial imbalance."<sup>108</sup> Congress was also very careful in its language to limit the scope of its application. Thus a subsequent title supplementing ESAA<sup>109</sup> adopts, in effect, the Title IV definition of desegregation;<sup>110</sup> imposes a prohibition against the use of appropriated funds for busing;<sup>111</sup> and provides for a suspension of the implementation of any court orders requiring transportation for desegregation pending their outcome on appeal.<sup>112</sup>

99. Id. § 1601(b). "The terms 'minority group isolated school' and 'minority group isolation' in reference to a school mean a school and condition, respectively, in which minority group children constitute more than 50 percentum of the enrollment of a school." Id. § 1619(10).

100. 45 C.F.R. § 185 (1975).

101. Id. § 185.11(a, b).

102. Id. § 185.14.

103. Id. § 185.14(a)(2)(i).

104. See text accompanying note 99 supra.

105. 20 U.S.C. § 1618 (Supp. IV, 1974).

106. See notes 34-35 supra and accompanying text.

107. But see notes 155-56 infra and accompanying text.

108. See note 60 supra and accompanying text.

109. 20 U.S.C. § 1651 (Supp. II, 1972).

110. 42 U.S.C. § 2000c(b) (1970), as amended, (Supp. II, 1972).

111. 20 U.S.C. § 1652 (Supp. IV, 1974); compare 42 U.S.C. § 2000c-6(a)(2) (1970), as amended, id. § 2000c-6(a) (Supp. II, 1972).

112. 20 U.S.C. § 1653 (Supp. II, 1972).

This last provision was given a very limited application by Justice Powell in his ruling in *Drummond v. Acree*.<sup>113</sup> It was observed that the terms of 20 U.S.C. § 1653 "[do] not purport to block all desegregation orders which require the transportation of students. If Congress had desired to stay all such orders it could have used clear and explicit language appropriate to that result."<sup>114</sup> Court-ordered transportation was still a valid means of achieving school desegregation as long as the purpose was not to overcome racial imbalance,<sup>115</sup> and voluntary busing plans retained their viability as within the discretion of local school officials.<sup>116</sup>

It appears that at this point in the legislative progression toward equal educational opportunity, Congress had adopted a combative attitude toward the courts. The newer legislation specifically restricted court orders,<sup>117</sup> rather than addressing directly the substantive issues of desegregation. Congressional intent appears to have been geared toward preventing the courts from effecting too much change in the systems of education, as well as curtailing the use of busing as a desegregation device. Instead of taking the lead in proposing realistic ways to provide truly integrated schools, the legislators have waited for the courts to act, then have imposed restrictions on the use of these remedies.<sup>118</sup> Although this appears on its face to reflect the basic scheme of our governmental system, it can prove a dangerous practice. It has been warned that:

[I]f our system of government is to work well and retain the confidence of our people, and if the institutions of our government are not to destroy each other in chaotic conflict, Congress and the President ought to provoke a direct clash with the Supreme Court only as a very last, only despairing resort. For only two outcomes of such a clash are possible. Either the Supreme Court digs in its heels and dashes popular expectations that Congress and the President have raised, thus discrediting Congress and the President, or itself, or more likely both. Or the Court surrenders, reverses itself, and leaves the indelible impression, at least for a generation, that it is not independent, that it does not follow . . . its own precedents, but rather the election returns. Neither result is beneficial.<sup>119</sup>

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113. 93 S. Ct. 18 (1972) (Powell, J., sitting as a Circuit Justice).

114. *Id.* at 20. Justice Powell reasoned: "In [20 U.S.C. § 1652], which precedes [20 U.S.C. § 1653], Congress prohibited the use of federal funds to aid in any program for the transportation of students if the design of the program is to 'overcome racial imbalance' or to 'carry out a plan of racial desegregation.' It is clear from the juxtaposition and the language of these two sections that Congress intended to proscribe the use of federal funds for the transportation of students under any desegregation plan but limited the stay provisions of [§ 1653] to desegregation plans that seek to achieve racial balance." *Id.* (emphasis and citation omitted).

115. *Darville v. Dade County School Bd.*, 351 F. Supp. 1249, 1250-51 (S.D. Fla. 1972), *aff'd*, 497 F.2d 1002 (5th Cir. 1974).

116. See *Darville v. Dade County School Bd.*, 497 F.2d 1002 (5th Cir. 1974), where it was pointed out that the "local school officials are not restricted by the provisions" limiting the use of busing. *Id.* at 1005.

117. See note 112 *supra* and accompanying text.

118. See notes 156-59 *infra* and accompanying text.

119. Bickel, *Untangling the Busing Snarl*, in *The Great School Bus Controversy* 34 (N. Mills ed. 1973).

One illustration of this conflict is evidenced by the conference committee report accompanying ESAA, where the legislators expressed their hope that "the judiciary will take such action as may be necessary to expedite the resolution of the issues subject to this section."<sup>120</sup> The reaction of the courts, while not outwardly defiant,<sup>121</sup> has consistently given these provisions a very limited interpretation.<sup>122</sup>

Further analysis of the legislative history of ESAA reveals that while there is a very clear intent to make the eligibility criteria for assistance as broad and flexible as possible,<sup>123</sup> the substance of the enactments appear calculated to provoke little change or disruption in the current operations of the local school districts.<sup>124</sup> An inference may be drawn that Congress did not intend that school districts undertake a massive reduction in minority group isolation on a district-wide scale—an inference which is reinforced by consideration of the legislative history of the Education Amendments of 1974.<sup>125</sup> Further provisions have made certain changes in the ESAA legislation,<sup>126</sup> the most significant being in the criteria to determine eligibility for assistance.<sup>127</sup> Congress observed:

The Committee bill contains an amendment to the Emergency School Aid Act to clarify the eligibility of local educational agencies in which a majority of the students

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120. 2 U.S. Code Cong. & Ad. News 2670 (1972).

121. See, e.g., *Medley v. School Bd.*, 350 F. Supp. 34 (W.D. Va. 1972), remanded, 482 F.2d 1061 (4th Cir. 1973), cert. denied, 414 U.S. 1172 (1974). Here the court, finding 20 U.S.C. § 1653 directly applicable to the facts in issue, observed that "the section is not an unwarranted intrusion into the judiciary and instead is a Constitutionally permissible Congressional limitation on the powers of this court." 350 F. Supp. at 56.

122. See notes 74-77, 113-16 *supra* and accompanying text. It has also been held that these restrictions on judicial power within ESAA do not apply retroactively. *Soria v. Oxnard School Dist. Bd. of Trustees*, 467 F.2d 59, 61 (9th Cir. 1972) (*per curiam*).

123. "The Senate amendment, but not the House amendment, provided that applicant school districts in order to be eligible must establish at least one stable, quality, integrated school and must have adopted a comprehensive district-wide plan for the elimination of minority group isolation to the maximum extent possible in all schools of such agencies. The conference substitute does not contain the Senate provision." 2 U.S. Code Cong. & Ad. News 2664 (1972). "The Senate amendment, but not the House amendment, required that the Secretary [of Education] must approve first those applications which place the largest numbers and the greatest percentages of minority children in stable, quality, integrated schools. The conference substitute does not contain this provision." *Id.* at 2666.

124. "The House amendment, but not the Senate amendment, required that nothing in this title could be construed as requiring any local educational agency which assigns students to schools on the basis of geographic attendance areas drawn on a racially nondiscriminatory basis to adopt any other method of student assignment whether or not the use of such geographic attendance areas results in the complete desegregation of the schools of such agency. The conference substitute contains the House provision except for the reference to whether or not the use of such areas results in the complete desegregation of the schools of such agency." *Id.* at 2669.

125. 20 U.S.C. §§ 1601-19 (Supp. IV, 1974). Several sections have been amended since 1974. See note 126 *infra*.

126. 20 U.S.C.A. §§ 1603, 1605, 1607, 1608, 1609, 1615, 1619 (Supp. 1976).

127. *Id.* § 1605(a)(1)(E). The new addition allows a school district to apply for assistance in establishing or maintaining one or more integrated schools.

are classified as being from minorities. The Committee adopted this amendment because the Department of Health, Education, and Welfare has misinterpreted the Emergency School Aid Act and, through its regulations, has barred from eligibility any local school district unless that district has adopted a comprehensive integration plan. It was clearly not the intent of Congress that school districts, a majority of whose students are minorities, should be required to adopt comprehensive district-wide plans for integration in order to become eligible for basic grants, pilot programs, or bilingual education programs. This amendment will have the effect of repealing that regulation of the Office of Education . . . to make such school districts eligible for those grants.<sup>128</sup>

In addition to these changes within ESAA, the Education Amendments of 1974 contained new provisions addressed to the busing controversy, entitled "Equal Educational Opportunities and Transportation of Students."<sup>129</sup> This section provides remedial guidelines<sup>130</sup> for the elimination of dual school systems,<sup>131</sup> as long as the segregation was de jure.<sup>132</sup> It also established priorities for the imposition of these remedies.<sup>133</sup> In addition, Congress limited the scope of any transportation order to include only the school closest or next closest to the student's place of residence,<sup>134</sup> and directed that in fashioning a remedy, school district lines should not be ignored unless those lines were drawn with an intent to segregate.<sup>135</sup>

Further restrictions were enacted late in 1975, with congressional approval of an amendment to the Departments of Labor, and Health, Education and Welfare Appropriation Act of 1976.<sup>136</sup> The amendment prohibits the Department of Health, Education and Welfare from using any of its money "to

128. 3 U.S. Code Cong. & Ad. News 4156-57 (1974). The committee expressed further concern that eligibility for the grants was being determined too restrictively. In criticizing the administration of the Act, the committee observed that "[t]he Department of Health, Education and Welfare has turned a deaf ear to efforts to explain Congressional intent and to efforts by outside organizations, even including the statutorily established National Advisory Council on Equality of Educational Opportunity, to offer advice on this and other points involved in the administration of the program. This lack of responsiveness by the Department and its restrictive interpretations of the Act led to more than \$33 million from the fiscal 1973 appropriation reverting to the Treasury. If the Department had vigorously supported the Act in its true intent, it would have been able to spend the entire appropriation. It should be noted here that the appropriation was only 50% of the authorization for 1973." *Id.* at 4157.

129. 20 U.S.C.A. §§ 1701-21 (Supp. 1976).

130. *Id.* §§ 1712-18, which requires "only such remedies as are essential . . . ."

131. *Id.* § 1702(b).

132. *Id.* §§ 1703-04; see *Brinkman v. Gilligan*, 518 F.2d 853, 856 (6th Cir.), cert. denied, 96 S. Ct. 433 (1975).

133. 20 U.S.C.A. § 1713 (Supp. 1976). This section makes assignment to schools closest to home the foremost priority, followed by voluntary transfer, revision of attendance zones, new school construction and closing of old schools, magnet schools, and lastly, "any other plan which is educationally sound and administratively feasible" within the limits on the use of transportation set forth in other sections of the Act.

134. *Id.* § 1714.

135. *Id.* § 1715.

136. H.R. 8069, 94th Cong., 1st Sess. (1975) (enacted by Congress but vetoed by President Ford on Dec. 19, 1975).



require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home, and which offers the courses of study pursued by such student, in order to comply with Title VI of the Civil Rights Act of 1964."<sup>137</sup>

Title VI prohibits the practice of racial discrimination in any program receiving federal financial assistance<sup>138</sup> and provides for termination of the grant in case of a finding of such discrimination.<sup>139</sup> This law has been seen not only as a declaration of national policy in civil rights, but as a basis for a new approach to school desegregation.<sup>140</sup> It is feared, however, that certain aspects of the Senate Amendment to the Appropriations bill may undermine the effect of Title VI with respect to a number of discriminatory practices unrelated to busing.<sup>141</sup>

#### IV. INTERACTION BETWEEN THE LEGISLATURE AND THE JUDICIARY

While congressional and judicial efforts to achieve equal educational opportunity have been extensive, it has been observed that many children throughout the country, and especially in the larger cities, attend school primarily with members of their own race.<sup>142</sup> As litigation continues to be brought, the parties tend to take positions upon which they are generally unwilling to compromise. Indeed, this has led one court to complain that "[a]ll parties appeal with typical inflexibility of position, understandably, perhaps, because of the great complexity of the problem and the inevitable intrusion of naked emotion and worrisome economic problems. Public objectivity is not to be even hoped for and judicial objectivity is difficult indeed."<sup>143</sup>

As previously indicated, the courts are hamstrung by the *de jure-de facto* distinction.<sup>144</sup> Their difficulty lies in finding the requisite state action and then determining how far to go in correcting racial imbalance.<sup>145</sup> One court has disregarded the distinction, recognizing that elimination of *de facto* segregation is desirable in and of itself "and that it is educationally important to children of all races in preparing them to exist harmoniously in a pluralistic, melting-pot society."<sup>146</sup> That this distinction should be eliminated is an

137. *Id.*

138. 42 U.S.C. § 2000d (1970).

139. *Id.* § 2000d-1.

140. Dunn, Title VI, The Guidelines and School Desegregation in the South, 53 *Va. L. Rev.* 42, 43 (1967); see Comment, The Courts, HEW, and Southern School Desegregation, 77 *Yale L.J.* 321, 322 (1967).

141. *N.Y. Times*, Sept. 25, 1975, at 17, col. 1.

142. Dell'Ario, Remedies for School Segregation: A Limit on the Equity Power of the Federal Courts?, 2 *Hastings Const. L.Q.* 113 (1975).

143. *Keyes v. School Dist. No. 1*, 521 F.2d 465, 468 (10th Cir. 1975), cert. denied, 96 S. Ct. 806 (1976).

144. See notes 14-16 *supra* and accompanying text.

145. See *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385 (5th Cir.) (en banc) (per curiam), cert. denied, 389 U.S. 840 (1967).

146. *Higgins v. Board of Educ.*, 395 F. Supp. 444, 486 (W.D. Mich. 1973), aff'd, 508 F.2d 779 (6th Cir. 1974).

ever-increasing need, since shifts in demographic makeup of the population centers throughout all parts of the country are more the cause of racial imbalance than were the earlier state laws or policies encouraging segregation.<sup>147</sup> Unfortunately, this approach to the problem has not been adopted by the courts, except in limited instances.<sup>148</sup> However, the argument is persuasive that because any form of segregation has a harmful psychological and educational impact on the people affected, the requirement of finding an intent to segregate is not important enough to support the distinction.<sup>149</sup> Indeed, the argument has been made that the section in the *Brown I* decision dealing with the harmful social and educational effects of segregation<sup>150</sup> blurs the distinction between de jure and de facto segregation, so that the "disestablishment of a legally enforced dual [school] system cannot be said to have occurred [*sic*] until the maximum amount of integration has taken place."<sup>151</sup>

There is argument that the Court's motive in upholding this distinction is less a fair application of constitutional principle than it is a reaction to a perceived public mood that enough has been done already to enforce the equalities guaranteed by our Constitution.<sup>152</sup> This method of decision is seen as weakening the effectiveness of the courts: "It is when judges begin to evaluate the political calculus, and modify their decisions to seek an accommodation, that they fail."<sup>153</sup>

Another argument is that the Court's only mandate is to remedy de jure situations, and that the courts are neither an adequate nor a proper forum for remedying our various social ills.<sup>154</sup> This contention points out that since the judiciary is the branch of government with the "smallest popular base of support," it is particularly ill-adapted to deal with social problems of such a far-reaching character.<sup>155</sup> Critics rightly contend that it is the function of Congress, as the popularly elected representatives of the citizenry, to legislate

147. Dell'Ario, Remedies for School Segregation: A Limit on the Equity Power of the Federal Courts?, 2 Hastings Const. L.Q. 113 (1975).

148. See *Pena v. Superior Ct.*, 50 Cal. App. 3d 694, 123 Cal. Rptr. 500 (5th Dist. 1975), where the California law is expressed as granting a cause of action for relief from de facto segregation "when the plaintiff alleges actual educational harm to the minority students as a result of the segregation." *Id.* at 703, 123 Cal. Rptr. at 505.

149. Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis, 60 Calif. L. Rev. 275, 435 (1972).

150. See notes 5-8 *supra* and accompanying text.

151. Bickel, Untangling the Busing Snarl, in *The Great School Bus Controversy* 30 (N. Mills ed. 1973).

152. *Milliken v. Bradley*, 418 U.S. 717, 814 (1974) (Marshall, J., dissenting); see Taylor, The Supreme Court and Urban Reality: A Tactical Analysis of *Milliken v. Bradley*, 21 Wayne L. Rev. 751, 776-77 (1975).

153. Dimond, School Segregation in the North: There is but one Constitution, 7 Harv. Civ. Rights-Civ. Lib. L. Rev. 1, 53-54 (1972).

154. Goodman, Integration, Yes; Busing, No, N.Y. Times, Aug. 24, 1975, § 6 (Magazine) at 46-48.

155. Note, Consolidation for Desegregation: The Unresolved Issue of the Inevitable Sequel, 82 Yale L.J. 1681, 1693 (1973).

a solution to such pervasive problems.<sup>156</sup> However, until Congress takes the initiative to develop a new and more effective approach to alleviating the conditions of segregation in the nation, rather than defensive legislation aimed more at the courts than at the problems of equal education,<sup>157</sup> any real solution is difficult to imagine.<sup>158</sup> Until then, the federal position on school desegregation will be a confusing and hotly debated issue. Only confusion can result when a different approach, indeed a different philosophy with a different goal, is reflected in the actions of the other branches of government.<sup>159</sup> When this happens in such a volatile area as school desegregation, the results can be harmful as the education of our young is allowed to suffer while the debate continues. This situation has led to the conclusion that "[t]he Federal Government does not appear to have any consistent policy of enforcing integration,"<sup>160</sup> and a characterization of the government's efforts in this area as a " 'model of inefficiency.' "<sup>161</sup>

One possible solution would be to do away with the artificial distinctions of de jure and de facto segregation. The efforts of the federal government could then be concentrated on the attainment of equal access to a quality education. In this approach, the role of the social sciences could be increased<sup>162</sup> to focus on the best way to achieve this end.<sup>163</sup> The problem is no longer isolated in the southern states, but is a national phenomenon<sup>164</sup> which can only be dealt

156. See, e.g., *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). The Court there acknowledged that reform of our basic tax structure would aid the attainment of complete equal educational opportunity, but felt constrained since "the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them." *Id.* at 59. On the issue of school tax reform see Comment, *An Analysis and Review of School Financing Reform*, 44 *Fordham L. Rev.* 773 (1976).

157. See notes 117-19 *supra* and accompanying text.

158. This responsibility appears to rest squarely on the Congress, since the courts "have no roving commission to seek out and right wrongs; the jurisdiction of federal courts is limited; and they, fortunately, are only authorized to decide a question after it has been presented as a 'case or controversy' under a pertinent statutory or constitutional provision." McMillan, *Social Science and the District Court: The Observations of a Journeyman Trial Judge*, 39 *Law & Contemp. Prob.* 157, 158 (1975).

159. See Time, Sept. 22, 1975, at 7-8.

160. Kifner, *North's Schools Face a Long, Hot Autumn*, *N.Y. Times*, Aug. 24, 1975, § 4, at 6, col. 1.

161. *Id.* at col. 4, quoting J. Greenberg of the NAACP Legal Defense Fund, Inc.

162. See Armor, *The Evidence on Busing*, in *The Great School Bus Controversy* 81-82 (N. Mills ed. 1973).

163. Another inducement has been suggested. Social science evidence in these cases can be seen as "the kind of support a court likes to find in a record to lend factual and scientific aura to a result sustainable by other, perhaps purely abstract and sometimes formalistically legal, considerations, but dictated by the moral necessity of changing social attitudes." Wisdom, *Random Remarks on the Role of Social Sciences in the Judicial Decision-Making Process in School Desegregation Cases*, 39 *Law & Contemp. Prob.* 134, 142 (1975).

164. See Pettigrew, *A Sociological View of the Post-Bradley Era*, 21 *Wayne L. Rev.* 813 (1975). There, it is pointed out: "Remarkably enough, considerable racial desegregation has taken place in the nation's public schools despite the intense resistance. The sharpest gains came in the

with through a new and comprehensive approach directly confronting the issue.

The use of transportation seems to be the swiftest and most direct means toward the goal of desegregating our schools. However, the problems inherent in this method have only resulted in a clouding of the issues, and further resistance to the enforcement of our constitutional principles. The use of busing has further compounded the problems by its effect on "white flight"—the process by which those who can afford to do so transfer their children to private schools or move from the district to avoid the effect of a court order.<sup>165</sup> Although the courts have consistently refused to allow this to interfere with the dismantling of a dual school system,<sup>166</sup> its effects can be far-reaching:

In the court's opinion the effect of mandatory transportation on students can be neutral or destructive, depending upon the community's response to the requirements of the law . . . . If the atmosphere surrounding desegregation is such that a child goes to a school where children of other races welcome him without fear, and where he can learn in an educationally productive atmosphere, the fact that his school is a bus-ride away may be little more than an inconvenience.<sup>167</sup>

Thus the attitude of the community is an important element in the use of this remedy. This attitude could be greatly improved if busing were to be employed only as a temporary means to effect a long term transition to equal educational opportunity for all children.

Another possibility would include the reorganization of school districts, as it has been observed that "[w]here districts can be consolidated, a single decisive intervention by the judiciary can correct the constitutional wrong and leave local political processes free to function as in any other desegregated districts."<sup>168</sup> Then, with the implementation of certain safeguards or reassur-

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South during the late 1960's and early 1970's. The number of black children in all-black southern schools declined from 40 percent in 1968 to 12 percent in 1971; those in predominantly white schools rose from 18 percent in 1968 to 44 percent by 1971. Indeed, by the fall of 1970 a greater percentage of black children in the South attended majority-white public schools (38 percent) than in the North (28 percent). A more sensitive indicator, the racial segregation index (RSI), reveals the same trend. In 42 southern urban districts, the degree of student segregation was nearly halved between 1967 and 1972, dropping from 88 percent to 48 percent. This compares with only modest reductions during these same 5 years in eight border urban districts, in which segregation dropped from 80 percent to 69 percent; 62 northern urban districts (from 68 percent to 61 percent); and 16 western urban districts (from 67 percent to 50 percent). On the RSI index, too, by 1972 the South had the lowest degree of racial school segregation." *Id.* at 815 (footnotes and emphasis omitted).

165. See Goodman, *Integration, Yes; Busing, No*, N.Y. Times, Aug. 24, 1975, § 6 (Magazine), at 10.

166. E.g., *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 490-91 (1972); *Higgins v. Board of Educ.*, 508 F.2d 779, 794 (6th Cir. 1974); *Morgan v. Kerrigan*, 401 F. Supp. 216, 233-34 (D. Mass. 1975).

167. *Morgan v. Kerrigan*, 401 F. Supp. 216, 239-40 (D. Mass. 1975).

168. Hain, *Techniques of Governmental Reorganization to Achieve School Desegregation*, 21 Wayne L. Rev. 779, 810-11 (1975). But see text accompanying notes 43-45 *supra*.

ance to the community,<sup>169</sup> a temporary busing program could be used as a means toward the ultimate goal: complete integration of the races. Eight conditions have been theorized which can help maximize the probability of integration and which should be considered in all desegregation litigation:

- (1) Both races must have equal access to the school's resources. . . .
- (2) Classroom—not just school—desegregation is essential for actual integration. . . .
- (3) Strict ability grouping should be avoided. . . .
- (4) School services and remedial training must be maintained or improved after desegregation. . . .
- (5) Desegregation should be initiated in the early grades. . . .
- (6) The need for interracial staffs is critical. . . .
- (7) Substantial, rather than token, minority percentages are necessary. . . .
- (8) Race and social class must not be confounded in the interracial school. . . .<sup>170</sup>

It appears that there has been some progress toward the attainment of equal education opportunity,<sup>171</sup> some clearly visible and some obscure. As one observation of the status of school desegregation makes clear:

The issue is not whether actions by public officials which maintain or foster racial segregation in the schools should be tolerated. Such actions are clearly unconstitutional and are no longer debatable. Similarly, the issue whether we should, as a matter of national commitment and public policy, move toward the goal of integrated classrooms is no longer debatable. Rather, the issue is how the goal of increasing integration can best be attained.<sup>172</sup>

## V. CONCLUSION

Some observers have remarked that congressional action to restrict busing reveals the extent of our underlying racism as Americans,<sup>173</sup> while others argue that the negativism results from the voters' opposition to imposition of a governmental plan upon the parents' choice of schools.<sup>174</sup> Whatever the motivation, it is suggested that there is a need to restructure the entire emphasis of educational legislation, placing more emphasis on the use of assistance to implement "coherent, well-planned local efforts to improve primary and secondary education" than on combatting the action of the

169. For example, it has been observed that busing can be more peacefully accomplished when: "1) the number of nonwhites in each school is less than 40%; 2) students are not bused to schools that are inferior to the ones that they previously attended; 3) schools are near enough so that the parents of the bused students can easily stay involved in them; 4) most parents, educators and city officials are committed to preventing disturbances; and 5) black-white advisory groups are formed to defuse problems in advance." *Time*, Sept. 22, 1975, at 13.

170. Pettigrew, *A Sociological View of the Post-Bradley Era*, 21 *Wayne L. Rev.* 813, 820-24 (1975) (emphasis omitted).

171. See note 164 *supra*.

172. Hawley & Rist, *On The Future Implementation of School Desegregation: Some Considerations*, 39 *Law & Contemp. Prob.* 412, 413 (1975).

173. J. Bolner & R. Shanley, *Busing: The Political and Judicial Process* 56 (1974).

174. Preyer, *Beyond Desegregation—What Ought To Be Done?*, 51 *N.C.L. Rev.* 657, 660 (1973).

courts.<sup>175</sup> The result of such an attitude on the complex issues involved in school desegregation could be far-reaching and dramatic:

District judges before whom school suits are brought are made to confront what is usually a wasteland: a school district deteriorating in every way, sinking deeper and deeper into racial isolation, and doing nothing about it. So the judge orders integration and busing. That is all he can do, short of throwing up his hands, which after 18 years in the school business he no longer thinks he may do. The record of the wasteland and of the judge's response to it then moves up to the Supreme Court. There the doctrinal pull of *Brown v. Board of Education* again exerts its force, a principled line between any case and the one immediately preceding it is hard to find—if we said desegregation, why not more desegregation?—and what happens is what we have seen happen. But if Congress and the President, instead of fighting the courts, try to get school districts to fight the reality to which the courts have been reacting, and manage to present courts in the future with school districts embarked on concentrated long-range reforms, then, without needing to renege on prior decisions and without accepting any impairment of the general function of judicial review, courts will be able to say that they are now faced with new facts, with a new reality, which no longer calls for the old remedies. And the Supreme Court will agree. Or so—candor compels one to add—so [*sic*] one would expect.<sup>176</sup>

For the present, however, the emphasis remains on the transportation issue, which is an infinitely more emotional problem than that of the standard of education itself.<sup>177</sup> This is unfortunate, because lurking behind the vocal opposition to "forced busing," there is a concern about the quality of education received in the schools at the end of the bus ride. It is contended that the decline in the quality of education at certain minority schools has led to the need for forced busing to achieve equal educational opportunity.<sup>178</sup>

Surveys have repeatedly shown that a majority of Americans, both black and white, overwhelmingly favor integration but oppose busing to accomplish it in schools. Part of the opposition is racist; much is based on fears among both black and white parents that desegregation will endanger the children. In addition, white parents fear that busing will lead to lowered academic standards. Compounding parents' worries is that the experience of those cities that have had forced busing is somewhat confusing and contradictory.<sup>179</sup>

One proposed solution suggests revisions in the governmental organization of school districts, including: consolidation, inter-district transfers, and um-

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175. Bickel, *Untangling the Busing Snarl*, in *The Great School Bus Controversy* 27, 36 (N. Mills ed. 1973).

176. *Id.* at 37.

177. A recent analysis of the views on the busing situation in Louisville, Ky. reported on a white mother of school age children: ". . . [T]he McCauleys feel put upon by Government. 'We've been shoved,' says Mrs. McCauley. 'Unemployment is running wild; inflation is killing us. Now the Federal Government steps in and orders this busing. We're fighting for our freedom as Americans.' Sadly she adds, 'I get up some mornings and feel like I want to secede.'" *Time*, Sept. 22, 1975, at 12.

178. See Edelman, *The Necessity of School Desegregation*, *N.Y. Times*, Sept. 22, 1975, at 33, col. 2.

179. *Time*, Sept. 22, 1975, at 11.

brella districts.<sup>180</sup> Although this is only one of many alternatives that have been proposed,<sup>181</sup> and despite the fact that this may face constitutional challenges of its own, it exemplifies the possible areas that Congress could explore in providing substantive assistance in solving the problems of racial isolation in America. Whether they will be able to see beyond the narrow issue of busing to the broad problems facing the American educational system is a matter of conjecture. But it is hoped that emotional considerations will be put aside and replaced by a practical and rational approach that will provide substantive and meaningful assistance.

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180. Hain, *Techniques of Governmental Reorganization to Achieve School Desegregation*, 21 *Wayne L. Rev.* 779, 782-87 (1975).

181. E.g., Hamilton, *The Nationalist vs. the Integrationist*, in *The Great School Bus Controversy* 297 (N. Mills ed. 1973) (suggests united action by all factions seeking to promote integration better to effect their goals through the political process); Orfield, *How To Make Desegregation Work: The Adaptation of Schools to Their Newly-Integrated Student Bodies*, 39 *Law & Contemp. Prob.* 314, 317 (1975) (suggests adaptations involving the personnel, students and curriculum of the desegregated school itself); Goodman, *Integration, Yes; Busing, No*, *N.Y. Times*, Aug. 24, 1975, § 6 (Magazine), at 48 (suggests making integrated schools more attractive to whites by giving them one and one-half times the budget of a nonintegrated school and keeping them open from the time parents go to work until they return).