

Senator Lowell Weicker: "No Way, Mr. President"

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ONE DOLLAR



Busing and Its Alternatives

Articles by Josiah Lee Auspitz, Peter V. Baugher, and The Nashville Ripon Society

Republican of the Year

For those who knew George Romney's record as Governor of Michigan, his vast energy and dedication to principle, the achievement of the Department of Housing and Urban Development over the last three years will come as no surprise. But by any standard, George Romney's record at HUD has been astonishing. Under his direction an unwieldy bureaucracy has taken new life. He has lured new business investment into the housing field, hiked subsidized housing more than tenfold and revamped the department, especially the traditionally conservative Federal Housing Administration. He has carried the message for revenue sharing across the country and recently developed cooperation for badly needed metropolitan planning.

Most important, however, George Romney has faced the critical social problem of our generation more squarely than any other public official we can think of. We believe his "open communities" program to encourage low income housing in the suburbs, where the jobs are, can have a long-term positive effect unmatched by any other domestic policy of this Administration.

In the face of a dramatic polarization between affluent white suburbs and poor central cities, George Romney opened the way to reconciliation. In pursuing his goal of housing opportunity for the urban poor, he walked a difficult path between liberals and conservatives who sought other priorities. But Secretary Romney stuck to his principles, and if the Nixon Administration ever opposed his goals, he brought it around to his own position, as both the President and the Attorney General affirmed last June.

George Romney's dedication to reconciliation — a theme we struck last year in making this award for the first time — can serve as an example not just to the Ripon Society but to all Republicans. His commitment to positive social change exemplifies the best possible tradition of the party of Lincoln. His leadership as a citizen reformer, from Michigan to Washington and around the country, gives us great pride in honoring him as the Ripon Society's Republican of the Year. (The award will be given at a dinner in Detroit on April 22).

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Circulation Dept.: Judith H. Behn.

Editorial Assistant: Priscilla Sapientza.

Art: Leslie Morrill, David Omar White.

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EDITORIAL

Law and Order — 1972

The President's role in developing busing as a campaign issue sadly betrays his own inaugural pledge "to bring us together," his 1970 campaign theme of law and order, and his own court appointees and their deliberations.

A U.S. Senator's temptation to play with volatile public emotions in the heat of a tough reelection campaign may be understandable, though not praiseworthy. But it is inexcusable for a President of all the people to go on national television at a time of high public concern and give a coarse and misleading political speech that contributes to confusion over the law and to hostility among the races.

As an accompanying editorial analysis shows, the President's March 16 address represented only the most recent in a long series of moves subordinating statesmanship to short term politics on this issue. Two years ago busing was not a matter of any national significance. Busing is and has been as American as apple pie. Forty percent of American public school children — 65 percent if those riding municipal transportation are included — take buses for reasons that have nothing to do with race. Busing has actually *declined* in four Southern states under desegregation orders.

The President claims that the courts had overreached their constitutional mandate in their effort to eliminate the last vestiges of a dual school system; and we too can criticize some details of selected court orders for busing — particularly when they seem to impose specific criteria of "racial balance" in the North. But instead of offering constructive measures in the spirit of the reiterated Supreme Court view — that busing is a necessary, though not exclusive tool, to achieve integration — the President seemed to make a plea for some nebulous concept of "separate but equal."

He also overreached his own constitutional mandate with a busing moratorium that not only appears unconstitutional but also seems unrelated to his professed interest in promoting "quality education." The companion "Equal Opportunities"

measure, offering compensatory funding to poverty areas, may well be desirable. But at best it merely extends ongoing programs that have had little positive impact.

The President's message, in fact, was a tissue of half-truths. When he stated his concern for the health and safety of school children riding buses, he failed to mention the harm his own order withholding HEW funds from school districts for busing might inflict on a city like Nashville. There children ride to school in shifts, often in buses which need servicing, because HEW has turned down the school board's request for money for new equipment.

The President criticizes the courts for imposing impractical busing plans, while he prevents HEW from giving technical assistance to communities undergoing desegregation. Without such assistance it is hard to conceive how the President expects to reach his goal of "more integration with less busing."

If responsible Republicans had not repeatedly sought constructive action on the part of the White House, both publicly and privately over the last several years, the Nixon policy would not have been so galling. Rejecting available alternatives which were both politically viable and intellectually sound, the Administration, however, placed symbolism before justice, a factious political strategy before reconciliation, and abandoned its own early policy of leaving the issue to the courts.

The great tragedy is the decline of Richard Nixon, who on occasion has displayed valuable moral insight on our racial crisis — supporting open housing in 1968 and dramatically affirming Secretary Romney's open communities policy a year ago. Under this Administration we have seen real strides toward the long term goal of school integration, especially in the South. To throw away that prospect of leadership for evanescent political gains is not worthy of the man, the office, or the historic ideals of the Republican party.

"No Way, Mr. President"

by Lowell P. Weicker

The President of the United States has requested legislation intended: (1) to give direction to the courts of this nation on the matter of busing; and (2) to provide a program of educational funding that would assure equal educational opportunity for all our children.

In sending such programs to the Congress, the President has left an impression with the American people that busing can be halted by simply saying so to the courts and that equal educational opportunity can be attained at minimal national inconvenience and out of pocket expense.

To all of which I respond "no way."

Our areas of disagreement are two-fold: (1) constitutional; (2) achieving equality of educational opportunity for 2.5 billion dollars.

On October 21, 1971, the President addressed the nation over television, announcing his nominations of Lewis Powell and William Rehnquist to the Supreme Court. In the course of that speech, President Nixon stated:

"Let me add a final word tonight with regard to a subject that is very close to my heart because of my legal background, and because of years of study of the American system of government. I have noted with great distress a growing tendency in the country to criticize the Supreme Court as an institution. Now, let us all recognize that every individual has a right to disagree with decisions of a court. But after those decisions are handed down, it is our obligation to obey the law, whether we like it or not, and it is our duty as citizens to respect the institution of the Supreme Court of the United States.

"We have had many historic, and even sometimes violent debates throughout our history about the role of the Supreme Court in our Government. But let us never forget that respect for the Court, as the final interpreter of the law, is indispensable if America is to remain a free society."

Those words accurately describe my feelings as to the role of the Judiciary in our government. To be true to those words means rejecting the interference in the courts urged in the Student Transportation Moratorium Act of 1972 and the Equal Educational

Opportunities Act of 1972. Why?

Because when our founding fathers set up the rules for building a nation they gave each branch of government one swing at each pitch.

Again in the Powell-Rehnquist speech of October 21, the President stated that:

"You will recall, I am sure, that during my campaign for the Presidency, I pledged to nominate to the Supreme Court individuals who shared my judicial philosophy, which is basically a conservative philosophy."

This the President has had unprecedented opportunity to do during his first term in office. Since January of 1969 he has appointed four new Justices to the Supreme Court and 161 Justices to the lower federal courts. These figures represent an almost one-third turnover in the space of three years.

Certainly then, the ingredient of conservatism has been added to the federal court system — a conservatism that most would agree was long overdue. But that was and is the President's swing at the pitch.

Again in the speech of October 21 which set forth the philosophy of the founders of this country, the President said, and I quote:

"By 'judicial philosophy' I do not mean agreeing with the President on every issue. It would be a total repudiation of our constitutional system if Judges on the Supreme Court, or any other Federal court, for that matter, were like puppets on a string pulled by the President who appointed them.

"When I appointed Chief Justice Burger, I told him that from the day he was confirmed by the Senate, he could expect that I would never talk to him about a case that was before the Court."

May I suggest that because the talks to the judiciary are over television as in the cases of Lt. Calley and busing, they are no less demeaning or suspect than if they were held one on one behind closed doors.

The function of Congress should not be to collaborate in such talks but to see to the business of legislative rather than judicial or executive solutions of America's problems. The courts, except as to number, type and the character of the men who sit on them, are not our business. America is,

The time has come for each American to believe that the Federal Courts exist for him as for the other fellow. Certainly each of us, at one time or the other has felt left out because of a particular court decision. But the fact remains that the judiciary has played an important role in making this the nation it was dreamt to be.

I think history shows that majorities have prospered in this country. But it is what America has done for its minorities that gives meaning to the word "greatest," as in "the greatest nation on earth." And since politicians, President and Senators, are elected by majorities, logically the judiciary has drawn the duty of being a voice for minorities.

Majority or minority aside, one thing I do know is when the day comes that it is my ox that is being gored, I hope to God there is a court system in this land whose concern is me and principle rather than the President and the tempers of the times.

One comment in passing as to the constitutional amendment route. The reason I reject that as a way of handling the busing question has nothing to do with how long it would take, but has a great deal to do with its cheapening of the Constitution. The Constitution of the United States is a document for all generations, not just the class of 1972. The last time we used it as a vehicle for handling a national craze, we invoked prohibition on January 10, 1920, only to repeal it on December 5, 1933. Such in and out legislating would eventually render the Constitution worthless.

Wooden Nutmeg Department

In closing my arguments against what I believe to be the unconstitutional aspects of the two Acts, I would like to address a few comments to my own state of Connecticut. Whatever busing exists in my state is strictly on a local, voluntary basis. There is a law suit in the City of Waterbury relative to segregation. It has been brought by the Justice Department. The Justice Department is not the Supreme Court, it is the Nixon Administration.

Might I suggest to the people of Connecticut that instead of giving gratuitous encouragement to efforts intended to slow down the breaking up of *de jure* segregation, we use the time to take care of any *de facto* situations in our own State. If the problem is handled imaginatively now, it can be handled voluntarily without busing.

In conclusion, certainly insofar as a Connecticut resident is concerned, the President's program means he is getting nothing for giving up some of his constitutional rights. Our history is that we sold wooden nutmegs, we didn't buy them.

Now to the question of the Equal Educational Opportunities Act of 1972. My disagreement here

lies not with the principle but with the substance of what has been proposed.

The impression has been left with the people of my State that this is a new program with new funding to build new schools. In fact, what has been proposed is already an on-going program. No new money has been recommended. And no new concepts such as linking schools and home together have been proposed. It's like having your Christmas gifts given back to you as birthday presents.

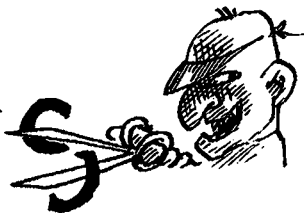
I think it important to point to this shifting around of existing funds because so many people have written me giving as their reason for support of the President's program their belief that the stated 2.5 billion makes them quits of what they recognize to be a valid national obligation of supplying quality education for all children. Unfortunately, catch-up equality doesn't come that cheap. If the right and proper thing were to be done for America's disadvantaged, it would cost us not \$2.5 billion but \$12 billion per year. I base this figure on an estimated per pupil cost of \$1200 per year for a quality education. At the present time we are spending slightly over \$900 per pupil. As there are 46 million children of elementary and secondary school age, this would mean the spending of an additional \$300 per pupil or the spending of the aforementioned \$12 billion.

Many persons believe, this Senator included, that fully an equal amount of money would have to be spent on housing in conjunction with education in order to achieve practical equality of opportunity. But so as not to drive away the remainder of those who came expecting a free show, I'll stick to the \$12 billion tab.

Having disagreed, I would like to state my alternatives to the President's proposals. I have a deep belief in the sanctity of our courts. Under no circumstance would I see that sanctity violated even in the smallest way for the shortest period of time.

In years past, many availed themselves of the right of unlimited debate on the Senate floor to slow the process of desegregation in this nation. Should the occasion arise, I would hope my colleagues would avail themselves of the same right to slow the re-introduction of the separate but equal philosophy into the enactments of this body. What I am saying is that for those who think we are going to get the hot busing issue over the election year hump by a little moratorium on the courts, I suspect they are going to see the Senator from Connecticut and others still arguing the propriety of such a method right up to election day. And during that period of time the courts of the United States will continue to operate without Presidential or Congressional back seat bus driving.

EDITORIAL NOTE



The President's demagoguery with the busing issue — and the continued necessity of busing for desegregation — should not blind us to the failure of American liberalism to respond intelligently to the changing character of our racial crisis. Many liberals (Senators Mondale and Ribicoff are obvious examples) today would have us believe that the President misrepresents their position when he speaks of "busing to achieve racial balance." Yet they then offer reams of dubious statistics showing 1) that educational benefits can only be secured in white majority schools; and 2) that schools with white minorities are inherently unstable because of the "tipping factor" (creating white "flight" to the suburbs and to private schools). Regardless of what busing advocates expect the courts to decide on the legal issue, therefore, it would seem that what they want is a rather specific racial equilibrium in every metropolitan school, North and South. And they imply that a failure to achieve such racial balance will ensure the maintenance of the kind of segregated schools which the Supreme Court in 1955 found to be "inherently unequal" and thus unconstitutional.

Though much better intentioned, this stance is nearly as fraught with deceptions and evasions as the President's. To begin with, the educational benefits of desegregation — as is cogently shown in an article by Patricia Lines published by the Harvard Center for Law and Education — are yet to be demonstrated. The federally sponsored Coleman Report and subsequent data are so full of inconsistencies and contradictions as to be virtually meaningless.

The liberals, moreover, have not been content simply to misinterpret the Coleman statistics once, to prove the necessity of racial balance. They misinterpret them again to prove the futility of compensatory education. Although it is difficult to predict what educational programs will seem most desirable as we confront the intractable challenge of educating the traumatized poor, one may be sure that some of the most promising approaches will require compensatory spending.

In any event, the morass of statistical data on the educational impact of desegregation is happily irrelevant to the matter of court-ordered busing. To base far-reaching constitutional rulings on haphazard collections of I.Q. tests and other dubious findings is truly to subvert and trivialize the Constitution and to expose desegregation to standards and expectations it will not meet.

Much of the confusion on busing derives from an effort to extend the *Brown* decision into a reordering of Northern school systems. The fact is that the crisis in the North — for all the superficial similarities cited by Northern liberals and Southern conservatives — is virtually unrelated to the process of overcoming dual school systems, begun by the Warren Court in *Brown*. Blacks should be bused out of the ghetto not because they are black, or because some circuitously

demonstrable pattern of state action segregated them there, but because large numbers of the desperately poor — when sequestered in a bleak and crowded urban environment — reinforce one another's patterns of poverty and futility. To transform this simple imperative of social policy into a matter of phoney testing statistics and judicial pettifoggery is a serious blunder. The most destructive result may be to subvert the nearly completed desegregation of the South, by connecting it to essentially unrelated and judicially unresolvable class conflicts in the North.

The problem in the Northern cities is not essentially racial. Middle class blacks pose no threat to anyone, while the lifestyle of the very poor of any race jeopardizes the status of both black and white lower middle class communities. The lower middle class lives on the margin; its members make up for lack of funds by the adoption of social disciplines and status symbols that distinguish them from the poor. Their fear of black infiltration of their neighborhoods and schools is not essentially racist. It is the understandable fear of change among people whose hold on respectability and order is precarious and who have endured the continuing outrage of simultaneously rising taxes and declining city environments. Integration in these areas is seen as a portent of further deterioration. It is seen as an economic threat to the community values which are perhaps the most important "earnings" of the lower middle class, restricted to its own locality far more than the wealthy.

To redistribute these non-monetary "earnings" in the guise of civil rights is to deprive these citizens of their most valued possessions without representation or compensation. And it is to delay the urgently needed national financial sacrifice and redistribution to which the lower middle class should not contribute at all. There is no reason that poor whites, who already suffer more from our ghetto tragedy than anyone except the immediate victims, should have any special responsibility for redressing it. They already pay in deteriorating city conditions; it is the relatively wealthy who escape and now maintain that spending (which *they* would have to do) is worthless and integration (which the lower class does) is constitutionally indispensable.

To define "racism" and "racial balance" as the problem thus evokes the wrong response from everyone. It insults the lower middle class white and directs his class resentments toward blacks; it retards the assimilation of middle class blacks indispensable if integration is to continue; it encourages black nationalists and separatists; it exacerbates the already profound and often false or counterproductive racial apprehensions of young blacks; it relieves upper class whites of the recognition that major and expensive new programs of income maintenance and redistribution are mandatory; and it induces blacks and whites to fight over existing lower-order jobs and social benefits in the invidious moral terms of discrimination rather than joining to demand a fairer distribution of jobs and income in the nation as a whole. The real battle at the moment is to maintain an anti-poverty strategy as our first priority against the imperious claims of better situated and organized groups, such as the Pentagon, the highway lobby, the women's movement, the farmers, and subsidy-seeking industries.

— GEORGE F. GILDER

The Evolution of a False Issue

The Nixon Administration's persistent flagellation of the school desegregation issue reached a climax of sorts last month, when the President took to the TV screen to denounce busing (along with the judges who ordered it and the "extreme social planners" who favor it) and then dropped two new legislative initiatives in the laps of an already divided and confused Congress.

To the relief of some, the President did not come out in support of an anti-busing amendment to the Constitution — chiefly on the ground that "it takes too long." He did say, however, that the pending proposal to end busing by constitutional amendment "deserves a thorough consideration by the Congress on its merits." And the solution Mr. Nixon proposed — a moratorium on new busing, combined with an "Equal Educational Opportunities Act" which would permanently curtail busing orders — was hardly less sweeping than a constitutional amendment.

The President's move, drastic though it was, came as no surprise to those who have watched in sorrow and dismay as the Administration first nurtured the nearly dying flames of the desegregation issue and then fanned them into a nationwide panic over busing.

Few would have thought in the fall of 1968 that school desegregation would still be in the headlines four years later. In May of 1968, the Supreme Court had ruled, in *Green v. County School Board of New Kent County, Virginia*, that ineffective "freedom of choice" desegregation plans would no longer suffice, and that school boards were obliged to devise plans "that promise realistically to work, and promise realistically to work *now*." Veterans of the school desegregation struggle in the South sensed a growing resignation among previously recalcitrant white officials and parents, along with a parallel determination to get on with the business of education for all children, regardless of race.

But the Nixon Administration was hardly in office before it made its first move to exhume the desegregation issue — delaying scheduled cut-offs of HEW funds to five segregated school districts. Again and again over the next three years, the Administration took steps to obstruct (or to appear to obstruct) the orderly process of school desegregation:

— The Mitchell-Finch statement of July 3, 1969, which had the effect of extending the deadline for final desegregation of many Southern school systems until September, 1970;

— The decision in August, 1969 (to side with 33 Mississippi school districts in asking for a delay in the Administration's own terminal desegregation

plans) which resulted in a Supreme Court ruling less than three months later that the Mississippi districts and all others like them were to desegregate "at once" (*Alexander v. Holmes County Board of Education*);

— The President's infamous statement of March 24, 1970, misstating the law on several points and contravening lower Federal court orders in advance of appellate or Supreme Court review (including the order of the U.S. District Court in *Swann v. Charlotte-Mecklenburg Board of Education*);

— Administration intervention in the Charlotte case when it reached the Supreme Court, resulting in a unanimous Supreme Court decision on April 20, 1971, that busing was a legitimate tool for dismantling dual school systems and that even "bizarre" and inconvenient remedies might be used to vindicate the constitutional rights of black children;

— The politically disastrous statement by Mr. Nixon on August 3, 1971, in which he announced, on the one hand, that the Administration was going to appeal a District Court decision rejecting an HEW-drawn desegregation plan for Austin, Texas (thus enraging Senator John Tower and other conservatives) and, on the other hand, that he was disavowing the HEW plan and was opposed to busing (thus angering nearly everyone else);

— The decision in the fall of 1971 not to permit any of the \$75 million available for school districts under *Swann*-type orders to be used for transportation of students, and the further decision to add an amendment to this effect to the then (and still) pending \$1.5 billion Emergency School Assistance Act, thus opening the floodgates for dozens of ill-conceived and dangerous amendments.

Through the 1970 elections, at least, all these steps appeared to be designed to strengthen Mr. Nixon's hand in the South, and to reduce the third-party movement of George Wallace to irrelevancy. Yet, except in Tennessee, Republican candidates suffered grievous losses in the South in 1970, while moderate "new breed" Democrats like Governors Reubin Askew of Florida, John West of South Carolina, and Dale Bumpers of Arkansas rose to the fore. Worse yet, Wallace survived covert GOP backing of his Democratic primary opponent and was reelected Governor of Alabama. The Administration's antics over the school issue had failed to distract Southerners from the more pressing concerns, mostly economic, that closely affected their lives. If white Southerners considered the question of school desegregation at all, they probably realized that the President had not slowed its pace.

In any case, the immediate beneficiary of the President's new initiatives (assuming they are implemented) is not the South, where most busing orders have already been entered, but Northern communities such as Detroit and Indianapolis which are facing court edicts in the near future. The President no doubt has observed that the busing hysteria has moved North; the question now may be whether he has done enough for the South — lately, as the saying goes.

What the President has proposed is, first, a moratorium on new busing (i.e., busing of a student not previously transported or previously transported to a different school) until July 1, 1973, or until passage of the second part of his package. It seems beyond argument in view of the clear commands of the Supreme Court in the *Green*, *Alexander*, and *Swann* cases that to the extent the moratorium delays any remedy for state-imposed segregation, it is unconstitutional. It is less clear that a definitive ruling on this question can be obtained before the moratorium expires. However, it is not unlikely that the lower Federal courts, if the moratorium bill is passed and interposed in a pending case, will disregard it or declare it unconstitutional.

The bill will have an immediate effect, though, even before it is passed, because the President, in his March 16 address to the nation, indicated that his message was as of that moment the policy of the Executive Branch. This means that the Department of Justice will not be filing motions in new cases where the likely remedy is new busing, and in fact will be going to court to oppose new busing orders; it also means that HEW's Office for Civil Rights will not be requiring desegregation plans that would result in new busing. Unless this executive policy is challenged in court — and such a challenge is conceivable — the Federal school desegregation effort will come to a halt at least until after the election.

As noted above, the effect of the bill will be felt mostly in the North. But the bill could also delay desegregation in a number of key Southern localities, such as Richmond, Virginia, where a Federal judge recently ordered consolidation of the predominantly black city system with two 90 percent white suburban systems; Memphis, Tennessee, where a long-overdue desegregation order is expected this summer; and Austin, Dallas, and Corpus Christi, Texas, where extensive busing is likely to be required as a result of appellate court action.

The other shoe dropped by the President, the Equal Educational Opportunities Act of 1972, is an ingenious mishmash of promised (but not actual) new money for compensatory education, restatements of current law in ways that sound different, and permanent curbs on busing.

In his televised address, the President implied that his bill would direct at least \$2.5 billion in new money toward the education of disadvantaged children. But an examination of the bill reveals that it merely reshuffles, not very effectively, funds already available or about to be approved by Congress. Some \$1.5 billion would come from Title I of the Elementary and Secondary Education Act of 1965, which provides for compensatory education for the economically and educationally deprived; \$1.5 billion is nothing more than the usual annual appropriation. The verbiage about "concentrating" these funds is equally meaningless, since the authority is already provided by law to set whatever standards are educationally desirable for concentration on schools with large percentages of poor children. The rest of Mr. Nixon's \$2.5 billion is to come from the \$1.5 billion Emergency School Assistance Act, stalled in Congress for nearly two years and now tied up in a House-Senate conference committee. The new bill, however, would work a 180 degree change in the purpose of these funds, since they were to be used to maximize integration and are now to be part of a return to "separate but equal." The President's proposal will undoubtedly cause further, if not indefinite, delay in enactment of the ESAA, which the Administration has allegedly been pushing since May of 1970.

The Title I Scandal

But even if the Administration were serious about committing new money to ghetto schools, the available evidence suggests that compensatory education in itself does not assure equal educational opportunity. Since 1965, the Government has been pouring up to \$1.5 billion a year into "compensatory" education for educationally deprived children. The program — the same Title I that the President would now rely on — has been a national disgrace, a welter of unenforced and broken rules, and the observable results have been negligible, if not negative. Why? Because Title I money is designed to be spent on deprived children — that is, minority children — and is required to be spent where such children are concentrated — that is, in ghetto schools. The commitment to apply such aid effectively has been lacking.

The Equal Educational Opportunities Act also contains a great deal of discussion of what constitutes denial of equal educational opportunity (most of which comports with existing law), and a trickily-worded endorsement of the "neighborhood school" concept (which, as qualified in the bill, says little or nothing). This sort of word game is probably harmless, if it helps to calm the public. But the bill also continues the President's deliberate and confusing manipulation of the term "racial balance" (Section 202, Racial Balance Not Required), and Mr. Nixon's TV address was cast almost entirely in terms of op-

position to "busing for the purpose of achieving racial balance in our schools."

Legally speaking, racial balancing means reassigning students to achieve a desired racial pattern, without regard to whether the segregation being corrected is the result of official action; desegregation on the other hand, means eliminating state-sponsored segregation. Federal courts have ordered busing only where they have found official responsibility for segregation; they have refused to act where segregation is the result solely of residential patterns or other adventitious factors. The Civil Rights Act of 1964 and various HEW and Office of Education appropriations measures, accordingly, have contained prohibitions against requiring transportation merely to overcome racial imbalance. So when the President denounces busing for racial balance, his statements, in the abstract, are legally correct; but he applies this proposition to situations which involve the elimination of officially sanctioned dual school systems. The fact is, as the President is well aware, that no Federal court order or HEW desegregation plan has ever required busing or any other action for the purpose of achieving racial balance.

Other Remedies

The heart of the Equal Educational Opportunities bill, of course, is the title concerning remedies. This title first directs the courts and Federal agencies to consider such remedies as geographical assignment, "majority-to-minority" transfers, and construction of new schools or educational parks, and to make specific findings that such steps will not suffice, before ordering increased transportation of students. Most judges and agencies already do this, though not always in the systematic manner the bill apparently requires. The bill does not indicate, however, how a court can require a school district to expend the millions of dollars necessary to construct an educational park, or what is supposed to happen during the years it would take to build such a park or even a new school.

But the real problem raised by the bill is its flat prohibition against any increase, under any circumstances, in the average time or distance to be travelled or the average number of students bused in the sixth grade and below. (Such increases are permitted, temporarily, for students in the seventh grade and above when there is "clear and convincing evidence" that the other measures described above are not adequate.) This provision would mean that in many cases, particularly in the North and in large Southern cities, students would be condemned to remain in segregated classes for the first six years of their educational experience. By the end of this period, of course, permanent damage would have been done; minority students could never fully overcome the ef-

fects of six years of inadequate basic education, and six years of being stigmatized as unfit to associate with middle-class whites. No amount of compensatory spending can dilute the holding in the seminal 1954 case of *Brown v. Board of Education* that such segregated education is inherently unequal.

Thus there is no escape from the conclusion that under the Supreme Court's interpretation of the Fourteenth Amendment in the *Brown, Green, Alexander, and Swann* cases, the bill's limitation on busing, to the extent that it perpetuates the existence or the effects of state-imposed segregation, is unconstitutional. The Administration has advanced a very sophisticated defense of its bills, premised on Congress' constitutional authority to create lower Federal courts and to implement the Fourteenth Amendment by appropriate legislation. But even if it is assumed that the power to create Federal courts includes the power to set jurisdiction and prescribe remedies, it is highly doubtful that Congress can pick and choose among various forms and degrees of specific relief without running afoul of the separation of powers doctrine (and violating the Fourteenth Amendment). And though Congress of course can implement constitutional provisions through legislation, the law is clear that it cannot in the process limit or dilute the effect of such provisions. The Supreme Court and lower Federal courts may reach the same conclusion, if the bill is ever passed, but the country will nevertheless pay a high price in the interim, in terms of needless division and racial discord. Chaotic conditions are virtually guaranteed by a section of the bill which provides for reopening of even those court orders already entered and implemented.

All the faults of the President's new legislation were evident, indeed exaggerated and caricatured, in his televised address to the nation. It is doubtful that a more cynical, misleading, and unconvincing message has ever been delivered by an American President not discussing Vietnam. Mr. Nixon's speech illustrated all the tragic failures of leadership, truthfulness, and compassion of his Administration's performance on school desegregation.

The foremost false assumption that has distorted the Administration's treatment of the desegregation question is that the issue, somehow, is busing. But busing is not a radical but rather an accepted part of mainstream education in America. According to the best available figures, some 20,000,000 elementary and secondary school children are bused to school every day. Forty percent of American public school children — 65 percent, if those riding municipal transportation are included — take buses for reasons that have nothing to do with desegregation. And the proportion of children riding buses in the Deep South, where most of the large-scale de-

segregation has occurred, is just 3 percent higher than the national average.

Indeed, in Alabama, Mississippi, and South Carolina, the amount of busing during the past five years (including the entire period in which busing has been used as a remedy for segregation) has actually decreased by 2 to 3 percent. And in Florida, where such major systems as Dade County (Miami), Duval County (Jacksonville), Hillsborough County (Tampa), Palm Beach County, Pinellas County (St. Petersburg), Orange County (Orlando), and Broward County (Ft. Lauderdale) have come under extensive busing orders in the past two years, a state study showed "a decline, not an increase, in the average number of miles children are being bused in Florida . . . substantially less busing now than in the days of segregation."

Courts which have weighed the evidence on busing have dismissed the contention that it is harmful or dangerous. In ordering desegregation of the San Francisco elementary schools last fall, Judge Stanley A. Weigel found that

the evidence demonstrates that there simply cannot be desegregation without some busing of some students The evidence also dispels false rumors and other fallacies regarding busing. For example, the National Safety Council statistics, put in evidence, demonstrate that busing is by far the safest means of getting children to and from school. And whatever the real or asserted concerns of parents, the evidence is without dispute in showing that children enjoy busing.

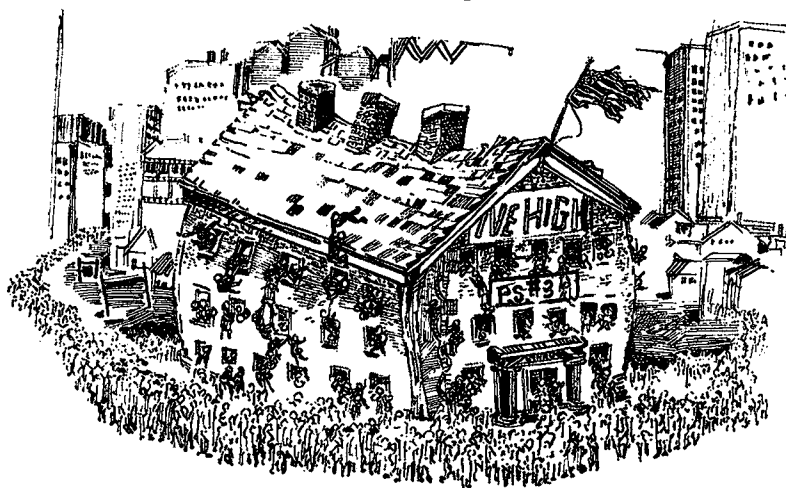
The evidence further shows that the problem of getting parent and child together in emergency situations is not aggravated by busing

Finally in this connection, it should be noted that all of the hue and cry about busing, shown and reflected in the evidence, defeats salient purposes of many of those opposed to busing who say they fear a "white" flight from San Francisco. By feeding unwarranted fears about busing, those opposing desegregation invite a white flight even

before children and parents have had a reasonable opportunity to see for themselves how busing works in actual practice. The testimony in this case makes it clear that in those communities in which busing has been employed, it has worked well. There was no evidence to the contrary.

What is happening now is that different people's oxen are being gored. In the mid-1960's, when schools in the South were desegregating under "freedom of choice" plans, the extent of actual integration was minimal and the process was entirely one-way (small numbers of blacks electing to attend white schools). Later, when attendance zones were redrawn or nearby schools "paired" (e.g., two schools with grades 1-6 becoming 1-3 and 4-6 respectively), the result was to mix black students with those of their white neighbors who were too poor to flee to the outskirts of town or the suburbs. These low-income whites were even more voiceless than the blacks, and no national panic ensued. But by 1970, as more moderate methods failed to desegregate the larger Southern systems and as the integration push moved North, where residential segregation was more pronounced, the courts began to devise remedies for official discrimination that reached beyond the inner-city rings of poor whites into the affluent suburban communities, and to draw assignment plans from which money and mobility no longer afforded an escape. The silent majority, which had been content to watch other people desegregate, especially in the South, suddenly noticed the attendant evils, such as busing; and of course they found a sympathetic ear in the Nixon Administration.

One can at least appreciate the honesty of the white citizens of Wilcox County, Alabama, which had avoided a meaningful desegregation order until mid-March, 1972. Children had always been bused to school in the rural system, and when the busing order finally came, white parents made no bones about the grounds for their opposition. "We don't call what we've been doing busing," State Senator Roland Cooper told the *Wall Street Journal* "That's just car-



rying the children to school. If a kid's got to ride a bus 50 miles to get to school, I'm in favor of it. But I'm not in favor of carrying them one mile to achieve integration."

As Senator Walter F. Mondale of Minnesota — the first Democratic "liberal" to speak out on the busing issue — told the Senate on February 18:

Black children, and their parents, know that the real issue is not "massive busing to achieve an arbitrary racial balance." They know that the real issue is our willingness to accept integrated schools. White children know this too. And the health and stability of our society over the next 50 years will reflect the lessons which we teach our children today.

An even more basic flaw in the President's latest initiative is that it is stated in terms of an attack on the courts. Mr. Nixon, in his TV address, specifically blamed the busing crisis on the lower Federal courts:

Those courts have gone too far — in some cases beyond the requirements laid down by the Supreme Court — in ordering massive busing to achieve racial balance. The decisions have left in their wake confusion and contradiction in the law — *anger, fear and turmoil* in local communities and worst of all *agonized concern* among hundreds of thousands of parents for the education and the *safety* of their children who have been forced by court order to be *bused miles away from their neighborhood schools.*

Demagogic and Distorted

This demagogic and distorted attack is a harsh reward for those lonely and courageous judges, many of them Republican appointees and many of them personally opposed to busing, who have risked ostracism and even physical attack because they adhered to their oath of office and to the Constitution. Its near hysterical references to "anger, fear, and turmoil" rival the rhetoric of George Wallace. Moreover, these remarks show again this law-and-order President's impatience with the institutions and processes he claims to hold so dear. It is highly improper for the President to overrule, or even comment upon, lower court decisions in advance of the appellate review; yet Mr. Nixon has done so, just as he did in his March 24, 1970 statement on desegregation and in his too hasty intervention in the case of Lieutenant William Calley. Commenting on lower court decisions still in the judicial process is roughly equivalent to commenting on a criminal suspect's guilt or innocence. But evidently, such considerations must give way in the headlong rush to reelection.

In addition, the President and his minions have enthusiastically cultivated the impression that the Federal courts have mercilessly escalated their demands on innocent school districts. This line of argument ignores the fact that school districts would not be

in court in the first place if they had not been guilty of constitutional violations, and that most would not be dragged back to court year after year if they would achieve a modicum of success in eliminating the dual system.

Moreover, the Administration, to suit its own peculiar purposes, has contributed to the impression that the courts have gone hog-wild, by fighting — and losing — pitched battles over cases which had little legal significance in themselves but became landmarks because of the attention they were given. First, in the fall of 1969, after its own HEW experts had drawn totally ordinary desegregation plans for 33 districts under court order in Mississippi, the Administration decided that Senator John Stennis' support on the ABM was more important than desegregation, and asked the First Circuit Court of Appeals to delay implementation of the plans. It was the first time since the beginning of the school desegregation movement that the Government had taken the side of recalcitrant school districts, and naturally, this move caused quite a bit of commotion — righteous anger on one side and false hopes on the other. To no one's great surprise, the Supreme Court ruled unanimously, and in record time, that further delay in carrying out the commandment of *Brown* was constitutionally impermissible (*Alexander* decision). In so doing, the Court merely reaffirmed its earlier ruling in *Green* which in turn merely ratified the rule laid down for most of the South by the Fifth Circuit in *U.S. v. Jefferson County Board of Education* (1967).

Pursuant to all these precedents, and in the face of considerable non-cooperation by the school board involved, Judge James B. McMillan in 1970 ordered full-scale desegregation of the schools of Charlotte and Mecklenburg County, North Carolina. Again, the Charlotte-Mecklenburg order was unexceptional, except that it covered a politically significant area — indeed, the city where President Nixon had made his Wallace-like remarks on school desegregation during the 1968 campaign. The order did require extensive busing, but how else could anyone desegregate a large city-county school system? Nonetheless, the Administration again leapt into the fray. Much of President Nixon's March 24, 1970, statement on desegregation — now almost completely discredited — was aimed at the McMillan ruling; and the Fourth Circuit Court of Appeals, bending to the political winds, struck most of the busing requirements from the lower-court order, along with most of the elementary school desegregation.

The Administration participated actively in the case at the Supreme Court level, sending the Solicitor General of the United States to argue against the NAACP Legal Defense Fund and on behalf of the

school board of Charlotte (and that of Mobile, Alabama, whose case reached the Court at the same time). Nearly a year went by between the Fourth Circuit decision in the Charlotte case and the Supreme Court ruling, a year during which the Government sat on its hands and awaited "guidance" from the Court. Finally, on April 20, 1971, the Court delivered itself of another unanimous opinion, reaching the only possible conclusion: that busing was a legal, indeed an essential, tool for desegregating the public schools. "All things being equal," the Court said, 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 cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

The opinion in *Swann v. Charlotte-Mecklenburg Board of Education*, while a thorough exposition of school desegregation requirements, really did nothing more than restate existing law. Its prominence as a so-called landmark was due more to the symbolism attached to it by the Administration than to any major legal departure. Even the South's reaction to the decision was relatively bored, at least until the Administration hopelessly confused and inflamed the Austin situation by first submitting a plan to the District Court in Texas that met *Swann* standards and then, in the President's infamous August 3, 1971, statement, renouncing its own plan. (The case is now in the Fifth Circuit, the result foreordained.)

Deja Vu in Richmond

Thus one can be forgiven a certain sense of *deja vu* with respect to the Administration's expressed intention to intervene in the Richmond case. Judge Robert R. Merhige's ruling has already been the subject of more over-reaction and hyperbole than either *Alexander* or *Swann*, with possibly even less reason, and the Administration appears to be headed down the road to yet another glorious defeat.

Judge Merhige's order consolidating the predominantly black Richmond schools with the 90 percent white Henrico and Chesterfield County systems was hardly the impetuous act of a power-crazed Federal judge. The idea of consolidation originated not with him, but with Richmond city and school officials, originally defendants in the case, who joined with black parents in requesting the relief Merhige ordered; and the judge's 325-page opinion was based on 22 days of testimony and hundreds of exhibits.

The order could well have been founded solely on the theory that the state and the individual school districts, under an affirmative duty to desegregate the public schools, have defaulted in this duty by drawing or maintaining attendance zone lines and district boundaries in a manner that reinforced, rather than reduced, the effect of residential segregation. But Judge Merhige's findings went beyond this relatively innocent theory of conduct, and listed deliberate and conscious discriminatory acts on the part of state and local officials. He fully substantiated the allegations that discriminatory acts on the part of the local districts and the state had contributed and still were contributing to the formation and maintenance of a dual school system in the Richmond metropolitan area, and that the school division boundaries creating separate black and white school systems were the result of the conscious and cooperative efforts of both local and state officials.

School construction decisions by the three districts involved contributed directly to the racial disproportion between city and suburbs, the judge found. And, he added, state officials had been deeply involved in maintaining school segregation, in the Richmond area and elsewhere, particularly during the period of "massive resistance," through such devices as pupil placement laws, school closings, and tuition grants for students wishing to attend discriminatory private schools. (Even while the Richmond case was pending, the state legislature, in anticipation of the result, passed a law designed to limit the power of the State Board of Education to modify school boundaries.) Judge Merhige's decision particularly emphasized the state's past willingness to consolidate districts and transport pupils across district lines for purposes other than, and often diametrically opposed to, desegregation.

If the facts are as Merhige found them, the remedy he prescribed is inevitable and firmly based on precedent. Despite the alarmist statements from the Administration and others, the Richmond case is not the first in which separate school districts have been consolidated or treated as a single district for purposes of desegregation. Such orders have been handed down in Alabama, New Jersey, Arkansas, Texas, Tennessee, and Mississippi; and the possibility that the process of desegregation might involve modification of existing school districts and attendance areas was recognized 17 years ago in the second *Brown* decision ("all deliberate speed").

So an appeal in the Richmond case would logically be directed, if anywhere, to the factual findings rather than the legal conclusions. Such appeals are almost never successful, and certainly do not present the kind of far-reaching questions that would justify

Government participation. The Government's interest, again, is attracted by political considerations, chiefly the Republican vote potential of the community affected.

As in the Mississippi cases and in the *Swann* case, the Richmond order is a legally ordinary decision that is highly likely to be upheld over the Administration's prostrate form, being accorded in the process more prominence than it deserves.

The Administration and others would have us believe that the Richmond tide, if not dammed, will wash over every metropolitan area in the country. But the Richmond decision rests upon a peculiar state of facts that cannot be assumed to exist in every metropolitan area, as should be obvious from the foregoing discussion. Where similar facts are found, the remedy could be the same even if the Richmond case had never happened. But the facts which underlie the Richmond decision are unusual, if not unique; and remedies in future school cases will have to depend on the facts that are developed in such cases, including the facts as to feasibility of proposed remedies, rather than those in the Richmond case.

The new Equal Educational Opportunities bill includes a section intended to thwart future Richmond orders, providing that school district lines shall not be ignored or altered except where it is established that the lines were drawn for the purpose, and had the effect, of segregating children among public schools on the basis of race, color, or national origin.

In school desegregation cases it has long been the law that if official action has *either* the purpose *or* the effect of segregating or discriminating against students, it is a violation of the Fourteenth Amendment. To the extent that this section holds otherwise, it is unconstitutional. But even as it stands, an argument could be made that it would not have prevented the Richmond decision.

Of all the shortcomings of the President's TV message and his new bills, perhaps the most serious is his failure to propose any constructive steps, even of the short-term variety. Mr. Nixon did say he was ordering the Department of Justice to intervene in cases where the courts had ordered busing in excess of Supreme Court requirements, but as can be shown, this action smacks of a political maneuver instead of the useful legal exercise it could have been — and might still be. The *Swann* case held that busing should not be ordered where it poses a risk to the health of the students involved or significantly impinges on the educational process. If there are in fact cases where the busing required exceeds this standard, the President should instruct the Justice Department to challenge such orders and to seek at least a more

specific measure of permissible and impermissible transportation.

In addition, the President could:

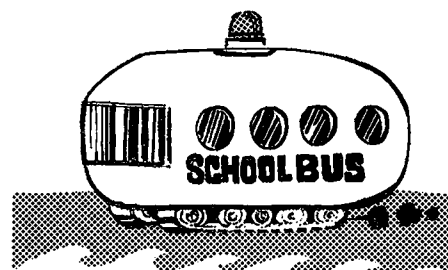
— Take steps to make Federal funds available for busing, where school districts request the money for this purpose. (A proviso to this effect was included in the Scott-Mansfield Amendment to the Emergency School Assistance Act passed by the Senate.) The Administration's refusal to authorize any funds for busing last fall imposed an immense hardship on many districts which were faced with court orders that had to be implemented with or without Federal assistance and which had been led to believe that transportation money would be available.

— Provide technical assistance to help school districts to attain Mr. Nixon's goal of more desegregation with less busing. Studies have shown that most public school transportation systems are incredibly inefficient, and that many could desegregate completely without any significant increase, and in some cases with a reduction, in the amount of busing.

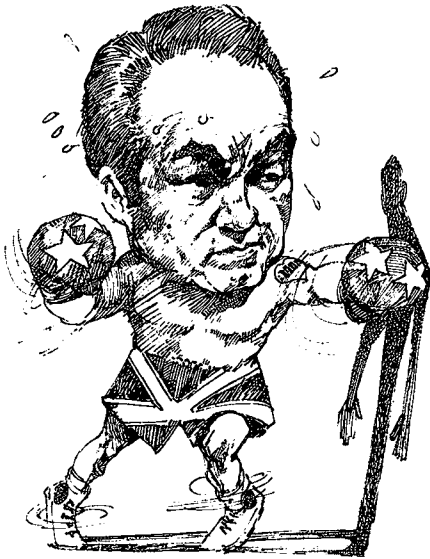
But the real solution to the problem of busing was best stated last August by Florida's Governor Askew, who along with Virginia Governor Linwood Holton stood almost alone for many months against the tide of anti-busing hysteria. Busing, said Askew, is an artificial and inadequate instrument of change. Nobody really wants it — not you, not me, not the people, nor the school boards — not even the courts. Yet the law demands, and rightly so, that we put an end to segregation in our society.

We must demonstrate good faith in doing just that. We must demonstrate a greater willingness to initiate meaningful steps in this area. We must stop inviting, by our own intransigence, devices which are repugnant to us. In this way and in this way only, will we stop massive busing once and for all.

Though the course of events may not be smooth, this country, to survive without the desecration of its deepest values and purposes, must one day be integrated; and those who turn from this goal in a moment of fear will be seen as moral and political mountebanks in the cold light of history.



Governor Wallace's Florida Failure



by
Clifford
Brown

Virtually every interpretive conclusion reached by the national news media with respect to the performance of George Wallace in the Florida primary is simply wrong. The news media has suggested that 1) Florida is a typical cross-section of the country because of its large in migration, 2) Wallace's performance was intrinsically impressive, 3) Wallace's performance demonstrates a significant upsurge in conservative sentiment — or at least a significant upsurge in Wallace support, and 4) that Wallace was able to capitalize dramatically on the busing issue. A careful analysis, county by county, of the returns in the presidential preference primary and in the busing referendum presents convincing evidence to refute each of these assumptions.

First of all, the assertion that Florida voters present a typical cross-section of the American electorate is absurd beyond belief. Florida may well have voters from all over the U.S. but certainly not in a proportion similar to the national mix. In the 1968 presidential election, for instance, Hubert Humphrey nationally received approximately four times as many votes as George Wallace and outside of the South this ratio was considerably higher. In Florida, however, George Wallace came within two percentage points of beating Hubert Humphrey (30.9% to 28.5%). The ratio was precisely 11-10. When Republicans are removed from consideration, remaining Democrats are even less representative of the national mix than the Florida electorate as a whole.

Secondly, the assertion that Wallace did intrinsically well and that the primary results showed a

Wallace resurgence are not valid by the results. Wallace indeed carried every county in Florida. He indeed carried 41 per cent of the electorate. But he *should* have carried at least this percentage, in accord with traditional Florida voting patterns. For the last decade Florida primaries have split almost evenly between "liberal" and "conservative" candidates. Wallace's performance was simply a manifestation of this pattern.

The total Democratic vote in this primary was almost identical to the combined Humphrey/Wallace totals in 1968, not only state-wide, but in virtually all counties. There is a sufficient correlation between these totals to demonstrate that the Democratic-AIP vote of 1968 constituted the bulk of the Democratic presidential preference vote in 1972. However, in 1972 the Wallace total was actually *down* significantly state-wide from its 1968 total: 624,207 in 1968, 515,916 in 1972. Not only did he receive over 100,000 fewer votes last month than in 1968, not only did his percentage of this two party vote drop from 48 per cent to 41 per cent, but the number of votes cast for his opponent(s) rose from 676,794 to 726,134.

What happened was that approximately the same people who voted for Wallace in 1968 came out and voted for him in 1972. In his counties of 1968 strength he was strong in 1972, in his counties of 1968 weakness, he was weak in 1972, and similarly in the counties of moderate strength.

His 1972 performance was *marginally* better in Dade and Palm Beach Counties (together with three small counties). But in the remaining 62 counties he received fewer votes in 1972 than in 1968 — despite the fact that the total relevant turnout was better.

Further, there is hardly any correlation between the Wallace vote and the anti-busing vote. (The latter was uniformly high throughout the state.) Wallace dropped as low as 27 percent in some counties, but busing in counties of poor Wallace performance was only marginally better received than in counties of strong Wallace performance. It can not be said that the busing issue improved Wallace's performance dramatically anywhere (because Wallace's performance didn't dramatically improve anywhere over his 1968 performance, and because busing seemed to be equally rejected where Wallace was doing well and where he was doing poorly.)

What, then, happened in Florida? It was a classic case of the liberal and moderate vote being split up among a large number of moderate candidates in a state where the liberal vote hangs around 50 percent of the total turnout in a Democratic primary. As a measure of this split, consider that Wallace *carried* Dade County (Miami) with 27 percent of the vote. The breakdown was as follows: Wallace, 27 percent, Humphrey, 26 percent, Jackson, 13 percent, McGovern, 12 percent, Muskie, 10 percent, Lindsay, 6 percent, Chisholm, 4 percent, Others, 2 percent. Around the state the vote was not evenly distributed among Wallace's opponents. Humphrey came in second in 38 counties, Jackson in 24, McGovern and Chisholm in two apiece, with one county having an even split between Humphrey and Chisholm.

Nixon's Gift to the Democrats

by Josiah Lee Auspitz

Those of us who had hoped that President Nixon and his advisers had learned their lesson from the misfiring of the crime issue in the 1970 elections apparently gave them too much credit. They are at it again, and this time lack even the sense to use the Vice President. The same glee at liberal discomfort, the same euphoria about an emerging Republican majority that surrounded the law-and-order radical-lib-permissiveness issue are now reported to accompany the President's stance on busing.

As with crime, the President has seized on a legitimate issue that causes many voters real concern. As with crime he can, if he wishes, get legislation with his stamp through the Congress. As with the attack on permissiveness two years ago, his attack on the liberal rationale for busing can draw on some sprightly intellectual support (see the spirited and influential polemic by Harvard Professor Nathan Glazer in the *March Commentary*, "Is Busing Necessary?", as well as the magazine's uncritical editorial endorsement of it.)

Yet as with crime, his political use of the busing issue will cost him many more votes than it wins. And though this would be a noble sacrifice if his position were right on the merits, his position, notwithstanding some very ambivalent phrasing, is very hard to interpret as judicious, responsible and correct.

Let us begin with the politics of the issue. The usual political sophisticate accepts that busing is an explosive gut issue, that the vast majority of whites and a good number of blacks oppose it, that therefore any President who espouses an anti-busing position will win votes.

But it is possible in politics to espouse an issue with which a Gallup Poll majority agrees and still lose an election on it. Richard Nixon and Murray Chotiner may remember this phenomenon from the Oregon primary of 1948 when their candidate, Harold Stassen, called for outlawing the Communist Party — a stance that a vast majority of voters supported. Thomas E. Dewey countered with a reasoned, New York lawyer's refutation that won him the primary. Why? The minority who were against outlawing the Communist Party were well informed people who could swing votes — their own and those of others — against a candidate they regarded as demagogic and unpresidential. In a two-party system, as in a two-man race, the balance of power often lies with such responsible people, who though in a minority are quick to switch between the parties and are good at persuading others to do likewise.

In voting behavior, these influential citizens, as a recent book by Walter DeVries and Lance Tarrance has noted, are ticket-splitters, who read editorials, remember what they hear on the news and take part in civic activities (*e.g.* participating in delicate busing compromises). Two years ago, they repudiated Republican senatorial candidates who seemed to be riding high on the issue of crime. New Jersey suburbanites who had chosen Nixon in 1968 and Cahill in 1969 and will vote for Case this year rejected Nelson Gross in 1970 by landslide proportions. Republican suburbs in Illinois that voted for Nixon in 1968 and will vote for Percy in 1972 showed unmistakable revulsion for Ralph Smith. *Washington Post* reporters David Broder and Haynes Johnson have

recently noted that certain key affluent precincts in California that voted for Nixon and Cranston (instead of Rafferty) in 1968, Reagan and Tunney (instead of Murphy) in 1970, now have begun to favor Muskie over Nixon.

Mr. Nixon himself was damaged on the crime issue, despite overwhelming popular support for his position. His dubious martyrdom at San Jose and his nationally televised anti-crime speech at Phoenix cost him the confidence of strategically placed voters, who are especially sensitive to presidential rhetoric. This was evident in post-election polls which showed a large shift from Nixon to Muskie among college educated voters making more than \$15,000 a year.

Laboriously over the past 16 months Mr. Nixon has tried to win back such support. He has become a proponent of the new prosperity, he has visited Peking, he has prepared a limited arms control agreement with the Soviets, he has toned down Agnew. But his political use of the busing issue will stir the old doubts. Delivered so close after the Florida Primary, his speech, however well-conceived, plays politics with the schooling of children.

His message to Congress put it in populist terms, saying that the school bus had become for many "a symbol of helplessness, frustration and outrage," "a symbol of social engineering."

For most Americans these words simply do not ring true. Forty percent of American children ride school buses; an additional 25 percent use municipal transportation. An infinitesimal number of these children are transported in the name of racial balance. In suburbs without sidewalks where so many swing voters live, the school bus is first, simply a symbol of the automotive age, second, a safer mode of transport than walking, third, an indispensable mode of access to quality or consolidated schools and fourth, a symbol of racial integration that one has not experienced but seen mainly on television. (School busing controversies have not directly involved most people in such swing states as New York, Pennsylvania, Illinois, and Wisconsin.)

To declaim against busing categorically will, even in impacted states like Michigan and Texas, strike many thoughtful people as disingenuous. How may it be that busing is proper for all purposes except that of achieving racial integration? This does not seem to square with the President's own assurances that he is not pandering to racial prejudice. Moreover, a year ago in vetoing money for ghetto schools, he cited the Coleman report findings that the problems of poor schools could not be solved by money but only by racial or socio-economic integration. Now presumably on a new reading of the same data, he is willing to pour good money down those ratholes of yesteryear.

Such inconsistencies give Mr. Nixon's partisan opponents a rare opportunity simultaneously to stoke the rage of anti-busing voters and to win the swing constituencies that either favor some use of busing or oppose playing politics with the issue. They need only issue delphic attacks on the President for cynicism, delay and legal obfuscation, or for other tangential faults; they thus can avoid committing themselves to an alternative position before nomination. After nomination, the classic position would be: "We Democrats, too, oppose busing, but not all busing. And we shall not try to divide the country on it. The real issue facing us is the economy." Both Muskie and Humphrey have preserved the flexibility to take this course, though either might also consider preempting the responsible Presidential type of approach that has been lacking on this issue in the early primaries, and in the President's speech.

But the political opportunity that Mr. Nixon has presented to his opponents is nothing compared to the distress he has caused his allies in the Senate. His busing speech, which he reportedly wrote himself, studiously avoided use of the word "integration," substituting instead "desegregation." His 8000-word message to the Congress, which his aides wrote, is remarkable for using "integration" or its derivatives only twice, once in a favorable and once in an unfavorable context. Mr. Nixon should not be surprised, then, that even casual listeners sensed a retreat from the ideal of an integrated society and feared a return to a separate but equal doctrine.

His speech, moreover, disrupted a moderate compromise that would have kept the issue in the courts and out of politics. The authors of the Mansfield-Scott Amendment, which narrowly passed the Senate, knew, as the President knows, that Chief Justice Burger has already committed the Supreme Court to busing as a means of achieving desegregation, or as he put it in the *Swann* case: "Desegregation plans cannot be limited to the walk-in school," though he also specified that busing will not be required when "the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process."

They also know that Burger has carefully hedged his words on racial balance, which he sees not as an end in itself, not an "inflexible requirement," but as "a starting point" for lower court judges in assessing whether there has been a good faith attempt at

FREUDIAN SLIP OF THE MONTH

The Republican National Committee's newsletter, *Monday*, composed the headline, "President Comes Out Strong Against Busing For Quality Education." Just before publication, someone spotted the error and inserted a comma after the word "Busing."



desegregation. He has specifically said that it is not necessary that every school be racially balanced in accordance with a statistical standard, that "no rigid rules" can apply to all communities, and that there is certainly "no need to make yearly adjustments of the racial compositions of student bodies once the affirmative duty to desegregate has been accomplished."

Moreover, there has been no case-setting guidelines for Northern schools. Because of failure in judicial communication, much of the public and even some lower court judges may have misunderstood Burger's opinion. To allay fears until the Supreme Court can elaborate its position, the authors of Mansfield-Scott provided that pending court-ordered busing cannot begin until all judicial appeals are exhausted; they also repeated Burger's assurances about unreasonable time and distance, and included another proviso to reassure worried parents: Federal officials would not require busing to markedly inferior schools.

The assumption behind Mansfield-Scott is that the country is in good hands — that the Supreme Court has laid down reasonable standards, that lower court judges are by and large responsible people trying to find a way of following the wishes of the court in their communities, that to the extent they fail to do this they will be overruled. Mr. Nixon, on the other hand, without saying anything that really challenges Burger's decision (he, like the Chief Justice, is against busing for "racial balance" alone), has fostered a contrary impression that the lower courts are running

mad, that crackpot social planners have been empowered (during the Nixon administration?) to destroy neighborhoods and disrupt families. It almost seems as if he wants the further elaborations of the *Swann* decision to be perceived by the public as a reversal which he brought about.

Those 48 Senators who passed the Scott-Mansfield amendment can only conclude that the President has opened the option of using busing as a major campaign issue in 1972, much as he used, through his Vice President, an attack on "permissiveness" and radiclibism in 1970. This opinion accords with an old hope of the Republican right that the movement of the racial issue northward would permit the forging of a new "conservative" GOP majority based on opposition to civil rights. In 1970 this tactic created severe strains in Republican unity — with candidates like New York Governor Nelson Rockefeller, Massachusetts Governor Francis Sargent and Ohio Senator Robert A. Taft disassociating themselves from Agnew. It will do the same again, as Republican Senators like Percy, Case, Brooke, Miller, Baker, Griffin, Thurmond, Tower and Pearson, who are up for reelection, will have to take a stand either for or against the President's busing policy.

Segregationists, moreover, do not appear to be mollified by the President's clever phrasing. Senators Eastland, Talmadge, Stennis and Allen, as well as Alabama Governor George Wallace, were quick to condemn Mr. Nixon, since they saw that his opposition to busing was limited to the trick phrase of "racial balance" and would in principle retain busing to achieve desegregation, quality education and equal opportunity.

Wallace-leaning constituents may be slower than well-heeled suburbanites to know when they've been had. But when they find out — and there is plenty of time till November — the school bus really will be a symbol of their outrage, this time directed at the President.

Were his speech delivered a week before election, Mr. Nixon might expect political gains. But over the longer term his position will erode. He has stirred distrust and confusion among responsible swing voters. He has given his Democratic opponents the luxury of attacking him instead of developing their own positions. He has reopened old strains in his own coalition. And he has contributed nothing to the debate that is not already in the *Swann* decision. As for the school children involved, nothing harms their future more than uncertainty about educational planning, and to this the President has added.

All that said, there is a need for a judicious approach that only someone of presidential or high judicial stature can make stick. It would try to find a doctrine or formula to reconcile the following con-

siderations and make them understandable to the public:

● Busing for the purposes of promoting desegregation, quality education and equal opportunity will and should continue. Some of it will be court-ordered, in accordance with guidelines to which the Supreme Court is already committed. Some will be voluntary, in accordance with feelings of community responsibility on which many Americans have already acted. Increasingly, citizens who derive high incomes from a metropolitan economy are sharing responsibility not only for the roads, civic improvements and commercial viability of the surrounding area, but also for the education of the children within it. Those who have not yet honored this duty should not be humored into mistaking skepticism about "racial balance" for a moratorium on integration itself.

● Busing will and should be demoted to one means among many. A research paper by Professor Robert Donaldson and other members of the Ripon Society chapter of Nashville, Tenn., (printed in this issue, page 22) delineates the limits of busing and suggests other approaches to desegregation, quality education, equal opportunity and freer choice. These include "magnet schools" with "open enrollment," rezoning plans, educational parks, comprehensive high schools, televised interschool classrooms, and variants of the voucher system. Many of these same measures are cited in the President's own message to Congress, along with a proposal to provide financial bonuses to the receiving school for each pupil transferred from a poor school to an advantaged one. As the Nashville Ripon paper suggests, to rely on busing exclusively is foolish and counterproductive, to oppose it flatly is demagogic.

● In the largest cities where there has been no history of dual school systems and where there exist both large ghettos and a growing black middle class, busing to achieve full racial balance is impracticable and perverse. One simply cannot successfully mix the black and white schools of New York, Chicago or metropolitan Washington, D.C., on the basis of race alone. Large Southern cities that have made continuing and good faith efforts at desegregation and then lapsed into Northern-style *de facto* patterns will have to be treated like the Northern cities. Here the emphasis will be less on busing than on alternate approaches, including control of schools by vigorous black communities. In small- to medium-sized cities, which the President's national growth policy targets for special development, busing will be more practicable, as disadvantaged children, white and black, are transported to schools where socio-economic integration may improve their life chances.

● Parents do, as the President suggested, have a right to plan their children's futures in a predictable environment. Provided the Constitution is obeyed, they do have a right to expect that their children will not be sent to markedly inferior schools, and that education will not be disrupted biennially in the name of electoral convenience or sociological theory. Judges and politicians can best reassure parents by setting firm standards in each community and making it clear that they will not be subject to continual political renegotiation.

Chief Justice Burger was well on his way to developing a body of doctrine that takes reasonable account of such considerations. The Mansfield-Scott amendment was designed to buy him time to do so. The President could thus have left well enough alone. Or he could have quoted and supported his Chief Justice, reminded the country that the issue was in capable judicial hands, and removed it from the 1972 campaign.

Instead, he chose to insert busing directly into the political process following a primary election in which it was a wholly unedifying issue, thanks in part to a referendum which members of his own staff encouraged to be placed on the ballot, in part to the frivolity of leading Democratic candidates. What effect can this have in the heated months before the presidential election but to undermine in advance the legitimacy of any middle-of-the-road formula that his Chief Justice may develop?

Now that the President has put the issue on the 1972 political agenda, he must suffer the consequences or make determined efforts to repair to higher ground. His own action to date has made honest conciliation more difficult. The opportunity remains for someone to exercise leadership.

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from the Washington Post



And It's Not Even Constitutional

by Peter V. Baugher

Both the President and the congressional Democrats have now announced their programs for curbing school busing while guaranteeing equal educational opportunity. Regrettably, the urgent tone and political timing of these plans would damage their credibility even if they were soundly conceived. But Mr. Nixon's legislative proposals must be challenged not simply on the basis of general policy but on legal grounds as well.

Even if busing were an unmitigated scourge unsupported by independent social analysis, constitutional principles would militate against the President's legislative program. As a general rule, Congress should decline to pass and the chief executive refuse to sign measures of questionable legality, because the forcing of a constitutional test by prestigious elected officials may itself undermine the constitutional order. This cautionary presumption is especially relevant in intragovernmental conflict, for power struggles between coordinate branches are frequently destructive and difficult to resolve.

Both President Nixon's bills violate this presumption. Both depend upon the alleged existence of far-reaching congressional authority to narrow the equity jurisdiction of federal courts. The Student Transportation Moratorium Act (H.R. 13916) would prevent judges from issuing new busing orders until July 1973, or until Congress took action on Mr. Nixon's second and more comprehensive busing plan. The Equal Education Opportunities Act (H.R. 13915) earmarks funds for upgrading inner-city schools and reaffirms (superfluously) the Constitution's proscription of all deliberate educa-

tional segregation. Courts, however, would be deprived of their present power to compel long-term busing of elementary school students, and all court order or desegregation plans currently in effect would be "reopened and modified to comply with the provisions of this Act." Each of these measures is legally vulnerable.

The Administration bills rely first on Article III, Section 2 of the Constitution, which grants the Supreme Court appellate jurisdiction over "all cases, in law and equity, arising under this Constitution, [and] the laws of the United States, . . . with such exceptions, and under such regulations as Congress shall make." The proposed statutes derive secondary support from clause 9 of Article I, Section 8: "Congress shall have the power . . . to constitute tribunals inferior to the Supreme Court." Finally, White House apologists point to Section 5 of the Fourteenth Amendment, which specifies that "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." When observed in the context of the whole constitutional structure and in terms of the framers' intent, however, the circumscribed nature of these dictates becomes apparent.

The cornerstone of our governmental framework is the doctrine that the Constitution stands above all else and is, to quote John Marshall, "superior paramount law, unchangeable by ordinary means, . . . [not] alterable when the legislature shall please to alter it." Accompanying this critical precept, is acceptance of the proposition set forth 170 years ago in *Marbury v. Madison*, 1 Cranch 137 (1803), that a major function of the Supreme

Court is to interpret the meaning of the Constitution and to review all executive conduct and legislative enactments which (like the current presidential offerings) seem to contravene those interpretations:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws [the Constitution and an act of Congress] conflict with each other, the courts must decide on the operation of each . . . This is the very essence of judicial duty.

Exceptions Clause

The presence of Article III's previously-quoted "exceptions" clause does not narrow the scope of these principles. In granting Congress the power to regulate the Supreme Court's appellate jurisdiction, the authors of the Constitution were concerned primarily with preventing the Court from subverting the purpose of jury trials by making its own findings of fact — an issue settled almost immediately thereafter by the adoption of the Seventh Amendment in 1791. The true intent of the framers concerning judicial guarding of constitutional freedoms (now including the "equal protection" guarantee of the Fourteenth Amendment) was eloquently voiced by James Madison during the congressional debate on a federal bill of rights:

If they [the proposed first ten amendments] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bul-

wark against every assumption of power in the legislative or executive.

From this perspective — to the extent that they perpetuate the existence or effects of state-imposed segregation, and therefore preserve conditions of unconstitutional inequality — the Nixon-sponsored limitations on busing cannot be sustained. Congress is no doubt empowered in this matter to prescribe preferences and priorities for guiding the courts in their determination of which methods should be employed to enforce the Fourteenth Amendment. Where a court, however, in the exercise of its judicial function concludes that busing is the only practical means of providing persons with the equal protection of the laws promised to them by the Constitution, no contrary legislative statement can be accorded deference.

How, for example, can the Constitution assign the Supreme Court the duty to decide "all cases" in accord with that document — contradictory legislative utterances notwithstanding — if Congress is at liberty to defeat this obligation by a jurisdictional edict? It is inconceivable that the mere power to regulate jurisdiction should be transformed into an engine by which the legislative branch can (1) affect rights having nothing to do with jurisdiction, and (2) affect those rights in disregard of all other terms in the very charter which confers that (properly construed) modest regulatory authority. Congress' exceptions to the jurisdiction of the Supreme Court must at least not be such as will destroy the essential role of that body in the constitutional plan.

Despite, though not necessarily inconsistent with, the efficacy of this reasoning, the Supreme Court has suggested on a number of occasions that the judiciary does not enjoy complete independence from congressional control. But in only one case since the founding of the

republic — a case the continuing validity of which has been publicly disputed by Justices William O. Douglas and the late Hugo L. Black — did the Court acquiesce to the removal of its jurisdiction over a matter of constitutional law. In *ex parte McCordle*, 74 U.S. 506 (1869), the Supreme Court (under intense pressure from the radical Republicans of that day) yielded to an act of Congress repealing its authority to handle *habeas corpus* appeals; a measure passed specifically to prevent the Justices from freeing newspaper editor Henry McCordle who was at that time being held unlawfully by military officials in Mississippi.

The force of this precedent is substantially restricted, however, by several considerations. The first of these is the Supreme Court's understandable political trepidation in the face of contemporary events — Andrew Johnson had just become the first United States President to face impeachment proceedings. The second distinguishing characteristic of *McCordle* is that parts of the judiciary were allowed to remain open to *habeas corpus* suits. Congress in no way attempted to cabin lower court jurisdiction, and the Supreme Court itself was not restrained from entertaining petitions for the writ filed with it in the first instance. Under the Nixon plan, on the other hand, no judge in any tribunal could order busing.

Furthermore, unlike the 1868 legislation, the Moratorium and Equal Opportunities Acts do not oust the federal courts of jurisdiction over the subject, in this case school desegregation. They merely proscribe the single remedy of recourse to the school bus. But Congress cannot pick and choose among various forms and degrees of relief without impinging on the doctrine of the separation of powers. So long as a court is not deprived of its authority to hear a case or class of cases, it is constitutionally

obliged to resist legislative instruction with respect to the mode and scope of its adjudication of the constitutional issues presented. Justice Wiley B. Rutledge put the matter succinctly:

It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them . . . Whenever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. (*Yakus v. United States*, 321 U.S. 414 (1944); dissenting opinion.)

In short, where no constitutional question is raised, Congress may generally enlarge or contract the equity jurisdiction of federal courts, though such alterations (1) must make provision for at least some access to a judicial panel, and (2) cannot withdraw jurisdiction selectively or fractionally in order to overrule an ongoing series of court decisions. The President's anti-busing bill fails under both of these qualifications. But more important, Congress patently lacks the power to prevent the Supreme Court from fulfilling its essential constitutional role as the agency whose unique function it is to interpret the Constitution and review the enactments of the legislature in the light of those interpretations. No act of Congress can legitimately constrict the Court's ability to discharge this responsibility.

It is claimed by the advocates of the proposed statutes that this rule should be modified when Congress seeks to exercise its stated rights to enforce the Fourteenth Amendment. Indeed, three recent Supreme Court cases — *Katzenbach v. Morgan*, 384 U.S. 641 (1966);

Shapiro v. Thompson, 394 U.S. 618 (1969); and *Oregon v. Mitchell*, 400 U.S. 112 (1971) — have suggested that Section 5 (Congress shall have the power to enforce . . .) may give rise to certain special legislative authority. But this authority can only be employed (if at all) to facilitate the realization or expand the reach of the Fourteenth Amendment. The authors of Section 5 did not go to the trouble of amending the Constitution so that one hundred years later Congress would be able to redefine more strictly the sweep of the equal protection clause. As Justice William J. Brennan wrote in *Katzenbach v. Morgan*:

Section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment. . . . [It] does not grant Congress power to exercise discretion in the other direction and to enact statutes so as in effect to dilute equal protection and due process decisions of this Court. We emphasize that Congress' power under Section 5 is limited to adopting measures to enforce the guarantees of the Amendment; Section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.

Provisions similar to Section 5 also appear in Amendments Thirteen (slavery), Fifteen (voting rights), Nineteen (women's vote), Twenty-three (D.C. representation), Twenty-four (poll tax), and Twenty-six (18-year old vote). Yet none of these grants has been — or could be — used to abridge basic guarantees embodied in those amendments. With regard to the Fourteenth Amendment, then, Congress may preempt or dictate the judicial response to school desegregation cases only when the banned remedy of busing is not constitutionally imperative. Where a

court determines busing to be the only means of achieving equal opportunity, statutory language passed pursuant to Section 5 but inconsistent with the judges' holding is of no consequence.

But if these legislative avenues are blocked, what of a constitutional amendment barring all compulsory busing? Aside from the nearly insuperable difficulties of drafting in this area, and the unexpiable affront of adding a racially motivated paragraph to the American Constitution, even the most carefully and humanely worded amendment would constitute a deficient approach to the disposition of the busing issue. Because it varies greatly from place to place and is local and time-bound in nature, the busing problem is not a suitable subject for constitution-writing. Our Constitution is not the Code of Federal Regulations, or the Elementary and Secondary Education Act of 1972. It is a repository for fundamental substantive, structural, and procedural provisions, suited as John Marshall said for ages to come.

A Majestic Promise

It may be replied that the courts are already dealing with busing, and in the name of the Constitution. But this is an exercise of their equity power to implement the constitutional mandate of *Brown v. Board of Education*. Numerous federal courts have issued specific decrees conditioned by the variables of one or another particularized situations. What the Constitution contains is only the majestic promise of equal protection, on which the gloss of the *Brown* decision has quite properly been placed. Implementation of that promise by individual judicial orders dispatched in different places at different times, is a matter widely dissimilar from attempting to govern the question of busing by inserting a constitutional clause.

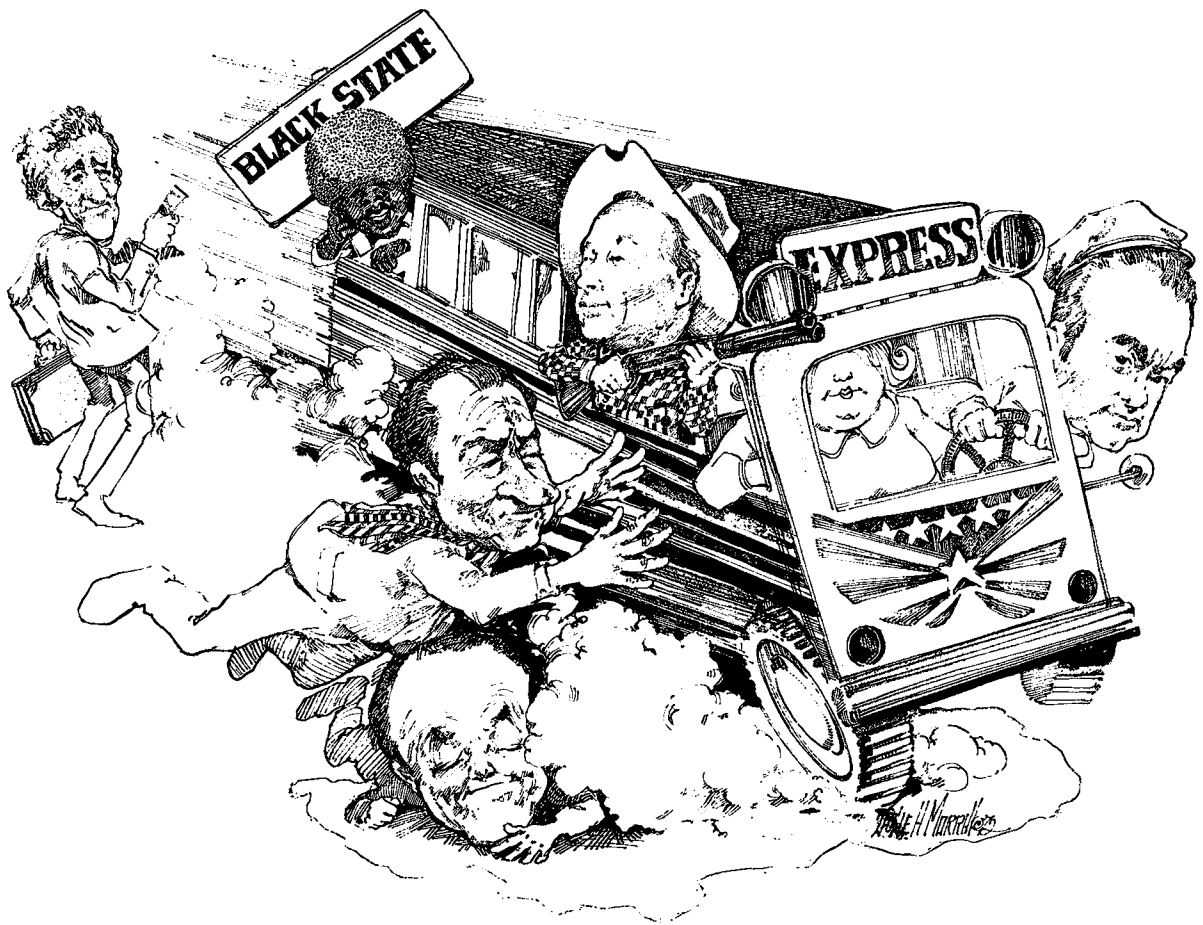
Both President Nixon's legislative program, and the amendatory

alternatives introduced earlier this year, are thus incompatible with American constitutionalism. Congress does, however, have the power to specify procedures for enforcing the Fourteenth Amendment, as long as those procedures are adjudged by the judiciary to be in conformance with the Constitution. If it is felt that *some* kind of "anti-busing" legislation is needed, the following language (together with the monetary provisions of the Equal Educational Opportunities Act) may fill that requirement:

"Except as required by the Constitution, no court, department, or agency of the United States shall order the implementation of a plan designed to transfer or transport students from any school attendance area prescribed by competent state or local authority, for the purpose of achieving a balance among students with respect to race, religion, or national origin, where such plan would increase (1) the average daily distance traveled by the students in question, (2) the average daily time of their travel, or (3) the average daily number of students involved in the busing."

This proposal has the advantage of effectuating Congress' view that when equal protection has been denied the first recourse should be to such measures as voluntary student transfer, rezoning of attendance lines, pairing of racially-opposite schools, and integration-governed site selection for new units. Only if these methods were inadequate, could a court (as the Constitution demands it must) order new busing. While accomplishing these reasonable objectives, the introductory clause would safeguard the bill's constitutionality and reassure those who have viewed the congressional response to the busing "crisis" as an attempt to retreat from the position of *Brown v. Board of Education* and an excuse to relinquish the goal of creating a fully integrated multiracial society.

A Ripon Policy Analysis



Busing and Its Alternatives

by The Ripon Society of Nashville

Introduction

In the midst of an election-year furor, the overriding objective of providing a quality education for all children is in danger of being submerged by what is essentially a debate over a long-existing form of transportation. Much genuine but misguided concern has been aroused for the welfare and safety of schoolchildren. Many fear that desegregation will bring a lowering in the quality of education. Clear and persuasive evidence is available to alleviate these fears.

But instead of engaging in con-

structive dialogue, some politicians are playing with this issue as a way of exploiting racial prejudice, to the extent that for some "anti-busing" becomes a synonym for "anti-black" and the "protection of the neighborhood school" becomes a synonym for "keep blacks out of my kids' school."

The Ripon Society reminds elected officials that equal opportunity in education is their constitutional mandate — *not* the "neighborhood school," which has no sanctity in the Constitution or in law. Education is a function of the state, not of the neighborhood. All schools in a dis-

trict are supported by all taxpayers of that area — a school does not "belong" to the citizens of the surrounding neighborhood.

One desegregation device — extensive cross-town busing — entails some inconvenience and arouses widespread aversion. There is evidence that in some demographic settings large scale busing may be counterproductive, stimulating white flight from public schools. Thus we propose to examine alternative plans involving lesser amounts of transportation, though we strongly reject attempts to bar entirely — by legislation

or by constitutional amendment — plans involving use of reasonable levels of transportation in circumstances where busing is needed to break down the walls of segregation; our emphasis will be on practical plans by which communities might achieve desegregation without massive busing.

The economic and social costs, to individuals and to the larger community, of further delay in desegregation are intolerable. Eighteen years have passed since the *Brown* decision; we cannot afford to wait longer while yet another generation of youths is denied equal access to quality education. Thus, we reject "pie-in-the-sky" proposals which serve only as excuses for indefinite postponement of the serious effort necessary to provide immediate remedies. The concentration of the energies and hopes of public officials on the proposal for a constitutional amendment against busing files away on the shelf the problem of educational opportunity. Such efforts threaten to destroy even the progress of two decades. Likewise, the simple advocacy of "open housing" may become an excuse for avoiding the real issue. Even with vigorous enforcement, its attainment is at least a generation away, and even then, it offers little hope to poverty-stricken blacks in the urban ghettos if it means merely the movement of middle-class blacks into middle-class white neighborhoods.

Even well-intentioned plans requiring a massive infusion of funds and massive capital construction are likely to be long-term in their implementation. Time is needed not only to pry out the funds but also to build the new educational centers. We shall consider some plans which involve large capital construction costs. But we recognize that the entire present system of financing public schools largely from the overburdened property tax is under growing attack in the courts. There may need to be an entirely new approach to the financing of public education in the near future. Thus we shall also present one plan (the voucher proposal) which represents a radical departure, but which has promise for removing both economic and racial inequalities in education.

We urge recognition of the fact,

however, that until such long-term plans can be approved and implemented, it may be necessary to resort to less desirable means to achieve the objective. The Ripon Society believes that the time for delay and wishful thinking is past.

Problems of Progress

During the late 1960's and early 1970's, steady and significant progress has been made toward the goal of ending school segregation in the South — *de jure* segregation produced by the manner in which state and local governments had established and operated the public school system. In 1968, 68 percent of the South's black pupils were in all-black schools; in 1971, the figure was 9.2 percent. To look at it in another way, as of 1970 39 percent of black children in the South went to schools where whites were in the majority, compared with only 28 percent in the North and West. Much of this progress was attributed by the HEW to court-ordered busing plans.

While a majority of Southern school districts have instituted effective desegregation plans, districts which still maintain a high rate of school segregation include many of the region's major metropolitan areas. In short, the rural South has made dramatic gains, while effective integration is yet to come in many large cities.

In fact, even when the state-supported patterns of discrimination have been ended, there is no guarantee that effective integration, in the sense of racially balanced yet majority-white schools, will result. The persistence of this *de facto* school segregation lies in the fact that, in many cases, the predominantly white suburbs and the largely-black inner city do not even constitute the same school district. For example, there are 75 school districts in the Boston metropolitan area, and 96 separate districts in the Detroit area. Add to these considerations the fact that in many Northern cities, even those white children who live in the central school district attend private or parochial schools (2 of 5 whites in Boston and St. Louis, 3 of 5 in Philadelphia), and the difficulty in achieving racial balance throughout the country becomes clear.

Is Busing the Issue?

Due to housing patterns in most metropolitan areas, court-ordered school desegregation in urban school districts has resulted in reliance upon the transportation of children away from neighborhood schools to more distant schools. In some cases, one-way busing of small groups of black children from ghettos to predominantly white schools, was ordered. However, a more extensive, two-way form of busing is increasingly being utilized to produce proportional racial mixtures throughout an entire school system. It is this form of busing — involving the transportation of white children to ghetto schools — which the courts have not only increasingly ordered, but which many white parents, both North and South, heatedly oppose.

Indeed, white Southerners have lived with, and accepted, busing for decades, for it was a primary tool for the maintenance of segregation. Ironically, some Southern courts ruled, prior to the *Brown* decision, that busing of black students, even to adjoining counties, was a constitutionally permissible device for the maintenance of "separate but equal" schools. No outcries about the alleged dangers of busing were heard on white lips two decades ago. A rough indicator of the extent to which busing has been an accepted tool in the South is the stark statistic that, even after 5 years of court-order busing for the purpose of dismantling segregation, the amount of busing in Alabama, Mississippi, and South Carolina in that period has *decreased* by 2-3 percent.

Clearly, for many demagogic politicians, it is the goal of racial integration, and not the means of busing, which is the real target, despite rhetoric to the contrary. As for the safety issue, National Safety Council statistics show that busing is the *safest* means of getting children to and from school. A recent six-year study in Pennsylvania found busing to be *three times* safer than walking to school!

Busing is not a radical scheme, but an accepted part of mainstream education. School buses travel about two billion miles each year, carrying over 20 million elementary and secondary pupils. Only a tiny fraction

of this is the result of court orders. Forty per cent of American public school children — 65 percent, if those riding municipal transportation are included — take buses for reasons that have nothing to do with desegregation.

Having placed in perspective the tool, and having seen how far the country is from achieving the goal, let us now examine the recent trends in judicial opinions.

On April 20, 1971, the Supreme Court handed down its long-awaited decision on a desegregation suit involving Charlotte and Mecklenburg County, North Carolina. The nine justices (five of whom were appointed by Republican Presidents) agreed that the district court's plan in the *Swann* case, which called for the two-way busing of students in order to overcome racial segregation, was constitutional. In upholding the requirement that local school authorities use bus transportation together with "pairing" of schools in non-contiguous zones to achieve desegregation, Justice Burger noted that the use of buses "has been an integral part of the public education system for years . . . Desegregation plans cannot be limited to the walk-in school."

In light of its importance (and its subsequent misinterpretation) it is necessary to note some specific details of the *Swann* case.

- The court stressed that its ruling applied to cases where district authorities had engaged in past discriminatory action to establish dual systems and had "totally defaulted" in their duty to draw their own acceptable plan. It did not rule on whether *other* types of state action were unconstitutional.

- The court did not find that "any particular degree of racial balance or mixing" was required by the Constitution. The constitutional command to desegregate "does not mean that every community must always reflect the racial composition of the school system as a whole." In this case, the use of mathematical ratios was a "starting point" rather than an "inflexible requirement." The existence of a small number of one-race schools in itself does not constitute a mark of *de jure* segregation, but a history of

segregation in a district "warrants a presumption against schools that are substantially disproportionate."

- Justice Burger characterized the district court's plan as "an interim corrective measure." He recognized that "all awkwardness and inconvenience cannot be avoided" when remedial measures are being taken to dismantle dual systems.

- While busing was allowable in the Charlotte case, the court recognized that "conditions in different localities will vary so widely that no rigid rules" could be laid down. Moreover, objections to bus transportation may be found to have validity "when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process." In Charlotte, the average bus trip would take 35 minutes and cover 7 miles.

- Finally the court recognized that in a mobile society few communities remain demographically stable. There is no requirement "to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished." In the absence of evidence of deliberate action to "fix or alter demographic patterns . . . further intervention by the district courts should not be necessary."

Less than six months later, in a decision involving the Winston-Salem, North Carolina schools, Justice Burger expressed concern that lower courts had been misreading the *Swann* decision. At this time he reiterated that the Supreme Court had not required substantial racial balance in all or most of the individual schools of a district; rather it had expressly negated such a requirement. Trial judges should, according to the Chief Justice, use racial balance only "as a starting point in the shaping of a remedy."

It should be clear from this discussion that substantial leeway remains within which local communities might shape their desegregation plans; no uniform national standard of massive crosstown busing was intended to be laid down by the court in the *Swann* case. A substantial variety of court-approved plans has been the result. On the same day that the Charlotte decision was announced, the Supreme

Court made it clear that Mobile, Alabama was under an obligation to integrate without further delay. A plan was worked out by local leaders in conjunction with civic groups. Black leaders agreed not to press for instant integration of the 40 percent black system; the resulting plan allowed nine of Mobile's all-black schools to remain segregated until 1973. In an attempt to reduce busing to a minimum, attendance zones were drawn to include black and white neighborhoods and thus permit the majority of students within the area to attend the neighborhood school, with the remainder transported by bus. Though it is less far-reaching than the plan ordered by the court in the *Swann* case, Mobile's integration plan, with the backing of community leaders, seems to be working.

The focus of opposition to busing last fall seemed to be in Pontiac, Michigan. There, District Judge Damon Keith had ruled that segregation of Pontiac's schools was the result of the gerrymandering of attendance boundaries. He ordered approximately 9000 of about 24,000 public school children to be bused for the purpose of achieving a racial balance. The opening of schools was met with a wave of violence, including the fire-bombing of ten school buses. Initially, a sizeable number of white children were absent from school, though most were returned following the Supreme Court's refusal to review Keith's order.

One of the most thorough court-ordered busing plans is in operation in a non-Southern city, Pasadena, California. There all of the district's 37 schools were re-zoned so that none of them would have a majority of non-whites as students. While there seems to be an over-all adjustment to the plan, the fact remains that 22 percent of the whites enrolled in the public school system left after busing began. Today, whites comprise only 50.3 percent of the enrollment, blacks comprise 35.5 percent, and Mexican-Americans, 10.3 percent. After two years of busing, the schools in the black neighborhoods receive greatly improved maintenance and better teaching staffs than in the past — an indicator that upgraded facilities

are likely to come quickly to ghetto-area schools after the transfer of white children to those schools.

The court-ordered desegregation plan implemented in Nashville in September, 1971, called for the transportation of 45,000 of the system's students (about half the total) for an annual distance of six million miles. Only 271 buses were available to the system, 18 more than last year, when fully 36,000 students were bused about half that distance in the 533-square mile area. The systematic refusal of political authorities on the local, state and federal levels to appropriate funds necessary to buy or lease additional buses meant in effect that the school officials were left to operate a system which the political power structure had sought to condemn to failure.

The limitations on available transportation forced school officials to stagger opening and closing times of schools (by as much as 3 hours) and curtail extra-curricular activities so that the existing pool of buses could do double duty. With no reserve fleet available in case of breakdowns, continued smooth operation throughout the year can be credited both to school personnel and to a mercifully mild winter.

The inconveniences necessary under such conditions, which could have been avoided had community and national leaders taken constructive action, cost the school system much community support. Schools opened amidst a campaign of picketing, rumor-mongering and boycott. Initially, almost 8000 white students were held out of school or placed in hastily-opened private schools or in the schools of adjoining counties. With them went much-needed state funds, which are allocated on a per-pupil-enrolled basis. This forced the system to plan to reduce its teaching staff by 300 during the course of the year. Moreover, the white flight from the schools meant that 17 inner-city schools fell short of the planned majority-white ratios. Finally, political pressure was brought to bear on federal officials, influencing them to refuse to grant applications for funds under the Emergency School Assistance Program from various private

groups in the community who sought to alleviate some of the tensions and inconveniences resulting from massive busing.

Despite these handicaps, many Nashville students and educators are claiming that the school system is having one of its best years. The proportion of blacks attending schools composed of from 80 - 100 percent minority pupils has dropped from 67 percent to zero. Racial disorders have been at a minimum, and over 2000 white students have returned to the public schools. Deteriorating facilities in the black areas of the city have been speedily refurbished by the school system as white students have been assigned to these schools — further evidence that busing may be the most effective means for enlisting pressure necessary to bring improved maintenance of school buildings in the black community.

Nevertheless, rather than beginning the planning necessary to cut down the inconveniences in future school years, local officials have been encouraged by statements from both the executive and congressional branches of the federal government to continue to hope for some miraculous reprieve from the imagined horrors of school desegregation.

The same reluctance to tackle the job of constructive planning for desegregation which characterized Nashville officials both prior to and following the court order of 1971 is evident in the city of Memphis. There a decision will soon be made on a plan for desegregating the school system. Unlike Nashville, where a metropolitan form of government exists and the city and county school systems have been consolidated, Memphis faces more severe logistical problems due to its sheer size, the basically segregated housing patterns, and the existence of several school systems within the county. To further complicate the situation, officials of the U.S. Department of Health, Education and Welfare informed the district court judge in January that they were pulling out of the business of devising plans for districts facing desegregation orders. According to HEW:

Our particular expertise lies in

truly educational matters related to desegregation . . . in matters of logistics, such as school building capacities and conditions, zone boundaries, pupil assignment arrangements, teacher assignments, peculiarities of local geography, transportation routes, safety, etc., our personnel are handicapped by a lack of detailed knowledge of local conditions.

Thus the burden of coming up with a plan is now squarely on the shoulders of the Memphis school board, which faces rising political pressures.

An even more resistant demographic situation is present in Atlanta, Georgia, where the school district has shifted dramatically from a 70 percent-white system 12 years ago to a 70 percent-black system today, with the remaining whites concentrated in the extreme northern and southern areas of the city. Atlanta had previously been declared desegregated, but rapidly-shifting housing patterns had led to the resegregation of many school zones. The district court thus ruled, in light of *Swann*, that the existing imbalance was *de facto*: there was no duty to continually change school assignments to cope with residential changes. Moreover, a resort to busing (the district owns no buses) would be neither "reasonable, feasible or workable" in that it would imperil the health of the students and impinge on the educational process. The resort to cross-town busing, the court reasoned, would result in Atlanta's becoming an all-Negro school system. (The Fifth Circuit Court, however, has rejected this line of argument, reversed the lower courts' decision and called for the case to be reopened.)

The "Tipping Factor"

Thus, in the Atlanta case cognizance was taken by the lower court of what has become known as the "tipping factor," the tendency in certain demographic situations for further racial imbalance to result as more whites flee from a school system perceived as becoming majority-black. Such seems to have been the situation this past fall in Norfolk, Virginia, following the announcement of a court-ordered desegregation plan requiring that the

city-wide ratio of 55 percent whites and 45 percent blacks be duplicated, as nearly as possible, through busing, in each of Norfolk's schools. So many white parents pulled their children out of Norfolk's schools (enrolling them in private schools or moving to the adjoining suburbs) that the white population of the district declined by 15 percent, leaving many schools predominantly black and resulting in a 50-50 ratio in the system. In the words of the school board chairman, a disillusioned moderate, "We had stabilized this city school system, and that's no mean feat. Now it's completely unstable."

It will be recalled that studies of black achievement have found that desegregation accomplishes little educational benefit unless black children are placed in majority-white schools. Once a school "tips over" and has a black majority, the black students begin to feel themselves once again in a black school. Moreover, the number of whites begins rapidly to diminish, and white financial and political support for the entire school system becomes endangered. Available evidence indicates that *stabilized* integration is unlikely in school systems which have 40 percent or more black pupils. Thus, for example, a study of 35 school districts in Mississippi under court desegregation orders, revealed that only those with fewer than 30 percent blacks in the school system avoided the phenomenon of "white flight" from the system.

What is clear, then, is that in certain demographic settings — such as the common one of a predominantly-black central city surrounded by white suburbs with separate school districts — a program of massive busing will likely be *counterproductive*. Not only will the educational benefits of desegregation be impossible to realize in a majority-black setting, but the attempt to achieve them may succeed only in driving more white families from the system. Future attempts to tackle the problem of *de facto* segregation in Northern metropolitan areas, as well as in a few remaining large cities in the South, such as Memphis, will run squarely up against this dilemma.

Two recent court decisions, affecting Richmond, Virginia and Detroit,

Michigan, have confronted this dilemma by calling for what the court in Atlanta had only hinted at as an alternative solution: desegregation plans encompassing an entire metropolitan area, thus in effect merging the school districts of surrounding suburbs and even of adjoining counties with that of the central city. In these cases, the federal courts were asked to determine whether some independent suburban communities, created through the powers of the state government, might be considered systems segregated *de jure*.

In Detroit, federal district judge Stephen P. Roth, arguing that segregated housing patterns were a direct result of government policies, ordered the State Board of Education and the Detroit school system to submit desegregation plans. The judge indicated that only a plan calling for busing between city and the suburbs would be satisfactory. Six plans were submitted by the state board, one of which combined Detroit and 35 adjacent suburban school systems. If the court accepts the metropolitan plan, the ratio of blacks to whites will be 30-70 as opposed to the present black-majority Detroit system.

The Richmond case has advanced to a final district court decree requiring that two counties adjacent to the city combine their school systems with the city district. This decision was based on evidence that the state had had a controlling role in establishing the segregated school boundaries, that the state had had the power to prevent this occurrence, and that it had failed its affirmative duty to end segregated dual systems by eradicating racial discrimination "root and branch." The result would be to create a white-majority metropolitan school system. Ironically, in face of the public outcry, indications are that aggregate busing in the area will actually be reduced by the new plan.

The Richmond decision will be appealed vigorously. However, should the district court's decision be affirmed, the result could be a dramatic shift in both the basis for desegregation suits and their results.

Moreover, the metropolitan plan, if upheld, could provide the only answer to the problem of "white flight," simply by insuring that the suburbs

will no longer be able to serve as "havens" for parents fleeing desegregation. Indeed, some have predicted that if the suburban school systems are required to participate in a metropolitan desegregation plan, a major reason for the "exodus to the suburbs" of the past two decades would be eliminated, and families may actually begin moving back into the central cities.

The Political Constraints

While the courts seem likely to continue to order desegregation plans which involve the use of busing, the President and Congress will certainly not do anything to encourage busing programs — indeed, they seem determined to do everything possible to discourage them. Any political leader is likely to think twice about statements tolerant of busing in the face of current surveys of public opinion on the issue. A Gallup poll in November indicated that 76 percent of the nation's voters were opposed to busing for the purpose of desegregation; this was down 5 percent from the previous year, but still a formidable figure. A *Newsweek* survey in March, 1972 showed that while 66 percent of the public approved of school desegregation, 69 percent opposed the use of busing in order to implement it.

Despite its stated intentions to leave school desegregation to the courts, the Nixon Administration, even before March, had assumed a hard-line position against busing. In his State of the Union message in January, the President went on record again as opposed to "unnecessary busing for the sole purpose of achieving an arbitrary racial balance." In the abstract, this position is unobjectionable: few advocates of desegregation would call for "unnecessary" levels of busing, and the court has made clear that fixing of an "arbitrary" racial balance is not the constitutional requirement. To characterize, by implication, the court orders presently under debate as involving "unnecessary" busing or "arbitrary" balance is a severe distortion. In the political context, the President's statements have only given encouragement to those who oppose the use of *any* busing for the purpose of eliminating state-supported segregation. In par-

ticular, the President's statement of August 3, in effect renouncing the government's own plan for applying the *Swann* standards to the Austin, Texas situation, was unwise and ill-timed. Busing opponents in dozens of communities which were preparing to implement court-ordered plans in the next few weeks were given encouragement in their resistance by Mr. Nixon's words.

Moreover, the Administration has at various times taken a position against busing in the courts, and it has lost on each occasion. Most objectionable is the Administration's decision to withhold HEW funds for busing from school boards which have requested them and to oppose the use of any of the \$1.5 billion earmarked for school desegregation for busing purposes. Such actions have only worked to the detriment of forces in communities such as Nashville who have earnestly sought to implement what the courts have declared to be law. And finally, the President's meeting with busing foes on February 14, the same day the Secretary of the Interior dedicated the home of black Republican Frederick Douglass as a national shrine, has raised the expectations of busing opponents.

Currently under consideration by the Congress are both constitutional and legislative amendments designed to deal with the use of busing. The Constitutional Amendment proposed by Congressman Lent and Senators Brock and Baker has considerable support on the political right, but even conservatives are divided about its effects. Some argue that it would take too long to be implemented, and others (including the Vice President) argue that it would trivialize the Constitution. The proposed amendment says that "No public school student shall, because of his race, creed or color, be assigned to or required to attend a particular school." It is unclear whether the courts would hold that this would require the scrapping of plans which in effect themselves undo the past assignment to segregated schools on the basis of race. At any rate, passage of such an amendment would throw the area of school desegregation into tumultuous confusion. It would likely undercut the 14th Amendment and thus produce

a devastating symbolic as well as legal effect, by damaging the greatest single Republican legacy to human rights and liberties.

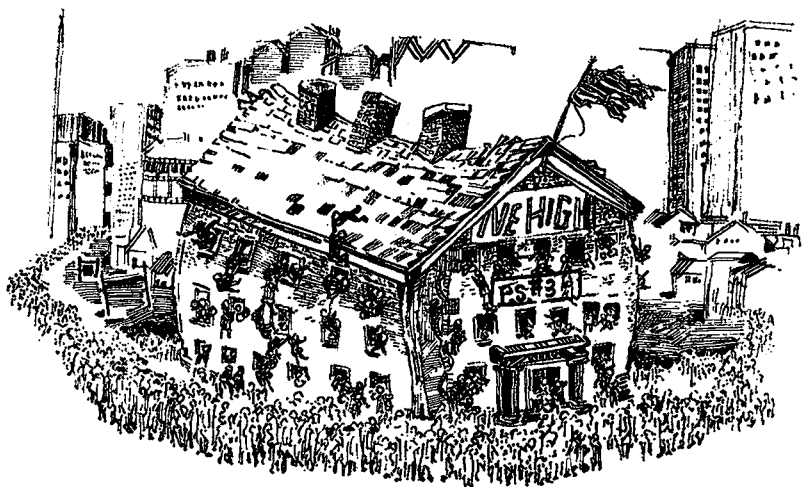
The so-called Griffin amendment to the Higher Education Act, first narrowly approved and then narrowly rejected by the Senate, sought to deny courts jurisdiction to order the transportation of pupils "on the basis of their race, color, religion or national origin." It would, moreover, have prohibited federal officials from withholding or threatening to withhold any government funds in order to coerce a local school district into accepting a busing program. Apart from the serious constitutional questions involved in a Congressional attempt to strip the courts of jurisdiction simply because of their prevailing interpretation of constitutional requirements, this measure would seriously undercut desegregation itself, by denying the use of a tool the courts have repeatedly affirmed as necessary in some measure if integration is to be achieved.

The Scott-Mansfield amendment to the same act, ultimately passed by the Senate, sought to prohibit the expenditure of funds for transportation in order to overcome racial balance except where expressly requested by local school officials. It would bar entirely the use of funds for transportation which would risk the health of children or seriously impinge on the educational process. (Such busing, however, was explicitly ruled out by the court in the *Swann* decision.) Furthermore, federal officials would be barred from requiring local officials to undertake busing "where the ed-

ucational opportunities available at the school to which it is proposed that such student be transported will be substantially less than those offered at the school to which such student would otherwise be assigned . . ." Finally, implementation of court orders requiring consolidation of districts for the purpose of achieving racial balance or transportation between school districts for such purpose would be postponed until all appeals were exhausted (or until June 30, 1972). These latter sections are clearly aimed at frustrating or delaying the implementation of orders of the metropolitan-wide Richmond or Detroit variety, or of orders aimed at the breakdown of *de facto* segregation.

If a choice must be made by the Congress, the Scott-Mansfield amendment is definitely preferable to the proposed alternatives, in that it would not bring school desegregation to a screeching halt or totally bar the use of busing as a tool. However, its enactment is not likely to stem the irresponsible rhetoric and delaying tactics of those whose real aim seems to be to turn back the clock on *Brown v. Board of Education*. It is a sad commentary that only a few courageous voices have been raised in defense of the proposition that the real issue is not "busing" but the shaping of constructive remedies to the denial of equal educational opportunity.

The Ripon Society urges political leaders on all levels to turn their attention to the task of devising new plans for desegregation. Better plans can minimize (though not totally eliminate) the need for bus transporta-



tion while maximizing the educational gain for all children.

In our contribution to this task, we recognize that for both the short and long term, the variety of demographic settings prevents articulation of a single scheme. Communities must choose the means best suited to their own circumstances. Some of our suggestions have been implemented in certain localities, either as a means of avoiding speedier integration or as a positive step toward ending *de facto* school segregation. Some plans require only nominal additional funding on the part of local authorities, and some require large amounts of capital expenditures over and above what is presently being allocated to education by the community.

Short-range Plans

1. "*Magnet schools*" with "*open enrollment*" The "magnet plan" has been used in various cities (including New York, Cleveland, Los Angeles and Philadelphia) as a means of voluntarily attracting students of all races from imbalanced to better-balanced schools. One approach calls for an entire school to offer a specialized curriculum. For example, one high school might be set aside as a math and science center. Hopefully, such a school would attract students interested in pursuing a field of study in more depth than would normally be possible. Though the "magnet" school would put particular emphasis on one or two areas, it need not give up its other academic offerings. Thus, a ghetto school could retain much of its own student body while attracting white students from other areas of the community.

In a slight variation of this approach special courses could be offered only at a particular school. Pupils would be drawn from other schools for only part of the day, and solely for the purpose of taking the special course. Thus, in New York City special classes in art and music were organized in one black school. It became the district school for such classes, and was able to draw successfully from all parts of the local community.

Often the "magnet" idea has been carried out as part of an "open enrollment" procedure: either a "freedom of choice" plan, allowing each

student to register at his chosen school, or a plan allowing students to transfer from schools in which they are a racial majority to schools in which they would be in a minority.

In some circumstances, these plans have been less than successful in bringing about integration, as "freedom of choice" for blacks has been restricted by intimidation, threat of economic reprisal, or harassment by white students. Even in less highly-charged environments, the plans have sometimes failed to work. Black parents, even while supporting the concept of integration, may resent having to send their children to "white" schools in order to bring it about. Conversely, white parents, for a variety of reasons, may feel that "black" schools are inherently inferior. Finally, both blacks and whites are influenced by the greater convenience of sending their children to schools in their own neighborhoods.

It would seem that only a limited open-enrollment policy (majority to minority) used in conjunction with a well-planned "magnet" school plan would have likelihood of achieving desegregation. The Dallas school board has initiated a program whereby high school pupils who voluntarily transfer from a majority to minority situation would attend classes for four longer rather than five days, giving three-day weekends to those students who wish time for work or leisure. Any student who volunteers is given free transportation, which naturally means "busing." Since it is a free choice decision on the part of the student, however, no outcry should be raised against such limited use of "busing."

2. *Re-zoning plans*

Where feasible, re-zoning can be one of the easier and least expensive ways to achieve desegregation. It can be accomplished by at least three methods (which in reality overlap). One is changing the feeder patterns of intermediate or secondary schools. For example, where two junior high schools, one black and one white, are "fed" by adjoining elementary school zones, the boundary lines can be redrawn to change the resulting ethnic composition of the intermediate schools. Both to avoid massive busing

and to preserve the neighborhood school concept, the schools being fed must be in close proximity. Depending on housing patterns, it may be difficult to find either enough feeding schools with common boundary lines or enough pairs of feeder schools close enough together to bring about a thorough racial balancing within the entire school system. Zone lines, moreover, have too often been hardened by tradition and custom and are not always easily changed.

A second re-zoning approach is to redraw the lines for the entire school system, rather than merely change feeding arrangements. Again if the idea is to minimize busing while preserving the neighborhood school, some housing patterns would make it almost impossible to remedy school segregation within their bounds. In cities with a central ghetto surrounded on all sides by white suburbs, however, school zones might be drawn cutting the community into a pie shape, with the smaller end of each wedge reaching into central black areas and the larger end gathering in white neighborhoods. (The location of existing schools would, of course, greatly affect the latitude in drawing the exact lines.)

Naturally, if substantial integration is to be accomplished, a fair amount of busing would be called for in larger metropolitan areas. Ghetto children would have to be transported away from inner city schools and white children from suburban schools. Yet the distances involved are less than are required when children are bused *across* the city. As a longer range goal, schools could be built so that they would be located approximately in the center of such sectors, thus forming a ring around the fringes of the center city and minimizing the transportation distances for both blacks and whites.

In Nashville, for example, the long-range construction plans worked out by school authorities call for comprehensive high schools to be built in such a "ring" pattern, approximately equidistant from the city's center and the outer fringes of the county.

School districts seeking to fashion re-zoning plans according to given

agenda (maximum racial balance, minimum of busing, relatively equal enrollments in each school), might well be advised to use the insights of a computer-assisted systems technique for pupil assignment. An illustration of the advantages of using systems analysis was presented by a Vanderbilt University engineering professor, to the federal district court and the school board prior to the decision of the Nashville case. There is evidence that had such an approach been adopted, re-zoning in Nashville might have been accomplished with more equity and less use of busing.

Another variant of the community-wide zoning technique is the so-called "Princeton Plan," under which schools are paired so that a child might attend a formerly all-white school for grades 1-3 and a formerly all-black school for grades 4-6. Again depending on the degree of desegregation to be accomplished, the extent of busing can either be fairly great or almost non-existent. If busing is to be minimized, the community school board might use guidelines similar to those used in New York City in carrying out a "Princeton Plan": 1) the paired schools should have common boundary lines, so that when the old lines were eliminated one continuous larger zone would be created; 2) the paired schools should be close together; 3) the travel time or distance from any affected home to the assigned school should not be substantial.

Finally, communities such as Berkeley, California, and Englewood, New Jersey, have used a zoning method in which a racially imbalanced school is made a "central school" for all children in one grade. For example, the students of a black school might be sent to nearby white schools for grades 1-5, but return along with all the white children to their own neighborhood school to attend grade 6. Thus, to some extent the neighborhood school is preserved and the total amount of busing is reduced. The more schools within a district, the more likelihood there would be of finding devices for creating central schools which would be reasonably close to other participating schools.

Alternatively, new racially-balanced attendance zones might be devised

through the selective *closing* of formerly all-black schools (the physical conditions of which, in many central cities, warrant such a step) and the transfer of students formerly attending such schools to nearby predominantly-white schools.

In fact, none of these short-term measures, *by itself*, constitutes a sure route to racial balancing of formerly-segregated systems. Rather, we would recommend that communities fashion, from a combination of these devices, plans suitable to their own particular demographic situations. Thus, for example, New York City has implemented the following package, in an attempt to reduce *de facto* segregation in its schools: 1) new schools are constructed in fringe areas between black and white neighborhoods; 2) zones are periodically redrawn to take account of housing shifts; 3) there is voluntary busing into underutilized schools; 4) an open enrollment policy is followed; 5) schools are paired, according to the "Princeton Plan;" and 6) feeder patterns for intermediate schools have been altered.

High-cost Plans

1. *The Educational Park Plan.* One of the more far-reaching and long-range suggestions offered for the purpose of desegregation in metropolitan areas is the educational park. As its name implies, the educational park would be a center for several schools, each enjoying certain common facilities. Designed to accommodate a large number of pupils, it would draw students from all sections of a community, cutting across former zone boundaries. It thus serves as an alternative to the "neighborhood school" concept.

The plan, as put forward by Professor Thomas Pettigrew of Harvard, envisions a park built on 80-100 acres of land, with no fewer than 15 schools reaching from the kindergarten to high school level. As many as 15,000 students would share common food services, auditorium equipment, and physical education facilities, to name just a few of the possibilities. Pettigrew further suggests that the park could lend itself to many innovative educational approaches, such as team-teaching and wider varieties of course offerings. Private and parochial schools might

be built nearby so that their students might share in the benefits of some of the park's specialized facilities.

As might be expected, though it would promise long-run economies of scale, such a park would involve enormous initial investments of money. Pettigrew sets the figure at \$40-50 million. Of course, not all parks would have to be this large. In fact, such a large park would be impractical for small and medium-sized cities. But even a smaller park would require amounts of financing prohibitive for most school districts over the short run. Besides the direct costs, the district would be forced to abandon expensive existing structures. Thus, an educational park can only appear as older buildings are condemned and the number of students enrolled in a school system grows.

As a tool for ending racial imbalance, the park plan has much to offer. By attracting large numbers of students, it would cut across old boundary lines and would draw students from all economic and racial backgrounds. Central-city and suburban school districts in a single metropolitan area might well cooperate in the design and financing of such facilities, which could be located on "neutral turf" between black and white population centers. Of course, the large parks would probably require provision of extensive transportation, which could be minimized by strategic placement of the facilities. But as centers of educational innovation, the park complex could neutralize one of the major arguments against two-way busing, that is, that white children were being sent to inferior schools.

2. *Comprehensive High Schools.* A plan somewhat similar in its approach is the comprehensive high school. Like the educational park, it would contain a large student body attracted from wider attendance zones. In Nashville, for example, McGavock High School, the first of its type in Tennessee, has a student population of 2700, drawn from an attendance zone combining the zones of three former high schools (all converted to junior high schools).

Like the educational park, the comprehensive high school offers a diversity of courses and unique facilities.

At Dallas's Skyline Center, there is a completely equipped hangar with 30,000 square feet of floor space, where courses are offered preparing students to take the F.A.A. license examinations for mechanics. But these schools are not just vocational centers; McGavock, for example allows a student to choose from 24 highly diversified semester course offerings during his junior and senior years.

Unlike the educational park, however, a comprehensive high school is not a center for several schools including students from below the high school level. Yet, it too is quite expensive; McGavock opened at a final cost of \$8.5 million. Thus many of the same cost problems associated with an extensive educational park system would be duplicated if a system sought to build a number of comprehensive high schools.

But in some of its effects, the comprehensive high school is similar to the educational park. It can draw students from larger attendance zones than do normal high schools; it can be strategically placed in fringe areas; and, by serving as an educational showcase, it can attract student and parent support.

3. *Televised Inter-School Classrooms.* An idea advanced by the Dallas Independent School District as a means to avoid massive busing is the use of closed-circuit television to link white, black and chicano schools. The Dallas School Board estimated the total cost of such a program at \$6.5 million. Though not a huge sum of money, this expense would be more than many communities are able to afford over a short period of time. Certainly, the plan can be criticized for "tokenism" and artificiality. A few hours per week of televised communication, even with required inter-visitation, would not seem to provide the kind of one-to-one contact thought necessary for effective integration.

A variant of the Dallas "confluence of cultures" plan, though lacking the unique use of television, has been accepted by a district judge in the Austin, Texas case. The Austin school board's plan calls for preserving neighborhood schools while busing elementary classes 25-32 percent of the time for "intercultural

learning." Like the Dallas program, this plan is under appeal in the courts, and whatever its virtues, may not be accepted as a satisfactory device to overcome legally established patterns of segregation.

The Voucher System

By no means are all school districts either willing or able to raise the funds necessary to carry out extensive capital construction programs. Indeed, the vast divergence in financial abilities of school districts, rooted in inequalities resulting from reliance on the property tax as the primary means for financing public education, is under growing judicial scrutiny as a possible "denial of equal educational opportunity." At the same time, more and more voices are



being raised in criticism of the entire concept of the traditional public school system. Many are asking, in short, is our public school system worth the investment of additional billions of dollars in facilities, or is it the philosophy rather than the facilities of public education which should be revamped? The simultaneous appearance of these two developments — the financial and the philosophical challenge — raises the opportunities for serious study of a radical alternative to public schools themselves — one which can be designed so as to simultaneously resolve the desegregation dilemma — namely, the voucher system of education.

Widespread discontent with the

American public education system has arisen in recent years. Critics charge simply that we have failed to educate our children, particularly the poor. Only the affluent can afford to move to suburbs with well-financed school systems, or enroll their children in private schools. In effect, control of one's children's education is directly related to one's ability to pay.

Educators have suggested a variety of possible alternatives to the present system. However there appear to be two features which must be present in any new system: the first is financial feasibility, and the second is room for continuing experimentation. The best system conceivable will fail if it does not receive adequate funds for its operation. Many communities throughout the country are voluntarily throwing their public schools into financial crisis by refusing to approve tax levies or bond issues. In addition, the entire realm of school financing is entering a new era as the result of an increasing number of cases challenging the constitutionality of our present means of financing schools. A new approach to public education may be needed to rebuild confidence and revive financial support of our public schools.

The second necessary feature of any alternative system is room for continuing experimentation. Most sectors of our society actively engage in continuing development and refinement of their systems and practices. Any successful school system today must have the ability to do the same. However, at present, many public schools are stagnant and need new methods of meeting the needs of modern society.

One feasible alternative to our present system of public schools is the educational voucher system. The basic concept is quite simple. Parents of school-age children are given vouchers which are worth the amount of money the school system would spend on a single child's education in that district. The parent is free to choose where he will spend the voucher. Any school in the area, be it public or private, may take part, if it meets the requirements established for participation.

The effect would be to create competition among schools in the system,

as each seeks to attract the voucher payments of parents in the district. Theoretically, poor schools will improve, and new schools will take the place of those existing schools which fail to meet the expectations of the participants.

The basic concept of distributing vouchers to parents can be refined in a number of ways. The restrictions placed on participating schools by the system will determine, for example, how the schools select their students and what curricula may be taught. Therefore, the completed structure of a voucher system entails many policy judgments. The end result, however, should be a system which offers students a wider range of educational opportunities.

The model most thoroughly developed in recent years was proposed by the Center for the Study of Public Policy in Cambridge, Massachusetts. It is a "regulated" model, currently being tested in Alum Rock, California, Gary, Indiana, and Seattle, Washington. The initial development of this model was funded by the Office of Economic Opportunity.

To participate in this voucher system, a school must agree: 1) not to charge tuition in excess of the voucher amount; 2) to admit students without regard to race, and to allocate at least one-half of available places randomly; and 3) to provide sufficient information about the school so that parents and the community are fully aware of its facilities, teachers, programs and students. To encourage the admission of disadvantaged students, it is recommended that such students' vouchers be worth twice as much. This additional amount would cover any additional costs in their education, as well as act as an incentive for the acceptance of such students. Also, transportation would be offered to any student to any school in order to encourage free selection. Thus, this model appears to contain sufficient safeguards to prevent segregation of races and economic classes.

The "regulated" model avoids some of the constitutional problems present in other plans. There appear to be adequate controls in the admission requirements to prevent economic and racial segregation. Once this initial hurdle is passed, there is

the further constitutional issue resulting from the inclusion of church-related schools in the voucher plan. Depending on the construction of the plan, the problem likely can be avoided.

It should be emphasized that any seriously proposed voucher system must be devised with a great deal of care. Several Southern states attempted to use the voucher system in the 1960's, but all attempts were held unconstitutional in light of their failure to offer "equal protection." Therefore, to employ a voucher system merely as a means of avoiding busing or other unpopular methods of desegregation is doomed to failure.

It is the belief of the Ripon Society that a properly constructed voucher system offers a promising and realistic alternative to our present public school system, and deserves further consideration. It offers the hope that parents may gain more control over the quality of their children's education. But caution must be taken in the planning stages so that fundamental constitutional requirements of equal protection are met. To achieve anything less would destroy the system's potential to meet the educational needs of our increasingly complex society.

Summary and Conclusion

It is altogether fitting that the status of public education in America should be an issue in the 1972 election year. But what is needed is not a divisive slogan-mongering contest centered around the false "issue" of busing. Rather, we in the Ripon Society call on political leaders of both parties and at all levels of government to take up the difficult challenge of discussing and establishing plans for the achievement of equal opportunity in education for all citizens. A national commitment to the goal of quality integrated education is needed, for equal educational opportunity is the primary agent for economic and social progress. We must achieve it because it is our constitutional mandate to do so, and we must do it because it is *right*.

It is acknowledged that segregation in the classrooms denies equal opportunity. Integration of economic and racial groups is a promising means for the upgrading of the educational

level of disadvantaged children. We are at present a long distance from achieving this goal, and progress has been especially slow outside the South, where housing patterns and the non-metropolitan nature of school district organization are formidable obstacles to integration. In the face of resistant demographic characteristics, bus transportation constitutes a safe and long-accepted tool which can be used for the achievement of desegregation.

Within the framework of recent court rulings, much flexibility has been made available to communities to draw up plans suitable to their own circumstances. Positive means are available which can help to minimize the inconvenience associated with extensive use of busing. What is needed is creative planning in the communities, for no single uniform solution is possible or desirable. What works in one setting may be counterproductive in another community if it stimulates the further flight of white families from the public schools. In large metropolitan areas, a degree of regional cooperation seems essential if equitable solutions are to be achieved.

But in the present political climate, which reflects the hopes of some that the clock will be turned back on desegregation, it is difficult for communities to engage in voluntary constructive planning. A constitutional amendment on busing or hasty legislative action such as that proposed by Senator Griffin would be an extremely ill-advised measure, depriving communities of a tool which is often indispensable in reversing the effects of discrimination.

We have suggested a variety of approaches available, some of which require little additional expenditure and are capable of immediate implementation, and some of which call for massive long-term expenditure. Some combination of these measures will allow communities to increase racial mixing in the schools without automatic resort to massive crosstown busing. And we have outlined one alternative which has promise for basically removing not only racial but also economic barriers to equal educational opportunity. Early constructive action must be taken if further injustice and the waste of more of our human resources is to be avoided.

1972 RIPON SOCIETY PUBLIC POLICY PRIZE

"... an idea whose time is yet to come"

First Prize \$1000.00 Second Prize \$500.00

The Ripon Society, a Republican research and policy organization, has prepared over the last several years a series of proposals on public policy for the Republican Party. The ideas set forth in political research papers by Ripon include:

- The Negative Income Tax
- Revenue Sharing
- A Volunteer Military
- Uniform Building Codes
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- A Deescalating Strategy in Vietnam
- Renewed Relations With China
- No Fault Auto Insurance

The Second Annual Ripon Society Public Policy Prize is seeking progressive public policy proposals that represent "an idea whose time is yet to come." Such ideas may have been frequently discussed in the academic community but need to be developed for use by political leaders. They should further the Ripon Society's objective of bridging the gap between the world of ideas and the world of government. Grants totaling \$2000 will be awarded to the authors of the best papers that propose new directions for public policy.

All papers will be judged on the basis of the originality of the proposal, its practicality and its relevance to the problems facing the United States in the 1970's. The papers may be addressed to any area of public policy, foreign or domestic. The winning entries will be chosen by the following panel of judges:

Houston I. Flournoy
Controller, State of California

Lee W. Huebner
Deputy Special Assistant to President
Nixon and former President of the
Ripon Society

James Farmer
Founder and former National Director,
Congress for Racial Equality

Daniel J. Elazar
Director, Center for the Study of
Federalism, Temple University

Prizes

An award of \$1000 will be made for the best paper submitted; a second award of \$500 will be made for the second best paper. All entries will be considered for these awards. In addition, the best paper authored by an undergraduate will be considered separately for an award of \$500. No entry will be eligible for more than one award. The best overall paper, receiving the \$1000 award, will be published in the November 1972 issue of the Ripon FORUM, the Society's monthly magazine.

Eligibility:

The competition is open to all candidates for academic degrees who are studying for, or will receive, their degree during the academic year 1971-1972. Members of the National Governing Board of the Ripon Society are excluded. Previously published papers are also excluded from the competition.

Format and Details:

All entries must comply with the following requirements:

1. Papers may not exceed 5,000 words in length.
2. Papers must be typewritten, double-spaced, and submitted in duplicate.
3. Papers must focus on a specific, practical public policy proposal. They should not merely analyze a social problem.
4. Papers must be well-documented, with sources included for facts and figures which are not common knowledge.
5. The author must be fully identified, with academic status indicated and home and school addresses given (if appropriate).
6. Entries must be postmarked not later than June 30, 1972.

Award winners will be notified September 30, 1972, and a full list will appear in the November issue of the Ripon FORUM. All entries become the property of the Ripon Society Prize, Inc.

Entries and/or questions should be addressed to:

THE RIPON SOCIETY PRIZE
14A ELIOT STREET
CAMBRIDGE, MASS. 02138