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# THE ANTI-BUSING CONSTITUTIONAL AMENDMENT

## STATUS

On June 27, a petition, sponsored by Rep. Ronald Mottl (D-Ohio), to discharge the House Committee on the Judiciary from consideration of a proposed constitutional amendment banning the forced busing of school children to achieve racial balance received the signatures of a majority (218) of the members of the House. Under the rules of the House, a discharge petition must receive floor consideration on the second or fourth Monday following a period of seven legislative days after the petition is printed in the Congressional Record. That day would have been July 23 of this year, but the House has already voted to postpone the floor consideration until July 24. On that day the House, after twenty minutes debate, will vote whether to accept the petition. If the petition is accepted, the House will immediately proceed to debate the amendment, and a final vote will occur before any other House business can be brought up. The amendment requires a two-thirds vote (290) of the House for passage. The Senate is awaiting House action before acting on the amendment.

## THE AMENDMENT

The text of the proposed amendment is as follows:

SECTION 1. No student shall be compelled to attend a public school other than the public school nearest the residence of such student which is located within the school district in which such student resides and which provides the course of study pursued by such student.

SECTION 2. The Congress shall have the power to enforce this article by appropriate legislation and to insure equal educational opportunity for all students.

## ANALYSIS

The intention of Section One of the amendment is to restrict the authority of any court to order the busing of school children to any public school other than the one closest to the students' homes in order to achieve some quota of racial enrollment. The latest figures of HEW's Office of Civil Rights shows that some 1505 school districts with an enrollment of more than 12 million students are now operating under desegregation plans imposed either by the federal courts or HEW. Almost all of these include some from a busing students away from their neighborhood schools to other schools. The last clause of Section One is intended to allow the busing of students to public schools that offer special courses of instruction such as fine arts or vocational education.

The phrase "equal educational opportunity," in Section Two of the amendment now appears in many federal education statutes. It has been used by HEW and the federal courts to impose a vast array of educational practices on schools at all levels including the hiring and firing of teachers based on considerations of race and sex, the admission of students based on the same considerations, and special programs of instruction and construction of educational facilities for the handicapped.

The word "education" does not appear in the Constitution, nor has education ever been affirmed by the Supreme Court as a right guaranteed by the Constitution. The proposed amendment gives Congress, and thereby the federal courts, "equal educational opportunity" over "all students." How such wording would be interpreted by the federal courts is open to question. For instance, does Section Two give Congress and the federal courts the authority to mandate equality of educational financing in all the school districts of a state? More fundamentally, will the upgrading of such language from federal statutes to the federal constitution imply an increase of the federal role in education?

## THE FEDERAL JUDICIARY AND BUSING

The path from the Supreme Court's landmark Brown v. Board of Education (1954) decision to court-ordered busing nationwide has been a complex and tortuous one. What follows is a brief summary of this path.

In the Brown decision, the Supreme Court struck down its own "separate by equal" doctrine as defined in Plessy v. Ferguson (1898) and declared that separate educational facilities are "inherently unequal." The Court based its decision on the Fourteenth Amendment, although admitting that the history of the amendment was "inconclusive" with respect to the area of segregation. In its second Brown decision (1955), the Court declared that all federal, state, and local laws mandating dual school systems according to race were unconstitutional. Also unconstitutional were any administrative procedures that discriminated

according to race. In effect, the Court became the overseer of every school district in the country by ordering local authorities to "make a prompt and reasonable" effort to end segregation, and by ordering the lower courts to "proceed with all deliberate speed" to end segregation in public schools. The Court stopped short of mandating integration of public schools, but stated that compulsory racial separation, that is, legally required racial segregation, must be ended.

The first federal school desegregation legislation was enacted in 1964 as part of the Civil Rights Act of 1964. It authorized the federal government, for the first time, to take a major role in desegregating schools. The authority was in several forms: authority to sue, to provide technical assistance and to withhold federal funds. The power to withhold federal funds became the primary tool for achieving school desegregation. The first enforcement efforts focused almost entirely on the dual school system of the South. "Freedom of choice" plans which permitted students to choose the school they wanted to attend but did not impose desegregation were accepted. But, by 1968, both HEW and the federal courts, impatient with the results under freedom of choice plans, began to narrow their acceptability.

Section 407 (a) of Title IV of the 1964 Civil Rights Act states that the Act did not authorize any U.S. official or courts to issue any order seeking to achieve racial balance in schools by transporting children from one school to another, nor did it enlarge the courts' existing powers to ensure compliance with constitutional standards. Nevertheless, the Supreme Court moved around this prohibition. In U.S. v. Jefferson County Board of Education (1966), the Fifth Circuit Court of Appeals began to eliminate the distinction between de jure segregation and de facto segregation. The court found that desegregation and integration were interchangeable terms, interpreted the Civil Rights Act as requiring integration, and declared that the schools must in fact be integrated if they were to be constitutional. The court struck down several freedom of choice school plans and the Supreme Court declined to review the case.

In Green v. County Board of New Kent County (1968), the Supreme Court disallowed as "intolerable" a school board plan to give parents freedom of choice to send their children either to a formerly all-white school or to a formerly all-black school. While foregoing the explicit language of the Jefferson County decision, the Court let it be known that all efforts to eliminate de jure segregation in laws and practices governing schools and efforts to eliminate any inhibitions of freedom were not enough if schools largely remained segregated along racial lines. In New Kent County, students were still attending schools that remained largely segregated due to housing patterns. The decision seemed to call for some remedy to eliminate the effects of such housing patterns.

In 1971, the Supreme Court faced the remedy of busing and approved it. In Swann v. Charlotte-Mecklenburg Board of Education, the Court noted that the federal district courts had broad equitable powers "to eliminate from the public schools all vestige of state-imposed segregation" and that these powers include the use of mathematical ratios as starting points in shaping remedies and the assignment of students according to race. It also upheld the lower court's order to bus children to accomplish desegregation. In effect, the Court held that there was no other remedy for segregated schools other than busing and that Brown's original contention that de jure segregation was unconstitutional was now meant that anything other than mandatory integration was unconstitutional. In 1973, the Supreme Court upheld busing in Denver, the first time that it had so held outside the South. Since the Swann case, school children have been bused by court order, or under impending threat of court order, in every section of the country.

The Court has shown a willingness to accept busing plans that transport students across city/county, city/suburbs lines even though this involves transportation between wholly separate political jurisdictions. But the Court has not always ordered that this be done. In Milliken v. Bradley (1974), the Court reversed an appeals court affirmation of a district court's order to bus students on a metropolitan basis in the Detroit area. The Court held that sufficient grounds of discrimination or segregation, based on state action or segregative intention by suburban officials, had not been established that would warrant the imposition of a metropolitan desegregation plan. In Bradley v. School Board (1974), the Court let stand an appeals court reversal of a district court's order for metropolitan desegregation/integration in Richmond for the same reasons. Yet, in Evans v. Buchanan (1975), the Court let stand a decision of a lower court that the purposeful segregation within Wilmington, Delaware, city schools affected the racial composition of county schools so that an inter-district remedy was required. A busing plan involving Wilmington and ten surrounding districts was ordered to be implemented.

On July 2 of this year, the Supreme Court upheld sweeping federal court busing orders in Dayton and Columbus, Ohio. The Court ruled that the two school systems had the "affirmative duty to eliminate the effects of past discrimination even if it no longer discriminates." In the dissenting opinion, Justice Powell wrote: "Parents are not bound by these decrees and may frustrate them through the simple expedient of withdrawing their children from a public school system in which they have lost confidence. The time has come for a thoughtful re-examination of the proper limits of the role of the courts in confronting the intractable problems of public education in our complex society."

## CONGRESS AND BUSING

Congress has never voted for the use of any federal funds in order to carry out court-ordered busing. Nevertheless, such funds have been expended by various departments in the executive branch. As a response to such unauthorized expenditures, there have been efforts in every congressional session of this decade to remove federal money from busing programs. Recent congressional action on this subject is outlined below.

1976. Congress included in the Fiscal Year 1977 HEW-Labor Appropriation bill a prohibition of the use of federal funds to require directly or indirectly the busing of school children to any school other than the one nearest any student's home. A Senate floor amendment to the Justice Department Appropriations bill, prohibiting the Department from intervening in any suit involving school busing, was defeated on a 55-39 roll call vote. In addition, a Senate attempt to remove the authority of the federal judiciary to order school busing lost on a 53-38 vote. As part of the revision to federal vocational education aid programs, Congress included a provision authorizing federal funds for the investigation of alternatives to court-ordered busing.

1977. Congress moved further in the direction of restricting federal funds for the use of busing. The Department of HEW had come up with the intepretation that previous restrictions on the use of federal monies to facilitate court-imposed busing did not rule out the transportation of students under reorganized grade structure plans pushed by HEW to mandate integration. In response, Congress adopted an amendment to the HEW-Labor Appropriations bill barring the use of funds for pairing or clustering of schools of differing racial compositions. A bill limiting the power of the federal judiciary to order busing was reported by the Senate Judiciary Committee, but did not receive floor consideration.

1978. Congress continued its ban on the use of HEW-Labor appropriations to assist court-imposed busing. The House passed an amendment to the Justice Department Authorization Bill that would have prohibited the Justice Department from bringing legal actions promoting school busing. The amendment was not agreeable to the Senate and was dropped in conference. An amendment to the Elementary and Secondary Education Act restricting the authority of the courts to impose busing, offered by Senator Joseph Biden (D-Del.), lost on a narrow vote of 49-47. The defeat was the narrowest that any such measure have ever achieved. If it had passed the Senate, passage in the House would probably have been assured.

## THE IMPACT OF BUSING

Outside of the courts, the impetus for the publicly enforced integration that logically resulted in busing to achieve this integration has come from the academic community. One of the most influential academics has been sociologist James Coleman of

the University of Chicago. In 1966 Coleman issued his landmark study, "Equality of Educational Opportunity," financed by a grant from the federal government. Its most widely noted conclusions were that the social composition of a school had more impact on student achievement than either resources or teaching methods and the lower-class black children scored somewhat higher on standardized tests in schools with a middle-class white majority than they did in schools where all the children were poor and black. Coleman's report has been probably the most powerful influence on public policy of any contribution from the academy in history. The conclusions of the report were circulated widely and incorporated in a number of federal education programs. Coleman himself testified numerous times before congressional committees and in school desegregation cases in courts.

In April 1978, Coleman published the findings of a follow-up study in which he reported that he had been completely wrong in his conclusions. Coleman maintained that mandatory busing had been counter-productive in that it had led to a massive white flight from big city public schools, that mandatory desegregation had been accompanied by so much turmoil and violence in schools and by lowered educational standards as to negate any possible improvement in black student achievement, and finally concluded that the notion that there is something inherently wrong with all-black schools was racist at its core.

Most other investigations have concluded that court-ordered busing has substantially hurt the public schools in that it has led to a massive "white flight" from public schools. The degree of this flight as a direct response to busing is uncertain since it has been accompanied by a historical trend of the white middle-class moving to the suburbs for other reasons. But few today doubt that court-ordered busing has contributed to the fact that inner cities are becoming increasing black.

In August of 1978 David Armor, senior sociologist at the Rand Corporation, released his own report in which he attempted to measure white flight caused by busing or other court-imposed segregation plans as compared to the white flight that would have occurred for other reasons. Armor measured white flight over a six-year period in twenty-three Northern and Southern cities that had court-ordered mandatory busing. Against a projected white-student loss without busing that varied between 2 and 4 percent depending upon the city over the six-year period, the average rate of real white loss quickly rose toward 15 percent for the first year of busing, and then dropped to about 7 percent to 9 percent during the next three years. Armor proved that busing has been counter-productive in that the amount of desegregation -- defined as minority exposure to whites -- is declining and for some districts has fallen below the pre-desegregation level. He also claimed that court-ordered busing was producing increasing ethnic and racial isolation in almost all large school districts.

Using figures supplied by each school district, some of the school districts Armor surveyed were the following:

| | Year of Court-Imposed Mandatory Desegregation Involving Busing | Percent White Enrollment in that Same Year | Percent White Enrollement in 1977 |
|---|---|---|---|
| Boston | 1974 | 52.4 | 41.6 |
| Denver | 1974 | 53.8 | 47.0 |
| Pasadena | 1970 | 53.7 | 36.3 |
| Pontiac, Mich. | 1970 | 62.2 | 48.8 |
| Springfield, Mass. | 1972 | 67.6 | 56.5 |
| San Francisco | 1971 | 31.7 | 21.9 |
| Detroit | 1971 | 11.3 | 15.8 |
| Prince Georges County, Md. | 1972 | 73.5 | 56.3 |
| Dallas | 1971 | 55.0 | 42.5 |
| Houston | 1970 | 49.1 | 36.5 |
| Jackson, Miss. | 1970 | 39.1 | 29.8 |
| Chattanooga | 1971 | 43.8 | 33.0 |
| Memphis | 1972 | 42.0 | 29.2 |
| Atlanta | 1969 | 35.8 | 10.6 |

## CONCLUSION

The last successful discharge petition also involved an attempt to overturn a Supreme Court decision: the 1962 and 1963 rulings prohibiting prayer in public schools. In 1971, supporters of a constitutional amendment to permit school prayer managed to bring that issue to the House floor for a vote but failed, 240-163, to win the necessary two-thirds majority.

Constitutional amendments have been passed to overturn Supreme Court decisions four times in the past. The Eleventh Amendment was ratified in order to prevent any person from suing a state in the federal courts. It was adopted after the Supreme Court took jurisdiction over a case, Chisholm v. Georgia (1973), filed by a citizen of South Carolina against the state of Georgia.

The Fourteenth Amendment resulted from the rejection of the Southern doctrines of state sovereignty and succession. It made federal citizenship paramount, thus overriding the Supreme Court's construction of the Constitution in Dred Scott v. Sanford (1857), which made citizenship by birth dependent on state law.

The Sixteenth Amendment, establishing the federal income tax, overrode the Supreme Court's decision in Pollock v. Farmer's Loan and Trust Company (1895), which stated that a federal tax on incomes derived from properties was unconstitutional.

The Twenty-Sixth Amendment extended the suffrage in both state and national elections to all citizens eighteen years and over. It was adopted after the Supreme Court, in Oregon v. Mitchell (1970), declared unconstitutional the provisions of the Voting Rights Act insofar as they related to state elections.

An unsuccessful campaign to overturn the Supreme Court's "one man-one vote" decision, Baker v. Carr (1962), occurred in the 1960s when a nation-wide drive in the state legislatures to call a constitutional convention fell one state shy of the necessary two-thirds number of states.

In addition to the school prayer, school busing, and reapportionment issues, Supreme Court decisions of the last two decades on abortion, "affirmative action" based on racial and sexual grounds, pornography, capital punishment, and rights of accused criminals have provoked varying degrees of social protest.

This has caused some to question whether the Supreme Court has gone beyond Chief Justice Marshall's statement that "It is emphatically the province and duty of the judicial department to say what the law is" (Marbury v. Madison, 1803) and moved into the realm of fashioning laws and public policies itself. Related to this question are two others. The first concerns control of the public purse. In various cases involving abortion and school busing, federal court decisions have included orders to expend public funds when such authority is written into every state constitution and the U.S. Constitution as exclusively one belonging to the legislature. The second involves the limits of judicial authority in this age of judicial activisism: that is, is the balance of power over social policy shifting towards judges, appointed officials with life-long tenure, and away from members of legislatures, elected officials whose actions are periodically answerable to the citizenry?

The federal judiciary stands alone as an advocate of school busing to achieve racial mixing. As already stated, such busing was specifically prohibited by provisions of the Civil Rights Act of 1964. Numerous congressional roll-call votes concerning the use of federal funds to assist busing have re-emphasized Congress' original intent. No President has ever publicly affirmed a position in support of busing. Public opinion polls throughout the 1970s have consistently demonstrated resounding disapproval of court-imposed busing. The most recent Harris Poll revealed that 85 percent of whites and 51 percent of blacks still oppose busing eight years after the Swann case made the issue a nation-wide concern.

The busing issue so radicalized normally progressive Boston that the city voted for George Wallace, who strongly opposed busing in his campaign, in the 1976 Massachusetts Democratic primary. In Los Angeles, the school board president, a supporter of busing, was recalled by citizen referendum in May of this year. Anti-busing refernda have been passed by the citizens of

Florida and Washington in previous years. A similar referendum has qualified for the ballot in California this year and seems certain to pass.

As has already been shown, court-imposed busing seems destined to achieve precisely its opposite intent -- increasing racial isolation in schools -- along with increasing racial residential isolation in cities. As whites leave for the suburbs, cities are becoming impoverished because of the loss of tax income from the white middle class. The Supreme Court has said that it will approve busing of students between wholly different political jurisdictions. It seems that this can only result in increasing the abandonment of the public schools, with the result that an ever greater number of parents will be taxed to support public education while enduring the additional expense of sending their children to private schools.

An obvious casualty of busing has been the American tradition of local control of schools and school policy. Another imminent casualty would seem to be the very basis of the existence of local government if the federal courts proceed with cross-jurisdictional busing.

Thomas R. Ascik
Policy Analyst