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Controlling the Structural Injunction

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CONTROLLING THE STRUCTURAL INJUNCTION*

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Recently a number of proposals designed to check perceived excesses in the federal judiciary have been made. The Judicial Reform Act of 1982 (S. 3018), for example, would have eliminated jurisdiction over cases claiming abridgment of rights secured by the Bill of Rights and also would have abolished the exclusionary rule; other sections related to class actions, attorneys' fees, exhaustion of state remedies in habeas corpus actions, and so on. Fundamental and broad-ranging ideas, especially when collected in one bill, are bound to arouse intense opposition. Whether right or wrong in terms of constitutional history and theory, such proposals will be seen as a radical attack on the judiciary. What is needed is selectivity and leverage — the limitation of one crucial aspect of judicial excess. Such a reform, if responsibly and carefully done, might be politically acceptable and yet might make other changes largely unnecessary. My suggestion here is that the structural injunction should be singled out for corrective legislation.

The importance of restricting the use of the injunction is independent of the wisdom or foolishness of the particular policies being pursued by the courts. The kinds of judicial interventions that I am about to describe are now used mainly to desegregate schools and to improve state prison systems. But the same devices were once proposed to protect the sanctity of contract,[1] and more recently they were widely used to suppress labor unions.[2] There are indications that in the future judicial intervention might be sought for such purposes as establishing order and discipline in the public schools.[3] The problems that I am concerned about are institu-

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1 Lower courts considered levying and collecting municipal taxes (and in the process assuming many functions of city governments) in order to assure payments on bond obligations. *See* Meriwether v. Garrett, 102 U.S. 472 (1880); Amy v. Shelby County Taxing District, 114 U.S. 387 (1885); Barkley v. Levee Comm'rs., 93 U.S. 258 (1876); Heine v. Levee Comm'rs., 86 U.S. 655 (1873); Rees v. City of Watertown, 86 U.S. 107 (1873); Thompson v. Allen County, 115 U.S. 550 (1885); Yost v. Dallas County, 236 U.S. 50 (1915).

2 The "labor injunction" is described in F. FRANKFURTER & N. GREENE, LABOR INJUNCTIONS (1930).

3 *See* People *ex rel.* George Deukmejian v. Los Angeles Unified School District, Civ.

tional, not ideological or partisan. They ought to concern both liberals and conservatives, indeed anyone who wants government to be accountable to the people and judges to be impartial enforcers of the law.

I

Today federal courts control more important public decisions and institutions in more detail and for more extended periods of time than at any time in our history. There is no way to be sure how many school districts are currently controlled significantly by federal judges, but one survey estimates more than 600. Federal judges have ordered pervasive reforms in prisons in some thirty states and suits are pending in eleven more. There are decrees affecting some 270 local jails with hundreds of cases pending. Mental health systems and public housing are under judicial control in many states, and of course federal courts have written numerous legislative apportionment plans. There are decrees that govern welfare programs and state fishery departments, and the federal judiciary is now beginning to restructure state and local personnel policies in an effort to dismantle patronage systems.

This unprecedented use of federal judicial power is not a response to a specific and limited necessity or emergency. The decrees are appearing in every state and on a wide variety of social issues, and for the most part they seem to be lasting indefinitely. The Topeka school system, ruled unconstitutional by the Supreme Court in its famous 1954 decision, is still under court order. Moreover, there is considerable potential for growth of judicial involvement in local government. I suppose, for example, that the bulk of local mental health programs, jails, and patronage systems are still free of court orders, but in each of these areas there is reason to think that judicial involvement may increase in the future.[4] The Supreme Court cannot be expected to contain the lower federal courts. Although for a short period the Court did attempt to limit the activities of the district courts, it has now largely abandoned that effort.[5] At present the Supreme Court is either un-

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nos. 64340 and 64341, described in Nagel, *How the Right Learned to Love Earl Warren*, THE WASHINGTON MONTHLY, October, 1982, 50.

4 On mental health programs, see Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 54 (1982); on jails see note 6, *infra*.

5 *Compare* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) *with* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); or *compare* Milliken v. Bradley, 418 U.S. 717

willing or unable[6] to provide any effective restraint on the intrusions of the federal judiciary into state and local government.

The mechanism used by federal judges to assume control over such a broad range of institutions and issues is the injunction. Injunctive decrees are often so complete and detailed that they resemble legislation and administrative regulations. Sometimes shaped and implemented by quasi-administrative officials called monitors or masters or receivers, they are used to govern nearly every aspect of the decision-making process from trivial to fundamental. Injunctions have determined the color of the paint on prison walls and the number of feet of urinal trough to which each prisoner is entitled.[7] They set standards for psychiatric treatment, for training and placing public school teachers, and for the curriculum offered in the schools. As a result of one decree the annual cost per resident at a state home for the retarded went from $4,600 to approximately $26,300; operating expenses were increased by $14,000,000 during the first year and capital expenses by $15,000,000.[8] Such expenditures, of course, directly or indirectly influence fundamental public policy determinations. Judicial decrees have been blamed for discouraging the development of alternative community treatment centers by requiring that energy and money be directed at improving institutions.[9] Similarly, resources committed to transporting school children to achieve racial balance can deplete the resources available for improving the quality of education provided to those children. Hence, intended beneficiaries of desegregation decrees sometimes actively oppose them.[10]

These decrees do not always or even usually pursue mistaken policies. Sometimes they do, of course, and sometimes even wise policies are pursued only clumsily. One mental health decree tem-

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(1974) *with* Milliken v. Bradley, 433 U.S. 267 (1977). *See generally* Chayes, *supra* note 4.

6 In some instances, even the sternest rhetoric by the Court insisting that lower courts not assume unwarranted control over state institutions seems to have little effect on the substance of lower court decisions. *Compare* Bell v. Wolfish, 441 U.S. 520 (1979) *with* Valentine v. Englehardt, 474 F. Supp. 294 (D.N.J. 1979).

7 Jones v. Wittenberg, 330 F. Supp. 707, 721 (N.D. Ohio 1971) (paint); Pugh v. Locke, 406 F. Supp. 318, 334 (M.D. Ala. 1976) (urinals).

8 *See* Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 434 (1977).

9 *See* Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L. J. 1338, 1372 (1975); Note, *Implementation Problems in Institutional Reform Litigation, supra* note 8 at 436 n. 41.

10 *See* Bell, *Serving Two Masters: Integration Ideas and Client Interests in School Desegregation Litigation*, 85 YALE L. J. 470 (1976).

porarily enjoined unpaid labor and thus left mental patients idle and bored, and arguably the same decree improved treatment within the hospital while making it worse in the community.[11] However, many of these court orders do much good. In any event, the mistakes and omissions of the other levels and branches of government are often worse; but the central issue is not whether judges are better able than others to make the trains run on time. The issue is whether the role that federal judges are assuming is consistent with elementary principles of self-government and with their duties as judges.

II

The use of the injunction involves federal judges in legislative and executive functions. As I have argued at length elsewhere,[12] such involvement often violates the spirit and sense of the constitutional principle of separation of powers, which helps to define the proper relationship between the federal government and the states.[13] Although the constitutional principle of balance as well as many practical considerations require the merging of departmental functions, the authority of each branch is still defined in part by a sense of functional appropriateness. At the federal level boundaries have been set by invalidating needlessly broad claims for overlapping authority. In *United States v. Nixon*, for instance, the Court subordinated the claim of executive privilege to the judiciary's power to subpoena information relevant to a criminal trial on the ground that the judicial claim was narrower than the President's "generalized" assertion of immunity; thus the executive's claim violated separation of powers because it would have interfered too deeply with the classically-defined functions of the judiciary. Analogously, the federal judiciary's use of the injunction is often unnecessarily destructive of state legislative and administrative functions. Surely if the Congress were to assign to its education committees the job of administering specific local

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11 Note *The Wyatt Case, supra* note 9 at 1375-76.

12 Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978).

13 For others who view this as a central issue, *see, e.g.*, HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); REBELL & BLOCK, EDUCATION POLICY MAKING AND THE COURTS, 241, n. 22 and passim; Mishkin, *Federal Courts and State Reformers*, 35 WASH. & LEE L. REV. 949 (1978); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

school districts or if it were to charge its judiciary committees with judging cases in place of a state judicial system, everyone would think the Congress was outside its appropriate role. The roles being assumed by federal district judges are no more appropriate in the constitutional scheme.

Even more troubling than this disregard for constitutional principles is the cumulative effect of judicial intrusions across many areas of policy and for prolonged periods of time.[14] The vitality of self-government at the local level depends, as the framers of our Constitution understood,[15] on maintaining strong incentives for popular participation. Chief among these incentives is the opportunity to influence policy in areas of importance to people's daily lives — areas such as public schools, mental health programs, public personnel systems, and so on. As courts increasingly control decisions in such areas, the judiciary becomes a threat to the sense of engagement that makes democracy possible at the local level. The stakes, then, go far deeper than the judiciary's capacity to protect specific constitutional rights. The judiciary's headlong drive to correct constitutional violations is jeopardizing the complex and symbiotic relationships among private associations, political parties, and the various levels of government that have characterized the American political system since de Tocqueville's time.

The number and range of issues over which federal judges are assuming control suggest that it is becoming routine to turn to the judiciary for solutions to difficult problems. This routinization of judicial power encourages and is encouraged by a fundamental shift in our concept of the purposes of lawsuits and the role of the judge.[16] Federal judges are described (and therefore begin to see themselves) as social problem-solvers, as heroic antidotes to an evil or inefficient system of popular government.[17] Thus, today judges sometimes shape the lawsuit that they will later decide.[18] One in-

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14 A problem emphasized by Professor Mishkin, *supra* note 13.

15 THE FEDERALIST Nos. 16, 17, 45, 46.

16 See Fuller, *supra* note 13; Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

17 For example, Professor Chayes wrote:

> And to retreat to the notion that the legislature itself — Congress! — is in some mystical way adequately representative of all the interests at stake, particularly on issues of policy implementation and application, is to impose democratic theory by brute force on observed institutional behavior.

Chayes, *supra* note 16 at 1311.

18 *See generally* Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

fluential suit began as an ordinary labor suit brought on behalf of some employees. But it became — at the suggestion of the presiding judge — a suit on behalf of the patients challenging nearly every aspect of the operation of the state's institutions.[19] (It is not surprising to learn that the judge eventually found these claims to be meritorious.) The role of moralist and the job of social reformer are psychically attractive to nearly everyone and, when combined with the formalistic and self-assured mental habits of judges in constitutional cases, they become a potent force for widening and deepening recent trends in the use of judicial power.[20]

The transformation of the lawsuit into a routine instrument of governance is sometimes defended on the ground that the judiciary is simply evolving as a reaction to the complexity of modern life. For example, Professor Chayes of Harvard, normally a careful and forthright observer of judicial processes, wrote:

> The new claims on judicial attention are ... traceable to the central phenomenon of the modern administrative state — bureaucratic decisionmakers exercising broadly delegated powers to run institutions and programs affecting ... the economic and social structures of society.[21]

Such explanations are a form of romanticism common in some academic circles and may safely be ignored. Most of the institutions that judges now control — prisons, mental hospitals, public schools — existed well before the twentieth century and are therefore not essential characteristics of what most would consider "the modern administrative state." Even if they do define the modern state, these institutions (and their deficiencies) existed for many decades before it occurred to federal judges to operate them. On the other hand, at least on occasion federal courts were tempted to use the injunction to govern entire cities as long ago as 1873,[22] and I doubt anyone would claim that the existence of municipal governments defines the modern state. Professor Chayes' description is not borne out in several European countries where complex welfare states exist without judicial control over major public programs and policies.

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19 See Note, *The Wyatt Case*, *supra* note 9 at 1347.
20 Points discussed by Mishkin, *supra* note 13 at 960, 964.
21 Chayes, *supra* note 4 at 60.
22 *See* note 1, *supra*.

The temptation to use the injunction as a substitute for self-government is traceable to a single, simple factor: the desire of the federal judge to accomplish objectives to which the other levels or branches of government strongly object. It is public resistance that tempts courts to resort to more intrusive enforcement devices. Whether the issue is protecting municipal bondholders in Memphis in 1880 or desegregating public schools in Boston in 1980, as the judge finds that legislators, mayors, tax collectors, school principals, and other public officials will not do what he believes is required, he is inclined to take over their functions.[23] Judicial intrusion into state and local affairs is not a consequence of the modern welfare state. It is a consequence of disagreement over public policy. Public resistance prompts judges to step outside their normal role, and the lack of legislative or other constraints on their use of power permits them to do so.

Why have federal judges in the last two decades come to believe that the law requires such an array of social policies with which other public officials disagree? Historically, some reasonably specific constitutional standard was occasionally thought to require the judge to vindicate a certain policy. This was true, for example, with respect to efforts to enforce the impairment of contract clause and the one-man one-vote standard. More recently, however, moral hubris and intellectual confusion has permitted judges to believe that "the constitution" requires a more pervasive set of social policies. So unmoored has constitutional meaning become that today the belief that a judicial policy is required often does not spring from any identifiable constitutional standard at all. Although judges still ritualistically intone their obligation to enforce the constitution, the remedy largely precedes and defines any definition of a legal standard.[24] Injunctions are so widespread in part because they so frequently are not prompted by, nor are they aimed at achieving, any independently ascertainable legal standard. To the extent legal meaning and constraint diminish, injunctions can become as common as social problems.

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23 For a graphic description, see Roberts, *The Extent of Federal Judicial Power: Receivership of South Boston High School*, 12 NEW ENG. L. REV. 55 (1976). The same process in a very different context is colorfully illustrated by Thompson v. Allen County, 86 U.S. 550 (1885), where a judge issued an order requiring the collection of taxes to repay an unpopular bond obligation but *no one* would accept the post of tax collector. Naturally, the lower court was then asked to collect the taxes as well. *See also* Washington v. Fishing Vessels Ass'n., 443 U.S. 658 (1979).

24 Proponents of such forms of judicial relief acknowledge this to be true. See Chayes, *supra* notes 4 and 16, and Fiss *supra* note 16.

Consider, for example, recent desegregation remedies.[25] They do not put those students who were illegally segregated into the condition they would have enjoyed but for the segregation (if anyone could imagine what that might be); indeed, they do not necessarily benefit the children who were actually illegally segregated at all, since these may long ago have grown up. They do require school officials to achieve racial balance in many schools that cannot realistically be said to have been illegally segregated. How the achievement of this balance will correct the constitutional harm is entirely unclear because it is entirely unclear what the constitutional harm was. Legal scholars and courts have been profoundly uncertain about the nature of the constitutional value at stake in school desegregation cases at least since the Supreme Court began approving expansive desegregation remedies in 1968. Here is an honest appraisal by a proponent of "root and branch" desegregation remedies:

> In desegregation cases, relief has consisted of some combination of magnet schools, redrawn district boundaries, consolidation, remedial education, busing, and so on. The appropriate mix has not been a function of the liability-creating conduct. Instead, it has responded to practical considerations about the operation of the school system, resource availabilities, and perhaps the preferences of the parties. These factors are quite distinct from, and even irrelevant to, the liability determination . . .
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> [T]here is no way to reason from the "right" to a desegregated school system established by *Brown* to the content of the decree in any particular case. It is equally impossible to work backward from the relief to define the contours of the right. After twenty-five years of observing its behavior and what it has let stand in the lower courts, we have some idea of the Court's vision of a desegregated system. But any attempt to formulate that conception must remain at a high level of generality. The method of "reasoned elaboration," in whatever direction pursued, does not yield very particularized, let alone determinate, results. To act as though it does, as the Court may have come to appreciate, would be to falsify *Brown* itself, which did not establish a particular structure or methodology for eliminating segregation in the schools . . . .[26]

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25 *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Milliken v. Bradley, 433 U.S. 267 (1977).

26 Chayes, *supra* note 4 at 50-51.

Much the same could be said of the prison reform cases, where the Supreme Court has never authoritatively articulated a constitutional standard that could explain the cases. The fact is that although it has engaged in rhetoric on both sides of the issue,[27] the Court has never squarely held that institutional conditions as a whole can violate the Constitution, and no court has ever established any intelligible, predictable standard whereby state officials can know what conditions are legal.[28] Prison systems in some thirty states are being remade by the federal judiciary because of a "constitutional" standard on which the Supreme Court has never seen fit to rule. Within very broad limits, the "law" in these cases is the remedy, which is to say that the preferences and ad hoc decisions of lower federal court judges, as expressed in their injunctions, is the law.

In sum, it is becoming normal to substitute the injunction for local self-government. The political system is becoming dependent on this use of judicial power, and it is being rationalized in a way that is likely to increase that dependence. The use of the injunction is not significantly constrained either by the Supreme Court or by reasonably definite conceptions of law and legal duty. The danger is not that judges will govern poorly but that they might govern well or at least tolerably, so that eventually the traditional idea that local government should be popularly accountable will begin to seem foreign to us.

III

The routine use of the injunction is not only a threat to self-government; it is also a threat to the judicial function. A number of cherished judicial ideals have already been sacrificed in specific cases. Let me illustrate.

Biased Decision-making. Judges have appointed masters, monitors, and receivers to help design injunctions and to oversee their implementation. These appointees are not judges and therefore neither their training nor role necessarily assures the habits and capacities required for the kind of disciplined impar-

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27 Both approving and disapproving language appears in Bell v. Wolfish, 441 U.S. 520 (1979). Dicta approving "conditions of confinement" cases also appears in Hutto v. Finney, 437 U.S. 678 (1978) and Rhodes v. Chapman, 452 U.S. 337 (1981).

28 *See* Robbins & Buser, *Punitive Conditions of Prison Confinement: An Analysis of* Pugh v. Locke *and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893 (1977).

tiality we expect of judges. Judges have appointed individuals whose associational ties (for example, mental health reform organizations) would suggest bias; in fact, judges have appointed members of the plaintiff class to supervise defendants' efforts at compliance.[29]

Judges cannot always be counted on to correct any resulting bias in the formulation or implementation of the decree. Findings of fact contained in master's reports are traditionally subject to judicial alteration only if clearly erroneous.[30] Although judges arguably are not bound by this rule in institutional cases,[31] there is no requirement of full review. Moreover, careful review is often difficult because many of the determinations of the special masters occur informally, so that such findings never reach the judge. These determinations can be so numerous and the activities of the master so complicated that the sheer magnitude of the task can discourage prompt review by the judge.[32] Finally, the nature of the lawsuit is such that even review by a judge cannot always assure impartiality. As discussed above, intrusive injunctive relief is normally a response to intense disagreement. Accordingly, during the course of a prolonged lawsuit, judges frequently have occasion to test their will against that of the defendants. The judge, having taken on the role of political manager, is subject to the pressures of a combatant. It assumes far too much about human nature to think that judges — sometimes after having shaped the lawsuit and then having endured years of tenacious resistance and public vilification — are able to put aside their deeply engaged emotions. One federal judge was removed from a lawsuit by an appellate court because he "shed the robe of the judge and ... assumed the mantle of the advocate ... [and became] lawyer, witness, and judge in the same proceeding. ..."[33] No one knows how widespread less extreme or less visible examples of the same problem might be, but the sense of intense commitment and frustration that can lead to bias is present in many institutional cases.[34]

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29 *See* Note, The Wyatt Case, *supra* note 9 at 1361.

30 Fed. R. Civ. P. 53 (e) (2).

31 *See Special Project: The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 807 (1978).

32 For an account, *see* Berger, *Away from the Court House and into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707, 724 n. 18 and passim (1978).

33 The case was Reserve Mining Co. v. Lord, 529 F.2d 181, 185-186 (8th Cir. 1976).

34 Listen, for example, to the tone of agitation in this judge's remarks:

> So what we are dealing with here is a situation where the School Committee ... for years followed a policy of plan, plan, plan, delay, delay, delay. And that is a

The Subordination of Legal Values. Normally it is thought that the insulation and detachment of judges will ensure faithfulness to legal, especially constitutional, values. Judges, removed from the immediacy of events and ambition, are expected to remember what the law requires when others are tempted to forget. Probably nowhere is this truer than with respect to the value of free speech. But consider how dissent appears to a judge engaged in social reform by injunction. Opposition to an injunction that is thought to be enforcing some "constitutional" requirement naturally seems illegitimate. Judges who are engaged in the kinds of political struggles that surround institutional injunctions see themselves as representing a higher good, and thus they sometimes feel it proper to silence the opposition.

Public debate about the propriety of desegregation orders can, for example, be limited by orders that are vague, such as the order that prohibited all persons from "in any way interfering with the carrying out of the court's order."[35] More specific orders can also be used to silence opposition — as, for example, the order that prohibited "persons, more than three in number" from gathering along any bus route "while school buses are being operated ...."[36] A few examples are startling: one judge ordered a school board to " 'jam' all citizen band radio channels in the area to prevent their use in organizing protests against the desegregation orders."[37] Less flamboyant, but perhaps more dangerous to democratic values, is the use or the threatened use of the contempt power when prompted by public threats of resistance.[38] This is

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quote by the way. One of the members, and I don't remember who it was, possibly it was a former superintendent, said, "We will in effect block the Racial Imbalance Act by delay, delay, delay, in submitting plans and plans and plans," and that quote is in here somewhere. Now there is the history, and if ever this city is to have desegregated schools, and if ever the plaintiff class is going to get the constitutional rights to which they are entitled, this pattern of delaying and delaying, finding one excuse or another not to go forward with commitments to the State Board of Education or orders of the state and federal courts has simply got to end, and that basically is why the Court feels obligated ... to ... go the contempt route."

Quoted from Roberts, *supra* note 23 at 58, 59 n. 19.

35 Kasper v. Brittian, 245 F.2d 92, 94 (6th Cir. 1957).

36 Newberg Area Council, Inc. v. Board of Education (orders issued, Nos. 7045, 7291, W.D. Ky., July 30, 1975, Sept. 2, 1975, Sept. 6, 1975). (No appeal was taken from these orders. The judge's desegregation order was affirmed *sub nom.* Cunningham v. Grayson, 541 F.2d 538 (6th Cir. 1976), *cert. denied* 429 U.S. 1074 (1977), *rehearing denied* 430 U.S. 941, 434 U.S. 883, *on appeal after remand, sub. nom.* Newburg Area Council, Inc. v. Bd. of Ed., 583 F.2d 827 (6th Cir. 1978)).

37 *Id.*

38 *See* Comment, *Community Resistance to School Desegregation: Enjoining the*

dangerous because — as judges readily declare when policing the other branches of government — even colorful talk of resistance is an important aspect of public discussion. Also dangerous to democratic values is the use of contempt to punish votes cast by elected officials in deciding the content of the plan to be submitted to the court,[39] for this type of coercion not only defeats the purpose of public debate but also deprives the judge of the formally-registered judgment that grows out of public debate. It is also questionable whether judges and their appointees should intentionally use the process of adjudicating legal rights to generate publicity and thus to influence political debate.[40]

The Correction of Conditions that Are not Violations of Law. There can be little doubt that at least on occasion judges, once involved in managing public institutions, are inclined to make the institution more than minimally adequate under the law. Does the Constitution really require that the prison cook have a bachelor degree in dietetics?[41] Or that every inmate be furnished a personal storage locker and 60 square feet of living space (the latter standard surpassing the recommendations of model penal codes)?[42] The Supreme Court itself approved an order that limited to thirty days the maximum sentence in solitary confinement when it was conceded that a longer confinement would not necessarily amount to cruel and unusual punishment.[43] It thus appears to have endorsed the power of district courts to correct conditions that are not legal violations.

Even when the judge does not order excessive reforms, the implementation of the decree through monitors and receivers can lead to much the same result. These judicial appointees, who are actually "in the field," are under the entirely understandable temptation to do as much "good" as possible. Moreover, the contours of the decree are sometimes unclear and so their permissible duties are arguable.[44] In such circumstances, it is not surprising

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Undefinable Class, 44 U. CHI. L. REV. 111, 147 (1976).

39 See Roberts, *supra* note 23 at 59.

40 For an instance where monitors were used for such purposes, see *supra* note 29 at 1363; for examples of judges themselves attempting to influence public opinion, *see* Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 452-53 n. 135.

41 Pugh v. Locke, 406 F. Supp. 318, 334 (M.D. Ala. 1976).

42 Discussed in Robbins & Buser, *supra* note 28 at 917.

43 Hutto v. Finney, 437 U.S. 678, 686 (1978).

44 For an example, *see* note 29 at 1351 *et seq.*

that judicial officers might resolve many issues that have little or nothing to do with the lawsuit. One master in a school desegregation case reports that he was asked to resolve whether the local parks department could "deprive the Brooklyn Figure Skating Club of its weekly practice sessions at the Coney Island ice rink."[45] Since this master was spending his time applying for Ford Foundation funds and drawing up a comprehensive plan that involved recreation, housing, social services, and the commerical rejuvenation of Coney Island,[46] it must not have seemed odd at the time that he was being asked to resolve such problems.

The Coercion of Non-parties. Although the Supreme Court once acknowledged that a generalized contempt power binding an entire community was contrary to established principles of equity jurisdiction,[47] some judges have tried to coerce whole populations. These instances illustrate the excesses that are caused by judges' frustration in enforcing programs in a hostile political setting. The institutionally self-protective instincts of the Supreme Court can be seen in its recent approval of such excesses.[48]

In one case a black political activist was held in contempt for appearing on school grounds in violation of an order that prohibited "entering school grounds without authorization ... or disrupting the orderly operation of a school."[49] This individual was not a party to the suit nor was he found to be acting in concert with any party. The order, however, applied to "any person ... having notice of this order" and a copy of the order had been served on him along with several others known to oppose the desegregation plan. In another case a judge on his own motion and in response only to some public threats of resistance prohibited assembling near school buildings and along bus routes.[50] Again, the order applied to "any person." In an entirely different kind of case, a district court subjected all fishermen in Washington State to its decree, although they were not parties to the lawsuit.[51] Such orders appear to violate the Rules of Civil Procedure, as well as the more general notion that courts do not legislate.[52]

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45 Berger, *supra* note 32 at 725.
46 *Id.* at 727, 730.
47 Chase National Bank v. City of Norwalk, 291 U.S. 431, 437 (1934).
48 Washington v. Fishing Vessel Ass'n., 443 U.S. 658 (1979).
49 Discussed in Comment, *supra* note 38 at 140-41.
50 *Id.* at 147.
51 Washington v. Fishing Vessel Ass'n., 443 U.S. 658 (1979).
52 For an excellent analysis, see Comment, *supra* note 38.

IV

The injunction is being used excessively and federal judges do not show significant signs of controlling themselves. Congress has responded constructively to similar situations in the past. In the Johnson Act of 1934 Congress limited the jurisdiction of the district courts to enjoin state and local ratemaking for public utilities.[53] In the Tax Injunction Act of 1937 Congress prohibited injunctions against the collection of state taxes except in extraordinary situations.[54] And, of course, the Norris-LaGuardia Act strictly limited federal court jurisdiction in labor disputes.[55] Although I do not pretend to be sure what specific form new corrective legislation should take, these Acts provide potentially useful models. A number of possibilities seem worth further attention.

(1) *Statement of General Policy.* As it did with respect to labor relations, Congress could declare a general policy, in this case in favor of protecting state and local authority to manage local institutions. The jurisdiction of the district courts to issue injunctions interfering with local decision-making authority could be limited to specific instances compatible with that general policy.

(2) *Requirement of Specific Findings of Fact Antecedent to Injunctive Relief.* In order to assure, as Judge Coffin suggests, that over-intrusive court involvement is a "remedy of last resort,"[56] Congress might require various types of factual findings: (a) a specification as to why the procedures and resources of the state court system makes relief there impossible and (b) an explanation as to how each aspect of the remedy imposed by the court will correct the condition that offends federal law; and (c) a specification as to what alternative, less intrusive plans were considered and rejected and why each was found to be inadequate; and (d) why any aspect of a plan submitted to the court by the relevant local officials and rejected or modified in the court's decree was inadequate for remedying the condition that offends federal law; and (e) the precise duties of any judicial appointees and any limitations on those duties necessary to protect against unwarranted inferences in local decision-making.

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53 28 U.S.C. § 1342 (1976).
54 28 U.S.C. § 1341 (1976).
55 29 U.S.C. § 101 (1973).
56 Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 CAL. L. REV. 983, 995 (1979).

(3) *Definition of Acts not Subject to Injunction.* Congress might preclude injunctive relief with respect to behavior thought to be especially crucial to the local democratic process. For example, it might especially protect: (a) the decision of any relevant public official as to the content of any remedial plan to be submitted to the court, and (b) participation in any public discussion or debate regarding the propriety of the court's plan of injunctive relief.

(4) *Definition of Permissible Coverage.* Although Rule 65 already is substantially aimed at achieving this objective, Congress might more specifically limit injunctions that bind non-parties. Jurisdiction over persons on the basis of analogies to in rem jurisdiction or expanded notions of privity might be prohibited. Standards might be developed for excluding from coercion under the decree any non-party whose behavior is not a direct, immediate, and substantial threat to the decree. And notice and hearing requirements might be strengthened.

(5) *Specification of Procedures to Be Followed.* As Judge Coffin has further suggested,[57] expedited interlocutory appeal of certain issues in institutional cases might be established. For example, expedited review before issuance of a permanent injunction might be required for certain determinations of law. This could help assure that an elaborate regime of injunctive relief is not begun unless the determination of the violation is correct and the findings of the trial court are in compliance with the statute proposed here. One function of such limited review would be to assure some degree of oversight before the lengthy and antagonistic process of implementation is begun, for once this process is underway and the court has committed its prestige and resources, institutional self-interest makes independent review difficult. Furthermore, Congress might mandate review by the appellate courts (and prohibit direct appeal to the Supreme Court) and might specify that a less deferential standard than abuse of discretion be employed.[58]

Procedures and standards might be established for disqualifying judges who have become or appear to have become so personally involved as to lack impartiality. Although federal judges are already required to disqualify themselves when their "impartiality might reasonably be questioned,"[59], it is doubtful that this rule is

57 *Id.* at 995-997.
58 The latter point, again, has been suggested by Judge Coffin. *Id.* at 998.
59 28 U.S.C. § 455 (a) (1982 Supp.).

specific enough for the realities of judging in an institutional case. Congress might, for example, require that demands for disqualification based on certain enumerated factors be heard in the first instance by a different judge. These factors — which might include claims that a judge proposed significant expansion in the theory of the case or in the type of relief demanded — could be made presumptive grounds for removal.

Standards might also be developed to assure impartiality in judicial appointees. Appointees might be subject to disqualification for personal or professional ties to the plaintiff, and for repeated and significant attempts to coerce behavior not subject to the injunction.

(6) *Creation of a Cause of Action Against Judicial Abuse.* Presently judges enjoy extraordinary degrees of insulation from liability for knowingly unconstitutional acts.[60] Quite aside from the question whether this immunity is justified for their traditional functions, it is clearly anomalous when judges assume the same kinds of executive and administrative functions that courts have determined ought normally to be exposed to much wider risk of liability. When performing defined managerial function, judges and those acting for them might be made liable for damages to individuals if the judge knew or should have known his conduct to be unconstitutional. Although the basis of the Court's doctrine of absolute judicial immunity is statutory interpretation, some of its dire predictions about the destructive impact on the judicial function of qualifying that immunity might suggest that qualified immunity for judges would be unconstitutional. However, there are strong reasons to believe that qualified immunity would be substantially more compatible with the judicial process than it is with the processes of the other branches.[61] For example, judges, unlike the police, have the power to postpone and carefully consider the difficult legal decisions that they must make. Moreover, judges have the training and acculturation that would make appropriate a liability standard that turned in part on knowledge of the law. In short, if the constitutional issue were squarely presented, the Court could fairly protect judicial officers from limited liability only if it were inclined to reverse its long-reiterated

60 Stump v. Sparkman, 435 U.S. 349 (1978). *See also*, P. SCHUCK, SUING GOVERNMENT 90-91 (1983).

61 This argument is laid out more fully in Nagel, *Judicial Immunity and Sovereignty*, 6 HAST. CON. L. Q. 237 (1978).

position on qualified immunity for many other governmental officials.[62]

These are rough proposals. They involve formidable technical problems of drafting. Some of them in their specifics may be misguided. But the direction of thought suggested here holds potential, I think, for protecting democratic accountability at the local level and ensuring the integrity of the judge's role.

62 P. SCHUCK, SUING GOVERNMENT (1983) (new liability standards proposed for government officials in general).