

6-1-1972

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Recommended Citation

Frank Thompson Jr. & Daniel H. Pollitt, *Congressional Control of Judicial Remedies: President Nixon's Proposed Moratorium on Busing Orders*, 50 N.C. L. REV. 809 (1972).Available at: <http://scholarship.law.unc.edu/nclr/vol50/iss4/5>

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CONGRESSIONAL CONTROL OF JUDICIAL REMEDIES: PRESIDENT NIXON'S PROPOSED MORATORIUM ON "BUSING" ORDERS

FRANK THOMPSON, JR.,* AND DANIEL H. POLLITT†

The school bus is a familiar sight on the American education scene. The big yellow bus criss-crosses the rural byways, or speeds along modern highways to the "consolidated" school, and picks up approximately forty percent of the children who go to school each day. For years, no one seemed to mind—except those who attended private parochial schools and therefore were denied this free transportation.

In the South, there were two buses: one carrying black children to black schools, and one carrying white children to white schools. No one seemed to mind—except the blacks who were denied an equal education.

Then, as the dual educational systems began to end, the black children rode the same bus with white children to the formerly "white" school, and "busing" became an issue. When it appeared that white children would be transported from the white suburbs to the formerly "black" inner-city schools, "busing" became a dirty word.

But not everywhere, and not for long. Consider, for example, the case of Hoke County, North Carolina. Hoke County is a small rural community of 18,000, with 4,850 children of school age: 50 percent black, 35 percent white, and 15 percent Lumbee Indian. For years, the county operated three different school and transportation systems. The white children were a year ahead of their black and Indian counterparts at the midway mark and two full years ahead by time of high school graduation. Then came integration, a unitary system under which each school, and each class, now reflects the county-wide population. But with integration came advance planning. Attention was focused on what happens at the end of the bus ride. There were conferences with fearful parents and apprehensive students. The capacities and achievements of each child were measured, and special needs and problems were identified and anticipated. The result was a marked success. White students continued to progress as before, and black and Indian students began to catch up. And the daily bus ride was cut down by an average of fifteen minutes.¹

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¹Mondale, *Busing in Perspective*, THE NEW REPUBLIC, March 4, 1972, at 18.

Senator Mondale, after two years as Chairman of a Senate Select Committee on Equal Educational Opportunity, reports that Hoke County is not an isolated or unique phenomenon. His conclusion, after two years of study of the problems nationwide, is that "*integrated education—sensitively conducted and with community support—can be better education for all children, white as well as black, rich as well as poor.*" It has been tried and is working."²

But the facts are either not known or not accepted. Many parents fear that their children will be "bused" into alien neighborhoods, and they are eager for any relief. And some political candidates were eager to promise relief. "Busing" became the big issue in the Florida "Presidential primary," in which there was a separate "busing" referendum item on the ballot. On March 14, 1972, the people of Florida went to the polls, selected Alabama's Governor Wallace as their preference for the Presidency, and voted almost three-to-one against "compulsory busing."³

It was almost inevitable that the "busing" issue would reach national dimensions, and it did within a few days.

THE NIXON MORATORIUM PROPOSALS

On March 16, 1972, President Nixon announced on nation-wide television that he was sending to Congress two bills on "busing."⁴ One was a bill "[t]o impose a moratorium on new and additional student transportation" and provides in essence that all existing court decrees "shall be stayed" to the extent that they require any school board to

²*Id.* at 17.

³The actual count was 78% against busing. *There Goes the Bus*, THE NEW REPUBLIC, April 1, 1972, at 13. Also, 79% of the Floridians voted for desegregated, "equal opportunity" public education. *Id.*

⁴The bills were introduced on March 20 by William M. McCulloch, the senior Republican member of the House Judiciary Committee. Mr. McCulloch subsequently repudiated them both when a thorough study convinced him that they were unconstitutional and unjust. When (then Acting) Attorney General Richard Kleindienst came to testify before the House Judiciary Committee in favor of the bills, McCulloch declared:

It is with the deepest regret that I sit here today to listen to a spokesman for a Republican Administration asking the Congress to prostitute the courts by obligating them to suspend the equal protection clause (of the Constitution) so that Congress may debate the merits of further slowing down and perhaps even rolling back desegregation in public schools.

He asked the witness: "What message are we sending to our black people? Is this any way to govern a country? Is this any way to bring peace to a troubled land?" AFL-CIO News, April 15, 1972, at 6, col. 4.

transport a student who was not being transported immediately prior to the entry of the court order.⁵

The other Nixon bill was styled as one "[t]o further the achievement of equal educational opportunities."⁶ On the positive side, it declares that all children enrolled in public schools "are entitled to equal educational opportunity without regard to race, color, or national origin,"⁷ and then it authorizes the Secretary of Health, Education, and Welfare (HEW) and the Commissioner of Education to concentrate federal funds on "basic instructional services and basic supportive services for educationally deprived students."⁸ It declares that "the neighborhood is an appropriate basis for determining public school assignments,"⁹ and then it imposes certain limitations on the powers of the federal courts to remedy racially discriminatory school assignments and plans that are in violation of the equal protection clause of the fourteenth amendment. For those in the sixth grade and below, the proposed bill provides that "no court" shall implement a plan to end segregation that will increase "the average daily number of students" transported, the "average daily distance to be traveled," or the "average daily time of travel" over the comparable average for the preceding school year.¹⁰

Concerning those in the seventh grade and above, the proposed law provides that "no court" shall remedy a segregated plan of education with busing provisions that increase the average number of students transported, the average daily distance traveled, or the average daily time of travel, unless other techniques have been tried and found wanting.¹¹ These other techniques include free transfer of students from a school in which students of their race comprise a majority to a school in which their race is a minority; the revision of attendance zones or grade structures, if this can be done without increasing the transportation of students; the construction of new schools and the closing of inferior schools; and the establishment of magnet schools or educational parks.¹²

⁵H.R. 13916, 92d Cong., 2d Sess. § 3(a) (1972). The moratorium was to begin the day after the enactment of the bill and was to terminate either on July 1, 1972, or on the date of enactment of the companion bill, whichever was earlier.

⁶H.R. 13915, 92d Cong., 2d Sess. (1972).

⁷*Id.* § 2(a)(1).

⁸*Id.* § 101(a)(2).

⁹*Id.* § 2(a)(2).

¹⁰*Id.* § 403(a). (It has been the personal experience of one of the authors, who is the father of three children, that integration is easier and more effective at the first grade level than when it occurs at either the junior or senior high-school level.)

¹¹*Id.* § 403(b).

¹²*Id.* § 402.

There is one other notable limitation on the courts: they are not to ignore or alter a school district line "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."¹³

So much for the "bare bones" of the proposed laws. Flesh was added at a White House Conference on March 17 when the highest administration officials "briefed" the press on the President's proposed laws.¹⁴ Several items are of interest. The first is that the Administration sent the bills to Congress for enactment without studying the legal implications. The proposal law would curtail the power of the federal courts to implement their judgments, and a reporter asked, "Is there a precedent in case law for this kind of action?"¹⁵ Attorney General (then Acting Attorney General) Richard G. Kleindienst replied in the negative. He said, "There is no precedent in exactly this kind of situation" The only analogy he could offer was that of the National Labor Relations Act, by which Congress had limited the remedies available to the National Labor Relations Board "to apply between employees and employers in representation [*sic*]."¹⁶

The second item of interest is that the Administration sent the bills to Congress without any study of the factual need for the proposed laws. Administrative officials were asked, "How much busing is going on now for the purpose of desegregation . . . ?"¹⁷ Wilnot Hastings, General Counsel of HEW, replied: "[W]e don't have any breakdown. . . . We have no data on miles, distance, or times, the breakdown, or what the relative amount of desegregation busing and nondesegregation busing amounts to."¹⁸

¹³*Id.* § 404.

¹⁴Representing the Administration were John D. Ehrlichman, Assistant to the President for Domestic Affairs; George P. Schultz, Director of the Office of Management and Budget; Elliot L. Richardson, Secretary of the Department of Health, Education, and Welfare; and Richard G. Kleindienst, (then Acting) Attorney General; and several members of their respective staffs. White House Press Release, March 17, 1972, at 1 [hereinafter cited as Press Release].

¹⁵*Id.* at 9.

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Id.* One can then only question the "findings" in § 2(a) of the proposed Moratorium bill: "For the purpose of desegregation, many local educational agencies have been required to reorganize their school systems, to reassign students, and to engage in the extensive transportation of students. . . . [T]hese reorganizations, with attendant increases in student transportation, have caused substantial hardship to the children thereby affected" H.R. 13916, 92d Cong., 2d Sess. §§ 2(a)(1)-(2) (1972).

The third item of interest is the political nature of the proposal. A reporter asked: "If, as the experts have testified here, we do not even know the extent of busing involved in the desegregation process, then what is the hard evidence that supports a Presidential call for a moratorium on busing."¹⁹ John D. Ehrlichman, Assistant to the President for Domestic Affairs, answered this one:

"I think you have come from some other planet not to be able to answer that question. Every place that you go around this country . . . this is the front burner issue in most local communities. . . .

Now, that is the evidence. It carries by such a preponderance that it cannot just be swept under the rug by some sort of statistical evasion."²⁰

The fourth item is that the President's proposals turn the clock back to 1896, the year in which the Supreme Court announced the "separate but equal" doctrine in *Plessy v. Ferguson*.²¹ A reporter asked: "Why is this not a return to separate but equal; if the moratorium on busing stops future busing plans and the financing of inner city schools encourages and develops those schools."²² Another reporter asked how the courts could end segregated education "without some form of transportation, since the facts of life are that blacks and whites don't live together."²³ The reply of Dr. Schultz, then Director of the Office of Management and Budget, can be reduced to this one sentence: "There is no necessary reason why one must desegregate everything."²⁴ But the equal education under the proposed laws will be not only separate but also unequal. Secretary Elliot Richardson of HEW told the reporters that the Administration was not asking for any funds for schools other than the amounts theretofore sought under earlier laws;²⁵ Dr. Shultz implied that there is no new money involved²⁶ and added that there were no present plans to ask for future additional funds with which to upgrade the quality of the inner-city schools.²⁷

The purpose of this article is not to comment further on any aspects

¹⁹Press Release at 24.

²⁰*Id.*

²¹163 U.S. 537 (1896).

²²Press Release at 16.

²³*Id.* at 24.

²⁴*Id.*

²⁵*Id.* at 7.

²⁶*Id.* at 12.

²⁷*Id.* at 20.

of the proposed bills, other than the constitutional issue of congressional control over the courts. But first, some retracing of recent history is necessary to know how we arrived at where we now stand.

THE 1954 BROWN DECISION AND CONSEQUENT STATE EFFORTS TO CURB THE FEDERAL COURTS

Until 1954, the District of Columbia and some seventeen states required a dual segregated system of public education, and four additional states permitted segregation on a local-option basis.²⁸ The legal justification for a segregated school system rested on an analogy to the 1896 decision in *Plessy v. Ferguson*,²⁹ in which the Supreme Court had sustained the constitutionality of a Louisiana statute requiring separate but equal accommodations for white and black railroad passengers.

In 1954, the issue of segregated public schools was brought to the Supreme Court in five different cases that arose in Kansas, South Carolina, Virginia, Delaware, and the District of Columbia. In *Brown v. Board of Education*,³⁰ a unanimous Court refused to "turn the clock back . . . to 1896 when *Plessy v. Ferguson* was written"³¹ and held that the forced segregation of Negro school children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."³² The Court concluded that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."³³

The first shoe was dropped.³⁴ But "because of the great variety of local conditions"³⁵ involved in the five cases before it, the Supreme

²⁸Pollitt, *Equal Protection in Public Education: 1954-61*, 47 AAUP BULL. 197, 198 (1961).

²⁹163 U.S. 537 (1896).

³⁰347 U.S. 483 (1954).

³¹*Id.* at 492.

³²*Id.* at 494.

³³*Id.* at 495.

³⁴The general initial reaction was one of resigned acceptance. The Governor of West Virginia immediately announced that his state would abide by the *Brown* decision. Governor Cherry said: "Arkansas will obey the law—It always has." Governor Whetherby announced that "Kentucky will do whatever is necessary to comply with the law." Oklahoma's Governor Raymond Gary warned that the school boards then contemplating defiance would get no aid or comfort from him; and similar statements were issued by the Governors of Virginia, North Carolina, and other southern states. See Pollitt, *supra* note 23, at 200-01 & n.30.

³⁵347 U.S. at 495.

Court put off the task of issuing an order until it could hear the views of all the parties (and interested intervenors) as to the appropriate next step. In 1955 the order came down.³⁶ The Court recognized that the termination of a segregated school system "may require solution of varied local school problems" and that the local school boards had the best knowledge and therefore the primary responsibility to resolve these problems.³⁷ Accordingly, the Supreme Court remanded the cases to the courts in which they had originated, with instruction that the local courts require the local school boards to "make a prompt and reasonable start" toward ending segregation and that the local courts maintain jurisdiction to ensure the admission of Negro students to the public schools on a racially nondiscriminatory basis "with all deliberate speed."³⁸

By then, resistance in some quarters had mounted to a fever pitch. Mob violence erupted when Autherine Lucy sought to enroll at the University of Alabama,³⁹ when James Meredith attempted to enroll at the University of Mississippi,⁴⁰ and when nine black students enrolled at the "white" high school in Little Rock, Arkansas. Governor Faubus put the Little Rock school "off limits" to "colored" students, ugly crowds drove the black children away,⁴¹ and President Eisenhower dispatched federal troops to enforce the federal court "desegregation" order.⁴² The resulting "chaos, bedlam and turmoil" was cited as justifying a postponement of the school integration,⁴³ but the Supreme Court said "no." The Court ruled as follows:

³⁶Brown v. Board of Educ., 349 U.S. 294 (1955).

³⁷*Id.* at 299. Contrast the proposal of President Nixon that the Congress "specify appropriate remedies for the elimination of the vestiges of dual school systems" throughout the land, wherever they exist. H.R. 13915, 92d Cong., 2d Sess. § 3(b) (1972).

³⁸349 U.S. at 300-01.

³⁹Pollitt, *supra* note 23, at 201.

⁴⁰James Meredith was not the first black to attempt enrollment at the University of Mississippi. Clennon King was the first. He was arrested while standing in line at the administration building and taken to a nearby state mental hospital for examination. Clyde Kennard was the second. He was arrested and later convicted of reckless driving as he approached the administration building. The first Negro to apply for admission to the University of Georgia was suddenly inducted into the Army, despite previous exemption due to physical disability; and another, after nine years of litigation and a Supreme Court decision in his favor, discovered that he was unable to qualify for admission to the University of Florida Law School under recently enacted admission standards. Pollitt, *supra* note 23, at 201.

⁴¹Cooper v. Aaron, 358 U.S. 1, 9-12 (1958).

⁴²See Pollitt, *Presidential Use of Troops to Execute the Laws: A Brief History*, 36 N.C.L. Rev. 117 (1958).

⁴³358 U.S. at 12-13.

The constitutional rights of [Negro school children] are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor

. . . [T]he constitutional rights of children not to be discriminated against in school admission on grounds of race or color . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."⁴⁴

And there were indeed many schemes, ingenious and ingenuous, to thwart the Supreme Court school integration decisions. First came the "interposition" or shocked-indignation statutes. In the legislative sessions of 1956 and 1957, some nine Southern states enacted interposition resolutions. Although they varied in detail, all condemned the *Brown* decision as an unconstitutional usurpation of legislative authority by the Courts, and all called for the state to "interpose" itself between the state citizens and the federal courts.⁴⁵ In 1960, the Supreme Court agreed with the federal district court in New Orleans that "interposition is not a constitutional doctrine. If taken seriously, it is an illegal defiance of constitutional authority."⁴⁶

Then came a number of efforts, like the current Nixon proposals, designed to "curb" the federal courts in the area of school desegregation. First were the "get the judges" proposals. Since it was the federal courts that had ended segregated education (neither the Congress nor the President had taken any steps in this direction), the "logical" move by segregationists was to cleanse the courts of the "misguided" judges. "Impeach Earl Warren" signs appeared all over the South, and Georgia lead the way with a legislative resolution calling upon Congress to initiate impeachment proceedings against all the Justices of the Supreme Court.⁴⁷

There was a parallel move to limit or eliminate entirely the power of the federal courts to rule on school segregation matters. Florida proposed a constitutional amendment that would have made all Su-

⁴⁴*Id.* at 16-17.

⁴⁵Pollitt, *supra* note 23, at 201. Compare the preamble of the Nixon Moratorium bill: "There is a substantial likelihood that . . . many local educational agencies will be required [by the courts] to implement desegregation plans that impose a greater obligation than required by the fourteenth amendment" H.R. 13916, 92d Cong., 2d Sess. § 2(a)(5) (1972).

⁴⁶*United States v. Louisiana*, 363 U.S. 1 (1960).

⁴⁷See Pollitt, *supra* note 23, at 202.

preme Court decisions in this area reviewable by the United States Senate.⁴⁸ Senator Eastland of Mississippi introduced legislation to deprive the Supreme Court of its appellate jurisdiction to hear school desegregation cases. This bill was defeated in the Senate by the narrow margin of forty-one to forty.⁴⁹

There were a number of additional efforts to prevent the federal courts from exercising jurisdiction. Louisiana "withdrew" its consent to be sued without prior legislative approval of each proposed law suit. Alabama declared that school boards are "judicial" bodies and, ergo, are immune from suit. Arkansas, Georgia, Louisiana, Texas, and Virginia authorized their governors to "seize and operate" the various school systems, with the hope and expectation that a suit against the governor would be considered to be a suit against the state and hence beyond the jurisdiction of the federal courts under the eleventh amendment.⁵⁰

"Barratry" and "champerty" laws were enacted to disbar the attorneys who filed school integration suits,⁵¹ and companion laws were passed to "get" the NAACP, which generally financed the law suits. These latter laws took many forms. Some required the discharge from state employment of all those who belonged to or contributed to the NAACP.⁵² Others merely required the public disclosure of all members and contributors, with the hope and expectation that public pressure would do the job.⁵³ State sovereignty commissions, un-American activities committees, commissions on education, and similar state agencies were established to investigate "racial activities."⁵⁴ The chairman of the Virginia committee announced that his investigations would be devastating to the NAACP, would "'bust that organization . . . wide open,'" and could be used to keep the NAACP out of litigation, which is the heart of the organization.

But the federal courts, with the total support of the Supreme Court, stood firm in the face of this state legislative onslaught. All the above,

⁴⁸*Id.*

⁴⁹*Id.*; see Pollitt, *Should the Supreme Court be Curbed? A Presentation of Civil Liberties Decisions in the 1957-58 Term*, 37 N.C.L. REV. 17 (1958).

⁵⁰Pollitt, *supra* note 23, at 202.

⁵¹See, e.g., *NAACP v. Button*, 371 U.S. 415 (1963).

⁵²See, e.g., *Shelton v. McKinley*, 174 F. Supp. 351 (E.D. Ark. 1959).

⁵³See, e.g., *Shelton v. Tucker*, 364 U.S. 479 (1960).

⁵⁴See, e.g., *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963).

⁵⁵*Scull v. Virginia*, 359 U.S. 344, 347 (1959).

and similar schemes for defeating the orderly processes of school desegregation, were declared unconstitutional. And, with the passage of time, the Supreme Court began to press for results.

In 1964 the Supreme Court ruled that "[t]he time for more 'deliberate speed' has run out"⁵⁶ In 1968 it ruled that "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."⁵⁷ In October 1969 it ruled that "the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."⁵⁸ In December 1969 the Supreme Court denied two requests for more delay, because "[t]he burden on a school board is to desegregate an unconstitutional dual system at once."⁵⁹

⁵⁶*Griffin v. County School Bd.*, 377 U.S. 218, 234 (1964). This case involved Prince Edward County, Virginia, one of the defendants in the 1954 *Brown* decision. After that adverse opinion, the county officials had closed the public schools and had contributed public support to "private" segregated white academies, leaving the black population substantially without any educational opportunities. The Court ordered the local school board to reopen the public schools and to cease giving financial assistance to the parents of the white children attending the "private" schools. .

⁵⁷*Green v. County School Bd.*, 391 U.S. 430, 439 (1968) (emphasis by the Court). Here, the Supreme Court held that a "freedom of choice" plan that allows the individual pupil to choose his own public school does not constitute adequate compliance with the decision in *Brown v. Board of Educ.* There were two schools in the county and no attendance zones. Under the "freedom of choice" plan, all the white children chose the school formerly restricted to whites, and all but a handful of the black children selected the school formerly restricted to blacks. The Court ordered the school board "to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." 391 U.S. at 442.

⁵⁸*Alexander v. Holmes County Board of Educ.*, 396 U.S. 19 (1969) (per curiam). In early July, the court of appeals ordered a number of Mississippi school systems to desegregate by the opening of the coming school year. In late August, the Department of Justice (on the recommendation of the Secretary of the Department of Health, Education, and Welfare) moved the court of appeals to delay the date of the integration order, and the court of appeals did so. See *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 1218 (Black, Circuit Justice, 1969). The Supreme Court reversed and directed the school systems "immediately to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color." 396 U.S. at 20.

⁵⁹*Dowell v. Board of Educ.*, 396 U.S. 269, 270 (1969) (per curiam); accord, *Carter v. West Feliciana Parish School Bd.*, 396 U.S. 226 (1969) (per curiam). In *Carter*, the court of appeals on December 1, 1969, ordered certain plans for the desegregation of three Louisiana school districts but postponed the effective date of the plans until the school year of 1970-71. The Supreme Court reversed and ordered the plans implemented by February 1, 1970. In *Dowell*, the district court on August 13, 1969, ordered the revision of some school attendance boundaries by September 2, 1969. On August 27 the court of appeals reversed the "partial plan." The Supreme Court in turn reversed the court of appeals because the school board must "desegregate an unconstitutional dual system at once." 396 U.S. at 270 (emphasis added).

In *Keyes v. School Dist. Number One*, 396 U.S. 1215 (1969), the court of appeals had postponed a desegregation order "on the premise that public support for the plan might be developed" during the period of delay. *Id.* at 1217. Mr. Justice Brennan, sitting as a Circuit Justice,

To comply with these decisions it is sometimes necessary to order that the children living in one segregated neighborhood attend schools located in a different neighborhood. This requires transportation, or busing. The constitutionality of this judicial remedy was decided for the first time in a series of cases decided in the spring of 1971.

THE 1971 BUSING CASES

In his television address of March 16, 1972, President Nixon came out against "busing children across a city to an inferior school just to meet some social planner's concept of what is considered to be the correct racial balance."⁶⁰ He also inveighed against "social planners who insist on more busing even at the cost of better education."⁶¹ Earlier, he had told the nation that "I am opposed to the busing of children simply for the sake of busing."⁶²

The implication in these statements is that the federal courts—from Chief Justice Burger on down—approved of busing "for the sake of busing," that the Supreme Court and the lower federal courts had embarked upon a massive busing program to achieve "racial balance" in each and every classroom throughout the nation. Nothing could be more erroneous.

In April 1971 Chief Justice Burger wrote three decisions, in which all members of the Supreme Court agreed, dealing with various and different "busing" problems. But nowhere in any of these opinions did the Court say anything directly or remotely to justify the implications in the President's broadside.

In *Swann v. Charlotte-Mecklenburg Board of Education*,⁶³ the district judge had ordered that all schools have approximately the same racial balance "so that there will be no basis for contending that one

reversed. Citing the Little Rock case, *Cooper v. Aaron*, 358 U.S. 1 (1958), he said that "the desirability of developing public support for a plan designed to redress *de jure* segregation cannot be justification for delay" 396 U.S. at 1217.

⁶⁰Stone, *Moving the Constitution to the Back of the Bus*, New York Review of Books, April 20, 1972, at 10.

⁶¹N.Y. Times, March 17, 1972, at 22, col. 1.

⁶²This was on August 3, 1971, when he announced at a press conference that he had asked the Secretary of HEW to submit to Congress an amendment to the proposed Emergency School Assistance Act that would "expressly prohibit expenditure of any of those funds for busing." N.Y. Times, Aug. 4, 1971, at 15, col. 3. The Emergency School Assistance Act authorized the expenditure of \$1.5 billion to aid and assist in the process of achieving a "unitary" school system. *Id.*

⁶³306 F. Supp. 1299, 1312 (W.D.N.C. 1969).

school is racially different from the others.”⁶⁴ He also ordered that the children beyond walking distance be “bused” to their new schools. The Supreme Court unanimously approved of this “plan” under the particular situation existing in that city, stating that “[a]wareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations.”⁶⁵

In the companion case of *McDaniel v. Barresi*,⁶⁶ the Board of Education of Clarke County, Georgia (not the federal court) established geographic zones for the elementary schools, with the proviso that pupils in Negro residential “pockets” were to be bused to schools in other attendance zones. The resulting Negro enrollment ranged from twenty to forty percent in all but two schools, in which it was fifty percent. The white-black ratio in the system as a whole was approximately two to one. The Supreme Court also unanimously approved this plan because of the particular situation existing in that county.

In neither case did the Supreme Court approve fixed “racial quotas.” In the *Swann* case, it approved the “norm” of a 71-29 white-to-black ratio in all the schools, but only as a “starting point” to end segregation. The Court expressly noted that had the district court required “as a matter of substantive constitutional right, any particular

⁶⁴Charlotte had segregated residential patterns that had resulted in part from federal, state, and local governmental action. Prior to *Brown* Charlotte had a segregated dual school system. After *Brown* Charlotte embarked upon a school construction program, locating a series of small elementary schools deep within the different residential zones. In 1966, Charlotte abandoned its dual school system and assigned children to the school nearest their homes under a free transfer program. The result was that two-thirds of the Negro students attended 21 schools that were either totally or more than 99% black. The faculties and the school buses were equally segregated.

Judge McMillan ordered school assignment on a “satellite zone” basis. One black inner-city school was grouped with two or three white outlying schools; children from grades one through four were assigned to the outlying schools; and children in grades four through six were assigned to the inner-city schools. The Supreme Court approved of these gerrymandered school districts and attendance zones:

Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such 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).

⁶⁵*Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971).

⁶⁶402 U.S. 39 (1971).

degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does *not* mean that every school in every community must always reflect the racial composition of the school system as a whole."⁶⁷

In both of these cases, the Supreme Court approved of the busing of some school children because "[d]esegregation plans cannot be limited to the walk-in school."⁶⁸ But the Supreme Court again was careful to note that there might well be limits imposed on future busing plans. The Court expressly warned the lower courts that "[a]n objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process."⁶⁹ The Court then added: "It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students."⁷⁰

To underscore and emphasize this point, the Supreme Court noted the "busing" situation in each of the two cases before it. Under the new desegregation plan in Clarke County, "[t]he annual transportation expenses of the present plan are reported in the record to be \$11,070 *less* than the school system spent on transportation during the 1968-1969 school year under dual [segregated] operation."⁷¹ Under the new desegregation plan in Charlotte-Mecklenburg,

[t]he trips for elementary school pupils average about *seven miles* and the District Court found that they would take "not over *35 minutes* at the most." This system compares favorably with the transportation plan previously operated in Charlotte under which each day 23,600 students on all grade levels were transported an average of *15 miles* one way for an average trip requiring *over an hour*.⁷²

It was because of "these circumstances" that the Supreme Court affirmed the use of "bus transportation as one tool of school desegregation."⁷³

More germane to this article, however, are the Court holdings

⁶⁷402 U.S. at 24 (emphasis added).

⁶⁸*Id.* at 30.

⁶⁹*Id.* at 30-31.

⁷⁰*Id.* at 31.

⁷¹402 U.S. at 40 n.2.

⁷²402 U.S. at 30 (emphasis added) (footnote omitted).

⁷³*Id.*

regarding the "broad remedial powers of a court" in school desegregation cases to order "interim corrective measures."⁷⁴

The litigation in the *Swann* case began in the spring in 1969, and the district court then ordered the school board to consider a plan that included elements of "busing." The North Carolina General Assembly promptly enacted an "Anti-Busing Law."⁷⁵ This statute prohibited the local schools boards from doing any of three things: It provided that "[n]o student shall be assigned or compelled to attend any school on account of race . . .," that no student shall be assigned to any school "for the purpose of creating a balance or ratio of race," and that "[i]nvoluntary busing of students in contravention of this article is prohibited"⁷⁶ In *North Carolina State Board of Education v. Swann*,⁷⁷ the Chief Justice ruled for a unanimous Supreme Court that the state law was unconstitutional because "it operates to hinder vindication of federal constitutional guarantees."⁷⁸

The Supreme Court concluded that the prohibition against school assignments on the basis of race "against the background of segregation"⁷⁹ in this case could not withstand constitutional challenge; otherwise it "would render illusory the promise of *Brown v. Board of Education*."⁸⁰ The Court concluded on this point that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."⁸¹ To compel school authorities to be "color blind" and ignore factors of race would deprive them "of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems."⁸² The Court similarly concluded that the "prohibition against transportation of students assigned on the basis of race" will hamper the ability "to effectively remedy constitutional violations," for "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."⁸³

⁷⁴*Id.* at 27.

⁷⁵Ch. 1274, [1969] N.C. Sess. L. 1495.

⁷⁶N.C. Gen. Stat. § 115-176.1 (Supp. 1971).

⁷⁷402 U.S. 43 (1971).

⁷⁸*Id.* at 45.

⁷⁹*Id.*

⁸⁰*Id.* at 46.

⁸¹*Id.*

⁸²*Id.*

⁸³*Id.*

In *McDaniel v. Barresi*,⁸⁴ it was similarly argued by those opposing the school integration that the fourteenth amendment required that the school authorities be "color blind" in making school assignment. The Supreme Court answered as follows: "The Clarke County Board of Education, as part of its affirmative duty to disestablish the dual school system, properly took into account the race of its elementary school children in drawing attendance lines. . . . Any other approach would freeze the status quo that is the very target of all desegregation processes."⁸⁵

The short of the matter is that the Supreme Court in the three cases held that a "busing" order is the "one tool" available to the federal courts that is "absolutely essential" for the vindication of constitutional rights. The question thus posed is whether the Congress can, consistent with the constitutional concept of separation of powers, deprive the courts of this essential remedial device.

THE ESSENTIALITY OF REMEDIES TO THE JUDICIAL PROCESSES

At the White House Press Conference on March 17, the administration officials denied that the proposed "moratorium" on busing orders would undermine the constitutional right of black children not to be sent to segregated schools. They sought to distinguish between the "constitutional right" and the remedies for establishing this right.

A reporter asked: "The court has set a standard under *Swann* which it deems to be constitutional. Now, are you saying that what Congress should ordain is something less than what *Swann* declared?"

⁸⁴402 U.S. 39 (1971).

⁸⁵*Id.* at 41. In *Swann*, those opposed to the integration order argued that the "busing" was prohibited by Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c, which provides in part that "nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils" 42 U.S.C. § 2000c-6. The Supreme Court rejected this argument, and said:

There is no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers. The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called "de facto segregation," where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action by state authorities. In short, there is nothing in the Act which provides us material assistance in answering the question of remedy for state-imposed segregation in violation of *Brown I*. The basis of our decision must be the prohibition of the Fourteenth Amendment that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

402 U.S. at 17-18.

Would it be constitutional then?"⁸⁶ White House Counsel Edward L. Morgan replied as follows: "We are saying that Congress has the power, under the substantive legislation, to define the limitations on the remedy. We are not in any way attacking the constitutional right."⁸⁷

This attempt to distinguish between "rights" and "remedies" is subterfuge at best. A right without a remedy is like a bell without a clapper: an empty promise demeaning to the judge, breeding cynicism and disrespect for the processes of the law. This attempted dichotomy has no place in our constitutional heritage. To the contrary, the opposite has been the law since (and was even before) the landmark decision by Chief Justice John Marshall in *Marbury v. Madison*.⁸⁸

On the very eve of his administration, President Adams appointed a number of "midnight" judges. One of them was William Marbury, who was appointed to a minor judicial office in the District of Columbia. But in the rush and confusion, the "commission" of Marbury was not delivered to him prior to the time President Jefferson took office. It was found in the Department of State, already signed and sealed, and Secretary of State Madison refused to deliver it. Marbury brought suit to compel its delivery, and the Supreme Court first held that he had a lawful right to it. The Court then moved on to "the second inquiry," which it stated as follows: "If he has a right, and that right has been violated, do the laws of his country afford him a remedy?"⁸⁹ Chief Justice Marshall answered emphatically in the affirmative: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."⁹⁰ The Chief Justice then added: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for a violation of a vested legal right."⁹¹

Both before and ever since the 1803 decision in *Marbury v. Madison* the Supreme Court has ruled that the power to issue a remedial order is an essential ingredient of the "judicial" power of the United States.

⁸⁶Press Release: *supra* note 14, at 18.

⁸⁷*Id.* (emphasis added).

⁸⁸5 U.S. (1 Cranch) 137 (1803).

⁸⁹*Id.* at 162.

⁹⁰*Id.* at 163.

⁹¹*Id.*

On several occasions, unforeseen and unforeseeable circumstances deprived the Supreme Court of power to issue a judgment it deemed appropriate, and on these occasions the Supreme Court refused "to proceed to judgment"⁹² because its judgment "would be incomplete and ineffectual."⁹³

On other occasions, an Act of Congress rendered the judgments of the courts "incomplete and ineffectual," and on these occasions the courts were quick to call a halt. The issue arose as early as 1792. In that year the Congress enacted a "pension" law for the benefit of widows and orphans of the Revolutionary War veterans.⁹⁴ It directed the courts of the United States to hear the claims and determine the appropriate pensions. *But*, the courts were directed to certify their decisions to the Secretary of War, who was authorized to pay or to refuse payment in his discretion.

The Supreme Court refused to have anything to do with the claims, because the power given to the courts by the Pension Act was "not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional."⁹⁵ Mr. Chief Justice Jay noted that "the government . . . is divided into *three* distinct and independent branches and that it is the duty of each to abstain from, and to oppose, encroachments on either."⁹⁶ He concluded that since the Congress authorized the Secre-

⁹²Hunt v. Palao, 45 U.S. (4 How.) 589, 590 (1846). This case was an appeal to the Supreme Court from the Territorial Court for the Territory of Florida. While the appeal was pending, Florida became a state and the territorial court was abolished. Mr. Chief Justice Taney dismissed the appeal out of hand, because "there is no tribunal to which we are authorized to send a mandate to proceed further in the case, or to carry into execution the judgment which this court may pronounce." *Id.*

⁹³McNulty v. Batty, 51 U.S. (10 How.) 72, 80 (1850). Here, the case was on appeal to the Supreme Court from the Territorial Court in the Territory of Wisconsin. Pending appeal, Wisconsin became a state and the territorial court was abolished. The Court dismissed the appeal "because there is no court in existence to which the mandate of this court could be sent to carry into effect our judgment. Our power, therefore, would be incomplete and ineffectual, were we to consent to a review of the case." *Id.*

⁹⁴Act of March 23, 1792, ch. 11, 1 Stat. 243.

⁹⁵This quote is from a note appended to the opinion in *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52, 53 (1851), which summarizes the results of *United States v. Todd*, a 1792 case unreported at the time, and the opinions expressed by the justices of the Supreme Court in the note to *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792).

⁹⁶*Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792) (emphasis in original). The Supreme Court made no decision in *Hayburn's Case*, but the opinions of the judges of the Circuit Courts of New York, Pennsylvania, and North Carolina are given in a note. These judges consisted of at least one Supreme Court Justice per circuit. See *United States v. Ferreira*, 54 U.S. (13 How.) 40, 49-50 (1851).

tary of War to review the decisions of the courts, the power given the courts by the Pension Act was not "judicial." Mr. Justice Iredell added that

the Legislative, Executive and Judicial departments, are each formed in a separate and independent manner

. . . .

. . . .

. . . [N]o decision of any court of the United States can, under any circumstances . . . agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments.⁹⁷

Mr. Justice Wilson added that "[i]t is a principle important to freedom that in government, the *judicial* should be distinct from, and independent of, the legislative department."⁹⁸ He wrote that the Pension Act reservation of power in the legislature to revise and control the "judgments" of the judiciary was "radically inconsistent with the independence of that judicial power which is vested in the courts."⁹⁹

On the few subsequent occasions when Congress sought to regulate or control the judgments of the Supreme Court, the legislative interference was declared to be unconstitutional.¹⁰⁰ Thus, in *Gordon v. United States*¹⁰¹ Congress had by special statute retained the right to refuse to pay the judgments issued by the Supreme Court, and as a consequence the Court refused to hear any cases arising under the statute. Mr. Chief Justice Taney explained that "[t]he award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power"¹⁰² and that the Constitution confers no authority "to the legislative or executive departments to interfere with [the] judgments or processes of execution" of the Supreme Court.

It appears from all the sources, then, that the issuance of remedial orders is an integral part of the judicial process, and if the courts are to act at all, their judgments are immunized from Congressional control. That moves us on to the next question: Does Congress have constitu-

⁹⁷2 U.S. (2 Dall.) at 412-13 (emphasis added).

⁹⁸*Id.* at 411 (emphasis in original).

⁹⁹*Id.*

¹⁰⁰*See, e.g.,* *Muskrat v. United States*, 219 U.S. 346 (1911); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851).

¹⁰¹117 U.S. 697 (1864).

¹⁰²*Id.* at 702.

tional authority to deny the federal courts the power to hear and decide busing cases?

CONGRESSIONAL CONTROL OVER THE APPELLATE JURISDICTION OF THE SUPREME COURT

President Nixon's proposed Equal Educational Opportunities Bill provides that "no court" shall order the implementation of a desegregation plan that requires an increase in the number of children "bused" to school.¹⁰⁴ This language, if enacted into law, would prohibit the Supreme Court from issuing the type of order it issued last spring in the *Swann* opinion.

At the Press Conference on March 17, (then Acting) Attorney General Kleindienst was asked if there were any precedent for this kind of action, and he replied in the negative.¹⁰⁵ However, he might have cited the immediate post-Civil War period when the Reconstruction Congress sought to twist the Supreme Court appellate jurisdiction for political objectives. In order to understand properly that turn of events some background is helpful, for the matter is somewhat technical and complicated.

The Constitution provides that the "judicial Power" of the United States shall extend to eight categories of cases: to those affecting ambassadors and other public ministers; to those arising under the Constitution; to those in which the United States shall be a party; to those between citizens of different states; and so on.¹⁰⁶ The Constitution also provides for two categories of courts: "one supreme Court," and such "inferior Courts" as Congress may from time to time ordain and establish.¹⁰⁷

The Constitution provides that the two most important categories of cases (those "affecting Ambassadors" and those "in which a State shall be a Party") are to be tried originally in the Supreme Court and that "in all other Cases" (the other six categories) the Supreme Court shall have "appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*"¹⁰⁸

The question here, of course, is whether the power given Congress

¹⁰³*Id.* at 700.

¹⁰⁴H.R. 13915, 92d Cong., 2d Sess. § 403 (1972).

¹⁰⁵*See* text accompanying note 16 *supra*.

¹⁰⁶U.S. CONST. art. III, § 2.

¹⁰⁷U.S. CONST. art. III, § 1.

¹⁰⁸U.S. CONST. art. III, § 2 (emphasis added).

to make "exceptions" and "regulations" includes the power to deny entirely the right to appeal a case in which constitutional rights are allegedly denied the litigant.

So much for the constitutional background of the post-Civil War cases. The statutory background is equally complicated and technical. It involves at least three separate but interrelated laws: one was enacted in 1789, a second in 1867, and the third in 1868.

In 1789 Congress enacted a Judiciary Act and authorized the lower federal courts to decide (by way of a writ of habeas corpus) the legality of the imprisonment of those confined under the "authority of the United States."¹⁰⁹ If the lower court affirmed the legality of the imprisonment and dismissed the writ of habeas corpus, the one held in custody could appeal this decision to the Supreme Court. But the appellate process was not spelled out or generally known; in fact it was described as being "attended by some inconvenience and embarrassment."¹¹⁰

In 1867, Congress amended the 1789 Habeas Corpus Act in two major respects:¹¹¹ first, it authorized the lower federal courts to hear the cases of those confined under both federal *and* state authority; secondly, it expressly provided for an appeal to the Supreme Court and spelled out the processes therefor. This brings us to the facts of the first case.

During Reconstruction, when the Southern states were under military occupation, a Mississippi editor named McCardle was an "unreconstructed rebel." He published in the *Vicksburg Times* an editorial that severely criticized the Yankee general in command of that area. The General arrested McCardle and held him for trial before a military tribunal on charges of inciting to insurrection, disorder, and violence. He did this under the authority granted him by the Reconstruction Acts.

McCardle filed a petition for habeas corpus with the federal court under the 1867 Habeas Corpus Act, alleging that the Reconstruction Acts were unconstitutional and therefore could not justify his incarceration. The federal circuit court dismissed his petition. McCardle appealed to the Supreme Court, again under the 1867 Habeas Corpus Act. The Government then moved to dismiss his appeal on the theory that the 1867 Habeas Corpus Act was intended to help the former slaves, not rebel editors like McCardle. The Supreme Court denied the motion

¹⁰⁹Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81.

¹¹⁰*Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 324 (1868).

¹¹¹Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

to dismiss the appeal¹¹² and heard oral argument on the merits of the case.

Congress then took an unprecedented step. Fearing that the Court might hold the Reconstruction Acts unconstitutional, Congress passed a law that expressly repealed the 1867 Habeas Corpus Act in so far as the earlier law "authorize[d] an appeal" to the Supreme Court.¹¹³ The United States for a second time moved to dismiss the appeal, this time with success.¹¹⁴

The Supreme Court held that because *McCardle* had filed his appeal under the Habeas Corpus Act of 1867, the appellate provisions of which had been expressly repealed by Congress, the Court had no option but to dismiss the case. But, the Court also pointed out quite clearly that it was error for *McCardle* to suppose that "the whole appellate power of the court, in cases of *habeas corpus*, is denied", for the repealing act of 1868 "does not except from that [appellate] jurisdiction any cases but appeals from Circuit Courts under the act of 1867," and it "does not affect the jurisdiction which was previously exercised" under the original Judiciary Act of 1789.¹¹⁵

In short, the Supreme Court in *McCardle* was not faced with the power of Congress to deny *all* appellate jurisdiction of the Supreme Court to determine important constitutional issues. All the Court held in *McCardle* was that Congress can cut off one of two or more alternate appellate routes to the Supreme Court.

Any doubts on this score were resolved by *Ex parte Yerger*,¹¹⁶ which was decided by the same Court in the same year. *Yerger*, like *McCardle*, was a civilian who, also like *McCardle*, was arrested by the military authorities in Mississippi and held for military trial. He filed a petition for a writ of habeas corpus with the federal court in Mississippi, and the writ was denied. He then filed an appeal to the Supreme Court *under the original Judiciary Act of 1789*. The United States moved to dismiss the appeal, relying as it had in *McCardle* on the 1868 "repealing" statute. The Supreme Court refused to dismiss the appeal, holding that the case was before it under the 1789 Act and that the "repealing section of the act of 1868 is limited in terms, and must be limited in effect to

¹¹²*Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 327 (1868).

¹¹³Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44.

¹¹⁴*Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869).

¹¹⁵*Id.* at 515.

¹¹⁶75 U.S. (8 Wall.) 85 (1869).

the appellate jurisdiction authorized by the act of 1867.”¹¹⁷

*United States v. Klein*¹¹⁸ arose as a result of the second and last attempt by the Reconstruction Congress to utilize the courts for political ends, and again Chief Justice Chase was quick to say no. The facts were these. In 1862 Congress declared the forfeiture of all property owned by those “aiding or abetting [the] rebellion.”¹¹⁹ This 1862 “forfeiture” law also authorized the President to grant amnesty to those who had engaged in the rebellion.¹²⁰ On December 8, 1863, President Lincoln took advantage of this option and proclaimed to certain persons a pardon and amnesty, thereby restoring all rights of property “except as to slaves” to “every such person who shall take and subscribe a prescribed oath of allegiance, and thenceforward keep and maintain said oath inviolate.”¹²¹ Under the Forfeiture Act of 1862, the Government had seized and confiscated some cotton belonging to a man named V.F. Wilson, who had “aided the rebellion.” After Lincoln’s offer of “amnesty” in 1863, Wilson took the required oath of allegiance and “kept the same inviolate”¹²² until his death. Then one Klein, who was appointed to administer Wilson’s estate, filed suit in the Court of Claims to recover the value of the seized cotton (125,000 dollars). A number of other similar suits were filed, including one by Edward Padelford that became the test case.¹²³ General Sherman had captured Savannah in December 1865 and had seized some cotton belonging to Padelford. Thereafter Padelford took the required oath of allegiance under Lincoln’s 1863 amnesty proclamation and filed suit in the Court of Claims for the return of his cotton. The Supreme Court affirmed his right to recover. This did not sit well with Congress. The idea of rebels swearing allegiance at this late stage of the war and thereby recovering their property was too much for it to accept.

The Supreme Court handed down its *Padelford* decision on April 20, 1870, and by July 12 Congress had struck back. There were to be no more decisions against the public treasury in favor of former rebels, Presidential pardon or not. Congress provided that in all suits filed to recover property held by the Government under the 1862 “seizure” law,

¹¹⁷*Id.* at 106.

¹¹⁸80 U.S. (13 Wall.) 128 (1872).

¹¹⁹Act of July 17, 1862, ch. 195, § 6, 12 Stat. 591.

¹²⁰*Id.* § 13, at 592.

¹²¹80 U.S. (13 Wall.) at 132.

¹²²*Id.*

¹²³*United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870).

if the former owner relied upon a Presidential pardon as the basis for recovery, the claim of Presidential amnesty "shall be taken and deemed in such suit . . . conclusive evidence that such person did take part in and give aid and comfort to the late rebellion . . . and the jurisdiction of the court in the case shall cease and, the court shall forthwith dismiss the suit of such claimant."¹²⁴

By the time Congress enacted this statute, Klein had won his suit (on the basis of the Presidential pardon) in the Court of Claims, and the Government had appealed to the Supreme Court. The Government then moved the Supreme Court to dismiss the case and rule against Klein because of the recently enacted Congressional statute.

The Supreme Court denied the motion. Chief Justice Chase acknowledged a general right in Congress to "confer or withhold the right of appeal"¹²⁵ to the Supreme Court from decisions of the Court of Claims. "And," continued the Chief Justice, "if this act did nothing more, it would be our duty to give it effect."¹²⁶ But the act did something more than merely withhold appellate jurisdiction—it withheld appellate jurisdiction "*as a means to an end*."¹²⁷ The Chief Justice held that this is not a legitimate "exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power"¹²⁸ of the Supreme Court.

The Chief Justice declared that "[i]t is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others."¹²⁹ He concluded that in this instance "congress [had] inadvertently passed the limit which separates the legislative from the judicial power,"¹³⁰ and he continued as follows:

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? The question seems to use to answer itself.¹³¹

¹²⁴Act of July 12, 1870, ch. 251, 16 Stat. 235.

¹²⁵80 U.S. (13 Wall.) at 145.

¹²⁶*Id.*

¹²⁷*Id.* (emphasis added).

¹²⁸*Id.* at 146.

¹²⁹*Id.* at 147.

¹³⁰*Id.*

¹³¹*Id.*

As a separate and additional reason for its refusal to dismiss the case, the Court pointed out that the act of Congress also intruded upon the constitutional power of the President to grant pardons. It said:

To the executive alone is intrusted the power of pardon . . .

. . . [T]he legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and to treat them as null and void. . . . This certainly impairs the executive authority and directs the courts to be instrumental to that end.

We think it unnecessary to enlarge. The simplest statement is the best.¹³²

Had the Chief Justice thought it necessary to enlarge, he might have added that the judicial branch of the government is charged with the power and obligation to ensure that the other branches of government are kept within the limits set by the Constitution. This was decided as early in our history as 1803 in the famous case of *Marbury v. Madison*.¹³³ There, Chief Justice John Marshall had to decide what to do when an act of Congress went one way¹³⁴ and the Constitution went a different way.¹³⁵ He had no problem. He wrote that "[i]t is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it"¹³⁶ Equally significant was his follow-up: "It is emphatically the province and duty of the judicial department to say what the law is."¹³⁷ He explained that were it otherwise, were the courts impotent to act when the Congress overstepped the constitutional limits, the Constitution would give "to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits";¹³⁸ were it otherwise, it would reduce

¹³²*Id.* at 147-48.

¹³³5 U.S. (1 Cranch) 137 (1803). See text accompanying notes 88-91 *supra* for a discussion of a different aspect of *Marbury*.

¹³⁴Congress provided by law that the Supreme Court would have *original* jurisdiction to issue writs of mandamus to those holding office under the authority of the United States. Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 80.

¹³⁵The Constitution provides that the Supreme Court shall have *original* jurisdiction only in two categories of cases, those affecting ambassadors and those in which states shall be a party. U.S. CONST. art. III, § 2. It does not say that the Supreme Court would have *original* jurisdiction to issue writs of mandamus to those holding office under the authority of the United States.

¹³⁶5 U.S. (1 Cranch) at 177.

¹³⁷*Id.*

¹³⁸*Id.* at 178.

"to nothing what we have deemed the greatest improvement on political institutions—a written constitution" ¹³⁹

The obligation and power of the courts to fault an act of Congress for reasons of unconstitutionality has not been challenged since the *Marbury* decision of 1803. It goes without saying that this is not an easy or pleasant task. The Framers of the Constitution recognized this and gave back-up support to the judiciary with permanency in office (the judges "shall hold their Offices during good Behavior"), ¹⁴⁰ with financial independence (their compensation "shall not be diminished during their Continuance in Office") ¹⁴¹ and though the express charge that the judges exercise jurisdiction and hear all cases "arising under this Constitution." ¹⁴²

But, the fact remains that the Supreme Court can hear these cases alleging unconstitutional action by Congress only by way of appeal from the lower courts; and the Constitution contains the proviso, as an addendum to all the other powers granted the Supreme Court, that its appellate jurisdiction is subject to "such Exceptions, and under such Regulations as the Congress shall make." ¹⁴³

Is this small qualifying clause to be read as authorizing Congress to deny to the courts the power to review those cases challenging the constitutionality of congressional action and thereby overrule an almost unbroken line of 170 years of history? Not unless one is willing to let an exception engulf the rule; not unless one is willing to read the Constitution as authorizing its own destruction; not unless one is willing to let one small tip of the tail wag a very large dog.

What, then, is the intent and purpose of this qualifying phrase regarding the appellate power of the Supreme Court? The history is meager, but it points to a much more limited purpose.

Various proposed drafts of the Constitution were submitted to the Founding Fathers in Philadelphia, and all of them provided for appellate review by the Supreme Court of constitutional cases "both as to law and fact," without any qualification whatsoever. This touched off a heated controversy, with some of the delegates protesting that this clause, permitting review "as to fact," would give the Supreme Court

¹³⁹*Id.*

¹⁴⁰U.S. CONST. art. III, § 1.

¹⁴¹*Id.*

¹⁴²*Id.* § 2.

¹⁴³*Id.*

the power to review and overturn the verdicts of juries. The various proposals were then given to a "Committee of Detail," which reported back the language as finally adopted: the Supreme Court should have appellate jurisdiction "both as to Law and Fact," but "with such Exceptions and under such Regulations as the Congress shall make."¹⁴⁴

Alexander Hamilton explained the purpose of the "exceptions and regulations" clause in the debate over the Constitution:

The appellate jurisdiction of the Supreme Court . . . will extent to causes determinable in different modes, some of the course of the COMMON LAW [that is, by jury trial], others in the course of the CIVIL LAW [without jury trial]. . . . [I]n the later, the reexamination of the fact [by an appellate court] is agreeable to usage [but not in the former]. . . . To avoid all inconveniences, it will be safest to declare generally, that the Supreme Court shall possess appellate jurisdiction, both as to law and *fact*, and that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe. . . .

This view of the matter, at any rate, puts it out of all doubt that the supposed *abolition* of the trial by jury, by the operation of this provision, is fallacious and untrue. The legislature of the United States would certainly have full power to provide, that in appeals to the Supreme Court there should be no reexamination of facts where they had been tried in the original causes by juries.¹⁴⁵

Patrick Henry agreed with Hamilton that the power given the Supreme Court to determine appeals "both as to law and fact" would, if unmodified, give the Supreme Court authority to review and overturn jury verdicts; he also agreed that the clause authorizing Congress to make "such exceptions" to the appellate jurisdiction was designed to allay fears on this score. However, Henry doubted that the qualifying clause authorizing Congress to make exceptions could, even if exercised by Congress in the situation of jury trials, succeed in its purpose. He argued to the Virginia Convention called to ratify the Constitution that power once given to the Supreme Court by the Constitution to review questions "of law and fact" could not then be taken away by Congress. He commented on the floor: "I may be told that I am bold; but I think myself . . . that Congress cannot, by an act of theirs, alter this jurisdic-

¹⁴⁴*Id.*

¹⁴⁵THE FEDERALIST No. 81, at 513-14 (B. Wright ed. 1961) (A. Hamilton) (emphasis in original).

tion as established. . . . It is subject to be regulated, but is it subject to be abolished?"¹⁴⁶ He answered in the negative, because "[i]f Congress can alter this part, they will repeal the Constitution";¹⁴⁷ and further, "When Congress, by virtue of this sweeping clause, will organize these courts, they cannot depart from the Constitution; and their laws in opposition to the Constitution would be void."¹⁴⁸ He concluded that "[i]f Congress, under the specious pretence of pursuing this clause [the "exceptions and regulations" clause], altered it, and prohibited appeals as to fact, the federal judges, if they spoke the sentiments of independent men, would declare that prohibition nugatory and void."¹⁴⁹

The late Mr. Justice Owen J. Roberts also commented on the "exceptions and regulations" clause, and he agreed with Alexander Hamilton and Patrick Henry that its thrust was to alleviate the fears that the Supreme Court, under authority previously given, might review and reverse the verdicts of juries. He asked a luncheon meeting of the New York Bar why the Framers left it to Congress to regulate the appellate jurisdiction of the Supreme Court, and then he answered his own question in these words:

There came into play state pride . . . and another feeling that since Anglo-Saxons prize the jury system, giving the Supreme Court appellate jurisdiction as to matters of law and fact would give it the opportunity to overturn jury verdicts, jury decisions, judgments based on jury decisions in New York, in Pennsylvania and elsewhere. The best compromise that could be made in the situation was to leave to Congress the right to define the appellate jurisdiction of the Supreme Court.¹⁵⁰

In short, recourse to history indicates that the mischief which the Framers intended to remedy with the "exceptions and regulations" clause was the fear that without it the Supreme Court might review and reverse the factual findings of juries.

Whatever validity this historical basis for the clause might have today, the fact remains that the Congress, with few exceptions, has honored the integrity of the Supreme Court's appellate jurisdiction. On

¹⁴⁶III ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 540 (2d ed. 1836).

¹⁴⁷*Id.*

¹⁴⁸*Id.* at 540-41.

¹⁴⁹*Id.* at 541.

¹⁵⁰Roberts, *Now Is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A.J. 1, 3 (1949).

the few occasions when the Congress has not done so, the Supreme Court was quick to assert its judicial supremacy: in *McCardle*, in which the Court permitted the Congressional blocking of one appellate route while loudly pointing out an alternative road to its bench;¹⁵¹ and in *Klein*, in which the Supreme Court proudly asserted that the congressional control over its appellate docket could not be used as a means to the end of ensuring that the decisions of the Court would not be adverse to the government and favorable to the suitor.¹⁵²

If the Congress could not tell the Supreme Court how to rule on cases in those post-Civil War years (against the "rebels"), there is no reason to believe that the same Constitution now permits the Congress to tell the Supreme Court how it should effectuate the fourteenth amendment (against the black school children).

CONGRESSIONAL CONTROL OVER THE "INFERIOR" FEDERAL COURT

The thrust of the proposed Nixon moratorium bills will fall most heavily not on the Supreme Court, but on the district courts of the United States, for in those courts the school integration cases are tried and remedial orders are first issued. May the Congress, consistent with our constitutional system of "checks and balances," deny them the power to issue "busing" orders if the district court judges are convinced that such orders are necessary for the vindication of constitutional rights? The answer is, "Probably not."

The Constitution provides in article III 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."¹⁵³ This power to "ordain and establish" inferior courts carries with it the power to establish inferior courts with less than complete jurisdiction. Thus, the very first Congress established "inferior" federal courts and gave them jurisdiction to hear and decide cases between citizens of different states but, added the Congress, not those suits between citizens of different states involving negotiable instruments transferred to the plaintiff by a citizen who resided in the state of the defendant.¹⁵⁴ This "incomplete" grant of jurisdiction was sustained by the Supreme Court in 1799.¹⁵⁵

¹⁵¹See text accompanying note 115 *supra*.

¹⁵²See text accompanying note 127 *supra*.

¹⁵³U.S. CONST. art. III, § 1.

¹⁵⁴Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 78.

¹⁵⁵*Turner v. Bank of North-America*, 4 U.S. (4 Dall.) 8 (1799).

Since that early date, Congress has granted the federal courts jurisdiction that is full or partial, complete or incomplete, as Congress has deemed wise and expedient.¹⁵⁶ As a general proposition this is perfectly proper, for there is no right to try a case in a federal court. Thus, in *Kline v. Burke Construction Co.*,¹⁵⁷ a construction company was incorporated in one state, Kline was a citizen of a different state, and the company filed suit against Kline in the federal court basing jurisdiction on "diversity of citizenship." Kline, the defendant in the federal suit, promptly filed suit against the company in a state court, hoping that the state forum would be more friendly to his cause. The company then asked the federal court to enjoin the state court proceeding, and the federal district court refused. On appeal, the Supreme Court agreed that the construction company did not have a "constitutional right" to have its case tried in the federal court:

The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. . . . And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. . . . A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right.¹⁵⁸

There are many illustrations of the power of Congress to take away the jurisdiction of the federal courts, in whole or in part.¹⁵⁹ The Norris-LaGuardia Act is a familiar one. There, Congress declared that unless certain enumerated conditions existed, "[n]o court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute"¹⁶⁰ The

¹⁵⁶C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 23-24 (2d ed. 1970).

¹⁵⁷260 U.S. 226 (1922).

¹⁵⁸*Id.* at 234.

¹⁵⁹The Johnson Act of 1934, 28 U.S.C. § 1342 (1970) (originally enacted as Act of May 14, 1934, ch. 283, § 1, 48 Stat. 775), provides that the federal courts are not to enjoin or restrain the utility rates made by a state agency so long as a "plain, speedy and efficient remedy may be had in the courts of such State." The Tax Injunction Act of 1937, 28 U.S.C. § 1341 (1970) (originally enacted as Act of Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738), similarly provides that no federal court is to enjoin or restrain the collection of any tax under state law "where a plain, speedy and efficient remedy may be had in the courts of such State."

¹⁶⁰29 U.S.C. § 107 (1970) (originally enacted as Act of March 23, 1932, ch. 90, § 7, 47 Stat. 71).

Supreme Court said as dictum that "[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."¹⁶¹

However, the Supreme Court is not so casual when the denial of federal jurisdiction also constitutes a denial of substantive constitutional rights.¹⁶² And, a series of decisions by the various courts of appeal under the Portal-to-Portal Act¹⁶³ recognize that Congress may not exercise its control over the "inferior" federal courts in a manner that denies those courts the power to vindicate rights guaranteed by the Constitution. Some background to these decisions might be useful.

The Fair Labor Standards Act¹⁶⁴ requires the payment of minimum wages, with time-and-a-half for hours worked in excess of an eight-hour day or a forty-hour week. In a series of cases at the close of World War II, the Supreme Court ruled that once an employee had crossed the portal of his place of employment, the "work day" and the "work week" included such preliminary and incidental activities as walking to the place where the work was to be done, changing to work clothes in the locker room, showering after work was over, and so on.¹⁶⁵ These decisions were quite unexpected and resulted in "windfall" obligations to thousands and thousands of employees. Almost two thousand suits were filed for back pay, claiming liability in excess of five and one-half billion dollars. The House Judiciary Committee investigated the situa-

¹⁶¹*Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) (footnote omitted). Shinner, who sought and obtained an injunction in the lower federal court, argued only that the picketing in front of his store did not constitute a "labor dispute" within the meaning of the Norris-LaGuardia Act because none of the pickets were employed by him. He did not argue that he had a constitutional right to a federal court injunction against labor union picketing.

¹⁶²*See, e.g., Dombrowski v. Pfister*, 380 U.S. 479 (1965). There, a federal law forbade federal courts to "stay proceedings in a state court." Nonetheless, the Supreme Court approved of a federal court injunction against a threatened state criminal prosecution because the state criminal law "chilled" the exercise of first amendment freedoms. *See also Lipke v. Lederet*, 259 U.S. 557 (1922), where a federal law forbade federal courts to entertain any suit "for the purpose of restraining the assessment or collection of any tax." The Supreme Court, despite this jurisdictional barrier, issued an injunction against the collection of money allegedly due under a federal tax law. The Court's conclusion was that the amount of money demanded was an "unconstitutional penalty" and thus not a "tax."

¹⁶³29 U.S.C. §§ 251-62 (1970).

¹⁶⁴29 U.S.C. §§ 206-07 (1970).

¹⁶⁵*Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946); *Jewell Ridge Coal Corp. v. Local 6167, UMW*, 325 U.S. 161 (1945); *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local 123*, 321 U.S. 590 (1944).

¹⁶⁶The legislative background and the ensuing statute are discussed at some length in *Seese v. Bethlehem Steel Co.*, 168 F.2d 58, 59-61 (4th Cir. 1948).

tion and concluded that payment of these claims would result in the bankruptcy of thousands of employers.¹⁶⁶

Consequently, Congress passed the Portal-to-Portal Act,¹⁶⁷ which did two things. First, it provided that no employer shall be subject to any liability under the Fair Labor Standards Act because of a failure to pay minimum wages or overtime compensation for work performed in the past unless the work activities were compensable at the time they were performed by either an express contract or by custom or practice.¹⁶⁸ Secondly, the Portal-to-Portal Act provided that "[n]o court of the United States . . . shall have jurisdiction of any action or proceeding . . . to enforce liability . . . for or on account of the failure of the employer to pay minimum wages or overtime compensation" unless the work activities were compensable at the time performed by contract, custom, or practice.¹⁶⁹

Motions were immediately made to dismiss the cases then pending in the federal courts. The plaintiffs argued against these motions for two reasons: because the Portal-to-Portal Act deprived them of property rights guaranteed by the fifth amendment to the Constitution, and because, a fortiori, the denial of access to a federal court to enforce these claims was also unconstitutional. If Congress has absolute control over the "inferior" federal courts and can choke off their jurisdiction even when this results in the inability to enforce rights protected by the Constitution, none of the courts would have considered the first issue raised by the plaintiffs in the pending cases. But all of them did. They all considered and rejected the contention that the Portal-to-Portal Act denied property rights guaranteed by the Constitution.¹⁷⁰

Typically, Judge Parker of the Fourth Circuit wrote that Congress may not "take one man's property and give it to another or arbitrarily strike down rights arising under contract."¹⁷¹ But, he added, "nothing of that sort is involved" in the Portal-to-Portal Act, because the rights stricken down by the statute are not rights arising out of contract but rights created by statute, which can be destroyed by the same power that

¹⁶⁷29 U.S.C. §§ 251-62 (1970) (originally enacted as Act of May 14, 1957, ch. 52, 61 Stat. 84).

¹⁶⁸29 U.S.C. § 252(a) (1970).

¹⁶⁹*Id.* § 252(d).

¹⁷⁰*E.g.*, *Fisch v. General Motors Corp.*, 169 F.2d 266 (6th Cir. 1948); *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir. 1948); *Seese v. Bethlehem Steel Co.*, 168 F.2d 58 (4th Cir. 1948); *Rogers Cartage Co. v. Reynolds*, 166 F.2d 317 (6th Cir. 1948).

¹⁷¹*Seese v. Bethlehem Steel Co.*, 168 F.2d 58, 64 (4th Cir. 1948).

created them.¹⁷² Judge Parker then concluded:

Since the provisions of sec. 2(a) of the act, striking down portal to portal claims not based on contract, custom or practice are valid, there can be no question as to the validity of sec. 2(d) denying jurisdiction to the courts to entertain the claims. . . . Whether the denial of jurisdiction would be valid if the provision striking down the claims were invalid is a question which does not arise.¹⁷³

In a portal-to-portal suit in the Sixth Circuit (where the same issues were raised), Judge Hicks concluded that the Act "in no way interferes with the powers of the judiciary."¹⁷⁴ He then added that "[s]hould Congress undertake to withdraw from the courts jurisdiction to consider and determine pure questions of ownership or title to property . . . a more serious question would be presented, but we are not confronted here with such a case."¹⁷⁵

Judge Chase was even more pointed in the portal-to-portal suit in the Second Circuit. He wrote for that court as follows:

A few of the district court decisions sustaining section 2 of the Portal-to-Portal Act have done so on the ground that since jurisdiction of federal courts other than the Supreme Court is conferred by Congress, it may at the will of Congress be taken away in whole or in part. . . . *We think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment.* That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.¹⁷⁶

President Nixon, of course, is asking Congress to do what it did not do in the Portal-to-Portal Act—"to interfere with the power of the judiciary to protect rights vested under the"¹⁷⁷ Constitution. His proposals challenge not only "busing" but also the very idea of law itself.

¹⁷²*Id.*

¹⁷³*Id.* at 65.

¹⁷⁴*Fisch v. General Motors Corp.*, 169 F.2d 266, 272 (6th Cir. 1948).

¹⁷⁵*Id.* at 273.

¹⁷⁶*Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948) (emphasis added) (footnote omitted).

¹⁷⁷*Fisch v. General Motors Corp.*, 169 F.2d 266, 272 (6th Cir. 1948).

The portal-to-portal cases strongly indicate that Congress has no power to withhold or restrict the jurisdiction of the "inferior" courts when the withholding or restriction of that jurisdiction would deny or deprive persons of property rights guaranteed by the fifth amendment. It follows that Congress has no power to withhold or restrict the jurisdiction of the "inferior" courts when the withholding or restriction (as suggested by the Nixon "busing" proposals) would deny school children of the rights already declared to be theirs under the equal protection clause of the fourteenth amendment.

CONCLUSION

President Nixon wants to put the Constitution on the back of the bus and to give the federal courts a second-class citizenship among the three independent branches of government. He has found a scapegoat but no solution to a difficult problem.

Many parents have legitimate concerns that their children will be transported from "nice" neighborhoods into schools that are old, dirty, dilapidated, over-crowded, understaffed, and located in the "bad" section of town. But if the schools are harmful for one child, they are harmful for all children.

The problem is not the bus ride, but what one finds when the bus ride ends. The solution is to replace the bad schools and to upgrade the educational opportunities within them. This requires money, much more than the token amount requested by the President.

But improvement of the schools is not enough. Education has had to shoulder a disproportionate share of the burdens of overcoming the effects of segregation. We should now put our efforts in overcoming economic barriers, in overcoming segregated housing patterns, so that every neighborhood will have its own desegregated school. But that, unfortunately, lies in the future. As for the immediate present, we can do no more than applaud the remarks made by Florida Governor Reubin Askew when he asked the people of Florida to repudiate the anti-busing proposal on the ballot in that state:

I hope we can say to those who would keep us angry, confused and divided that we're more concerned about a problem of justice than about a problem of transportation.

And that while we're determined to solve both, we're going to take justice first.¹⁷⁸

¹⁷⁸Address by Governor Reubin Askew, Feb. 21, 1972, in *South Today*, May, 1972, at 3, col.

