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LEGAL ANALYSIS OF S. 528, 97TH CONG., 1ST SESS., THE "NEIGHBORHOOD SCHOOL ACT OF 1981"

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SUMMARY

This report analyzes the legal and constitutional implications of S. 528, the "Neighborhood School Act of 1981," introduced by Senator Johnston, et al., on February 24, 1981. Section 2 of that bill states that the "neighborhood public school" is "the preferred method of public school attendance and should be employed to the maximum extent consistent with the Constitution of the United States." To implement this congressional policy, §3 imposes certain limits on the authority of the Federal courts to require the transportation of any student beyond the public school "nearest the student's residence" in school desegregation cases. The bill's major restriction would operate to bar the courts from ordering the bus transportation of any student in excess of thirty minutes "total actual daily time" or ten miles "total actual round trip distance" beyond that required for the student's attendance at the "public school closest" to his or her residence. Based on a review of the case law, the report indicates that S. 528 could preclude judicial use of busing remedies heretofore approved by the Supreme Court in Swann v. Board of Education and its progeny to eliminate de jure or unconstitutional segregation from the public schools. This, in turn, raises issues of constitutional dimension related to Congress' power to legislate remedies for equal protection violation under §5 of the Fourteenth Amendment, or to restrict the jurisdiction of the Federal courts pursuant to Article III of the Constitution.

With regard to the §5 issue, the report suggests that, in view of the emphasis in Katzenbach v. Morgan and Oregon v. Mitchell, et al., on Congress' superior fact-finding capacity in framing remedies for equal protection violations, the limitations imposed by S. 528 may be entitled to judicial deference, particularly if the findings in §2 of the bill relative to the harms of busing are supported by other evidence adduced in congressional hearings and debate. However, because the bill could be viewed as restricting or abrogating, rather than expanding, a remedy essential to the right to a desegregated education in some cases, and involves the issue of Congress' power vis a vis the Federal courts rather than the States as in Morgan and Oregon, those precedents may not be totally applicable to S. 528. Another possible source of authority for the remedial limits of the bill, as they would apply to the use of busing by the lower Federal courts, may be found in Article III of the Constitution which empowers Congress to "ordain and establish" the inferior Federal courts. The Supreme Court has consistently construed Congress' power over the jurisdiction of the lower Federal courts to be virtually plenary. More problematic, however, is the issue whether Congress' Article III power to make "Exceptions and. . . Regulations. . ." to the Supreme Court's appellate jurisdiction would sanction the statutory withdrawl of Supreme Court authority to order busing remedies to effectuate the right to a desegregated education. Fundamental constitutional considerations related to separation of powers and the Supreme Court's essential function in giving uniformity and national supremacy to Federal law may operate as limitations upon Congress' Article III powers in relation to the appellate jurisdiction of the Supreme Court.

LEGAL ANALYSIS OF S. 528, 97TH CONG., 1ST SESS., THE "NEIGHBORHOOD SCHOOL ACT OF 1981"

INTRODUCTION

On February 24, 1981, Senator Johnston, on behalf of himself and several colleagues, introduced S. 528, the "Neighborhood School Act of 1981," which was referred to the Committee on the Judiciary. That bill would impose certain limits on the power of the Federal courts with respect to the grant of injunctive relief in suits to desegregate the public schools and would authorize the Attorney General to seek judicial enforcement of these limits on behalf of private parties in certain circumstances.

Section 2 of the bill contains a declaration of Congressional findings to wit: that court ordered transportation of students beyond the public school "closest to their residences" has been an "ineffective remedy" frequently resulting in an "exodus" of children and loss of community support for public school systems; that such transportation is "expensive and wasteful of scarce supplies of petroleum fuels;" and that student busing "to achieve racial balance" has been "overused" by the courts, is "educationally unsound," and actually causes racial imbalances in the schools "without constitutional or social justification." Accordingly, §2 concludes by stating that the assignment of children to their "neighborhood public school" is "the preferred method of public school attendance and should be employed to the maximum extent consistent with the Constitution of the United States."

To implement this congressional policy, §3 of the bill would add a new subsection (c) to 28 U.S.C. 1651[1/] providing that, except in certain limited circumstances,

> No court of the United States may order or issue any writ ordering directly or indirectly any student to be assigned or to be transported to a public school other than that which is nearest to the student's residence. . .

The bill provides for exceptions to this general limitation on judicial authority where more extensive transportation is required by a student's attendance at a "magnet," vocational, technical, or other specialized instructional program, is related "directly or primarily" to an "educational purpose," or is otherwise "reasonable." However, no such transportation requirement shall be considered reasonable if alternatives less onerous in terms of "time in travel, distance, danger, or inconvenience" are available. The cross-district busing of students would also be deemed unreasonable. Nor would a transportation plan be "reasonable" where it is "likely," presumably because of white flight or otherwise, to aggravate existing "racial imbalance" in a school system, or to have "a net harmful effect on the quality of education in the public school district." Finally, §3 would make it unreasonable, and therefore bar the courts from ordering, the bus transportation of any student that exceeds by thirty minutes or by ten miles the "total actual time" or "total actual round trip distance" required for the student's attendance at the "public school closest" to his or her residence.

1/ This section currently provides:

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Section 4 of the bill would amend Title VI of the 1964 Civil Rights Act[2/] to authorize the Attorney General, on complaint by a student or his parent that "he has been required directly or indirectly to attend or to be transported to a public school in violation of the Neighborhood School Act," to initiate a civil action in Federal district court to enforce these limitations. Before instituting such action, the Attorney General must certify that the complaint is meritorious, and that the complainants are unable to maintain an appropriate action for relief. The Attorney General is authorized to implead as defendant such parties as may be necessary to the grant of effective relief.

I.

As is apparent from the bill's preambulatory findings, the basic legislative objective of the proposed act is to, in effect, constitutionalize the "neighborhood school" by imposing strict statutory limits on the power of the Federal courts to order the transportation of any student beyond the "closest" public school to his or her residence in desegregation cases. For purposes of the bill, it is indifferent whether the order or plan is directed to elimination of segregation de jure in origin, that is, that caused by the intentional actions of school officials and traditionally condemned as a violation of the Equal Protection Clause of the Fourteenth Amendment, or de facto and resulting without the complicity of State or local officials. Accordingly, the bill would make attendance at the neighborhood school the preferred method of student assignment, valid for all purposes under Federal law, and would sanction judicial departures from this policy only to the extent that they did not entail an increase beyond prescribed limits, in either the time or distance of travel, over that required for a student's attendance at the school closest to his or her home.

2/ 42 U.S.C. 2000c et seq.

As such, it would not affect the authority of the courts to enforce remedies in school desegregation cases involving the reassignment between schools or the reformulation of school attendance boundaries which do not place a greater transportation burden on any affected child. Nor would the bill interfere with the use of other commonly employed desegregation remedies, such as voluntary majority to minority transfers, the establishment of "magnet" schools, school closings and new school construction, and the remedial assignment of of faculty and staff. Beyond this, however, the bill may import significant restrictions on Federal authority to impose "affirmative" remedies to redress conditions of State sanctioned segregation violative of equal protection guarantees.

Before proceeding further, however, it should be noted that certain language in the bill could invite a narrow judicial interpretation of the busing limitations with a view to reconciling them with existing authority under the Fourteenth Amendment. For instance, the congressional finding in §2(a)(4) that neighborhood public schools "should be employed to the maximum extent consistent with the Constitution of the United States" (emphasis added) finds a statutory parallel in the Scott-Mansfield amendment to Title II of the 1974 Education Amendments. That provision qualified a restriction on court ordered busing beyond the school "closest or next closest" to the home by stating that nothing in that Act "is intended to modify or diminish the authority of the courts of the United States to enforce fully the Fifth and Fourteenth Amendments to the Constitution of the United States."[2a/] Taking a cue from the Scott-Mansfield language, the busing limitations in Title II were subsequently held by the courts not to bind judicial authority in cases involving constitutional violations, that is, where there has been a finding of

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2a/ See, 20 U.S.C. 1702(b).

de jure segregation. Thus, in Dayton Board of Education v. Brinkman[2b] the Sixth Circuit pointed to the statement of congressional finding in §1702(b) in refusing to adhere to the "next closest school" limitation and ruled that the 1974 Act, taken as a whole, restricted "neither the nature nor scope of the remedy for constitutional violations in the instant case."

Another possible limiting construction is suggested by inclusion in §3 of language that would measure the time and distance limitations on student transportation by comparison to "the public school closest to the student's residence and with a grade level identical to that of the student." (emphasis added). During consideration of the fiscal 1977 Labor-HEW appropriations, Congress adopted a provision which, in terms somewhat analogous to the bill, directed HEW that it may not require the transportation of students beyond the school nearest the home "which offers the courses of study pursued by such student" in order to comply with Title VI of the 1964 Civil Rights Act.[2c] Nothwithstanding the explicit prohibitory language of the statute, and contrary indications in the legislative history, the Department of Justice subsequently issued an analysis that Congress did not intend to prohibit HEW

2b/ 518 F. 2d 853 (6th Cir. 1975), cert. denied 423 U.S. 1000 (1976). See, also, Morgan v. Kerrigan, 530 F. 2d 401 (1st Cir.), cert. denied 426 U.S. 935 (1976); Hart v. Community School Board, 512 F. 2d 37 (2d Cir. 1975); Evans v. Buchanan, 415 F. Supp. 328 (D. Del. 1976), aff'd 555 F. 2d 373 (3d Cir. 1977).

2c/ Section 208 of Pub. L. 94-439 (9/30/76). The Byrd Amendment provided in full as follows:

> None of the funds contained in this Act shall be used to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home, and which offers the courses of study pursued by such student, in order to comply with Title VI of the civil Rights Act of 1964.

required busing associated with the desegregation techniques of school "pairing" and "clustering."[2d/] Generally, pairing or clustering plans involve the division or reorganization of grade structures between or among two or more schools, with student attendance predicated on grade level rather than geographical proximity.

The Justice Department relied in part on the above qualification in the Byrd amendment to reach this conclusion. It reasoned from the Byrd language that Congress intended the transportation limits to apply only after pairing or clustering of schools, not to the original student assignment scheme. That is, a student could be assigned or required to attend a school beyond the prescribed limits if, because of a grade structure reorganization adopted for desegregation purposes, the school nearest the home did not provide "the course of study pursued by such student." The similarity of the Byrd language to that proposed in the busing provisions of the bill suggest that the latter's time and distance limitations could likewise be interpreted in a manner contrary to the probable intent of its sponsers.[2e/]

2d/ See, 123 Cong. Rec. 10908 (daily ed. 6/28/77).

2e/ This result could probably be avoided, however, by the addition of language to eliminate any inherent ambiguity and narrowing the scope of the present qualifying language. An example may be found in the Eagleton-Biden Amendment adopted in 1977 as a response to the Justice Department interpretation of its predecessor, the Byrd Amendment. Eagleton-Biden, first enacted by the fiscal 1978 Labor-HEW appropriations, §208, Pub. L. 95-205, 91 Stat. 1460 (12/9/77) incorporated the Byrd language but added the following:

> For the purpose of this section an indirect requirement of transportation of students includes transportation of students to carry out a plan involving the reorganization of the grade structure of schools, the pairing of schools, or the clustering of schools, or any combination of grade restructuring, pairing, or clustering. The prohibition in this section does not include the establishment of magnet schools.

Barring these or other narrow judicial interpretations of the bill's language, it may be appropriate, in order to more fully appraise its legal and constitutional implications, to review the course of Supreme Court decisions stemming from Brown v. Board of Education.[3/] In Brown the Court held that the Equal Protection Clause forbade State policies mandating the separation of students in the public schools on the basis of race. In striking down State statutes which required or permitted, by local option, separate schools for black and white children, the Court declared that the "separate but equal" doctrine announced in Plessy v. Ferguson[4/] had no place in public education.

But over the next two decades, the nature of the obligation placed on school officials evolved from the mere cessation of overt racial assignment, the target of Brown, to elimination of the "effects" of the former dual system. In Green v. County Board of Education[5/] the Court held that school officials had an "affirmative duty" to abolish the "last vestiges" of a dual school system, including all "racially identifiable" schools. In addition to the racial composition of their student bodies or staffs, schools could be racially identifiable by comparison with other schools in the district if the quality of their physical facilities, curricula, or personnel differ significantly. Although there

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3/ 347 U.S. 483 (1954).

4/ 163 U.S. 537 (1895).

5/ 391 U.S. 430, 438-9 (1968). In Green, the Court declared that "[s]chool boards. . .operating state compelled dual school systems [are] nevertheless charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination [is] eliminated root and branch." This affirmative duty requires the "school board today. . .to come forward with a plan that promises realistically to work, and promises realistically to work now." See, also, Alexander v. Holmes County Board, 396 U.S. 19 (1969).

is no duty to make schools identical in all respects, there is a "presumption" against schools that are one race or "substantially disproportionate" in racial composition, or that otherwise diverge markedly from the norm defined by these criteria. Thus, the Court in Swann v. Board of Education[6/] and later cases[7/] held that such differences between schools in a former statutory dual system establishes a prima facie case that school officials are continuing to discriminate or that they have failed in their duty to remedy fully the effects of past discrimination. Since the 1973 ruling in the Denver case, Keyes v. School District No. 1,[8/] it is also clear that the same affirmative constitutional duty attaches where de jure segregation in a "meaningful portion" of the system results from intentional school board policies in a district without a prior history of statutory dual schools.

The Court in Swann sought to define the scope of judicial authority to enforce school district compliance with this constitutional obligation and set out "with more particularity" the elements of an acceptable school desegregation plan. With respect to the assignment of pupils, the Court stated that in eliminating illegally segregated schools, the "neighborhood school" or any other student assignment plan "is not acceptable because it appears to be neutral." Rather, in a system that is de jure segregated, a constitutionally adequate plan may require "a frank--and sometimes drastic--gerrymandering of school districts and attendance zones," resulting in zones "neither compact nor continguous, indeed they may be at opposite ends of the city." Accordingly, the Federal

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6/ 402 U.S. 1 (1971).

7/ Columbus Board of Education v. Penick, 443 U.S. 449 (1979); Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979).

8/ 413 U.S. 189 (1973).

courts may require school officials to implement plans involving "gerrymandering of school districts. . .[and] 'pairing,' 'clustering,' or 'grouping' of schools with attendance assignments made deliberately to accomplish the transfer of Negro students out of formerly Negro schools and transfer of White students to formerly all-Negro schools."[9/]

A related aspect of the Swann decision was its qualified endorsement of student transportation as a desegregation remedy. The Court cautioned that "the permissible scope of student transportation" could not, because of the "very nature" of the desegregation process, be precisely defined "for the infinite variety of problems presented in thousands of situations." Nonetheless, finding that "[d]esegregation plans cannot be limited to the walk-in school," the Court held that, "as a normal and accepted tool of educational policy," busing for desegregation purposes could, subject to certain limitations, be employed "where the assignment of children to the school nearest their home would not produce an effective dismantling of the dual system." While suggesting limits, however, the Court declined to provide any "rigid guidelines" for future cases, saying only that busing could be used where "feasible," and that its use was to be limited by considerations of times and distances which would "either risk the health of the children or significantly impinge on the educational process."[10/] In addition, limits on time of travel would vary with many factors, "but probably with none more than the age of the students."[11/]

Three companion cases decided by the Court on the same day as Swann also addressed the judicial use of remedial student assignments and busing in school

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9/ 402 U.S. at 27.

10/ 402 U.S. at 30-31.

11/ 402 U.S. at 31.

desegregation cases. In Davis v. Board of School Commissioners[12/] the Court reversed the Fifth Circuit Court of Appeals for failing to achieve adequate desegregation of Mobile County, Alabama. The Fifth Circuit had affirmed a desegregation order that did not require busing of students across a major highway which divided Mobile into district zones. The Supreme Court's reversal was critical of the appeals court decision because "inadequate consideration was given to the possible use of bus transportation and split zoning."

> As we have held, 'neighborhood school zoning,' whether based strictly on home-to-school distance or on 'unified geographic zones' is not the only constitutionally permissible remedy; nor is it per se adequate to meet the remedial responsibilities of local boards. Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. A district court may and should consider the use of all available techniques including restructuring of attendance zones and both contiguous and noncontiguous attendance zones. [citing Swann]. The measure of any desegregation plan is its effectiveness. 13/

In McDaniel v. Barresi[14/] the Court reversed a ruling of the Georgia State Supreme Court that a school desegregation plan imposed by the former Department of H.E.W. under Title VI of the 1964 Civil Rights Act violated the rights of white students and their parents because it treated students differently on account of race. The Court held that in compliance with its duty under Green and Swann to convert to a unitary system, the local board of education of Clark County, Georgia had properly considered the race of the students in fixing school attendance boundaries.

> In this remedial process, steps will almost invariably require that students be assigned 'differently because

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12/ 402 U.S. 33 (1971).

13/ 402 U.S. at 37.

14/ 402 U.S. 39 (1971).

> of their race.' [citation omitted] Any other approach would freeze the status quo that is the target of all desegregation processes. 15/

Finally, in North Carolina Board of Education v. Swann, 16/ the Court held unconstitutional North Carolina's anti-busing law, which forbade the assignment or transportation of any student on the basis of race or for the purpose of achieving racial balance in the public schools. The State statute was found to prevent implementation of desegregation plans required by the Fourteenth Amendment and was therefore unconstitutional. According to Chief Justice Burger, "[b]us transportation has long been an integral part of all public school systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it." 17/

In his ruling on application for a stay order in Winston-Salem/Forsyth County Board of Education v. Scott, 18/ Chief Justice Burger, sitting as Circuit Justice, offered some additional indication of the limits imposed by Swann on student busing. The Chief Justice found "disturbing" the district court's apparent agreement with the school board that Swann required that each school have a proportion of blacks and whites corresponding to the proportion prevailing in the system as a whole. He denied the stay application, but only after chastising the board for being vague in its reference to "one hour average travel time," and indicated, "by way of illustration," that three hours would be "patently offensive" when school facilities are available at a lesser distance. The Chief Justice also stressed that he would be disposed to grant

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15/ 402 U.S. at 41.

16/ 402 U.S. 42 (1971).

17/ 402 U.S. at 46.

18/ 404 U.S. 1221 (1971).

the application for stay if it had been made earlier and seemed especially concerned that the court's order called for 16,000 more students to be transported in 157 more buses, nearly double the number before adoption of the plan.

Short of the presumptive upper limit of three hours suggested by the Chief Justice in Winston-Salem/Forsyth case, and the broad health and safety limitations noted in Swann, there appear to be no hard and fast rules as to the time or distance of travel that will be permitted. As in other equity cases, the lower Federal courts were vested by Swann with "broad discretion" to determine, in the first instance, what specific measures may or may not be necessary to achieve "the greatest possible degree of actual desegregation" in a given case. Thus, for example, in Mannings v. Board of Public Instruction,[19/] the Fifth Circuit approved a plan to desegregate the Tampa, Florida schools which required the transportation of some 20,000 additional students for bus rides averaging 45 minutes to 1 1/2 hours one way. On the other had, the Sixth Circuit in the Memphis case,[20/] where total desegregation could have been accomplished by a plan involving bus rides up to 60 minutes, affirmed a plan which left some 25,000 black students in 25 all-black schools, but which reduced the average bus ride to 38 minutes each way, with no rides over 45 minutes in length. The courts in several other cases have attempted to gauge the extent of required busing to that involved in the Swann case. Under the plan approved by the Supreme Court in Swann, trips for elementary school students averaged about seven miles and the trial court had found that they would take "not over 35 minutes at most." The Supreme Court noted that this compared favorably with the transportation plan previously operated in Charlotte under

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19/ 427 F. 2d 874 (5th Cir. 1971).

20/ Northcross v. Board of Education, 341 F. Supp. 583 (W.D. Tenn. 1972), aff'd 489 F. 2d 15 (6th Cir. 1973), cert. denied. 416 U.S. 962 (1974).

which each day 23,600 students on all grade levels were transported an average of 15 miles one way for an average trip requiring over an hour.[21/]

As this sampling of cases suggests, it is impossible to determine in advance the impact of the bill's restrictions, in any particular case, on the courts' discretion to order relief necessary for compliance with the remedial principles of Swann and related cases. This is particularly so because, in addition to the time and distance limitations in §3, the bill employs other non-quantitative, and perhaps unquantifiable, restrictions on judicial authority to order student transportation. For example, irrespective of considerations of travel time or distance, the bill would preclude transportation orders that are "likely" to aggravate "racial imbalance" in the system, because of white flight or otherwise, or to have "a net harmful effect on the quality of education" in the system, or where "reasonable alternatives" exist. In some cases, the Swann standards might be met without requiring busing beyond the limits imposed by the bill, but in the circumstances of the Swann case itself, and a substantial number of cases where it has been employed, some more extensive busing might be required to desegregate schools to the extent mandated

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21/ See, e.g., Vaughn v. Board of Education of Prince George's County, 355 F. Supp. 1051 (D. Md. 1972), aff'd 468 F. 2d 894 (4th Cir. 1973) (maximum busing time of 35 minutes per pupil, with mean average of 14 minutes per one-way bus trip compared with 35 minute maximum in Swann though that represented a reduction in maximum one-way bus trips prior to desegregation in that case); Brewer v. School Board of City of Norfolk, Va., 456 F. 2d 943 (4th Cir.), cert. denied 406 U.S. 905 (1972) ("30 minutes each way" not "substantially different" from that required by Swann); Moss v. Stamford Board of Education, 365 F. Supp. 675 (D. Conn. 1973) (plan provided "maximum time to be spent on the buses by any child is 34 minutes--slightly less than the maximum time in the Swann case and therefore acceptable"); Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), aff'd 530 F. 2d 401 (1st Cir. 1976) (under final plan approved for the Boston schools "the average distance from home to school will not exceed 2.5 miles, and the longest possible trip will be shorter than 5 miles" with travel time averaging "between 10 and 15 minutes each way, and the longest trip will be less than 25 minutes").

by current constitutional standards. In these cases, the courts would be effectively restrained from fully exercising the equitable discretion they possess under existing precedent. To the extent that S. 528 may vary from or alter the remedial powers of the courts in school desegregation cases, its constitutional validity may depend on the reach of Congress' authority under §5 of the Fourteenth Amendment, which is cited as authority in §2(b) of the bill[22/], to define the scope of equal protection guarantees. Another potential source of legislative authority for the proposed restrictions may derive from Article III of the Constitution which grants Congress the power to restrict the original jurisdiction of the lower Federal courts and the appellate jurisdiction of the Supreme Court in certain cases. The remainder of this report analyzes both these sources in relation to Congress' power to enact the busing limitations in S. 528.

II.

Section 5 of the Fourteenth Amendment vests with Congress the "power to enforce, by appropriate legislation, the provisions of this article." The first significant recognition of Congress' role in the definition of constitutional rights and implementing remedies under §5 is found in Katzenbach v. Morgan[23/] which interpreted the section as a "positive grant" to Congress of "the same broad powers expressed in the Necessary and Proper Clause." The Supreme Court there held that §4(e) of the Voting Rights Act of 1965, which invalidated a New York literacy requirement for voting as applied to Puerto Rican residents educated in American Flag schools, was appropriate legislation under §5. This was so

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22/ Section 2(b) of the bill states: "The Congress is hereby exercising its power to enforce, by appropriate legislation, the provisions of the fourteenth amendment."

23/ 384 U.S. 641 (1966).

despite the Court's own refusal, in Lassiter v. Northampton Election Board,[24] to strike down State literacy requirements for voting as a violation of the Equal Protection Clause in the absence of any discriminatory use of the test. To be appropriate legislation, §4(e) had to be "plainly adopted to the end" of enforcing equal protection and "not prohibited by, but. . .consistent with the letter and spirit of the Constitution."

The decision in Morgan rested on two separate rationales, both involving a major extension of congressional enforcement authority under §5. First, Justice Brennan, writing for himself and five other members of the Court, with the separate concurrence of Justice Douglas, characterized §5 as a broad grant of discretionary power to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[25] In this view, Congress is empowered by §5 to enact prophylactic measures to ensure enjoyment of equal protection guarantees against the potentiality of official discrimination and to remove obstacles to the States' performance of their obligations under the amendment. As in reviewing necessary and proper clause legislation, where the Court is able "to perceive a basis" for the congressional determination, its inquiry is at an end. Here, the Court held,

> It is for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations--the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interest that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school.[26]

24/ 360 U.S. 45 (1959).

25/ 384 U.S. at 650-51.

26/ 384 U.S. at 653.

Thus, despite the absence in the record of any actual discrimination by New York in the provision of such services, it was within Congress' power to act to insure that Puerto Ricans have the political power to enable them "better to obtain 'perfect equality of civil rights and the equal protection of the laws.'" 27/ The second branch of Morgan held that §5 confers independent authority on Congress to find that a State practice violates the Equal Protection Clause even if the Court is unwilling to make the same determination.

> Here, again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement. . .constitute[s] an invidious discrimination in violation of the Equal Protection Clause. 28/

Accordingly, the majority in Morgan suggested not only that Congress has authority under §5 to define as well as remedy denials of equal protection but also that the courts should defer to congressional exercise of that authority.

Justices Harlan and Stewart, who joined in the only dissenting opinion, rejected both branches of the majority's rationale. They dismissed the remedial theory as inapplicable to the challenged legislation. Since §4(e) had been introduced from the floor during debate on the Voting Rights Act, there had been no investigation of legislative facts to support a finding of discrimination against Puerto Ricans in rendering of governmental services. As to the second rationale, their objection was more fundamental. The issue whether New York's denial of voting rights to those subsequently enfranchised by §4(e) violated equal protection was a judicial question which could not be resolved by Congress. A congressional determination that Spanish-speaking citizens are as capable of making informed decisions in elections as English-speaking citizens might have some bearing on that judicial decision, but in the dissenters' view,

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27/ 384 U.S. at 653.

28/ 384 U.S. at 656.

courts should, in interpreting the Equal Protection Clause, give no more deference to congressional judgments than those of State legislatures.[29/]

The broad language of the Morgan majority might support congressional prescription of the remedial standards in S. 528 even if they impose limits, in terms of time or distances of travel or otherwise, on judicially ordered student transportation to effectuate public school desegregation. But this conclusion is rendered less certain by indications in Morgan that Congress may only exercise its §5 authority to facilitate the realization or extend the protections of the Fourteenth Amendment. Morgan upheld a voting eligibility standard arguably more liberal than the judicially defined constitutional requirement. A caveat to the Court's opinion in Morgan emphasized the distinction between the power to expand and the power to restrict the reach of equal protection thusly:

> Section 5 does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress' power under 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. Thus, for example, an enactment authorizing States to establish racially segregated systems of education would not be—as required by section 5—a measure 'to enforce'

29/ According to the dissenters:

> . . .[W]e have here not a matter of giving deference to a congressional estimate based on its determination of legislative facts, bearing upon the validity vel non of a statute, but rather what can at most be called a legislative announcement that Congress believes a state law to entail an unconstitutional deprivation of equal protection. Although this kind of declaration is of course entitled to the most respectful consideration, coming as it does from a concurrent branch and one that is knowledgeable in matters of popular political participation, I do not believe that it lessens our responsibility to decide the fundamental issue of whether in fact the state enactment violates federal constitutional rights. 384 U.S. at 669-70 (dissenting opinion).

> the Equal Protection Clause since that clause of its own force prohibits such state laws. 30/

Accordingly, insofar as S. 528 would place limits on transportation remedies that could interfere with effectuation of the right to a desegregated public education as defined in the case law, it may come within this explicit exception to the Morgan doctrine.[31/] In addition, Morgan concerned a congressional statute directed to certain actions by the States. The remedial standards in S. 528, on the other hand, directly implicate the equitable power of the Federal courts and may, therefore, involve different considerations.[32/] Finally,

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30/ 384 U.S. at 651-52, n. 10.

31/ However, Professor Charles Alan Wright, a noted constitutional scholar at the University of Texas, concluded in congressional testimony on earlier busing legislation that:

> Neither Swann nor any other Supreme Court case holds that there is a constitutional right to attend a racially balanced school or a constitutional right to be taken to school by bus for that purpose. Swann explicitly rejected the notion that the Constitution requires racial balance, 402 U.S. at 24, and recognized that one race schools may remain so long as they are not part of state-enforced segregation, 402 U.S. at 25-26. It would seem that the power of Congress to speak to the question of remedy and to say whether and under what circumstances a particular remedy is to be used, is no less for violation of the Equal Protection Clause than it is for violation of the fourth amendment, the Self Incrimination Clause, the Due Process Clause, or any other provision of the Constitution.

A Bill to Further the Achievement of Equal Educational Opportunities: Hearings on H.R. 13915 Before the House Committee on Education and Labor, 92d Cong., 2d Sess. 1163 (1972) (statement of Charles Alan Wright).

32/ In this regard, one commentator has noted:

> Whatever the reach of section 5 as a vehicle for augmenting the power of Congress to regulate matters otherwise left to the States, it provides no authority for Congress to interfere with the execution or enforcement of federal court judgments or to overturn federal judicial determinations of the requirements of the fourteenth amendment. The entire fourteenth amendment increased congressional power at the expense of the states, not of the federal courts.

Rotunda, R.D., Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing, 64 Geo. L. J. 839, 859 (1976).

the full breadth of congressional power elaborated in Morgan may not command a majority of the present court.

Four years after Morgan, the Court in Oregon v. Mitchell[33/] reconsidered the breadth of congressional power under §5 within the context of the 1970 amendments to the Voting Rights Act which, inter alia, mandated a minimum voting age of 18 for all elections, State and Federal, contrary State law notwithstanding. A literal reading of Morgan suggests that the congressional determination would be upheld provided that there was a perceptible basis for concluding that the extension of the franchise to 18 years old was necessary to effectuate Fourteenth Amendment guarantees or, alternatively, that such age discrimination was an invidious classification unsupported by a "compelling state interest." However, only three Justices, Brennan, White, and Marshall, fully embraced the broad rationale of Morgan while Justice Douglas, in a partial concurrence, found simply that "Congress might well conclude that a reduction of the voting age from 21 to 18 was needed in the interest of equal protection." Justices Stewart, Burger, Blackmun, and Harlan found that Congress lacked the power under §5 to change age qualifications for State elections. The deciding vote was cast by Justice Black who found that Congress' §5 power was limited by the Constitution's delegation to the States of the power to determine qualifications for State elections.

The Court thus rejected 5 to 4 the application of the 18 year age requirement to State elections, but the conflicting rationales of the Justices served only to obscure the issue of the scope of congressional power under §5. Justice Brennan, joined by Justices White and Marshall, reasoned on the

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33/ 400 U.S. 112 (1970).

basis of the second branch of Morgan that, whatever the Court's view of excluding 18 year olds from the vote, Congress' determination was entitled to deference because "proper regard for the special function of Congress in making determinations of legislative fact compels the Court to respect those determinations unless they are contradicted by evidence far stronger than anything that has been adduced in these cases." 34/ Elaborating further on the justification for judicial deference to congressional fact-finding, Justice Brennan stated:

> The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as 'arbitrary,' 'irrational,' or 'unreasonable.' 35/

A significant aspect of Justice Brennan's opinion in Oregon was its apparent reformulation of the limiting principle in Morgan predicated on the dilution of equal protection rights. Instead of the Morgan distinction between legislative dilution versus expansion, Justice Brennan emphasized as critical under §5 Congress' superior capacity to "determine whether the factual basis necessary to support a state legislative discrimination actually exists."

> A decision of this Court striking down a state statute expresses, among other things, our conclusion that the legislative findings upon which the statute is based are so far wrong as to be unreasonable. Unless Congress were to unearth new evidence in its investigation, its identical findings on the identical issue would be no more reasonable than those of the state legislature. 36/

Although not entirely clear, this statement may imply, contrary to Morgan,

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34/ 400 U.S. at 240.

35/ 400 U.S. at 247-48.

36/ 400 U.S. at 249, n. 31.

an indefinite power in Congress, as legislative fact-finder, to narrow the scope of equal protection and due process rights on the basis of new evidence.

Five members of the Court took issue with Justice Brennan's position, finding various limitations on Congress' §5 power. Justice Black argued that Congress has power under §5 to override an express delegation to the States only in cases of racial discrimination.[37/] Justice Harlan, after determining that the Fourteenth Amendment was not intended to reach discriminatory voter qualifications of any kind, rejected the notion that Congress has a "final say on matters of constitutional interpretation. . . as fundamentally out of keeping with the constitutional structure." Justice Stewart, joined by the Chief Justice and Justice Blackmun, read Morgan to give Congress power to do no more than "provide the means of eradicating situations that amount to a violation of the Equal Protection Clause."[38/] They argued that §4(e) had been upheld on the alternative ground of remedying discrimination against Puerto Ricans in the furnishing of public services. Discrimination against Puerto Ricans was an undoubted invidious discrimination. Thus, Morgan's two branches merely allowed Congress to act upon established unconstitutionality, to impose upon the States remedies "that elaborated upon the direct command of the Constitution," and to overturn State laws if "they were in fact used as instruments of invidious discrimination even though a court in an individual lawsuit might not have reached that factual conclusion."[39/] But, in their view, nothing in Morgan sustained congressional power to "determine as a matter of substantive

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37/ 400 U.S. at 129.

38/ 400 U.S. at 296.

39/ 400 U.S. at 296.

constitutional law what situations fall within the ambit of the [equal protection] clause, and what state interests are 'compelling.'" 40/

The opinions of a majority of Justices in Oregon appear to have severely undermined Morgan's second rationale that §5 authorizes Congress to define the substantive reach of the Equal Protection Clause by invalidating State legislation. The first branch of Morgan, however, recognizing congressional power to act to remedy State denials of equal protection appears to have survived, at least with respect to State practices aimed at "discrete and insular" minorities. 41/ As in Oregon, the Court in Fullilove v. Klutznick 42/ relied on Congress' competence as legislative fact-finder to uphold a statutory remedy enacted pursuant to §5. It there approved the minority business enterprise (MBE) set aside provision in the Public Works Employment Act of 1977 43/ on the basis that the program was aimed at remedying a discriminatory situation found to exist by Congress.

> With respect to the MBE provision, Congress has abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination ... Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection laws. 44/

40/ 400 U.S. at 295-6.

41/ See, 400 U.S. at 129 (Black, J.). It appears that, even in Justice Stewart's view, although Congress can act only upon the "direct command of the Constitution," it can circumvent that limitation by hypothesizing the existence of racial discrimination and declaring that its enactment is necessary to correct that discrimination. See, 400 U.S. at 295, n. 14 (Stewart, J., concurring in part and dissenting in part).

42/ 100 S. Ct. 2758 (1980).

43/ 42 U.S.C. 6701 (1979 Supp.).

44/ 100 S. Ct. at 2774-75.

The distinction between rights and remedies for constitutional violations, as it relates to the power of Congress, has found expression in other contexts as well. In City of Rome v. United States,[45] the Court upheld Congress' power to enact such remedial legislation pursuant to its comparable enforcement authority under section 2 of the Fifteenth Amendment. At issue in this case was the constitutionality of the Voting Rights Act of 1965, as amended, and its applicability to electoral changes and annexations made by the city of Rome, Georgia. Such changes were deemed to have the effect of denying the right to vote on account of race or color, and thus were in violation of the Act. The Court specifically held that, "even if §1 of the Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to §2, outlaw voting practices that are discriminatory in effect."[46] The Court in City of Rome relied to a great extent on its holding in South Carolina v. Katzenbach[47] which dealt with remedies for voting discrimination. It also cited Katzenbach v. Morgan. The Court wrote:

> ... In the present case, we hold that the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that §1 of the Amendment prohibits only intentional discrimination in voting. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact. [48]

45/ 446 U.S. 156 (1980).

46/ 446 U.S. at 173.

47/ 383 U.S. 301 (1966).

48/ 446 U.S. at 177.

Similarly, in Bivens v. Six Unknown Fed. Narcotics Agents, [49] the Court alluded to the power of Congress over remedies in the context of an action for damages against Federal officials for violation of Fourth Amendment rights. In holding a damage remedy implied by the constitutional prohibition against unreasonable searches and seizure, the Court sustained the action, but acknowledged its deference to Congress, noting that "we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." Chief Justice Burger, joined in dissent by Justices Black and Blackmun, urged Congress, without adverting to Morgan or Oregon, to create different rules to supplant judicially created standards to implement Fourth Amendment rights. [50] A noted legal commentator has conceived the matter as follows:

> The denial of any remedy is one thing. . . .But the denial of one remedy while another is left open, or the substitution of one remedy for another, is very different. It must be plain that Congress necessarily has a wide choice in the selection of remedies, and that a complaint about action of this kind can rarely be of constitutional dimension. [51]

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[49] 403 U.S. 388, 397, (1971).

[50] Chief Justice Burger was particularly critical of the judicially created exlusionary rule, requiring the suppression of illegally seized evidence in Federal criminal trials, and stated:

> Reasonable and effective substitutes can be formulated if Congress would take the lead, as it did for example in 1946 in the Federal Tort Claims Act. I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials. 403 U.S. at 421.

[51] Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1366 (1953).

It is therefore possible that Congress' power under §5 to legislate remedies for judicially recognized violations of the Equal Protection Clause, as affirmed in Morgan and arguably preserved by Oregon and later cases, could be advanced in support of the restrictions on busing in S. 528. Of significance in evaluating these limits may be the language in the Swann decision which permits the district courts to deny busing when "the time or distance of travel is so great as to risk either the health of the children or significantly impinge the educational process."[52/] The Swann Court also acknowledged that the fashioning of remedies is a "balancing process" requiring the collection and appraisal of facts and the "weighing of competing interests," a seemingly appropriate occasion under Morgan for congressional intervention. In addition, busing is only one remedy among several that have been recognized by both the courts and Congress to eliminate segregated public schools.[53/] Thus, the findings in §2 of the bill relative to the harms of busing, particularly if supported by other evidence adduced in congressional hearings or debate, may comport with the emphasis of Justice Brennan's opinion in Oregon on

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52/ 402 U.S. at 30-31.

53/ In enacting Title II of the Education Amendments of 1974, captioned "Equal Educational Opportunities and Transportation of Students," Congress specified practices which are to be considered denials of due process and equal protection of the laws and delineated a "priority of remedies," ranging from more preferred to less preferred and even prohibited. Thus, the courts are directed to consider and make specific findings with regard to the efficacy of the following before requiring implementation of a busing plan:

(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

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Congress' superior fact-finding competence, and therefore be entitled to judicial deference.[54/] By contrast, the dissenters in Morgan found §4(e) of the Voting Rights Act failed to qualify as a remedial measure only because of the lack of a factual record or legislative findings.

Complicating this conclusion, however, are judicial statements implying that the elimination of busing as a remedy to the extent contemplated by the

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(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 1714 of this title;

(e) the construction of new schools or the closing of inferior schools;

(f) the construction or establishment of magnet schools; or

(g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 1714 and 1715 of this title. 42 U.S.C. 1713.

54/ Richard Kleindienst, Acting Attorney General, while testifying before the House Committee on the Judiciary, stated:

> The question here is the appropriate remedy for implementation of the right to a desegregated education, an area in which Congress' special fact finding expertise should be utilized. Legitimate questions that might be raised in the area are, for example: How much busing will harm the health of a child? How much may impair the educational process? How great are the benefits to children in receiving a desegregated education compared to the detriments of busing? These are essentially legislative--not judicial--questions.

Proposed Amendment to the Constitution and Legislation Relating to Transportation and Assignment of Public School Children: Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, 92d Cong., 2d Sess. 1145 (1972) (statement of Hon. Richard G. Kleindienst, Acting Attorney General of the United States).

bill may be fraught with constitutional difficulty. For example, in North Carolina Board of Education v. Swann,[55/] the Supreme Court invalidated an analogous State law restriction on busing for desegregation purposes noting that "it is unlikely that a truly effective remedy could be devised without continued reliance upon it." This, and the consistent judicial emphasis on affirmative desegregation remedies since Green, suggests that the correlative right to attend and the obligation to establish racially desegregated schools are inseparable. Accordingly, the distinction in Morgan and Oregon between constitutional rights and remedies may become blurred in the school desegregation context in those cases where student transportation, beyond the limits prescribed by the bill, is deemed necessary for compliance with current constitutional standards. Of course, the fact that the State courts are left free by the bill to order any form of remedy to implement a desegregation plan may be argued in reply to objections that busing may be the only effective remedy available in some circumstances. Nonetheless, because the bill could be viewed as restricting or abrogating a remedy essential to the right to a desegregated education in such cases, and involves the issue of Congress' power vis a vis the Federal courts rather than the States as in Morgan and Oregon, substantial questions relative to the application of those precedents to congressional authority to enact S. 528 remain. In the final analysis, the validity of the bill as an exercise of congressional power under §5 may depend upon whether the busing restrictions are viewed as based on a rationally supportable factual determination of the effectiveness of such remedies within the constitutional framework of Swann and related cases, or are instead a declaration of a constitutional standard in conflict with prevailing judicial standards.

55/ 402 U.S. 43, 46 (1971).

An alternative source of congressional authority for the remedial limitations imposed by S. 528 may reside in Article III of the Constitution which defines and delimits the judicial power of the United States. Article III does not by its terms create any of the inferior Federal courts, but instead confers that power on Congress:

> Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . 56/

Congressional power over the appellate jurisdiction of the Supreme Court is found in Article III, Section 1 which defines the original and appellate jurisdiction of the Supreme Court as follows:

> In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such exceptions, and under such Regulations as the Congress shall make.

It has sometimes been argued that the language of Article III compels Congress to vest the entire judicial power in some inferior Federal court. 57/

56/ This Congressional power is also affirmed in Article I of the Constitution concerning the legislative power, which states:

> Section 8. The Congress shall have the Power. . . To constitute Tribunals inferior to the Supreme Court.

57/ Justice Story, in Martin v. Hunter's Lessee, 14 U.S. (1 Wheaton) 304, 330-331 (1816), argued:

> Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself; and if in any of the cases enumerated in the constitution, the state courts did not then possess jurisdiction the appellate jurisdiction of the Supreme Court ... could not reach those cases, and, consequently, the injunction of the constitution, that the judicial power "shall be vested" would be disobeyed. It would seem, therefore, to follow, that congress are

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But the Supreme Court has consistently construed Congress' power over the jurisdiction of the lower Federal courts to be virtually plenary. In Cary v. Curtis,[58] for instance, the Court stated:

> ... the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good .... [T]he organization of the judicial power, in definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature.

Again in Kline v. Burke Construction Co.,[59] the Court stated:

> The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part ....

More particularly, Congress has engaged in a variety of actions with respect to the jurisdiction of the lower Federal courts, and those actions have consistently been upheld by the Supreme Court. Not until 1875, for instance, did Congress

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> bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the United States, and of which the supreme court cannot take original cognizance ... [T]he whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority.

See, also, Eisentrager v. Forrestal, 174 F. 2d 961 (D. C. Cir. 1949), reversed on other grounds sub nom. Johnson v. Eisentrager, 339 U.S. 763 (1950).

58/ 44 U.S. (3 Howard) 236, 245, (1845).

59/ 260 U.S. 226, 234 (1922).

vest the inferior Federal courts with general Federal question jurisdiction.[60] Moreover, the Supreme Court has consistently affirmed such Congressional actions over the jurisdiction of the lower Federal courts as (1) withdrawing jurisdiction even as to pending cases,[61] (2) delimiting lower Federal court jurisdiction over a particular cause of action to a single tribunal,[62] and (3) selectively withdrawing the jurisdiction of the lower Federal courts to adjudicate particular issues or to order particular remedies.[63]

60/ 18 Stat. 470, Sec. 1 (Mar. 3, 1875). In 1801 Congress had briefly granted the inferior federal courts jurisdiction over "all cases in law and equity, arising under the Constitution and laws of the United States (2 Stat. 89, Sec. 11 (Feb. 13, 1801)), but a year later repealed that grant (2 Stat. 132 (Mar. 3, 1802)).

61/ Bruner v. United States, 343 U.S. 112 (1952) (amendment of statute concerning claims for service to U.S.—the Tucker Act—withdrawing federal district court jurisdiction over claims by employees as well as officers, without any reservation as to pending cases, requires dismissal of pending cases). See also De La Rama Steamship Co., Inc. v. United States, 344 U.S. 386 (1953) (general authority of Congress to withdraw federal court jurisdiction even as to pending cases affirmed, but General Savings Clause held to preserve pending claims in instant case).

62/ E.g., the Emergency Price Control Act of 1942 (56 Stat. 23) required all challenges to the validity of regulations adopted to enforce it to be brought in a single Emergency Court and barred all other Federal, state, or territorial courts from asserting jurisdiction over such challenges. The decisions of the Emergency Court were reviewable in the Supreme Court. This unusual jurisdictional scheme was held to be within Congress' constitutional power in Lockerty v. Phillips, 319 U.S. 182 (1943) and Yakus v. United States, 321 U.S. 414 (1944). Similarly, the Voting Rights Act of 1965 (79 Stat. 437, 42 U.S.C. 1973) limited jurisdiction over proceedings to terminate the coverage of the Act in a particular area to a single court in the District of Columbia, and this was upheld in South Carolina v. Katzenbach, 383 U.S. 301 (1966). See, also, the jurisdiction of the Temporary Emergency Court of Appeals as created by the Economic Stablization Act of 1970 (P.L. 91-379, 12 USC 1001) and as further defined in the Emergency Petroluem Allocation Act of 1973 (P.L. 93-159, 87 Stat. 628, 15 USC 751 et seq.) and the Energy Policy and Conservation Act of 1975. (P.L. 94-163, 89 Stat. 871).

63/ Modern examples include the Norris-La Guardia Act (47 Stat. 70, 29 USCA 101 et seq.), in which Congress restricted the jurisdiction of the Federal courts to issue restraining orders or temporary or permanent injunctions in labor disputes, upheld in Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938), and the Anti-Injunction Act (26 USCA 7421(a)), in which Congress barred all courts from entertaining suits to restrain the assessment or collection of any

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The Norris-LaGuardia Act,[64] perhaps the most celebrated modern example of Congress' exercise of its Article III powers, removed the jurisdiction of the lower Federal courts to issue a restraining order or an injunction in labor disputes. In upholding the Act's limitation, the Supreme Court in Lauf v. E.G. Shinner & Co.,[65] acknowledging that there is no constitutional right to a labor injunction, stated that "[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." Signficantly, however, the Court had in an earlier case ruled that State legislation which imposed similar restrictions on employers' remedies constituted a denial of due process.[66]

Even more restrictive than the Norris-LaGuardia Act was the Emergency Price Control Act of 1942,[67] which operated to limit both State and lower Federal court jurisdiction. Exclusive jurisdiction to determine the validity of any regulation, order, or price schedule was vested in a new Emergency Court of Appeals and even that court was denied power to issue any temporary restraining order or interlocutory decree. The Supreme Court upheld the Act in Lockerty v. Phillips,[68] recognizing that Congress could so limit the jurisdiction

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tax, most recently upheld in Bob Jones University v. Simon, 416 U.S. 725 (1974). Earlier examples include the Judiciary Act of 1789, in which Congress excepted from the lower Federal courts' diversity jurisdiction those cases in which diversity resulted from an assignment of a chose in action, upheld in Sheldon v. Sill, 49 U.S (8 Howard) 441 (1850) and an 1839 statute in which Congress disallowed suits in assumpsit in the Federal courts against the collectors of customs duties which allegedly were assessed unlawfully, upheld in Cary v. Curtis, supra.

64/ 29 U.S.C. 101-115.

65/ 303 U.S. 323, 330 (1938).

66/ Truax v. Corrigan, 257 U.S. 312 (1921).

67/ Emergency Price Control Act, ch. 26, 56 Stat. 23 (1942).

68/ 319 U.S. 182 (1943).

of the Federal courts under Article III. In Yakus v. United States,[69] the Court was faced with a more serious constitutional challenge to the Act in the context of a criminal prosecution for its violation. The defendant, who had been convicted by an enforcement court, claimed that the denial of a stay order during his appeal to the Emergency Court deprived him of due process. In rejecting this assertion, the Supreme Court stressed that "[t]here is no constitutional requirement that that test be made in one tribunal rather than another," and that the "award of an interlocutory injunction by courts of equity has never been regarded as a matter of right." Further, the Court seemed to suggest that Congress, in protecting the public interest, could impose some burdens on individual rights:

> If the alternatives, as Congress could have concluded, were wartime inflation or the imposition on individuals of the burden of complying with a price regulation while its validity is being determined, Congress could constitutionally make the choice in favor of the protection of the public interest from the dangers of inflation. 70/

The Health Programs Extension Act of 1973[71] is further support for Congress' power to eliminate lower Federal court jurisdiction with respect to remedies. Section 401(b) of the Act provides that the receipt of Federal funds by a hospital does not per se authorize "any court" to require such hospital to perform any sterilization procedure or abortion if such was contrary to the hospital's religious or moral convictions. In Taylor v. St. Vincent's Hospital,[72] an action was brought against the hospital claiming that it had violated plaintiff's constitutional rights by refusing her request to undergo a sterilization procedure.

69/ 321 U.S. 414 (1944).

70/ 321 U.S. at 439.

71/ 42 U.S.C. 300a-7(a).

72/ 369 F. Supp. 948 (D. Mont. 1973), aff'd, 553 F. 2d 75 (9th Cir. 1975), cert. denied, 424 U.S. 948 (1976).

The district court held that it did not have jurisdiction to hear the action in view of the Act, basing its decision on the power of Congress to control both the jurisdiction and the remedies of the lower Federal courts.

> There can be no doubt that Section 401(b) which restricts the course and power of inferior federal courts is a valid exercise of Congressional power. Under Article III of the Constitution, Congress can establish such inferior courts as it chooses. Its power to create those courts includes the power to invest them with such jurisdiction as it seems appropriate for the public. [citation omitted]. Further, Congress is free to legislate with respect to remedies the inferior Federal courts may grant. [citations omitted]. 73/

Thus, the language of Article III, the history of past Congressional action, and judicial interpretation of Congress' power all appear to affirm that Congress has broad authority to impose limits on the jurisdiction of the lower Federal courts, and this may be particularly so where the limitation relates to the remedial rather than adjudicatory functions of the court. 74/ Although some cases have suggested that Congress' power over the jurisdiction of the lower Federal courts is limited by the taking clause of the Constitution 75/ or the due process requirement that persons not be denied all judicial

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73/ 369 F. Supp. at 951.

74/ See, e.g. Glidden v. Zdanok, 370 U.S. 530, 557 (1962) where the Supreme Court approved the power of Congress to limit the equitable remedies of the Court of Claims, stating that "[n]o question can be raised of Congress' freedom, consistently with Article III, to impose such a limitation upon the remedial powers of a federal court."

75/ In the Portal-to-Portal Act of 1947 (29 U.S.C. 251-262) Congress removed Federal court jurisdiction over suits claiming overtime compensation under the Fair Labor Standards Act for activities prior and subsequent to the principal employment activity of the day. The statute was a response to a Supreme Court decision which had held such activities as walking to and from employees's work stations, changing clothes, and cleaning up to be compensable under the FLSA. (Anderson v. Mt. Clemens Pottery Co. 328 U.S. 680). In the leading case of Battaglia v. General Motors Corporation, 169 F. 2d 254 (2d Cir.) cert. denied 335 U.S. 887 (1948), the U.S. Court of Appeals for the Second Circuit held the validity of that withdrawal of Federal court jurisdiction to depend on

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remedies to a claimed deprivation of a Federal right,[76] neither may be pertinent to S. 528. As in Lockerty and Yakus, the right of access to a forum where full relief may be obtained is not abrogated, it is merely reallocated. The State courts would remain open to litigants to press claims that student transportation beyond that permitted by the bill is necessary to adequately desegregate the school system. As long as a litigant is able to proceed in State court, a viable forum exists, and there is arguably no denial of due process. In this regard, the Supreme Court has stated that "Congress could, of course, have routed all Federal constitutional questions through the State court system, saving to this Court the final say when it came to review of the state court judgments."[77] In addition, the full range of remedies authorized by the Equal Educational Opportunities Act of 1974 would be available to the lower Federal courts in desegregation cases, including the use of student transportation to the extent authorized by the bill.

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the validity of Congress' redefinition of activities compensable under the FLSA:

> We think...that the exercise by Congress of its control over jurisidiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court it must not so exercise that power as to deprive any person of life, liberty, or property without just compensation. Thus, regardless of whether subdivision (d) of section 2 (withdrawing federal court jurisdiction) had an independent end in itself, if one of its effects would be to deprive appellants of property without due process or just compensation, it would be invalid. 169 F. 2d at 257.

Nonetheless, the court upheld the withdrawal of jurisdiction.

76/ See Cary v. Curtis, supra, (McLean, J., dissenting) and Yakus v. United States, supra.

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

The bill's restrictions as they affect the appellate jurisdiction of the Supreme Court may be more problematic, however. Article III confines Congressional power over the appellate jurisdiction of the Supreme Court to the making of "Exceptions and. . .Regulations. . .," a power seemingly less complete on its face than Congress' power to "ordain and establish" the inferior courts. Indeed, it has even been suggested that the historical evidence surrounding the exceptions clause of Article III indicates that it should be read in light of the contemporary State practice to confine regulation basically to housekeeping matters and to certain proceedings where neither error or certiorari traditions had been available. 78/ Additional uncertainty stems from the fact that since the Judiciary Act of 1789 Congress has made no attempt to sharply curtail the appellate jurisdiction of the Supreme Court, and thus the possible limits of its power have not been fully tested. This is particularly true with respect to Supreme Court review of State court decisions concerning Federal rights:

> [T]he Supreme Court has always had authority, under certain circumstances, to review a final judgment or decree of the highest court of a state in which a decision could be had, where. . .the judgment turns upon a substantial federal question. 80/

Nonetheless, numerous statements by the Supreme Court can be found describing Congress' power over its appellate jurisdiction in as broad a terms as those used to describe Congress' power over the jurisdiction of the inferior Federal courts. For example, in The "Francis Wright," Chief Justice Waite

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78/ See, J. Goebel, The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, p. 240 (P. Freund ed. 1971). Also, Merry, "Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis," 47 Minn. L. Rev. 53 (1962).

79/ 1 Stat. 73.

80/ Moore's Federal Practice, Vol. 1 (2d ed.), $0.6(6), pp. 252-53.

stated:

> ... while the appellate power of this Court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe .... What [the court's appellate powers] shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not. 81/

Often cited as support for an expansive view of Congress' power to regulate the Supreme Court's appellate jurisdiction is the post Civil War

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81/ 105 U.S. 381, 385-6 (1881). In Turner v. Bank of North America, 4 U.S. (4 Dallas) 8, 10 (1799), Justice Chase stated the proposition thusly:

> The notion has frequently been entertained, that the federal Courts derive their judicial power immediately from the Constitution; but the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress. If congress has given the power to this Court, we possess it, not otherwise; and if congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the Federal Courts, to every subject, in every form, which the constitution might warrant.

Similarly, in Daniels v. Railroad Company, 70 U.S. (3 Wallace) 250, 254 (1865) the Court stated:

> The original jurisdiction of this court, and its power to receive appellate jurisdiction, are created and defined by the Constitution; and the legislative department of the government can enlarge neither one nor the other. But it is for Congress to determine how far, within the limits of capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation.

See, also, Durousseau v. United States, 10 U.S. (15 Otto) 38 (1810).

decision in Ex parte McCardle.[82] In that case, under the authority of the Reconstruction Acts, the military government had imprisoned McCardle for publishing allegedly libelous and incendiary articles in his newspaper. He then brought a habeus corpus action alleging that the Reconstruction legislation was unconstitutional and, following an adverse decision below, filed a direct appeal to the Supreme Court under the then recently passed Act of February 5, 1867.[83] After the Court had acknowledged jurisdiction but before a decision on the merits, Congress withdrew the statutory right of appeal,[84] seeking to avoid a Supreme Court determination that the Reconstruction legislation was unconstitutional.[85] The Court then declined the appeal and dismissed the case for want of jurisdiction, finding that while its appellate jurisdiction "is, strictly speaking, conferred by the Constitution . . .it is conferred 'with such exceptions and under such regulations as Congress shall make'" according to Article III, Section 2.

> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words. 86/

Notwithstanding these assertions, however, some limitation may still attach to Congress' control of the Supreme Court's appellate jurisdiction.

82/ 74 U.S. (7 Wallace) 506 (1868).

83/ Act of February 5, 1867, ch. 26, §1, 14 Stat. 385.

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

85/ See, generally, C. Fairman, The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88, pt. 1, at 433-514 (P. Freund ed. 1971).

86/ 74 U.S (7 Wallace) at 514.

In Ex parte McCardle itself and subsequently in Ex parte Yerger [87] the Court emphasized that the repeal of the 1867 statute did not deprive it of all appellate power over cases involving the constitutional right of habeas corpus:

> The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised. [88]

That is, under the Judiciary Act of 1789 the Court had, prior to 1867, exercised the authority to review lower federal court decisions concerning habeas corpus, not by appeal but by a writ of certiorari. In Ex parte Yerger it was argued that the 1867 act authorizing direct appeals implicitly repealed the jurisdiction granted in the 1789 act, and that the subsequent repeal of the 1867 act deprived the Court of all appellate jurisdiction over habeas corpus proceedings. But the Court rejected the argument, stating:

> ...it is too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction, exercised upon the decisions of courts of original jurisdiction. In the particular class of cases, of which that before the court is an example.... it is evident that the imprisoned citizen, however unlawful his imprisonment may be in fact, is wholly without remedy unless it be found in the appellate jurisdiction of this court.
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> These considerations forbid any construction giving to doubtful words the effect of withholding or abridging this jurisdiction. [89]

87/ 75 U.S. (8 Wallace) 85 (1869).

88/ 74 U.S. (7 Wallace) at 515.

89/ 75 U.S. (8 Wallace) at 102-103.

The Court deemed the sudden withdrawal of jurisdiction in McCardle to be justified by "some imperious public exigency ... within the constitutional discretion of Congress to determine...." 90/ But it refused to construe the 1867 and 1868 statutes as withdrawing

> ...the whole appellate jurisdiction of this court, in cases of habeas corpus, conferred by the Constitution, recognized by law, and exercised from the foundation of the government hitherto....91/

A principle implied by Article III and unaffected by McCardle is the separation of powers doctrine that may limit Congress in the exercise of its power to regulate Federal court jurisdiction. The requirement of an independent judiciary was directly addressed by the Court in a post-McCardle decision, United States v. Klein, 92/ which concerned the effect to be given Presidential pardons of those who had aided and abetted the rebellion during the Civil War. The Captured and Abandoned Property Act authorized suit in the Court of Claims for the return of seized Confederate property on proof that the claimant had given no aid or comfort to the rebellion. In United States v. Padelford 93/ the Supreme Court had ruled that the statute was satisfied when the claimant had received a pardon under a Presidential general amnesty. Thereafter Congress, while appeal in the Kline case was pending, enacted a rider to an appropriations bill providing that a Presidential pardon would not support a claim for captured property, that acceptance without disclaimer of a pardon for participation in the rebellion was conclusive evidence that the claimant had aided the enemy, and that when the

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90/ 75 U.S. (8 Wallace) at 104.

91/ 75 U.S. (8 Wallace) at 106.

92/ 80 U.S. (13 Wallace) 128 (1871).

93/ 76 U.S. (9 Wallace) 531 (1870).

Court of Claims based its judgment on such a pardon the Supreme Court lacked jurisdiction of the appeal.

In Klein, the Supreme Court held this statute unconstitutional as infringing the power of both the judiciary and the President. Although recognizing that Congress had the power under Article III to confer or withhold the right of appeal from the Court of Claims, the Court held that the proviso was not within "the acknowledged power of Congress to make exceptions and prescribe regulation to the appellate power" because it intruded upon the independence of the judicial branch and amounted to a "rule of decision, in causes pending, prescribed by Congress. . ."

> What is this [the act] but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants . . .Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it? We think not. . .We must think that Congress has inadvertently passed the limit which separates the legislative from judicial power. It is of vital importance that these powers be kept distinct. 94/

The Klein decision, which was cited with approval by the Court in its 1962 ruling in Glidden Co. v. Zdanok, 95/ suggests that Congress must exercise its power to limit jurisdiction in a manner consistent with the independence of the judiciary.

94/ 80 U.S. (13 Wallace) at 145-147. With respect to the powers of the Presidency, the Court found the pardoning power to be granted "without limit" to the Executive and held the Congressional provision to be an unconstitutional impairment of that independent power.

95/ 370 U.S. 530 (1962).

Other cases suggest further possible limitations based on the supremacy clause of Article VI of the Constitution, which states:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

It could be argued that this constitutional provision would be a nullity if there were not a single supreme tribunal with the authority to interpret and pronounce on the meaning of the Constitution and of Federal law. Thus, Justice Taney, in Ableman v. Booth, 96/ stated:

> But the supremacy thus conferred on this Government [by the supremacy clause] could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place...and the Constitution and laws and treaties of the United States, and the powers granted to the Federal Government, would soon receive different interpretations in different States and the Government of the United States would soon become one thing in one State and another thing in another. It was essential, therefore, to its very existence as a Government, that...a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, should be finally and conclusively decided...And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it; [and] to make the Constitution and laws of the United States uniform, and the same in every State.... 97/

With even more dramatic flourish Justice Story justified Supreme Court review of State court decisions as follows:

96/ 62 U.S. (21 Howard) 506 (1858).

97/ 62 U.S. (21 Howard) at 517-18.

> A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution... [T]he appellate jurisdiction must continue to be the only adequate remedy for such evils. 98/

In other words, a Supreme Court with authority to review and revise lower and State court judgments may be constitutionally necessary to assure the national uniformity and supremacy of the Constitution and federal law. 99/

Another argument related to the above stems from the due process clause. 100/ If appellate review by the Supreme Court were denied in cases involving a constitutional right, and if as a consequence different interpretations of the law developed in the various States or Federal judicial

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98/ Martin v. Hunter's Lessee, 14 U.S. (1 Wheaton) 304, 347-48 (1816).

99/ For fuller development of this argument, see Ratner, "Congressional Power over the Appellate Jurisdiction of the Supreme Court," University of Pennsylvania Law Review 109: 157, 160-67 (1960). In Hart and Wechsler's famous dialogue on Congress' power over the jurisdiction of the Federal courts, the limitation asserted as to Congress' power over the Supreme Court's appellate jurisdiction is simply that "...the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." Bator, Mishkin, Shapiro, and Wechsler, Hart and Wechsler's The Federal Courts and the Federal System, (2nd ed., 1973), p. 133.

100/ Sedler, "Limitations on the Appellate Jurisdiction of the Supreme Court," 20 University of Pittsburg Law Review 99, 113, 114 (1958).

circuits, then the effect would be unequal treatment of persons similarly situated. That is, persons asserting the same right would be treated differently in different jurisdictions. This result, it has been suggested, would be "a manifest abuse of due process, one of the bases of which is equal treatment before the law."[101/] Thus, appellate review may be a necessary consequence of due process, "if such an appeal is necessary to secure uniform treatment before the law."[102/]

Thus, the cases may provide less forceful precedent for the limitations imposed by S. 528 as they relate to the Supreme Court's appellate jurisdiction than the original jurisdiction of the inferior Federal courts. With the exception of McCardle, all of the cases have involved legislative limits on judicial authority with respect to claims arising from the common law or Federal statute. McCardle and Yerger, on the other hand, establish only that Congress can extinguish one means for obtaining appellate review of an asserted constitutional right when other means remain open, or conversely, that the courts will narrowly construe jurisdictional statutes when to do otherwise would have the effect of eliminating all remedies for a constitutional violation. In addition, Klein suggests that the Supreme Court may be less receptive to congressional mandates that intrude upon judicial independence by prescribing the manner in which the merits of a particular claim are to be viewed. Finally, fundamental constitutional limitations on Congress' power may derive from the Supreme Court's essential function in giving uniformity and national supremacy to Federal law or from due process demands that the enforcement of constitutional rights not depend on geographical location in the United States. But because of the infrequency with which Congress has acted to limit the Court's appellate jurisdiction in

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101/ Id., at 113.

102/ Id., at 114.

the past, and the consequent dearth of case law, the contours of Congress' power remain largely undetermined.

It could be argued, however, that these constraints on Congress' power lose some of their force given the nature of the limitations imposed by the bill. That is, the bill would affect the Supreme Court's appellate jurisdiction only with respect to the implementation of certain school desegregation remedies, but would not otherwise restrict its authority to review the constitutionality of school officials' actions alleged to deny equal protection of the laws, or to order such other relief as may be appropriate to remedy any violation found to exist. This relief could even include the busing of students to the extent authorized by the bill. In addition, relief beyond that available ~~in the~~ Federal courts could be obtained by litigants in State courts which would remain open to school desegregation suits. The Supreme Court decisions in Swann and its progeny would continue to stand as controlling precedent in this area, presumably binding on State court judges as they ruled in related cases. In this regard, one noted commentator has suggested:

> There is, to be sure, a school of thought that argues that 'exceptions' has a narrow meaning, not including cases that have constitutional dimension; or that the supremacy or the due process clause of the fifth amendment would be violated by an alteration of the jurisdiction motivated by hostility to the decisions of the Court. I see no basis for this view and think it antithetical to the plan of the Constitution for the courts—which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution as 'the supreme Law of the Land. . .any Thing in the Constitution or laws of any State to the Contray notwithstanding.' Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of the government. They do so rather for the reason that they must decide a litigated

> issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land. This is, at least, what Marbury v. Madison was all about. I have not heard that it has yet been superceded, though I confess that I read opinions on occasion that do not exactly make its doctrine clear. 103/

Supporting Professor Wechsler's view is the fact that the Supremacy Clause and uniformity arguments sanctioned by the Court in Martin v. Hunter's Lessee (supra) and other early cases were based on an interpretation of the jurisdiction affirmatively granted or recognized by Congress in the Judiciary Act of 1789. Whether these arguments would have independent constitutional force against a Congressional denial of jurisdiction has yet to be adjudicated.

A final consideration that may affect the constitutionality of the bill under Article III is the separation of powers limitation enunciated in Klein. The Klein principle, precluding attempted congressional interference with the judiciary in the decision of pending cases, could have implications for the bill's limitations on judicial use of busing remedies. This may be particularly so as applied in suits by the Attorney General under §4 to reopen previously decided cases for retroactive enforcement of those remedial limits. Indeed, even more compelling reasons may support invocation of the Klein doctrine in the latter circumstances since it could be argued that Congress is attempting to alter or postpone the equitable effect of prior court decrees, and because of the heavy burden the duty to relitigate would place on the judicial process. In Pope v. United States, 104/ the Supreme Court declined to decide under what conditions the Klein holding also prohibits a congressional act from setting aside a judgment in a case already decided. "We do not consider

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103/ Wechsler, "The Courts and the Constitution," 65 Columbia L. Rev. 1001, 1005-6 (1965).

104/ 323 U.S. 1, 8-9 (1944).

just what application the principles announced in the Klein case could rightly be given to a case in which Congress sought, pendente lite, to set aside a judgment of the Court of Claims in favor of the Government and require relitigation of the suit." However, the Court's recent decision in United States v. Sioux Nation of Indians[105/] suggests that the mere fact that a congressional enactment requires relitigation of a previously decided case may not violate the separation of powers doctrine provided that the act is otherwise within Congress' constitutional powers.

Sioux Nation involved an act passed by Congress in 1978 waiving the res judicata effect of a prior judicial decision which had rejected a claim that Congress' 1877 ratification of an agreement ceding the Great Sioux Reservation, including the Black Hills, in violation of the Fort Laramie Treaty of 1868, effected a taking of Sioux lands without due process. The 1978 Act directed the Court of Claims to review de novo the merits of the Black Hill's taking claims without regard to the defense of res judicata. In holding that the statutorily mandated duty to relitigate the Sioux claims did not violate the doctrine of separation of powers, Justice Blackmun wrote for the Court:

> When Congress enacted the amendments directing the Court of Claims to review the merits of the Black Hills claim, it neither brought into question the finality of that court's judgments, nor interfered with that court's judicial function in deciding the merits of the claim. When the Sioux returned to the Court of Claims following passage of the amendment, they were in pursuit of judicial enforcement of a new legal right. Congress had not 'reversed' the Court of Claims' holding that the claim was barred by res judicata, nor, for that matter, had it reviewed the 1942 decision rejecting the Sioux claim on the merits. As Congress explicitly recognized, it only was providing a forum so that a new judicial review of

105/ 48 U.S.L.W. 4960 (S.Ct. 6/24/80).

> the Black Hills claim could take place. This review was to be based on the facts found by the Court of Claims after reviewing all the evidence, and an application of generally controlling legal principles to those facts. For these reasons, Congress was not reviewing the merits of the Court of Claims' decisions, and did not interfere with the finality of its judgments. 106/

The legislation upheld in the Sioux Nation case, however, may be distinguishable from S. 528 in several relevant particulars. First, as observed by Justice Blackmun, the Act there did not purport to resolve the outcome of the Court of Claims new review of the merits of the claim. The remedial limits imposed by the bill, on the other hand, may be outcome determinative in the sense of requiring a court to devise a new remedy utilizing less student busing than previously ordered. Secondly, Sioux Nation involved a claim against the United States and the Court found that the 1978 Act was a valid exercise of Congress' power to condition waivers of sovereign immunity of the United States. Finally, Justice Blackmun also found that the waiver of res judicta was within Congress' power under §8 of Article I of the Constitution to provide for payment of the Nation's debts. Accordingly, it is possible that the Court would take a different view with respect to retroactive application of the busing limitations in S. 528.

Related to Klein is a principle implied by several early decisions that the Article III guarantee of an independent judiciary prevents the legislature and the executive from reviewing a judicial decision. 107/ Chief Justice Taney,

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106/ 49 U.S.L.W. at 4970.

107/ E.g. Hayburns Case, 2 U.S. (2 Dallas) 408 (1792); Gordon v. United States, Appendix I, 117 U.S. 697 (1885); Muskrat v. United States, 219 U.S. 346, 354 (1911) (citing Chief Justice Taney's draft opinion as one of "great learning"). See, also Schneiderman v. United States, 320 U.S. 118, 168-9 (1943) where Rutledge, J., concurring, commented that Congress does not have authority both to confer jurisdiction and to nullify the effects of its exercise by other jurisdictional provisions in the same statute.

for instance, argued in Gordon v. United States that the award of a remedy is an essential part of the exercise of judicial power and that rendering a judgment and yet having the remedy subject to Congressional approval is not an exercise of Article III power.[108/] In Chicago & Southern Airlines v. Waterman Steamship Corp.,[109/] the Court adopted similar reasoning to deny judicial review of a presidentially reviewable order of the Civil Aeronautics Board on the ground that such dual review would violate Article III. In strong language, Justice Jackson observed that:

> Judgments within the powers vested in the courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government. 110/

Therefore, it is possible that in permitting the Supreme Court to review constitutional determinations in school desegregation cases, but denying it authority to order certain remedies, Congress may be acting beyond its powers under Article III.

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May 7, 1981

108/ Chief Justice Taney's last judicial writing stated:

> Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without remedy . . .unless Congress should at such future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this Court, in the exercise of its appellate jurisdiction; yet it is the whole power that the Court is allowed to exercise under this act of Congress. 117 U.S. at 702.

109/ 333 U.S. 103 (1948).

110/ 333 U.S. at 113-114.