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FEDERAL COURTS AS STATE REFORMERS

A significant development of the 1970's has been the substantial expansion of the occasions on which lower federal courts have, in the name of remedying perceived constitutional violations, ordered affirmative changes in, and undertaken pervasive and continuing supervision of, the operation of state or local governmental units such as prisons, mental hospitals, or schools.[1] This proliferation of what I shall refer to as "institutional decrees" raises important issues on a number of levels. There may, of course, be questions about the correctness of each particular decree. More broadly, serious questions may be and have been raised about the efficacy and wisdom of such orders in general. These are interesting and worthwhile inquiries,[2] but they are not our central focus here.

From a perspective which, as ours here, emphasizes the proliferation of orders of this kind, important issues appear concerning the suitability of the federal judicial process and its procedures for deciding upon, framing, and implementing such decrees. In one direction, these questions then raise the possibility of changing the existing and traditional judicial frame-

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[1] Three examples, involving respectively a mental hospital, a police department, and the public schools of a whole state, are discussed in this lecture. Citations to numerous other instances are collected in the articles cited in note 7, *infra*.

Presently pending in the United States Supreme Court is J.L. v. Parham, 412 F. Supp. 112, 412 F. Supp. 141 (M.D. Ga. 1976), *prob. juris. noted*, 431 U.S. 936 (1977), in which a three-judge district court held that Georgia's law permitting voluntary admission of minor children to mental hopsitals by parents or guardians violated due process and as remedy the court ordered, *inter alia*, that non-hospital facilities and personnel be provided for minors who could be cared for in such a "less drastic" environment and that "such money of the State of Georgia as is reasonably necessary" be spent for that purpose, even though no such facilities were ever authorized by the Georgia legislature. The case was argued on December 6, 1977 (46 U.S.L.W. 3386); six weeks later it was restored to the calendar for reargument at the coming Term, 434 U.S. 1031 (1978).

[2] *See generally* Glazer, *Courts and Social Policy* (Jefferson Lectures, University of California, Berkeley, 1978) (forthcoming) [hereinafter cited as Glazer]; L. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISION ON RACE AND THE SCHOOLS (1976); D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977) [hereinafter cited as D. HOROWITZ]. *See also* E. BARDACH, THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES LAW (1977); Kirp, *School Desegregation and the Limits of Legalism*, 47 PUB. INTEREST 101 (1977).

work so as to adapt it better to institutional decree cases. Some new measures, such as judicial appointment of external oversight committees,[3] have been tried and others have been suggested, taking as given that it is desirable that these cases constitute a major, central, and regular element of federal courts' work.[4] At the same time, the model which emerges of judge and court adapted to this role poses some deep problems not only as to the continued viability of the judicial institution thus revised, but also as to conceptions of "the judicial power" to which the Federal Constitution committed its enforcement as "the supreme Law of the Land," and for which it granted judges life tenure.[5]

In another direction, those questions regarding the suitability of judicial processes merge with larger issues concerning the allocation of power which are presented by noting the more immediate effects of proliferating institutional decrees, including particularly the phenomenon of one or more federal judges undertaking supervision and control over, simultaneously, a state's schools, mental hospitals, and prisons (let alone other institutions).[6] Thus, by one route or another, focusing on the fact of proliferation brings us to the fundamental question which is our central concern here: the legitimacy of the federal courts issuing orders of this kind as a regular matter in the ordinary course of business.

Let me stress that I am not questioning the legitimacy of such orders per se. In particular circumstances, where the constitutional right is clearly and soundly based and there is no alternative way to effectuate it, I believe institutional orders are justified. What I am challenging is the regularization of decrees of this kind. I challenge the acceptance of the set of mind that, having identified a real social problem, too easily concludes (a) that if there is a problem, there must be a solution, (b) that the continued existence of the problem establishes both that the other parts of government cannot be relied upon and that courts' traditional remedies are not efficacious, and (c) that judges must therefore act in a wholesale fashion to reform government to bring about the "cure". I challenge also what often flows from this: the too-ready recognition of new constitutional claims asserted in terms which themselves imply—or, indeed, are derived from—the desirability of federal courts assuming oversight of state governmental institutions. What I urge is not withdrawal but restraint, not the abjuring of extraordinary remedial measures but their reservation for those

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[3] *See, e.g.*, text at note 23 *infra*. *But see* Newman v. Alabama, 559 F.2d 283, 288-90 (5th Cir. 1977).

[4] *See, e.g.*, Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) [hereinafter cited as Chayes]; Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977); Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975). *See also* LaRue, *Justiciability and Mental Health*, 32 WASH. & LEE L. REV. 347 (1975).

[5] U.S. CONST., arts. III & VI.

[6] *See generally "Who Governs Alabama?"* on the program "60 Minutes" on the CBS national television network, April 17, 1977.

relatively few, extraordinary cases where they have special, adequate justification.[7]

I

As might be expected, the growth of institutional remedies in recent years began in such special, extraordinary circumstances. The phenomenon appeared most visibly in the two most prominent and portentous lines of decision by the Warren Court: school desegregation[8] and legislative apportionment.[9] In the reapportionment cases, the constitutional standard established was "one person, one vote".[10] But whatever the standard held to govern, an individual voter's right to cast a ballot free from the effects of malapportionment could only be vindicated by overall reapportionment. Judicial relief for a violation of that constitutional right thus necessarily involved bringing about restructuring of the overall legislative representative scheme. While primary and ultimate responsibility for defining the shape of the new districting or other electoral structure properly remained with the state legislatures,[11] the federal courts' posture of enforcing the constitutional requirement necessarily implied at least the right to withhold approval of proposed plans and, if necessary, to displace the existing malapportioned structure provisionally with one ordered by the court.[12]

In the school desegregation cases, the necessity for institutional relief might at first appear not quite so ineluctable, since in theory relief could be provided each plaintiff by an order requiring admission of that individual to a school which that student would have been eligible to attend but for the school district's policy of racial segregation. That statement of the theoretical remedy, however, should be enough to demonstrate its unreality. The constitutional rights, even of individual minority plaintiffs, were

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[7] For a thoughtful study which reaches a similar conclusion on the basis of careful, sustained analysis of separation of powers principles and authority, see Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies,* 30 STAN. L. REV. 661 (1978). For another recent and very useful article on a closely related subject, see Frug, *The Judicial Power of the Purse,* 126 U. PA. L. REV. 715 (1978) [hereinafter cited as Frug].

[8] Beginning, of course, particularly with Brown v. Board of Educ., 347 U.S. 483 (1954), 349 U.S. 294 (1955). *See also* note 14 *infra.*

[9] Beginning, of course, with Baker v. Carr, 369 U.S. 186 (1962).

[10] Gray v. Sanders, 372 U.S. 368, 381 (1963); *see* Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (1964).

[11] *See, e.g.,* Connor v. Finch, 431 U.S. 407, 414-15 (1977); Reynolds v. Sims, 377 U.S. 533, 586 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656, 675-76 (1964); *cf.* Scott v. Germano, 381 U.S. 407, 409 (1965) (state courts). *See also* Wise v. Lipscomb, 98 S. Ct. 2493 (1978)(decided after this lecture was delivered).

[12] *See* cases cited at note 10 *supra.* So long as the legislature had and retains for the future the option of enacting any valid apportionment plan it selects, this remedy surely raises fewer problems and is less obtrusive than a direct judicial order to the state legislature to enact an acceptable plan. The same is true as to the possible remedy of enjoining any substantive legislative action by the state until a properly apportioned legislature is elected (or even only until a properly apportioned election is provided for). The alternative of enjoining any election until the legislature enacts an acceptable plan is obviously unsatisfactory.

hardly likely to be effectively implemented if one or a handful of student plaintiffs were simply admitted to previously all-white schools. When one adds the fact that the school desegregation cases were class actions,[13] the need for structural change again appears unavoidable. This is not to say that every facet, or even every major element, of every decree issued in the enforcement of the school desegregation principle was correct and warranted. But the general proposition seems undeniable that some degree of judicial supervision or intervention on a more than sporadic basis was essential for the effectuation of the underlying constitutional right.

The school desegregation and reapportionment cases were landmark decisions of extraordinary magnitude. They represented the recognition of fundamental constitutional rights, in each instance only after protracted consideration[14] led the Supreme Court to the ultimate conclusion that the deepest assumptions of the constitutional order commanded no less. In both instances, the constitutional commands meant addressing major institutions of society, and the development of special, far-reaching remedies in such circumstances can be specially and forcefully justified.[15]

Even in those two specific areas, the remedies necessarily implied, and those explicitly authorized by the Supreme Court, have been more limited than those frequently ordered by lower courts.[16] As is the way of precedent and of mankind, once broad remedies attained prominence, the tendency

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[13] In *Brown v. Board of Education* for example, the action was brought on behalf of all "Negro children of elementary school age residing in Topeka." 347 U.S. 483, 486 n. 1 (1954).

[14] The movement toward *Brown* and the abolition of the "separate but equal" doctrine in schools began "several years" earlier with Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) and Sweatt v. Painter, 339 U.S. 629 (1950). In *Gaines,* the Court held invalid Missouri's refusal to admit blacks to the University of Missouri School of Law, the only existing state law school, regardless of the state policy of paying their tuition to an out-of-state school. In *Sweatt,* the Court found that the Texas law school set up for blacks was not the equal of the all-white University of Texas Law School and ordered blacks admitted to the latter.

Constitutional claims against malapportioned voting districts had been presented in the Supreme Court as early as Colegrove v. Green, 328 U.S. 549 (1946). *Colegrove* affirmed dismissal of the case, but the majority's inability to agree on a single opinion, and the strong dissent, suggested that the underlying issue was far from buried. In 1962, Baker v. Carr, 369 U.S. 186, overturned *Colegrove.*

The claims asserted in support of institutional relief in the current run of cases are most frequently of quite recent vintage. For example, see note 18 *infra* as to the "right to treatment."

[15] The statements in the text assume the legitimacy of the basic holdings of the reapportionment cases—a matter not beyond question. It is unnecessary here to resolve that issue, since it is sufficient for present purposes that those holdings are "special" and distinguishable from the general run of institutional relief cases. The reapportionment cases can be easily distinguished on the basis that malapportionment is inherently a self-perpetuating evil because it distorts the composition of the legislature, thus tending to prevent correction by legislative means. This justification for judicial intervention, as well as the inexorability of an institutional remedy if the underlying right is once recognized, is not present in the run of institutional relief cases.

[16] *See* Frug, *supra* note 7, at 762-70. The general question of the relationship between the Supreme Court and the lower federal courts in the evolution of doctrine dealing with the scope of courts' power is an intriguing one, but not one that can be pursued in this lecture.

of litigants to seek them—and of courts to grant them—in more routine settings could be expected to grow. And it did.

Two leading instances may help illuminate the phenomenon. In *Wyatt v. Stickney*,[17] the evil under attack was that mentally ill persons in Alabama were being civilly committed to a state hospital which confined them in terribly overcrowded, inhuman conditions without treatment and even without decent custodial care. Such action by a state might be seen as depriving these individuals of liberty without due process of law or subjecting them to cruel and unusual punishment.[18] The traditional form of relief then would appear to be a negative injunction or perhaps habeas corpus, causing the individuals to be released from confinement unless the state improved the hospital conditions to at least a minimally decent level.[19] Though problems with such relief might have justified some institutional remedy, what actually occurred was quite different. What began as an action to prevent the discharge of a hospital employee was converted, with encouragement from the district judge[20] and the appearance of "public interest" counsel,[21] into a class action on behalf of committed patients, asserting a constitutional "right to treatment".[22] The relief sought was a

[17] 325 F. Supp. 781 (M.D. Ala.), *on submission of proposed standards by defendants*, 334 F. Supp. 1341 (1971), *enforced*, 344 F. Supp. 373, 387 (1972), *aff'd in material respects sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

[18] *See* Estelle v. Gamble, 429 U.S. 97, 101-06 (1976); O'Connor v. Donaldson, 422 U.S. 563, 588 n.9 (1975) (Burger, C.J., concurring); *cf.* Robinson v. California, 370 U.S. 660 (1962). Arguably, the state's failure to provide adequate services might also be considered a denial of the equal protection of the laws. *Cf.* Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

[19] An action for damages might also lie. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563 (1975); *cf.* Estelle v. Gamble, 429 U.S. 97, 105 (1976) (cause of action exists under 42 U.S.C. § 1983 (1976) for deliberate indifference to illness or injury of individual confined in state prison). The statutory basis for injunctive or damage relief would be 42 U.S.C. § 1983 (1976), for habeas corpus, 28 U.S.C. § 2241(c)(3) (1976).

[20] *See* Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338, 1347 (1975) [hereinafter cited as *Implementation of a Judicial Decree*].

[21] The Center for Law and Social Policy, of Washington, D.C., represented a number of national professional and civil liberties organizations (including, *e.g.*, the American Orthopsychiatric Association and the American Civil Liberties Union) who entered the case formally as *amici curiae*. The district court extended to *amici* the same participation rights as parties. *Id.* at 1348 & n.49. The Center's attorneys played a most significant role in the litigation.

[22] The concept of a "right to treatment" is of relatively recent origin. The earliest mention in print appears to have been Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960). Its first judicial recognition came in Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966), but that decision rested on a statutory base. There was little authority for, or definition of, such a constitutional right at the time of its assertion in *Wyatt*. For a collection of the then-existing authority, as well as an analysis strongly supportive of the recognition of such a right, see Comment, Wyatt v. Stickney *and the Right of Civilly Committed Mental Patients to Adequate Treatment*, 86 HARV. L. REV. 1282 (1973) [hereinafter cited as *Right to Adequate Treatment*]. It should be noted that this comment appeared prior to O'Connor v. Donaldson, 422 U.S. 563 (1975). *See also* Stone, *Overview: The Right to Treatment—Comments on the*

judicial order prescribing the details of hospital operation, regulating everything from specific staffing ratios and provisions for individual patient treatment programs through the temperatures to which running water was to be heated and inside air cooled. The district court, after conducting hearings which included substantial expert testimony on treatment questions, granted relief on the lines sought. The court appointed its own "Human Rights Committee" to oversee the administration of the hospital and directed the filing of progress reports with the court.[23]

The other case, *Rizzo v. Goode*,[24] involved a somewhat different problem. There was no question that some members of the police force in Philadelphia had engaged in unconstitutional conduct on a number of occasions. Several "public interest" groups considered that the general performance of the Philadelphia police left a good deal to be desired, and it was this they sought to change.[25] Two lawsuits were brought by these groups as class actions on behalf of all the citizens of Philadelphia and the included subclass of the black citizens of the city. The plaintiffs presented evidence of forty specific incidents over a year's time, of which at most twenty were later found to involve constitutional violations. Though a significant number of these instances involved two specific police officers, those policemen were not joined as defendants; the suits were brought against the mayor, the police commissioner, and other high officials. One group of plaintiffs asked for court appointment of a receiver to take over the police department. The other sought a court-ordered procedure for receipt and handling of civilian complaints against policemen, including, but not limited to, complaints of unconstitutional conduct. There was no evidence that any of the high officials had enforced any unconstitutional policy or had affirmatively encouraged unconstitutional conduct by policemen.

The district court found that "[v]iolations of the legal and constitutional rights of citizens are committed by only a small percentage of the members of the police force," but that "such violations do occur, entirely too frequently."[26] At the same time, the court recognized that "the problems disclosed by the record in the present case are not new, and are fairly

Law and Its Impact, 132 AM. J. PSYCH. 1125 (1975); and for a somewhat divergent view see Shwed, *Protecting the Rights of the Mentally Ill*, 64 A.B.A.J. 564 (1978).

[23] Interestingly, the court specifically refused to enjoin further commitments until conditions at the hospitals were improved. 344 F. Supp. at 378.

[24] 423 U.S. 362 (1976), *rev'g* 506 F.2d 542 (3d Cir. 1974), which affirmed COPPAR v. Rizzo, 357 F. Supp. 1289 (E.D. Pa. 1973).

[25] In this case, unlike *Wyatt*, the groups were locally oriented. Indeed, one lead group, the Council of Organizations on Philadelphia Police Accountability and Responsibility, was organized specifically to seek ways of controlling what was considered the improper operation of the Philadelphia police under then-Commissioner, later-Mayor, Frank Rizzo. For this group as well as the other less narrowly focused ones, Mr. Rizzo's electoral successes made resort to the courts appear all the more imperative.

[26] 357 F. Supp. at 1318.

typical of the problems afflicting police departments in major urban areas."[27] The court emphasized that it

> has not decided that the plaintiffs and the class they represent have a constitutional right to improved departmental procedures for handling civilian complaints against the police. What the Court has decided is that, under the existing circumstances, violations of constitutional rights by the police do occur in an unacceptably high number of instances; that, in the absence of change in procedures, such violations are likely to continue to occur; and that revision of procedures for handling civilian complaints is a necessary first step in attempting to prevent future abuses.[28]

The court ordered the establishment of new procedures in accordance with guidelines prescribed by it and subject to its approval and continuing oversight. The guidelines called for, among other things, revision of police manuals and rules "spelling out in some detail, in simple language, the 'do's and don'ts' of permissible conduct in dealing with civilians" and specifically included among the "don'ts" not only constitutional matters but "derogatory remarks, offensive language, etc."[29]

II

The *Wyatt* and *Rizzo* cases illustrate the major features of recent decisions granting broad institutional relief. Most significant is the expansive definition of constitutional rights in terms which imply an institutional remedy. Thus, in *Wyatt,* the court's acceptance of a constitutional "right to treatment," rather than simply to humane conditions of commitment, even in general terms would appear to require systemic change in state mental hospitals. In fact, the court went beyond that to define the content of the entitled "treatment" to include details of building structure and operation, environmental conditions, and hospital procedures. From such a definition, the institutional decree follows inexorably. In *Rizzo,* the district court explicitly did not recognize a constitutional right of the citizenry to specific modes of police administration, such as a civilian complaint review procedure. But its holding effectively found a constitutional right of citizens in general to be free of "too many" violations by the police or at least to have substantial affirmative efforts by the police administration seeking to minimize them. The court's general determination that allegations and proof of a small number of instances of unconstitutional conduct by rank-and-file policemen were sufficient, without more, to establish a constitutional cause of action against high officials can have no other meaning.[30] From that definition of a right, the institutional remedy auto-

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[27] *Id.*

[28] *Id.* at 1321.

[29] *Id.*

[30] The theory was not one of *respondeat superior* but rather of a duty to achieve (or at least seek to achieve) certain overall results. Incidentally, on June 6, 1978 (after the delivery

matically follows.

The proposition I have just stated, that the institutional remedy follows from the definition of the constitutional right, is a formal one. The *Rizzo* case (and perhaps *Wyatt* as well) suggests that the actual process of derivation is often the other way around: the perceived need for a systemic change comes first, and the formulation of the constitutional right is derived from that. To point this out is not to condemn it, but to note something important for an understanding of the phenomenon we are considering. At the least, it casts doubt on the concept of each constitutional right as inexorably preordained in the basic law, entitled to have all else yield before it.

Another key fact about institutional decrees is that the relief ordered often does much more than just prevent or undo constitutional violations. This has been true in school desegregation and reapportionment cases, and is explicitly clear in *Rizzo*. The opinion in *Wyatt* asserts otherwise,[31] but I have great difficulty in believing that a transgression of the Constitution —even of a constitutional "right to treatment"—would have been found initially if the failure to provide air conditioning down to 83 degrees, or the omission of any of many other features of the decree, were the only derelictions brought forth by the plaintiffs in the original litigation.[32]

The pervasive scope of these decrees is explained in part by the fact that once a court begins to reform an institution and gets involved with it, the judge is not likely to be content with addressing only the specific evil which originally justified judicial intervention, leaving all other lesser evils in place. This is simply human. The point is perhaps best made by analogy. Assume that one has a well-used automobile which performs not well but barely adequately, until it suddenly conks out—for example, one spark plug finally fails completely. A mechanic called in is most unlikely simply to replace the spark plug and return the car in its previous barely adequate condition. Even a mechanic with little pride in his work will feel that all the spark plugs should be replaced. One with real pride is likely to feel that the car should be in fairly decent running order when he is finished with it. Judges are not less human and have no less pride in their work.[33]

But a more significant reason for the extensive detail of such decrees lies elsewhere. It is a fact, and one highly important in many ways, that

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of this lecture), the Supreme Court held that while municipalities and high officials sued in official capacity could be liable under 42 U.S.C. § 1983 (1976) for their unconstitutional laws or policies, there was no liability under that section on a *respondeat superior* theory. Monell v. Department of Social Serv., 98 S.Ct. 2018 (1978).

[31] The district court asserted that all the conditions being required by it were "constitutional minimums." 344 F. Supp. at 376.

[32] Consider, for example, that in 1970 only 15% of all housing units in Alabama had central air-conditioning; the majority had no air-conditioning of any kind. *U.S. Bureau of the Census*, 1970 *Census of Housing*, vol. 1, pt. 2, Table 36.

[33] Of course, mechanics can only recommend, while judges order. But that is another matter.

the terms of institutional decrees are basically drafted not by the judge but by the parties. Professor Owen Fiss has described the framework of the process:

> This technique of first having the defendant draft the proposed relief to be entered against it—the plan-submission technique—was modelled after the school desegregation cases. From that experience, we know that its minimalist quality is but an illusion. After submission of the draft program, the plaintiff will have the opportunity to object. Undoubtedly there will be defects in the submission and the district court will have to rule on those objections, and in all likelihood will probably have to construct its own decree (based on submission). The plan-submission technique might be understood as an attempt to capitalize on the expertise of the defendant, but more often than not the dynamics that led to the initial violation prevent the defendant from using its expertise effectively to control its own behavior. Moreover, even after an appropriate program is designed and the defendant ordered to abide by it, jurisdiction must be retained to determine whether the decree is being fully implemented and whether it is adequate to eliminate the pattern of misconduct. If not, supplemental relief will be needed. The cycle would then repeat itself.[34]

In such a framework, defendant's counsel will generally find it wise to negotiate in advance with counsel for plaintiffs. In fact, it is highly likely that the judge will in any event encourage him to do so. In such negotiations, it can be hard for defendants to resist demands of plaintiffs for specific items which are prima facie "good" even when they are clearly not constitutionally required. In *Rizzo,* for example, if there is to be a manual of police "do's and don'ts,"[35] how can one argue against the inclusion of prohibitions against policemen using offensive language?

This process of negotiation gives plaintiffs' counsel substantial leverage as to the scope and detail of the decree. This is true even where, as in *Rizzo,* the defendants are adamantly opposed to plaintiffs' lawsuit. And that is not always the case. In *Wyatt,* for instance, while the Governor and the state administration were strongly opposed to plaintiffs' claims,[36] there is certainly reason to believe that mental health professionals running the state hospitals were not too unhappy about the suit and even generally

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[34] Fiss, *Dombrowski,* 86 YALE L.J. 1103, 1155 (1977).

[35] *See* text accompanying note 29 *supra.*

[36] Governor Wallace filed a separate appeal from the district court's decree as well as motions to stay the decree pending appeal. *Implementation of Judicial Decree, supra* note 20, at 1369. He also filed a separate brief on appeal which "was marked by a self-professed agreement with the 'ultimate achievement of the standards and goals for mental health facilities which are set forth in the District Court's Order of April 13, 1972,' along with a deep disagreement with the role assumed by the court in formulating and implementing the decree." *Id.* at n. 189 (citation omitted).

shared the plaintiffs' experts' perspectives on the criteria for a good mental hospital.[37]

This last point indirectly leads us to another major point regarding institutional litigation: it can be used essentially to bypass majoritarian political controls. In one sense, of course, any judicial action on constitutional grounds is counter-majoritarian. What I am referring to here is the use of litigation by parts of the majoritarian government in order to bypass the legislature or even the electorate. The role of the Alabama mental health professionals in *Wyatt* may or may not fit that description.[38] But it is interesting to note that in *Rizzo* the Commonwealth of Pennsylvania government, rather than take any possible direct action itself, appeared as *amicus curiae* on the side of the plaintiffs.[39]

Probably the clearest example is in another federal court case arising in that same state. Though *Pennsylvania Association for Retarded Children v. Pennsylvania*[40] is captioned as nominally against the State and was originally so brought, as matters developed the State administration ended up supporting the plaintiffs in their positions, including particularly their contention that retarded children should be educated in free public schools or programs. The only resisters were dissenting school districts responsible for providing public schools and, in a more indirect sense, the legislature of the Commonwealth which could have, but had not, ordered such an arrangement in the first place.

This is not to say that majoritarian bodies are always unhappy with court orders for institutional relief. Such orders do put pressure on the legislature. But they may also provide the legislature, as well as other elected officials, with an excellent excuse for taking action which they might favor but which they fear the voters would disapprove of,[41] thus the court decree can insulate such officials from political responsibility, and may at times even be welcome for that reason. Because those circumstances may combine to make a judicial order appear more acceptable, let me say explicitly that such legislative acquiescence does not, in my view, make the decree right. That legislators may like a result, and be pleased to avoid

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[37] *Id.* at 1367-68; *see Right to Adequate Treatment, supra* note 22, at 1298-99.

[38] *See Implementation of a Judicial Decree, supra* note 20, at 1367-68; *cf. id.* at 1353 n. 75 ("Stickney, the Commissioner of the Alabama Board of Mental Health, was discharged from his position. Among the reasons for his discharge was a disagreement with the Governor over whether the state was bound to pay for improvements in the three institutions that had been agreed to in stipulations before the court.").

[39] 423 U.S. at 364 n.1.

[40] 343 F. Supp. 279 (E.D. Pa. 1972).

[41] Since, by hypothesis, it would be impolitic for elected officials to acknowledge such a position, it is impossible to cite unambiguous examples. There are, of course, many instances in which elected officials and legislatures have acted in response to a judicial decree in the very ways they had previously refused to act, and one can at times draw inferences from such a pattern. Indeed, one might even wonder about Governor Wallace's release of eleven million dollars of Alabama's revenue sharing funds to the Mental Health Board while the *Wyatt* district court order was up on appeal. *See Implementation of a Judicial Decree, supra* note 20, at 1369.

a political battle while seeing that result achieved, does not supply legitimacy to a court's action.[42]

The point is true generally, but as will appear, it may at times have particular force because of another feature of institutional decrees. That is, they involve allocation or reallocation of state resources. The amounts involved may be relatively minor. In *Rizzo,* the requirement that civilian complaints be promptly investigated meant that detectives would have to be hired or shifted from other assignments to this duty. In *Wyatt,* the expenses of the Human Rights Committee and other costs of the court's supervision would have to be paid by the state. But much more important in *Wyatt* is the cost of compliance with the substantive requirements of the court's institutional reforms. In fact, one might well say that the root constitutional violation found in the case was the state's failure to allocate enough funds for its mental hospitals. Performance to the standards set by the court in *Wyatt* clearly meant allocating very substantial amounts of state funds to that purpose.[43] For the moment, I merely note this; I shall address the implications of such reallocations of state funds later.

The final characteristic of institutional decrees that I wish to identify here is perhaps already obvious: They involve a continuing oversight of the institution for a protracted period. Although nominally this oversight is by the court, and on ultimate issues it may be in fact, the realities of the judge's role and other responsibilities mean that much of the continuing work must be delegated. Some of this may at times be given to masters or court-appointed committees. But whether or not that is done, plaintiffs' counsel will, as a result of any such decree, come to play an important role in the operation of the institution. Their right to challenge the administrator's performance, by motions for contempt or otherwise, gives them a constant leverage which only the stupid or obdurate administrator will ignore. And ultimately, the court is dependent upon counsel and their experts, at least as much as upon the administration of the institution, if the court's order is to achieve any worthwhile results.[44]

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[42] Indeed, the acquiescence of political officials, nominally defendants, in the objectives sought by plaintiffs in the lawsuit may even raise the dangers of collusive litigation. At the same time, there would seem to be a special need for effective adversary process in these institutional reform cases where the nature of the issues strains the capacities of the judicial process in the first place. Moreover, from the point of view of the system as a whole, such acquiescence without accountability (or with much attenuated accountability) by political officials still serves to bypass majoritarian processes and controls.

[43] *See* 344 F. Supp. at 377-78; 503 F.2d at 1317-19. Then Governor Wallace estimated that bringing Alabama's mental hospitals up to standards would involve an expenditure of $75 million, or sixty percent of the existing state budget excluding school financing. *Id.* at 1317. Although plaintiffs disputed Governor Wallace's figures, neither the trial nor appellate court seemed to have any doubt that very substantial amounts were involved.

[44] Detailed studies of the implementation phases of institutional decrees are relatively rare, and the statements in the text are based in large measure upon informally reported observations. For a detailed study of the implementation experience in the *Wyatt* case, see *Implementation of a Judicial Decree, supra* note 20. For other studies, see D. HOROWITZ, *supra* note 2, at 106-70 (desegregation of the District of Columbia public schools); Glazer, *supra* note 2 (reform of New York's Willowbrook Development Center for the retarded).

III

The characteristics I have described certainly limn a different picture from that of courts' normal operations. Before addressing the rights and wrongs of this new pattern, it is useful to consider the reasons why judges have been moved to it. I believe the principal cause is relatively clear. The judge's attention is focused on what he sees as an evil. He is at the same time offered a proposal for action which promises to cure that evil. He is in a position to command the implementation[45] of that proposal (or some other to the same end), and he feels that he ought to use his power to the end of remedying the perceived evil.

By describing these feelings, I do not mean to denigrate them. No decent person confronted with the facts of the Alabama mental hospital present in the *Wyatt* case could, or should, remain unmoved. I lived in Philadelphia during the period involved in the *Rizzo* case and I think I can fully understand what moved the judge in that case.[46]

At the same time, recognizing the validity and strength of these feelings, and of the commendable personal desire to act against a perceived evil, is not the same as accepting them as a legitimate basis for a federal court to exercise its power. Appointment as a federal judge does not, to use the classic phrase, confer "a roving commission to do good." The deepest assumptions of our constitutional order imply a more limited and defined role for the life-tenured lawyers on the federal bench.

Yet the drive in many institutional relief cases is precisely that desire to do good and eliminate evil. The fact that "evil," and not merely constitutional violation, is the target is neatly illustrated by *Pennsylvania Association for Retarded Children.*[47] In that case a settlement among litigating parties produced an order providing for education of retarded children in free public schools and programs.[48] Approving of the settlement, the district court incorporated the agreed upon terms in a judicial decree which was then to be enforced against unconsenting school districts. Most significant for present purposes, the court never found that there had been any constitutional violation. The court held that it could, and it did, enter its order without deciding the validity of the constitutional claim. It based its power to act on the rule that the assertion of a colorable federal claim is sufficient to give a federal court jurisdiction of a case, and found that such a claim had been asserted in the complaint.[49] The evil was to be eliminated whether or not it had amounted to a constitutional violation.

Pennsylvania Association for Retarded Children is atypical in the clar-

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[45] This is not to say, of course, that the implementation will fully occur or that the judge expects that it will.

[46] I put it that way not to boast of having lived in Philadelphia, but because I think the record made in the *Rizzo* case was much less convincing than the reality.

[47] *See* text accompanying note 40 *supra.*

[48] The order also provided for formal hearings and evaluative procedures for assigning children, and other relief sought. 343 F. Supp. at 302-03.

[49] *See id.* at 293, 295, 297, 299.

ity with which the court's drive is disclosed but not at all, I believe, in the nature of the drive itself. More often, of course, what is seen as an evil is translated into a constitutional violation. Isn't that implicit in a passage in which a judge, addressing issues akin to those we are considering here, declares that

> [a]ny doctrinal approach to interpreting the Constitution, at whichever extreme, is both inappropriate and unworkable. Adjudication of constitutional issues requires an openness of mind and a willingness to decide the issues solely on the particular facts and circumstances involved, not with any preconceived notions or philosophy regarding the outcome of the case.[50]

I submit that it is impossible to decide constitutional issues "solely on the particular facts and circumstances involved." There must be some criterion or frame of reference for evaluating them. If none is explicit, then isn't the one actually being applied simply the judge's personal judgment of right and wrong? Under these circumstances, what distinction is there between perceiving an evil, at least a serious evil, and finding a constitutional violation?

On a broader level, the issue turns on what is the proper conception of the source of the constitutional rights enforced by the federal courts. There is no doubt that that conception has not been static. To sketch this change, it seems appropriate here to take as a benchmark a statement in John Randolph Tucker's treatise on *The Constitution of the United States.* Tucker concluded his discussion of different conceptions of federalism by saying, "The written Constitution of 1789 must be what those who brought it into being and gave it the sanction of their ratification believed and knew it to be, and cannot be changed by what men a century thereafter choose to think it ought to have been."[51] If that proposition were considered to apply across the entire range of constitutional interpretation, it surely represents a view not prevalent today. Even those of us who believe that the constitutional principles must be firmly rooted in the document and its history would not assert today that the Constitution is confined to what those who enacted it in 1789, or those who amended it at particular later times, "believed and knew it to be."[52] We would couch the necessary connection with the Framers in terms of adherence to their principles or objectives, rather than their specific time-bound conceptions. Thus, we might criticize a decision on the basis that it did not have roots in the

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[50] This passage was written by federal District Judge Frank Johnson, the trial judge in *Wyatt,* in his John A. Sibley Lecture, *The Role of the Judiciary With Respect to the Other Branches of Government,* 11 GA. L. REV. 455, 468-69 (1977). But it seems fair to say that, except in the articulateness of his thought, he is far from unique in this view.

[51] J. TUCKER, *The Constitution of the United States,* 180 (1899) (published posthumously).

[52] *Id.* There are those who take essentially this position, *see* R. BERGER, GOVERNMENT BY JUDICIARY (1977), but they are relatively few and would have to be considered exceptions to the text discussion. *See* note 83 *infra.*

Constitution in terms such as Professor John Hart Ely used with regard to the abortion decisions: "A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it."[53] Yet even that view is today the more conservative and restrictive one. The locus of debate (principally but not exclusively academic debate) these days is between those who adhere to some such position and those who assert that that is too limited, that the general purposes of the Framers of the document or its amendments are less relevant than currently held moral principles. Thus, Professor Archibald Cox's reply to his colleague, Professor Ely, was: "My own view is less rigid. I find sufficient connection [for the abortion decisions] in the Due Process Clause. All agree that the Clause calls for some measure of judicial review of legislative enactments, and from that point forward all must be done by judicial construct with no real guidance from the document."[54] Nor is Professor Cox's view idiosyncratic or, by any means, an extreme conception of the degree of freedom which judges have in determining and establishing constitutional principle.[55] Though federal judges, and the Supreme Court in particular, may now be seen as having acted with an equivalent degree of freedom in the past, there can be little doubt that our present conception of the judicial role accords a huge degree of latitude and discretion consciously and overtly. And since with judges, even more than other officials, the conscious and overt conception of their proper role becomes a self-fulfilling prophecy determining how they perform their role,[56] that difference is a highly significant one.

As I have already indicated, I adhere to the view that constitutional principles must be founded in the document, meaning by that not only its words but also its history, its objectives and values, and its structural design. I believe that the warrant for the power of federal courts to enforce the constitution rests on that base and the power must be exercised with direct reference to that base. It is impossible, of course, to spell out here all the supporting reasoning for this position. Perhaps it is helpful, however, to state that this position rests on a conception of the democratic structure of our government as based heavily on wide distribution of power and in particular, on a distribution which commits the major responsibility for our polity to elected representatives rather than life-tenured judges.

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[53] Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L. J. 920, 949 (1973).

[54] A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113 (1976).

[55] For an indication of the locus of academic debate, see Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L. J. 399 (1978); Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Hart et al., *Jurisprudence Symposium*, 11 GA. L. REV. 455 (1977); Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029 (1977); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977).

[56] *Cf.* Mishkin, *Prophecy, Realism and the Supreme Court: The Development of Institutional Unity*, 40 A.B.A.J. 680 (1954).

It is sometimes said, in response to argument such as this, that the range of concern confided to life-tenured judges is particularly to intervene when the majoritarian, political agencies have failed to perform as they should. And, of course, a major justification of the power of federal courts to enforce constitutional rights is precisely to assure those rights against denial by the majoritarian, political agencies. From this is derived at times the concept that the courts have responsibility specifically to represent those who are not adequately represented in the political process and that the courts should therefore formulate constitutional rights and duties to that end. On some levels, that is, in my judgment, correct. If the issue is actual discrimination against minorities that are, in Justice Stone's phrase, "discrete and insular"[57]—or in other terms, those denied full participation in the political process because of some irrelevant characteristic such as race or color—then there is, in my view, clear constitutional warrant for judicial intervention. That is most sharply exemplified by school segregation, where the segregation not only reflected exclusion from the political processes but served to continue and reinforce the isolation of the minority from the mainstream. Similarly, if the issue is the integrity of the political process, there is reason for the courts to occupy a special role in maintaining that integrity against those who have been given political power to hold only for the time being. The legislative reapportionment issue is a case in point.

If the concept is expanded, however, to suggest that courts have an obligation to protect all those who lose out in political contests, or even those who regularly tend to, then clearly the result would be to counterpose the courts against the outcomes of democratic government. After all, the definition of politics and democratic government is that its processes determine who gets what. All of us are in the minority at times; majorities are really differing aggregations of minorities. Aside from any question of whether courts could for long act consistently against politically determined results, the general posture that courts should seems untenable.

The escape from this broad position is often to say that courts are responsible for "taking up the slack" where the majoritarian agencies have "failed to live up to their responsibilities." But that assumes that the courts may properly define the responsibilities of the majoritarian agencies. And if it is contended, as it sometimes is, that the failure of the political processes demonstrates that those favoring the result sought were not "adequately represented" in the process, doesn't that also rest on the assumption that the courts can determine what the "right" result would be if the process was working "properly"? Ultimately any such broad view starts from the premise that the "right" results are known (and even indisputable), and that the judges are ultimately charged with seeing to it that our polity achieves those results. That premise can only mean either that there are no significant differences on important issues for the democratic

[57] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

processes to "broker" and resolve by majoritarian rule, or that the judges are ultimately charged with making the important choices of thrust and direction for our society. I do not believe that either is implied in the establishment of the institution of judicial enforcement of the Constitution.

These are, of course, fundamental issues of all constitutional interpretation. But the question of institutional relief on constitutional grounds projects these concerns in particularly sharp form. There is a major difference between courts invalidating or setting limits on affirmative actions which elected governments choose to undertake and courts requiring those governments to take affirmative actions prescribed and supervised by the federal courts. In the former role, courts set the basic conditions or the outer limits, leaving to the political branches all the major options as to whether and how action will be taken. The latter role necessarily involves removal of significant numbers of those options, including issues of relative priority and allocation of resources, to the ken of the federal court. The former is essentially congruent with traditional judicial remedies, such as negative injunctions or habeas corpus. The latter are effected by institutional remedies, which thus raise in keenest form the problems inherent in any free-wheeling concept of constitutionalism.

IV

Several characteristics inherent in the judicial process take on new bearing and significance in the context of decisions on whether or not to grant institutional relief. Any lawsuit tends to focus on the particular. The nature of litigation heightens the impact of specific wrongs, which are presented in immediate and graphic terms. This emphasis on the individual's point of view is precisely one of the strengths of a judicial forum in a regular constitutional adjudication where the issue is a single violation founding a traditional damages or injunctive remedy. Where the issue is an alleged systemic wrong and a claim for institutional relief, the particularized focus takes on new and more questionable implications. The identification with the individual remains strong; indeed, its effect may well be augmented by counsel's selection of particularly egregious and dramatic examples for full presentation. Moreover, not only are the "warts" seen in gross relief, but the specific problem inevitably appears in a frame of importance that makes it larger than in real life. Remitted to the rear of the stage—or the wings—are other problems, which may have competing claims on resources, and other, more abstract considerations. It is somewhat like a television program. When the CBS program "60 Minutes" does a segment on the idiosyncratic behavior of Federal Judge Ritter and its effects on litigants and other people, the awesome effects of arbitrary use of judicial power are brought strongly home.[58] The primary response felt is that "something should be done about it." What does not come across,

[58] "60 Minutes" Broadcast, CBS television network, (January 8, 1978).

certainly not with any of the same force, are the problems involved in "doing something about it"—the possible risks to judicial independence and other institutional costs in setting up machinery for removing federal judges from office.

In litigation, as in the television example, the problem in the foreground is real, and it is desirable that the harm or injustice be keenly perceived. But it is also true that the keenness of that perception may not be matched or even partially balanced by a recognition of more abstract, but perhaps no less important, countervailing considerations. Where the only result is a traditional damage or negative injunctive remedy, that ordinarily will not pose any difficulty. But an institutional remedy undertakes to make over the actions of state governments. An institutional remedy inevitably involves allocation of state resources, at times in major amounts.[59] To such decisions, the more abstract problems, possible countervailing considerations, and possible competing claims are all highly relevant. There is nothing in the nature of litigation which necessarily brings these matters out, or indeed, which provides a good vehicle for their development even if tried.[60]

This is one very important respect in which the legislative process differs. Competing claims on resources must be faced ultimately, however much legislators may try to forget that fact.[61]

Countervailing considerations will, almost inevitably, be brought to bear through the lobbying of those who would be affected.[62] The necessity

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[59] *See* text accompanying note 43 *supra.*

[60] Amicus curiae briefs may at times be very helpful—if they are read—but they are necessarily drawn in terms of a legal framework and cannot regularly be an effective alternative to political processes. *See* text accompanying notes 80-82 *infra.*

[61] Legislators, quite humanly, prefer to avoid difficult decisions, and it is often easier to vote for an appropriation, and then another, and then another, without facing up to the sum total of what is being done. But a time of reckoning inevitably does force itself upon the legislative process. Even in times of economic expansion, if the legislature will not attend to the sum total of the separate actions, the necessity of doing so will move leadership to the executive branch. It was this fact and the resulting increase in Presidential power that led Congress to establish its own budget office and procedures for compelling legislative attention to the overall totals of combined appropriations.

Moreover, legislators must ultimately face the responsibility of levying taxes. Even if inflation, possibly combined with economic expansion, may provide increasing revenues over protracted periods without the imposition of new taxes, a day of reckoning is not necessarily avoided. The recent Proposition 13 in California, and the spreading "taxpayer revolt" generally, clearly testify to the ultimate accountability of legislative allocation of resources. By contrast, what is the recourse of taxpayers who disagree, even very strongly, with the allocation of resources ordered by the federal judiciary? *See* text accompanying notes 76-82 *infra.*

[62] Thus, with regard to the television example in the text at note 58 *supra,* the federal judiciary has certainly made Congress pay careful attention to preserving judicial independence in erecting any judicial disciplinary machinery. This is demonstrated by the history of the Nunn-DeConcini proposed Judicial Tenure Act. The present bill, S. 1423, 95th Cong., 1st Sess. (1977), would place the entire machinery in the hands of Article III judges. That was not the structure of the original proposal for discipline or removal of federal judges, and the shift was clearly responsive to objections based upon the feared threat to judicial independence. *See* S. REP. No. 1035, 95th Cong., 2nd Sess. (1977).

of running for reelection makes legislators and other political officials receptive to a wide range of influences, whether they wish it or not. Federal judges are under no such compulsion. Indeed, tradition explicitly calls for their insulation from political pressure, particularly with regard to the outcome of a pending case.

This insulation of judges has another relevant effect. It makes judges particularly susceptible to the views of a specific, relatively small, elite group of the society. Judges are, of course, lawyers, almost invariably graduates of law school and college. They are thus likely to begin by sharing the perspectives of that limited segment of society which possesses similar background. Moreover, their training and conception of their role, by steering them away from openly political influences, make them more dependent on professional and social contacts, and may at the same time steer them toward books, magazines and other writings, as the sources of views about social policy. In any event, judges are certainly more susceptible to the views of a more limited elite than are legislators.[63] Perhaps I should not object. I do not know how much influence law professors' writings exert at all, but I am convinced that they stand a better chance with judges than with legislators. But I am troubled by the disproportionate influence of an elite, even if it be one in which I may claim membership.

It is not only, or even so much, what the elite may affirmatively affect as it is that the range of divergent views is restricted. Under such conditions, not only is a judge's perception of what is evil (or how much it is evil) influenced, but also the degree of confidence or doubt he has about the universality of his belief on that point as well as on his estimate of countervailing or competing considerations. Finally, I am troubled because the particular elite I am referring to seems today to have too little confidence in the legislature and other political institutions and to put too much reliance on courts. I am sufficiently a part of this group to feel that those agencies have not sufficiently lived up to their responsibilities. But I also feel strongly that efforts to compensate by turning too readily to the courts will ultimately fail, and in the process both harm the courts[64] and undermine further the majoritarian institutions.[65]

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[63] Legislators are, of course, an elite group too. But their training, professions, occupations, and background are all more varied, and the influences to which they must remain exposed if they wish to succeed in elected office are much wider and more diverse, than is true of the judiciary.

[64] I believe that injury to the courts is a real danger, but the causal relationships are far from linear and explicating them is beyond the scope of this lecture. I am therefore not relying here upon the possibility of damage to the federal judicial institution.

In any event, the effects upon judges or courts ought not to be the principal focus of concern. Even if the courts would be strengthened by expansion of institutional remedies, the weakening of our democratic polity should remain by far the more important concern.

[65] The problems discussed in this lecture have special and major impact in constitutional cases. They may be substantially obviated when institutional relief is prescribed by a statute according to given substantive standards. With the increasing significance of such cases and of class actions for enforcement (which often by their nature carry a momentum toward an institutional type of remedy), attention has been drawn to the many ways in which the

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To this point, I have spoken in terms of federal judicial orders intervening in the operation of governmental agencies without any special distinction whether those agencies were parts of the federal or of state and local government. There are, however, very significant differences. It is no accident that institutional orders have been directed principally at state or local agencies. There are many reasons for this. An important one may be simply that there are many more state units than federal. Another may be that there are more bases for dissatisfaction with the operation of state or local units as compared to federal. But there are other, structural factors which tend to stimulate federal judges to act against state agencies and, at the same time, provide far less inhibition against their doing so.

I think it is fair to say that federal judges generally hold state and local agencies in lower esteem than federal units. Some of this undoubtedly reflects wider societal attitudes. Yet even those attitudes may at times be those of a particular elite, rather than those which are held universally. And from this aspect it becomes highly relevant that federal judges are selected in Washington. It is not simply that they are appointed by the President; it is almost commonplace that United States Senators, though locally elected, are far more nationally oriented than officials of state government. Moreover, once confirmed, the nominee becomes a federal officer, goes to seminars and meetings, and has other continuing contact with other federal officials. Consequently, it is only to be expected that the federal judge will have a special, and somewhat removed, perspective on the agencies of even his home state. The perspective can facilitate the

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traditional procedures of courts are ill-adapted toward this more wholesale type of litigation. *See, e.g.,* Chayes, *supra* note 4. Work has been done, and much more appears to be in progress, toward changing the model of the judicial process to accommodate better this kind of function. For example, the problems of supervision and administration of an institutional decree will often exceed a judge's knowledge and skills. Therefore, institutional decrees will often involve substantial reliance upon experts, and the use of masters, special committees, or other kinds of auxiliary staff for the court. The *Wyatt* litigation is a case in point. *See also* sources cited at note 4 *supra;* Glazer, *Should Judges Administer Social Services?,* PUB. INTEREST 64 (Winter 1978).

Making provisions for the regular handling of institutional litigation might thus bring about a substantial change in our current conception of a court, specifically the conception of a court as a judge (possibly with some law clerks) applying law in a detached manner to specific issues brought before him. Changes of this kind have many potential implications, some of which might even go to the viability of courts as instruments for enforcement of constitutional rights. I shall not explore this aspect here. From the present point of view, the question is not whether judicial machinery can be adapted to the general granting of institutional relief, nor whether such adaption should be made, nor what it would do to the status or operation of the judiciary (though, needless to say, those are significant and debatable issues). For the moment, it is important only to recognize that if such changes are made, even if their primary origin and focus is in statutory or conventional class action context, the shift would probably have significant impact on courts' handling of constitutional cases. Most likely it would make it easier for courts to think and act in terms of institutional relief in constitutional cases. Yet that, as I have tried to show, involves major problems of a distinctive kind.

federal judge's readiness to act against state or local governments. At the same time, and even more important, the structural restraints that inhibit a judge's willingness and power to act against other parts of the federal government do not operate with anything like the same force to restrain action against non-federal agencies.

Alexander Hamilton, in No. 78 of the *Federalist Papers,* defended life-tenure for federal judges by pointing out that the power conferred would be effectively restrained. He said that:

> the Judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. . . . [T]he judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.[66]

Consider first the "sword" image. It is worth pausing to note the irony and contrast with Hamilton's metaphor in the fact that the statue of blindfolded justice often used to symbolize courts carries in her hand a sword—representing the coercion or force behind judicial orders. Certainly that coercive power is an essential element of the problem we are considering. Judicial intervention is sought, and is significant, precisely because it can result in direct commands. Hamilton's image, however, pointed to a different aspect. He was referring to the fact that the federal courts would ultimately need the executive to back up their orders. And it is true that in the context of the federal courts acting against the federal government, that need keeps the courts in an ultimately dependent position which can operate to restrain their assertions of power. One always hesitates before challenging an authority whom one may need in a "crunch."[67] In the context of federal court orders against state or local governments, that restraint is absent. Those courts have behind them the powerful force brought to bear by the acknowledged general duty of the federal Executive to enforce federal court orders. The story of President Jackson saying "John Marshall has made his decision; now let John Marshall enforce it"[68] is apocryphal. The actions of Presidents Eisenhower and Kennedy were real,[69] and demonstrate that fulfillment of the duty does not depend upon

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[66] THE FEDERALIST No. 78 (A. Hamilton) 333 (Thompson & Homans pub. 1831).

[67] This remains true even though, in several "great" cases, Presidents have complied with Supreme Court orders. *See, e.g.,* United States v. Nixon, 418 U.S. 683 (1974) (presidential tapes case); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) (the Steel Seizure Case). The pattern is not so firmly established as to provide reliable advance assurance as a matter of course. President Nixon's early public position in the tapes case that he would obey [only?] a "definitive" decision by the Supreme Court certainly suggests that he considered non-compliance—even with a Supreme Court order, let alone a lower court's—a very real option. New York Times, July 27, 1973, § 1, at 1, col. 8; *id.* Aug. 30, 1973, at 1, col. 4.

[68] IV A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 551 (1919). President Jackson was upset about the Court's decision in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[69] Both Presidents Eisenhower and Kennedy strongly supported implementation of fed-

agreement with the court orders. As against state or local governments, the federal courts need feel little restraint out of concern for who holds the sword.[70]

For similar reasons, the federal courts are not as inhibited with regard to state "purses" as to the federal. Federal courts have asserted powers to command state revenues in fairly stark terms. For example, in *Wyatt*, Judge Johnson said that if the Alabama Legislature failed to provide funds to "implement fully" the standards he ordered, he would "take affirmative steps, including appointing a master, to ensure that proper funding is realized;"[71] indeed, he went on to imply that if a special session of the legislature were not called and the funds thus promptly made available, he would bring in various state officials and agencies as additional parties and "utilize other avenues of fund raising."[72]

It is certainly hard, if not impossible, to conceive of a federal judge making such a statement to the Congress.[73] The difference is not sovereign

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eral court mandates. On September 5, 1957, Governor Orville Faubus had the state militia bar Negroes from entering Little Rock, Arkansas' Central High School, saying he would defy federal court-ordered integration, and wired President Eisenhower to stop "unwarranted interference by federal agents." N.Y. Times, Sept. 5, 1957, § 1, at 1, col. 8. President Eisenhower immediately replied that he would uphold the Federal Constitution "by every legal means at my command." *Id.* Sept. 6, 1957, § 1, at 1, col. 8. After meeting with President Eisenhower several days later, Governor Faubus agreed to abide by the terms of the court order. *Id.* Sept. 15, 1957, § 1, at 1, col. 8. When an angry mob of citizens forced the Negro student away from the high school, *id.* Sept. 24, 1957, § 1, at 1, col. 3, President Eisenhower sent in army troops and United States Marshals and he federalized the Arkansas National Guard. *Id.* Sept. 25, 1957, § 1, at 1, col. 6. The heavily protected students were finally able to return to classes. *Id.* Sept. 26, 1957, § 1, at 1, col. 8.

Five years later, on September 14, 1962, Governor Ross Barnett defied the Fifth Circuit Court of Appeals and Justice Black's orders to admit James E. Meredith to the University of Mississippi, saying he would shut down the state's schools rather than permit integration while he was governor. *Id.* Sept. 14, 1962, § 1, at 1, col. 1-2. On September 30, 1962, faced with mob violence, President Kennedy sent army troops to Oxford, Mississippi and federalized the Mississippi National Guard. *Id.* Sept. 30, 1962, § 1, at 1, col. 8. Governor Barnett capitulated the next day, *id.* Oct. 1, 1962, § 1, at 1, col. 5, and Meredith was admitted to the University of Mississippi. *Id.* at col. 8. On October 2, 1962, James Meredith enrolled and began classes while U.S. Marshals, army soldiers, and the Mississippi National Guard quelled hours of rioting. *Id.* Oct. 2, 1962, § 1, at 1, col. 8.

[70] Apocryphal stories often contain kernels of truth, and history cannot demonstrate that Presidents will always back up federal court orders. That there is a duty to do so seems accepted, and that recognition itself militates strongly toward its fulfillment. In any event, the decision will be made in the White House in Washington, and not by any level of state or local government.

[71] Wyatt v. Stickney, 344 F. Supp. 373, 378 (1972).

[72] *Id.* at 378 n. 8.

[73] This is, of course, not to say that the federal courts have failed to enter money orders against the United States, or that the Congress has failed to pay on such orders. The whole history of the Court of Claims alone testifies to the contrary. But it is also a part of that history that when the issue of whether litigation against the United States could constitute a "case or controversy" within Article III was considered, though a key element of doubt was the lack of coercive enforceability of orders against the United States, the Supreme Court always has resolved the issue of justiciability without declaring that the judicial orders could

immunity, since within its scope the states share that immunity to judicial action. Rather, the causes go back to much the same structural differences and attitudes as we considered earlier. For example, Congress has controlling power over the jurisdiction of the federal courts and the nature of their business, not to mention additional judgeships, other working conditions, and supporting personnel.[74] Moreover, the courts cannot be as confident about the President backing them in a confrontation with Congressmen as with state legislators. In these as well as other respects, the matrices for judicial activism are different. With regard to the state and local government, then, the federal courts are clearly not so constrained to be, and apparently do not think of themselves as, a weak branch of government.[75]

Particularly because the failure of structural restraints with regard to states appears to make the issue a real one, the question of funding is worth considering further. It goes to the heart of the matter before us, both practically and theoretically.[76] On the practical level, institutional decrees, as we have seen, always involve allocation of some, and at times, large amounts of state resources.[77] Control of substantial state revenues is a *sine qua non* of many such decrees. They then pose in crucial form the ultimate problem of legitimate power.

In theory, at least, it would seem that if a court can order the appropriation of state funds, it implicitly would have the power to order the raising of funds necessary to carry out its decree. This could presumably involve an order to the relevant legislative body to levy additional taxes, on pain of contempt for failure to comply.[78] Such a head-on approach, of course, produces the most direct confrontation, with the greatest opportunity for resistance and the least guarantee that the court will prevail. More indirect techniques might help to avoid the stark confrontation. But such ingenuity does not really avoid the basic problem. For example, seizure and sale of state assets, as suggested in *Wyatt*,[79] still involves literal appropriation of state funds to uses directed by the federal court.

Ultimately, whether cast in terms of new taxes or siphoning off existing revenues, the issue is the classic one of taxation without representation. It is more than simply ironic that, in a judicial proceeding which could result

be enforced without congressional concurrence. *See* Glidden Co. v. Zdanok, 370 U.S. 530 (1962); P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 98-102 (2d ed. 1973).

[74] *See id.* at 11-63, 309-438.

[75] The lack of structurally-based constraints provides additional reason for applying to the federal courts, in their relation to state or local governments, the principles and concepts of separation of powers. *See generally* Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978).

[76] *See generally* Frug, *supra* note 7, at 126.

[77] *See* text accompanying note 43 *supra*.

[78] *See* Griffin v. County School Bd., 377 U.S. 218, 232-33 (1964).

[79] The Court reserved ruling on plaintiff's motion to force the Mental Health Board to sell or encumber portions of its landholdings, 344 F. Supp. at 377, but indicated that if prompt action was not taken by the Alabama Legislature "other avenues of fund raising" would be compelled. *Id.* at 378 n. 8.

in the allocation of major state resources, it would be difficult if not impossible to provide for "representation" of all potentially affected interests even in the restricted sense that due judicial process normally requires.[80] Think, for example, of having all interests with claims on the state budget appear in federal court![81] But even if that could somehow occur, the essential fact of taxation without representation would remain. For in the sense connoted by our Revolution's battle cry, "representation" does not mean simply appearance before an all-powerful decider, but political participation in the decision. And that is the one thing that federal court processes cannot accord.

Exploration of the appropriation issue serves to illumine the quintessence of the larger problem of institutional decrees. For they involve the taking over of institutions of state or local government by federally-appointed lawyers neither chosen by nor responsive to an electorate, neither charged with nor even assuming responsibility for the ultimate directional thrust or effectiveness of the institutions of state or local government.[82]

VI

To all the objections I have raised (and others), the normal answer is that we are dealing with constitutional rights and all these problems are simply inherent in our commitment to a system of judicial enforcement of constitutional rights. And up to a point that is a sufficient answer. If we are dealing with soundly established constitutional rights for which court-ordered institutional relief is unquestionably the only possible effective remedy, then surely such judicial relief is in our system fully justified. The consequences I have traced out might theoretically be implicated, but to this extent they must be accepted as corollary to our fundamental institution of a written Constitution enforceable as law in the regular courts.

At the same time, it is true that the number of constitutional issues which meet the stated description are exceedingly few. School desegregation and legislative apportionment, both mentioned at the outset, may be

[80] *See generally* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) [hereinafter cited as Stewart].

[81] Such broad representation would presumably be necessary even if the amount at stake constituted a far smaller percentage of the state budget than Governor Wallace estimated in the *Wyatt* case. *See* note 43 *supra*. Presumably, in any such circumstance the interests potentially affected would include not only all beneficiaries of state programs which might be curtailed, but also all possible interests which might be subjected to either new taxes or marginal increases in existing ones.

[82] Thus, for example, the point about the meaning of "representation" as connoting political participation in the power of the decider, though perhaps most sharply drawn in the taxation context, has much wider general pertinence. A great deal of valuable work has gone into the concept of representation in a legal framework. *See* Stewart, *supra* note 80. But the point is sometimes missed that no amount of representation of this nature in front of an appointed, politically unaccountable decider is the equivalent of a democratic legislative process. *See* Chayes, *supra* note 4.

the outstanding examples. And while such special instances are undoubtedly both prominent and important, it is also true that the relatively infrequent ordering of institutional remedies under extraordinary and specially warranted circumstances does not pose a major threat to the fundamental democratic ordering of the polity.

Thus the problem becomes the proliferation and regularization of broad institutional relief. That is in large part a function of the declaration of constitutional rights, particularly new ones, in broad terms which readily implicate institutional remedies. The *Wyatt* case presents an instance of this. The courts in that case held that a mentally ill person has an affirmative constitutional "right to treatment" from the state, rather than simply a right to be free from involuntary commitment to less than humane conditions. If one holds a Blackstone or John Randolph Tucker view of constitutional law and imposes it on that holding, then that holding might be seen as inexorably dictated by the fundamental document. But, as I have indicated earlier, current views of constitutional law do not conceive it as so firmly fixed or even as necessarily rooted in any firm relation to the document. With the flexibility inherent in any of the current dominant conceptions of the sources of constitutional doctrine,[83] it is surely not amiss to press for greater consideration of the implications for our democratic and federal distribution of power of framing broad constitutional duties in terms that call for extensive affirmative judicial enforcement.

A second element in the proliferation of institutional decrees is an impatience with the apparent inefficiencies of more traditional remedies, and a relatively easy willingness to find that only an institutional remedy will serve. I have not developed this point previously, but it grows out of attitudes I have described—impatience to extirpate a perceived evil and a lack of confidence in other agencies of government or society to accomplish the desired systemic change. The *Rizzo* case provides a good example, because it illustrates two different aspects. On the one hand, the district judge in that case explicitly asserted that damage suits "have no preventive effect,"[84] a matter not beyond doubt.[85] On the other, subsequent events in Philadelphia have demonstrated that the press can be a very effective reformer, producing more radical cures of far more serious evils in police practices in that city than could ever have come out of the *Rizzo* lawsuit.[86]

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[83] To the extent that there exist less flexible conceptions, *see* text accompanying note 52 *supra*, they do not present any problems regarding the expansion of institutional remedies.

[84] 357 F. Supp. at 1319.

[85] Even if damage actions against individual police officers were likely to be ineffective, the same would not necessarily be true for such actions brought against the Mayor, Police Commissioner, and other high officials named as defendants in the *Rizzo* case (or against the City of Philadelphia itself). It would seem that the theory of liability which supported the relief granted by the lower courts in *Rizzo* could equally support a damage remedy.

[86] In 1977, two reporters for the *Philadelphia Inquirer* did a series of investigative reports on the Philadelphia police department which won for that newspaper the Pulitzer Prize Gold Medal for Public Service. According to the *New York Times* report of that award:

> For four months [the reporters] reviewed three years of challenged interroga-

The more traditional remedies may indeed appear more piecemeal and indirect, but that is unavoidable if major options, and thus power, are to be left to the majoritarian institutions of the society.

Finally, the problem of proliferating institutional remedies is exacerbated further by the framing of such decrees in terms which command more than simply stopping or undoing a found constitutional violation. As I have indicated earlier, both *Rizzo* and *Wyatt* seem to provide examples of this, the former in explicit terms, and the latter in fact. However desirable particular prescriptions might be as a matter of general policy, only a constitutional warrant can justify a federal court command.[87]

The momentum toward proliferation and regularization of broad institutional relief can be slowed or stopped only by heightened judicial sensitivity to its implications and concomitant judicial restraint in all three dimensions: the formulation of new constitutional rights in affirmative duty terms which imply institutional relief; the dismissal of more traditional or more limited remedies as ineffective without a clear demonstration that this is the fact; and the drafting of institutional decrees in terms where the relief exceeds the scope of the violation. In the ultimate, federal judges must acknowledge that they are, after all, lawyers appointed by the President, and while our society has reposed much faith in its lawyers, particularly those chosen for public office, it nevertheless has committed to life-time appointees from the legal profession only a relatively narrow range of concerns, not its basic thrust, direction, or ultimate fate.

VII

The Court of Appeals for the Fifth Circuit affirmed *Wyatt* in all significant respects.[88] The Third Circuit affirmed the *Rizzo* order, but the United States Supreme Court granted certiorari and reversed (5-3).[89]

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tions in murder cases and other records and talked with detectives. Their four-part series last April described "a pattern of beatings, threats of violence, intimidation, coercion and knowing disregard for constitutional rights in the interrogation of homicide suspects and witnesses."

The investigation grew out of the case of a mentally retarded auto mechanic, convicted of five murders in 1976 and cleared last spring because of "prosecutorial misconduct."

. . . Sixty-five policemen were named in The Inquirer's articles. Fifteen have been indicted by Federal Grand Juries and five by state juries. Last month six homicide detectives were convicted of conspiracy to beat and threaten witnesses and suspects. Three police officers have pleaded guilty to corruption charges.

N.Y. Times, April 18, 1978, at 1 & 29.

[87] This is not to suggest that courts may do no more than prohibit future constitutional violations, nor that the concept of undoing a past violation is a sharp, easily applicable one. Merely determining the effects of a past violation is often a complex and difficult task, let alone designing a remedy to undo those effects in the present and future—inevitably already changed—circumstances. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267 (1977). See also Hutto v. Finney, 98 S. Ct. 2565, 2572 n.9 (1978); Houchins v. KQED, 98 S. Ct. 2588, 2609-10 (1978) (Stevens, J., dissenting), handed down after this lecture was delivered.

[88] Wyatt v. Aderholt, 503 F.2d 1305 (1974).

[89] Rizzo v. Goode, 423 U.S. 362 (1976), *rev'g* 506 F.2d 542 (3d Cir. 1974). Justice Rehnqu-

The Supreme Court's principal substantive holding was that the simple showing of a small number of unconnected constitutional violations, without any demonstration of a causal connection between those violations and the actions or omissions of the defendant city officials did not give rise to a cause of action against those officials under 42 U.S.C. § 1983.[90] The opinion by Mr. Justice Rehnquist put major stress on the lack of evidence putting causal responsibility for the violations on the particular high officials. The holding also was clearly influenced by the very sparse factual showing: as I have said, although evidence covering forty odd incidents was introduced, only twenty at most involved constitutional violations—in a period of one year, in a city of three-million population with a police force of 7,500. Whether a showing of a truly pervasive pattern of constitutional misbehavior might have supported an inference of direction or encouragement from above did not have to be considered. What is clear is that if the court upheld the grant of relief on the basis of the showing actually made in this case, it would effectively be authorizing federal court intervention into the police forces of every major city in the country.

The *Rizzo* opinion went on to set forth and reject an additional claim which would have directly supported institutional relief. Plaintiffs' brief in the Supreme Court asserted:

> The right plaintiffs sought to vindicate is the fundamental right of people living in a democratic society to be free from repeated patterns of unconstitutional, illegal and unjustified exercises of police power. The right to be protected from such violations is simply a corollary right, and the need for protection from such abuses is the predicate for injunctive relief.[91]

Note the framing of the issue. Plaintiffs asserted not only the right to be free of unreasonable searches and seizures, but the right to be protected from such—by an administrative system. Addressing this contention, the Court's response began with the proposition that even within a unitary system in which state courts deal with state agencies, or federal courts with federal agencies, the normal requirements of equity sharply limit judicial intervention into a government agency's "dispatch of its own internal affairs." The Court went on to hold that when federal courts are considering equitable relief against state agencies, further restraint is required by the "principles of federalism." The opinion referred to the line of cases limiting federal injunctions against pending state judicial actions, saying that the principles involved there "have applicability" where federal injunctive relief is sought against those in charge of agencies of state or local government.

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ist delivered the opinion of the Court. Justice Blackmun dissented, joined by Justices Brennan and Marshall. Justice Stevens took no part in the consideration or decision of the case.

[90] 42 U.S.C. § 1983 (1976) is a civil rights statute which provides remedies for constitutional violations.

[91] Brief for Respondents at 34-35.

Although written in a narrow manner and with immediate emphasis on precedent rather than broad systemic considerations, the opinion, in my view, basically reflects concern with the kinds of considerations discussed in this paper. Some have seen the reference to the federalism lines of cases as signalling a total bar to all federal judicial relief against state or local governments (perhaps at least as long as state courts are potentially available).[92] I believe that such an extreme reading is unwarranted. Justice Rehnquist's analysis of the relevant statutory and case material does tend to emphasize restrictions on federal court authority, but careful examination of his language and handling of authority should make clear that no absolute barrier was erected.

As I have sought to indicate, I think the underlying principles that the *Rizzo* opinion effectuates do not call for total preclusion but rather for judicial restraint. Federal court institutional relief has been, and should and will continue to be, available where a sufficiently strong case is made. Thus, for example, while others (supporters of the *Wyatt* result) have expressed the view that the *Wyatt* case would have to be reversed under *Rizzo,* I am not certain that the *Rizzo* holding bars all institutional relief in the *Wyatt* situation. I believe there is unquestionably a constitutional right not to be held involuntarily in a state mental institution under plainly intolerable conditions. Habeas corpus, or possibly a negative injunction, would be the normal remedy for a violation of that right, and a class action for such relief might even be available. At the same time, actual release into society of some inmates of the state hospital might not be a real possibility, for example, because they had been held so long. Release of all those who were not in such condition might well leave the institution in a position to care adequately for those remaining. But if that should prove not to be so, then I do not think federal courts should be limited to the "grizzly choice" of releasing or doing nothing, and institutional relief of a limited nature might well be justified.

In sum, I think that *Rizzo v. Goode* in the Supreme Court is a precedent representing the heightening of judicial restraint, not the total prohibition of federal institutional relief. And, as I have indicated, I think that heightening is, in general terms, sound.

One final point. Very often, discussions about jurisdiction or the proper role of courts start from implicit policy orientations. Those who like what the courts are doing argue for enlarged jurisdiction, and those opposed contend for more narrow conceptions of the judicial role. Let me say explicitly that is *not* the basis for my view. I agree with the policy objectives of the plaintiffs and the courts in most, if not all, of the cases where institutional orders have been granted. That is certainly true, for example, in *Wyatt.* My view is that these results are very much what an enlightened society should be seeking to achieve. But it is also my view that it is not the province of lawyers with life-time tenure—even in judicial-review

[92] *See, e.g,* Frug, *supra* note 7, at 747-48.

America—to make the society do everything which I, or even most lawyers, think that it should. I believe the federal courts can serve an extremely valuable role in setting perimeters of decency within which the majoritarian processes must work. But the way to achieve desirable goals—and the only way to do so lastingly—is through the democratic political processes which must remain the core of our polity.

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