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The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy

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Federal courts have been asked with increasing frequency in recent years to grant injunctive decrees that would restructure public institutions in accordance with what are asserted to be the commands of the federal Constitution. This type of litigation has become such a familiar part of the legal landscape that it has acquired a distinct vocabulary: the lawsuit is called an "institutional suit," and a resulting remedial injunction an "institutional decree."[1] The variety and importance of the institutions involved, the range of issues that courts must address, and most important, the broad discretionary powers trial courts must exercise in framing remedial decrees set modern institutional suits substantially apart from other forms of litigation. These suits pose a number of difficult problems concerning the appropriate role of federal judicial power in our society. The most fundamental of these problems is legitimacy.

There are a number of ways to analyze the legitimacy of judicial action in this area. Several recent articles have taken a Frankfurterian approach, arguing for or against institutional suits based on assumed or asserted ap-

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1. The decrees are also called "structural" injunctions, O. FISS, THE CIVIL RIGHTS INJUNCTION 7 (1978), and "administrative" injunctions, Altman, *Implementing a Civil Rights Injunction: A Case Study of* NAACP v. Brennan, 78 COLUM. L. REV. 739, 739 (1978).

propriate roles for federal and state governmental branches.[2] This Article takes a related but distinct approach, focusing on the legitimacy of the remedial discretion exercised by trial courts in constitutional institutional suits,[3] and on the significance of such discretion for the allocation of tasks among the branches.[4] Familiar as these issues may seem, the Article provides a vantage point from which they may be seen afresh. In the manner of Wittgenstein's Indian mathematician, it offers a different "way of looking at things;"[5] one that may alter our perception with subtle but important consequences for the way in which we evaluate institutional suits.

The Article treats four groups of cases: apportionment cases, school desegregation cases, Eighth Amendment prison condition cases, and mental hospital right to treatment cases. It analyzes the ways in which trial courts may try either to avoid the exercise of remedial discretion or to structure the manner of its exercise. It also examines the ways in which the Supreme Court has tried to limit the occasions for the exercise of trial court remedial discretion by its formulation of rules of liability. Using this analysis, the Article provides a means of distinguishing legitimate from illegitimate judicial remedial discretion in institutional suits.

Trial court remedial discretion can to some degree be controlled in the manner of its exercise; in some cases it may even be eliminated without sacrificing unduly the constitutional or other values at stake. But there comes a point when certain governmental tasks, whether undertaken by the political branches or the judiciary, simply cannot be performed effectively without a substantial amount of discretion. That point may, by determined and resourceful judicial effort, be pushed back, but eventually it

2. *See* O. FISS, *supra* note 1; L. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978).

3. Many of the same issues are raised in statutory institutional suits, but this Article focuses exclusively on institutional suits based on the federal Constitution because they pose most acutely the problem of judicial legitimacy.

4. The effort to characterize different forms of governmental dispute resolution by taxonomy or by establishing "models of decisionmaking" has been fairly common in the last two decades. These efforts to characterize the "true" or, depending on one's orientation, merely the "traditional" model of adjudication roughly coincide with the realization that the courts have substantially departed in practice from any narrow view of their appropriate function or functions. *See, e.g.*, H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958); Fuller, *Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Hazard, *Law Reforming in the Anti-Poverty Effort*, 37 U. CHI. L. REV. 242 (1970); Howard, *Adjudication Considered as a Process of Conflict Resolution: A Variation on Separation of Powers*, 18 J. PUB. L. 339 (1969); Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975); Weiler, *Two Models of Judicial Decision-Making*, 46 CAN. B. REV. 406 (1968).

5. Wittgenstein imagined that East Indian mathematicians, in doing what Western mathematicians might do by formal proofs, drew a figure and said simply, "Look at this." L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS #144, at 57e (G.E.M. Anscombe trans. 3d ed. 1958).

must be reached. The practical inevitability of remedial discretion in performing those tasks defines the legitimate role of the federal courts. The Article contends that since trial court remedial discretion in institutional suits is inevitably political in nature, it must be regarded as presumptively illegitimate. But it concludes that the presumption of illegitimacy may be overcome when the political bodies that should ordinarily exercise such discretion are seriously and chronically in default. In that event, and for so long as those political bodies remain in default, judicial discretion may be a necessary and therefore legitimate substitute for political discretion.

I. Description of an Institutional Suit

The institutional suits with which the Article is concerned are typically brought against state officials[6] to enforce asserted constitutional norms.[7] Frequently, such suits are filed only after the plaintiffs have unsuccessfully exerted pressure on the political branches of the state government to correct the problems of which they complain.[8] Sometimes, as part of a general attack, such suits are filed concurrently with the exertion of pressure on the political branches.[9] The subject matter of these suits and the litigants' desire to influence political as well as judicial action frequently result in extensive news coverage of the problems giving rise to the litiga-

6. While the suit is, in practical effect, against the institution, the actual defendants are state, and sometimes local, officials. When state institutions are the subject of a suit, it is not a matter of mere procedural detail that the officials rather than the state or its agency are named as defendants, for the Eleventh Amendment forbids suits by private citizens against the state. *See* Alabama v. Pugh, 438 U.S. 781 (1978); Edelman v. Jordan, 415 U.S. 651 (1974); *Ex parte* Young, 209 U.S. 123 (1908).

7. A number of useful studies describe in detail the course of litigation and the surrounding political circumstances in particular institutional suits. *See* R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 290-328 (1968); M. HARRIS & D. SPILLER, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS (1977) [hereinafter cited as AFTER DECISION]; LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION (H. Kalodner & J. Fishman eds. 1978) [hereinafter cited as LIMITS OF JUSTICE]; Altman, *supra* note 1; Leedes & O'Fallon, *School Desegregation in Richmond: A Case History*, 10 U. RICH. L. REV. 1 (1975); Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975). For an excellent general study, see Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978). The description in the text is drawn largely from these sources.

8. *See, e.g.*, Smith, *Two Centuries and Twenty-Four Months: A Chronicle of the Struggle to Desegregate the Boston Public Schools*, in LIMITS OF JUSTICE, *supra* note 7, at 34-43 (describing efforts in 1960's and early 1970's to desegregate Boston public schools by political rather than judicial action).

9. *See, e.g.*, Fishman, Ross, & Trost, *With All Deliberate Delay: School Desegregation in Mount Vernon*, in LIMITS OF JUSTICE, *supra* note 7, at 375-409, (describing almost ten years of political pressure and maneuvering between filing a school desegregation case in federal court in 1966 and the end of the study in 1975). The lawsuit itself is, of course, a form of political pressure. Even the judge may, on occasion, be an active political agent. For example, several participants in the Arkansas prison litigation believed that the district judge "deliberately held court proceedings during the times when the legislature was in session . . . as a method of awakening legislators to the reality that prison conditions were deplorable and as a method of impressing them with the necessity for adequately funding the system." Spiller, *A Case Study of* Holt v. Sarver, in AFTER DECISION, *supra* note 7, at 90. For a discussion of the case, see *infra* pp. 685-86.

tion, and, though sometimes to a lesser degree, of the litigation itself.[10]

The structure of an institutional suit tends to be sprawling, with a large number of parties, intervenors, and amici.[11] The actual trial, during which plaintiffs seek to establish the existence of a constitutional violation, often involves many witnesses and extensive testimony. The judge, both before and during trial, frequently encourages the participants to work out a settlement. He or she may also be reluctant to set an early trial date or to expedite the trial itself if it appears that the state, through either its political branches or its judiciary, is likely to arrive at an acceptable solution on its own.[12]

If the court does find a constitutional violation, that finding is typically only a prelude to a drawn-out and complex process of devising a decree directing the defendants to reform their institution and practices.[13] The

10. For example, in the New Orleans jail litigation, Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970), Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972), the sheriff in charge of the jail encouraged extensive news coverage of what he considered deplorable conditions in order to "pressure the city into making improvements." Spiller, *A Case Study of* Hamilton v. Schiro, in AFTER DECISION, *supra* note 7, at 280. Among other things, the sheriff concluded that the news coverage "created a climate in which a lawsuit could be successfully brought." *Id.* The district judge in the case later encouraged the special master in charge of compliance to "make full use of the news media." *Id.*

In the Baltimore city jail litigation, the district judge actively encouraged news coverage, going so far as to make himself "available to the press to clarify legal matters and sensitive factual issues on a non-attribution basis." Harris, *A Case Study of* Collins v. Schoonfield, in AFTER DECISION, *supra* note 7, at 383. The case is reported at Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972), 363 F. Supp. 1152 (1973). *See also* Schoonfield v. Mayor of Baltimore, 399 F. Supp. 1068 (D. Md. 1975).

The district judge is not the only person with the power to use the media. In the New York City jail case, there was some suspicion that the district judge held "hearings unnecessarily in order to permit the inmates to air their grievances." Apparently as a consequence, the defendant city's attorneys "directed much of their courtroom strategy toward the reporters who were present," which in turn annoyed the judge, who criticized the attorneys for "trying the case to the press." Hermann, *Rhem v. Malcolm*, A Case Study of Public Interest Litigation: Pretrial Detention, at 17 (unpublished manuscript on file in Boalt Hall Library). The various opinions and orders in the case are reported at Rhem v. Malcolm, 432 F. Supp. 769 (S.D.N.Y. 1977); 396 F. Supp. 1195 (S.D.N.Y. 1975); 389 F. Supp. 964 (S.D.N.Y.), *aff'd*, 527 F.2d 1041 (2d Cir. 1975); 377 F. Supp. 995, *aff'd*, 507 F.2d 333 (2d Cir. 1974); 371 F. Supp. 594 (S.D.N.Y.). *See also* Rhem v. McGrath, 326 F. Supp. 681 (S.D.N.Y. 1971).

For a recommendation that district judges use news coverage "within the normative constraints of their profession" to encourage compliance with court orders, along with several examples of judges deliberately obtaining publicity for the institutional suits in which they were involved, see Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 452-53 & n.135 (1977).

11. For a lengthy description of the participants in institutional suits, see Special Project, *supra* note 7, at 870-927.

12. See, for example, the San Francisco school case, Johnson v. San Francisco Unified School Dist., 339 F. Supp. 1315 (N.D. Cal. 1971), *vacated and remanded*, 500 F.2d 349 (9th Cir. 1974), in which the district judge encouraged the parties to settle "throughout the hearings." Kirp, *Multitudes in the Valley of Indecision: The Desegregation of San Francisco's Schools*, in LIMITS OF JUSTICE, *supra* note 7, at 449-50. Among other things, he postponed decision in the case, in part because the Supreme Court decision in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), was then pending, but also because it gave the parties an opportunity to settle the case during the postponement.

13. For an interesting perspective on the bargaining that takes place and the judge's role in the

remedial decree, rather than the finding of a constitutional violation, is commonly perceived as the key to the success or failure of the litigation.[14] At this stage of the suit additional parties are frequently permitted to intervene, making the already unwieldy structure of the litigation even more cumbersome.[15] In formulating the decree, the judge usually asks the parties to agree on a "plan." If the parties do agree, the judge issues an injunction that incorporates their agreement. When soliciting plans from the parties or formulating the decree itself, the court frequently hears additional evidence and expert testimony concerning the possible effects of contemplated decrees; sometimes the court appoints its own experts, special masters or committees; and sometimes it threatens to impose draconian decrees that not even the plaintiffs want.[16]

What the remedial decree may seek to accomplish, and the means chosen, vary. A decree may be extremely detailed. In a prison or mental hospital case, for instance, it may specify precise staffing ratios, the temperatures in rooms or cells, the types and quantities of food to be served, the manner of determining types of and times for isolation or solitary confinement, and a variety of other things.[17] Once the decree is issued, the judge sometimes appoints a special master to supervise its implementation, or in certain cases, a "receiver" to take over and run the state institution for a time.[18] Ordinarily, the decree stays in effect for a number of years, and

negotiations, see Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979).

14. *See generally* O. FISS, *supra* note 1; M. HARRIS & D. SPILLER, *supra* note 7; Special Project, *supra* note 7. Patricia Wald and Lawrence Schwartz conclude, "However successful the lawsuit, the work really begins with the decree." Wald & Schwartz, *Trying a Juvenile Right to Treatment Suit: Pointers and Pitfalls for Plaintiffs*, 12 AM. CRIM. L. REV. 125, 162 (1974).

15. The importance attached to intervention at the remedy stage may be seen in Johnson v. San Francisco Unified School Dist., 500 F.2d 349 (9th Cir. 1974). There the court of appeals reversed a decision of the district court that had denied as untimely a petition to intervene filed after the decision of liability had been reached, and eleven days after proposed remedial plans had been filed by the parties. *Id.* at 352-54.

16. *See generally* Special Project, *supra* note 7, at 796-813. For an extraordinary tale of the experiences of a special master in formulating and proposing (unsuccessfully) a remedial plan to the district judge, see Berger, *Away from the Court House and into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978). For a somewhat different perspective on the case in which Professor Berger was a master, see Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89 YALE L.J. 513, 525-37 (1980). The case is reported at Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y.), *supplemented*, 383 F. Supp. 769 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975). For an example of a threatened draconian decree that induced defendants to devise an acceptable reapportionment plan, see Butterworth v. Dempsey, 237 F. Supp. 302 (D. Conn. 1965). In that case, the district judge appointed the Director of the Yale Computer Center as a special master with the responsibilty to develop a "stand-by" reapportionment plan. The Connecticut legislature, "under the pressure of reapportionment by computer," then devised an acceptable temporary reapportionment plan. Comment, *Reapportionment and the Problem of Remedy*, 13 U.C.L.A. L. REV. 1345, 1348 (1966).

17. The most famous decrees of this sort are those issued in Wyatt v. Stickney, 334 F. Supp. 373, 387 (M.D. Ala. 1972), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

18. Two examples of receiverships are of particular interest. In Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977), the district judge appointed a federal receiver

the parties are required periodically to submit to the court reports or other evidence of their compliance. Sometimes the decree is amended as conditions change, or as it becomes apparent that the original decree is inadequate to accomplish its purpose.[19]

An institutional suit is much more than a conventional courtroom dispute in which one party asserts that another has broken a legal rule and in which the court can provide a determinate and easily administered remedy. It has been argued that little of importance differentiates modern institutional decrees from many well-established judicial practices that intrude deeply into the affairs of public and private entities.[20] But the fundamental difficulty with constitutional institutional decrees lies not in the depth of their intrusion into the political affairs of the states, but rather in the *manner* of their intrusion. In reorganizing and redirecting the governmental functions of a political branch of a state, a federal court must rely largely on its own ingenuity in discovering the likely consequences of its remedial decree, and on its own intuitions in evaluating the desirability of those consequences. Owen Fiss describes an institutional suit and decree as "the initiation of a relationship between the judge and an institution—a

to run South Boston High School in light of a "rather dramatic record of opposition by school officials to any efforts to desegregate and the unpalatable alternative of closing the school." Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 CALIF. L. REV. 983, 986 (1979). The court of appeals, in affirming an order to repair the school while under receivership, cautioned: "The important objective is to avoid the entrenchment of the receivership and to secure a return to normal administration as soon as feasible." 548 F.2d 28, 33 (1st Cir. 1977). The receivership was terminated a year later. 456 F. Supp. 1113 (D. Mass. 1978). For other aspects of the case, see Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974), *aff'd sub nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir.), *cert. denied*, 421 U.S. 963 (1975) (liability), and Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass.), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied sub. nom.* Morgan v. McDonough, 426 U.S. 935 (1976). For a full treatment of the Boston school case, see Roberts, *The Extent of Federal Judicial Equitable Power: Receivership of South Boston High School*, 12 NEW ENG. L. REV. 55 (1976), and Smith, *supra* note 8.

In the Alabama prison case, the district judge appointed the Governor of Alabama as a temporary receiver for all Alabama penal and correctional institutions after the Governor petitioned the court to be so appointed. Newman v. Alabama, 466 F. Supp. 628, 636-39 (M.D. Ala. 1979). The district judge had concluded that there was "no reasonable likelihood of effective cooperation and substantial compliance from the present Board of Corrections." *Id.*, at 630. For other aspects of the case, see Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975), and Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part and rev'd in part*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded sub. nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (Eleventh Amendment claim), *cert. denied*, 438 U.S. 915 (1978).

See generally Note, *Receivership as a Remedy in Civil Rights Cases*, 24 RUTGERS L. REV. 115 (1969).

19. *See* Special Project, *supra* note 7, at 817-21. The power to revise injunctions is not without limit, however. *See, e.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (district court may not revise busing decree to adjust for changing population patterns if original decree was sufficient to desegregate the schools, and there is no further evidence of illegal discrimination); *see infra* p. 679.

20. Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 476-81 (1980) (providing examples of techniques for dealing with intransigent defendants, the exercise of long-arm jurisdiction, pretrial attachment and garnishment, and post-judgment levy and execution); *see id.* at 481-91 (discussing examples of complex cases, including probate, trust and bankruptcy proceedings, and administrative and prerogative writs).

declaration that the judge will henceforth manage the reconstruction of an ongoing social institution."[21] In such a role, a judge moves far beyond the normal competence and authority of a judicial officer, into an arena where legal aspirations, bureaucratic possibilities, and political constraints converge, and where ordinary legal rules frequently are inapplicable.

II. Discretionary Remedies and Legitimate Judicial Power

Discretion occupies an oddly neglected place in Anglo-American legal thought.[22] H.L.A. Hart has treated judicial discretion as a means of filling otherwise existing lacunae in a system of legal norms, but he has very little to say about discretion itself.[23] Ronald Dworkin has tried to deny its existence.[24] Whatever one may think of the merits of Dworkin's argument—and there is ample reason to suspect that Dworkin's contentions correspond rather badly to the judges' own perception of what they are doing[25]—his position obviously stems from a desire to legitimate the exercise of judicial power by showing that it is controlled rather than discretionary.[26] But even Dworkin does not try to legitimate remedial institutional decrees by denying that the trial judge exercises discretion in their formulation. Indeed, his intellectual framework appears to be incapable of

21. O. FISS, *supra* note 1, at 92. Fiss makes a telling point about the minimal role of legal rules and principles in institutional remedies: "[W]hen we speak of the decisional authority in the injunctive process we often talk not of *the law* or even of *the court*, but of Judge Johnson or Judge Garrity." *Id.* at 28 (emphasis in original). *See also* Fiss, *supra* note 2. Fiss' approach has been both criticized, *see* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 15 (Supp. 1981), and praised, *see* Wisdom, Book Review, 89 YALE L.J. 825 (1980).

22. Kenneth Culp Davis writes, "I know of no systematic scholarly effort to penetrate discretionary justice. Writers about law and government characteristically recognize the role of discretion and explore all around the perimeter of it but seldom try to penetrate it." K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY v-vi (1969).

Davis' arguments have not gone unnoticed by the judiciary. Judge J. Skelly Wright describes Professor Davis' book on discretion as "brilliantly and systematically [laying] bare the soft underbelly of the American legal sytem." Wright, Book Review, 81 YALE L.J. 575, 577 (1972). According to Judge Henry Friendly, the "value [of Davis' book] lies . . . in compelling us to attend to what we have known well enough but have preferred to forget." Friendly, *Judicial Control of Discretionary Administrative Action*, 23 J. LEGAL EDUC. 63, 63 (1970).

23. *See* H.L.A. HART, THE CONCEPT OF LAW (1961).

24. R. DWORKIN, TAKING RIGHTS SERIOUSLY (Harvard Paperback ed. with appendix 1978).

25. *See* Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473, 507 n.115 (1977).

26. In what may be an essential corollary to the proposition that Dworkin insists on his rights thesis because discretion is threatening to judicial legitimacy, Kent Greenawalt suggests that an effect, and perhaps a purpose, of Dworkin's arguments is to encourage judges to depart more willingly from a narrow view of legitimate judicial decisions. Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359, 362 (1975).

"The contemporary relevance of Dworkin's theory is that it seems to accomplish what no amount of tinkering with the positivist model has been able to do—namely, to reconcile legal form with the substantive decisions that courts have been reaching for many years." Gabel, Book Review, 91 HARV. L. REV. 302, 306 (1977).

legitimating such discretionary power.[27]

A. *Control and the Legitimacy of Judicial Discretion*

The critical attribute of illegitimate discretion is that it is the exercise of power without effective control over the person exercising that power. Such control can be external, internal, or both. A spectrum of discretionary power and its relation to external control may be roughly described as follows. At one extreme, elected officials properly have a great deal of discretion, in framing legislation for example, because electoral control over their actions generally constitutes a sufficient check on the abusive exercise of power. Appointed administrative officials also properly have a great deal of discretion, though it is frequently structured and confined in ways that elected officials' discretion is not, both because administrative officials perform some adjudicative and quasi-adjudicative tasks, and because the officials may be partially insulated from direct electoral control. At the other extreme, the discretion of judges—particularly Article III federal judges—is properly limited because of their insulation from political control, and because of the difficulty of appellate control over lower court discretion.

Though our society generally looks to external controls—such as elections and appellate courts—to legitimate the exercise of power, internal controls are also an important mechanism for channeling and legitimating the exercise of power. Though a particular judicial action may be beyond the reach of an appellate court, it may nonetheless be governed by legal criteria that make it non-discretionary.[28] Or, in a more attenuated way,

27. In his appendix, "Reply to Critics," included in the paperback but not the hardback edition of TAKING RIGHTS SERIOUSLY, Dworkin appears to concede that his rights thesis does not apply to remedial decrees in institutional suits:

> The administrative business of courts, which Chayes thinks provides a new style of adjudication, raises a great many problems of jurisprudence and political theory, and, though they touch the rights thesis only obliquely, they are problems that any theory of adjudication must one day confront. . . . [M]uch more needs to be said about the energetic administrative role courts seem to have assumed, and the impact of that practice on the rights thesis.

R. DWORKIN, *supra* note 23, at 345. This disclaimer is sufficiently inconspicuous and ambiguous, however, that it may not be clear to everyone that Dworkin intends to exclude institutional decrees from the scope of his thesis. *See, e.g.*, Fiss, *supra* note 2, at 9 ("The task of the judge is to give meaning to constitutional values, and he does that by working with the constitutional text, history, and social ideals. He searches for what is true, right, or just.") (citing R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977) and Dworkin, *No Right Answer?* in LAW, MORALITY AND SOCIETY 58 (P. Hacker & J. Raz eds. 1977)).

28. 28 U.S.C. §§ 1447(c)-(d) offer an interesting example. They provide:

> (c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case. . . .
>
> (d) An order remanding a case to the State court from which it was removed *is not reviewable on appeal or otherwise* . . . .

Id. (emphasis added). *But see* Thermtron Products v. Hermansdorfer, 423 U.S. 336 (1976). There the Court held that despite the words of the statute a remand was reviewable on mandamus if it affirma-

even though an action is discretionary, a judge is not free to decide on whim.[29] Similarly, even the power the electorate may exert over political officials might be insufficient to control and legitimate their actions if those officials were not also guided to some extent by common internalized norms of behavior.

External and internal controls may be, and frequently are, present at the same time. To the extent that an appellate court may reverse an erroneous decision by a trial judge, the control is external. To the extent that a trial judge tries conscientiously to apply appropriate legal norms, the control is internal. A few controls on political bodies may similarly be both external and internal. For example, a legislator should not take bribes. Though a legislator may not necessarily lose his office for accepting bribes, many voters will vote against him on that account, and the prohibition against taking bribes provides a clear standard of behavior to which a conscientious legislator will adhere.

Judicial discretion in some settings is a familiar and non-threatening form of power. Common examples are discretion in procedural matters and discretion exercised within statutorily defined boundaries. But two forms of judicial discretion are more threatening and less easily legitimated.

First, a court—usually an appellate court—has discretion to formulate a rule of law. Such rule formulation is the judicial analogue to legislation—the establishment of a basic proposition governing fact patterns within its reach. Most academic literature, both on common-law and on constitutional adjudication, has focused on this sort of discretion.[30] Though there are significant problems of legitimacy even as to the exercise of this form of discretion, they are mitigated both by the nature of the rule that is produced and by its relative visibility. Once formulated, a rule governs appropriate cases until overruled; moreover, the generality of application inherent in a rule necessarily means that only certain things may be effectively accomplished by rule. Further, the standards of legal craft dictate

tively appeared in the record that the remand was based on an erroneous ground.

29. Judge Friendly writes:

> [O]ne finds statements like Lord Halsbury's in Sharp v. Wakefield, that discretion requires "that something is to be done according to the rules of reason and justice, not according to private opinion; . . . according to law and not humour. It is not to be arbitrary, vague and fanciful, but legal and regular." While the meaning of this is not altogether clear to me, it sounds remarkably like what judges do, or think they do.

Friendly, *supra* note 22, at 64 (1970).

And according to Dworkin: "The strong sense of discretion is not tantamount to license, and does not exclude criticism. Almost any situation in which a person acts . . . makes relevant certain standards of rationality, fairness, and effectiveness." R. DWORKIN, *supra* note 24, at 33.

30. *See, e.g.*, B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); *see also* J. FRANK, LAW AND THE MODERN MIND (1930).

that a rule, even though based originally on a discretionary determination, cannot be overruled without some affirmative justification; and when it is overruled, the overruling must be in favor of another rule, which, like the first rule, must be general in its application. Finally, the quasi-legislative character and relative visibility of a rule makes appellate rulemaking vulnerable to political control in a way that helps to reduce the threat of its exercise. Common-law rulemaking may be reversed by passing an overruling statute—that is, a statute that simply substitutes the legislature's rule for that of the court. Constitutional rulemaking is less vulnerable to reversal, but outside forces operate in a variety of ways to control its exercise.[31]

Second, a trial court may exercise discretion to remedy the violation of a legal rule, as it does in an institutional suit. The drafting of a remedial decree is the judicial analogue to administrative or executive action—the implementation of a general command in a particular setting. The specificity of the decree and the indeterminacy of the norms that guide its drafting make the trial judge's remedial discretion more difficult to control, and hence more threatening, than the discretion inherent in judicial rulemaking. In a constitutional institutional decree, the difficulty is particularly acute. In part because the court directly supplants a politically based governmental body, the competing factors that must be balanced in an institutional decree tend to be both more complicated and more intangible than those involved in private injunctive suits. Moreover, the incidental effects of judicial action in institutional suits are less easily placed and understood in our scales of economic and political values. In a school busing case, for instance, in addition to effects on the school board's budget, on white participation in the school system, on the reputation of particular schools, and on student, teacher and parent morale, they include effects on distribution of wealth and opportunities in the society at large, and on the society's perception of itself as just or unjust.

Most important, the means of external and internal control over the trial court's remedial discretionary actions are extremely limited. In a statutory case, the danger of discretionary power in the hands of a trial court is somewhat mitigated by the residual control the legislature retains to modify the statute and accordingly to restrict or change the character of the discretion exercised. But this form of control is limited. Since the trial judge issues an injunction rather than formulates a rule, a legislature cannot overrule the decision simply by passing a statute substituting a new rule. In a constitutional case, the means of political control are even

31. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); C. BLACK, THE PEOPLE AND THE COURT (1960).

cruder and therefore more limited.[32] Appellate courts also have little ability to exercise external control, since discretionary action almost by definition means an action of the trial judge that is not subject to appellate reversal. Finally, internal controls may also be lacking, for there may simply be insufficient legal norms to guide a conscientious trial judge in the discretionary formulation of a remedy.

B. *Polycentricity and the Nature of Remedial Discretion*

The concept of polycentricity may help to clarify the problems involved in trial court remedial discretion in institutional suits. Polycentricity is the property of a complex problem with a number of subsidiary problem "centers," each of which is related to the others, such that the solution to each depends on the solution to all the others. A classic metaphor for a polycentric problem is a spider web, in which the tension of the various strands is determined by the relationship among all the parts of the web, so that if one pulls on a single strand, the tension of the entire web is redistributed in a new and complex pattern.[33] Michael Polanyi pointed out in the 1950's that polycentric problems permeate our society, and argued that, for the most part, they are ill-suited to resolution by governmental decisionmaking authorities.[34]

For purposes of analysis, polycentricity should be divided into two sorts, legal and non-legal.[35] Legal polycentricity exists when there are various

32. *See, e.g.*, Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

33. Fuller, *supra* note 4, at 395.

34. M. POLANYI, THE LOGIC OF LIBERTY, REFLECTIONS AND REJOINDERS (1951). Polanyi's thesis canot be demonstrated today in quite the same manner as in 1951 even though it remains generally true. For instance, his discussion of the practical limits imposed by the capacity of "computing machines" on the ability to solve what he calls "theoretically formalizable" polycentric problems, *id.* at 180-84, is now out of date. Further, the work of economists in theories of "public choice" have refined our ability to formulate and resolve certain polycentric problems. *See, e.g.*, K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951); A. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE (1970). Finally, the work of economic model building in the intervening years has enabled economists to predict with greater accuracy the consequences of various public economic choices. For the most part, however, lawyers and judges remain ignorant of these developments, though occasional articles have been written for legal academics. *See, e.g.*, Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to* Bakke, *the FCC, and the Courts*, 88 YALE L.J. 717 (1979). Judging from the difficulty of such articles, lawyers', judges', and perhaps even academics' ignorance of the topic is likely to continue.

35. Melvin Eisenberg has pointed out that polycentric problems tend also to be problems resolvable only by reference to multiple criteria. Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 424-26 (1978). In many contexts, it may be important to distinguish between polycentric and multiple-criteria problems. It is clear that what are referred to in the text as non-legal polycentric problems also tend to be problems decided by reference to multiple, non-legal criteria. Eisenberg's concept of multiple criteria lends itself to the distinction between legal and non-legal polycentricity, for another way of drawing the distinction is between legal and non-legal criteria of decision. Eisenberg describes the remedial decree "in a public

legally protected "centers," each with interests that must be protected by the judge. It exists, for example, in a suit in which a variety of claimants all assert legal rights to share in limited water resources.[36] Non-legal polycentricity exists when there are competing and interacting interests that are not legally protected, as, for example, in a dispute over the allocation of scarce teaching resources in a school system when no claim of legal right is involved.

A particular polycentric problem may, and often does, involve legal and non-legal elements. For example, a state legislature may be faced with a demand for funds to improve a state prison system. Since state funds are limited, additional dollars spent on prisons mean fewer dollars spent on other things. So long as budgetary decisions are made without legal compulsion, the problem of allocation is polycentric in an entirely non-legal sense. If, however, a demand for funds to improve prison conditions is made not on policy or humanitarian grounds, but rather on the ground of an asserted constitutional right to be free from unconstitutional conditions of confinement, the problem has a legally protected interest as one of its asserted centers. So long as none of the other centers involves a comparable legal claim, the dispute has become, as to the basic rule of liability, non-polycentric for someone charged with enforcing the law.

At the liability stage of a legally non-polycentric suit, the conceptual task of a judge is easy. All the judge need do is pretend—or, in a legal sense, find—that the dispute is not polycentric and that the claim of legal right must therefore prevail over non-legal demands. But when the judge devises a remedy for unconstitutional prison conditions, the dispute becomes unavoidably polycentric. There are typically a number of permissible ways to remedy the constitutional wrong—for instance, the release of prisoners, the improvement of the existing prison, or the construction of a new prison. To the extent that a judge is controlled by legal norms in devising ways to satisfy the legal claim—for instance, the prisoners cannot be enlisted as slave labor to rebuild the prison—the non-legal polycentricity of the remedial process is confined.[37] But to the extent that a judge is

law [institutional] case [as] often look[ing] very much like a discretionary regime addressing a problem governed by multiple and polycentric criteria." *Id.* at 428.

36. *See*, Fuller, *Irrigation and Tyranny*, 17 STAN. L. REV. 1021, 1042 (1965). It may be that Fuller, in the vocabulary of this Article, would have called the competing interests for water "non-legal" rather than "legal," but this is unclear. His discussion elsewhere suggests that he would not distinguish in this context between non-legal and legal interests. *See* Fuller, *supra* note 4, at 370-71.

37. This familiar proposition may be illustrated in a variety of contexts. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (municipality may refuse to rezone for wide variety of reasons, but may not refuse for racially discriminatory reasons); Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969) (landlord may evict tenant for any legitimate purpose, or even for "no reason," but may not evict for "retaliatory" purpose); Edward G. Budd Mfg. Co. v. NLRB, 138 F.2d 86 (3d Cir. 1943), *cert. denied*, 321 U.S. 778 (1944) (employer may fire employee at whim but may not fire him because of union activity).

not bound by legal norms to choose one remedy over another, the remedial process is polycentric in an entirely non-legal sense.

Lon Fuller argued that polycentric conflicts are unsuited to resolution by normal techniques of adjudication, contending that at some point "managerial" techniques involving intuitive and discretionary judgments are necessary.[38] He did not distinguish between legal and non-legal polycentric problems, and to that extent the strength of his objection to remedial judicial discretion in institutional suits is understated. A critical factor in such suits is that the court is asked to solve not merely a polycentric problem, but a *non-legal* polycentric problem in which it has no guidance from legal norms as to the appropriate values to be served by the solution. Thus, although judicial intervention is triggered by the violation of a legal standard, the court must reorganize the governmental functions of a political branch of a state, relying largely on its own uncontrolled discretion in performing that task.

Discretion is no stranger to government. Indeed, Kenneth Culp Davis contends that no government can exist unless its officials exercise a large amount of discretionary power.[39] The inevitability of discretion is explicable in substantial part by the polycentric nature of the problems addressed by government. Polanyi argued that the best method of solving a polycentric task is mutual spontaneous adjustment by the constituent parts of the problem itself[40]—rather like the bees in a hive finding their appropriate space and function by their sense of the bees around them, with each bee individually adjusting to its neighbors, and each neighboring bee in turn adjusting to the others' adjustment until a stable equilibrium is reached. In order to mimic this behavior and to approximate the solution it would achieve, a governmental decisionmaker must employ discretion.[41]

But discretion is a far from perfect tool. First, even a decisionmaker with complete discretion can solve a problem properly only if he or she perceives the objective facts about the problem, and the interrelationships among its constituent parts.[42] Second, to mimic the bees successfully a dis-

38. *See* Fuller, *supra* note 4, at 398. I think it probably not an accidental echoing of Fuller's terminology that Alexander Bickel, in criticizing judicial behavior in the "Warren era," referred to the courts' "imperfectly bridled managerial drive." A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 104 (Harper Torchbook ed. 1970). *See also* H. HART & A. SACKS, *supra* note 4, at 668-69.

39. K. DAVIS, *supra* note 22, at 1-26; Davis, *Discretionary Justice*, 23 J. LEGAL EDUC. 56, 58 (1970).

40. M. POLANYI, *supra* note 34, at 154-200.

41. For a variant of this view, see H. HART & A. SACKS, *supra* note 4, at 669:

> A problem is "polycentric" when it involves a complex of decisions judgment upon each of which depends on the judgment to be made upon each of the others. Such problems characteristically present so many variables as to require handling by the method either of *ad hoc* discretion or of negotiation or of legislation.

42. For interesting persepectives on this proposition, compare R. DAHL, WHO GOVERNS? DEMOC-

cretionary decisionmaker must solve and re-solve a problem until no further solutions are necessary. A governmental decisionmaker may lack the incentive, or even the ability, to continue re-solving a problem until the optimum solution is found. Third, since the modes of external control over a discretionary decisionmaker tend to be limited, discretion is a dangerous form of power.[43] Finally, the discretionary decisionmaker needs to understand and weigh all the values at stake to evalute normatively the ends served by the possible solutions, but this is an enormously difficult task in a pluralistic society even for an avowedly political body.

Remedial decrees in institutional suits have greatly accentuated versions of these difficulties. First, courts are less able than the political branches[44] to apprise themselves of the "legislative facts" necessary to understand questions of public policy.[45] Second, since courts normally enforce their

RACY AND POWER IN AN AMERICAN CITY (1961), Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968), and Polsby, *On Intersections Between Law and Political Science*, 21 STAN. L. REV. 142 (1968).

43. *See* Fuller, *supra* note 36. In attempting to explain the whimsical "despotic" powers exercised by some governments in allocating water for irrigation, Fuller writes:

> The early hydraulic societies tended toward despotism because they took on too difficult a social task too soon. They took on the task too soon because the existing state of social invention did not make available to them the institutional means that might have facilitated a solution to their problems—that might, in other words, have offered workable alternatives to despotism.

Id. at 1037.

44. Attempting in this post-Frankfurter period to analyze reasons for separating out distinct functions to be served by courts, on the one hand, and political bodies, on the other, is to some degree swimming against the intellectual current. In positing the case for blurring functional distinctions, Robert Cover aptly describes the traditional mode of analysis:

> Scholars have assumed that it would be most "natural," "rational," or "appropriate" to have a unique, determinate relation between disputes and forums in which, within some given domain, there is plenary and exclusive authority to settle any particular dispute. This assumption is often implicit because the foreground of analysis is occupied by some exception to the assumption. The presence of diverse sovereignties in the international realm and the qualified autonomy of the states in American federalism are generally thought to be reasons for tolerating or living with a multiplicity of agents and institutions performing the same function. Specialization and expertise—in administrative law and such special tribunals as family courts—are also acknowledged as bases for departure. But what remains implicit is that, but for federalism, sovereignty, expertise, or whatever, the appropriate system would be one that assigns a unique tribunal to any given dispute.

Cover, *Dispute Resolution: A Foreword*, 88 YALE L.J. 910, 913 (1979). Even after one concedes both the similarity of many dispute resolution functions and the clear overlapping of functions among dispute-resolving bodies, it is nevertheless still the case that there are differences among those bodies. A sound analysis must take these differences, as well as the similarities, into account.

45. *See* H. HART & A. SACKS, *supra* note 4, at 384-85. The continuing debate over the famous footnote in *Brown* citing sociological studies, Brown v. Board of Educ., 347 U.S. 483, 494 n.11 (1954), indicates the difficulty the judicial system has in dealing openly with its need for legislative facts. For recent views on the place of sociology and, more broadly, of legislative facts in judicial lawmaking, see Levin & Hawley, *Symposium, School Desegregation: Lessons of the First Twenty-Five Years* (pts. 1 & 2), 42 LAW & CONTEMP. PROBS., Summer-Autumn 1978, at 1, and THE COURTS, SOCIAL SCIENCE, AND SCHOOL DESEGREGATION (B. Levin & W. Hawley eds. 1975). For an earlier view, see Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 358-63 (1957). What is most striking is that the considered views of thoughtful commentators on the indispensability of social science, and the impossibility of developing a methodology for dealing with it, have remained relatively constant.

judgments by compulsory process without a significant opportunity for reversal or modification by the private parties affected by these judgments, they are less likely than other governmental decisionmakers to solve and re-solve a polycentric problem until an optimum solution is found. Third, since institutional decrees necessarily entail a great deal of discretion in their formulation, and since discretionary behavior is largely beyond the power of an appellate body to control, the primary means of external control over trial court behavior is virtually useless. Finally, and most important, courts have no institutional authority to assess normatively the ends of possible solutions to non-legal polycentric problems. The formulation of the remedial decree thus depends to an extraordinary extent on the moral and political intuitions of one person acting not only without effective external control over his or her actions, but also without even the internal control of legal norms.

III. The Attempt to Domesticate Judicial Remedial Discretion

Federal courts in constitutional institutional suits have tried in several ways to control or influence the manner in which remedial discretion is exercised, and thereby to reduce its threat to the legitimacy of the judicial process. The evidence for this proposition is to a degree circumstantial, and the actions and rationales of the courts still inchoate. But the courts do seem to be moving toward a practice that encourages judges to avoid exercising their own discretion; toward a theory that equates discretion with informed judgment; and, with the greatest difficulty, toward a theory that permits some appellate control of the discretionary acts of a trial judge. Yet, as will be seen, these efforts to provide legitimacy are not, and probably cannot be, entirely successful.

A. *Negative Injunctions, Court-Approved Plans, and Affirmative Injunctions: Can a Court Avoid Exercising Discretion?*

With limited success, district judges have tried to avoid exercising remedial discretion in institutional suits. Their efforts reflect both the difficulty of bringing remedial discretion under the control of legal norms, and the judges' perception that such discretion is inherently suspect. The reasons behind their efforts are best understood by an examination of the various forms of relief possible in institutional suits. The preferred form of injunction is to instruct the defendant not to do what it has been planning or to stop what it has been doing. The affirmative or mandatory injunction, instructing the defendant to do a particular thing or set of things, is the

disfavored remedy.[46] In recent decades, this distinction has come to have less practical importance as courts have become increasingly willing to grant affirmative decrees in those cases in which injunctive relief of some sort is warranted. Yet the distinction between negative and affirmative decrees continues to be conceptually significant.[47]

1. *The Prison Reform Cases*

The prison reform cases provide the clearest example. Prisoner plaintiffs in such suits ordinarily allege that the conditions of their confinement violate the cruel and unusual punishment clause. Relief frequently takes the form of an affirmative injunction directing that prison conditions be improved. There is available, however, a much more straightforward response: the court could release on habeas corpus all of the prisoners being held under unconstitutional conditions of confinement. Not surprisingly, federal courts in prison reform cases rarely use a massive writ of habeas corpus except as a threat to recalcitrant state officials who are unwilling or unable, at least absent the threat, to reform their prisons.[48]

At the conceptual level habeas corpus is the easiest remedy, for it relieves the judge of the need to resolve any non-legal polycentric remedial problems beyond the bare resolution inherent in the release of the prisoners.[49] The court is not obliged to learn the details of prison administration, to predict the consequences of contemplated reforms on prisoners, prison

46. *See, e.g.*, D. DOBBS, LAW OF REMEDIES 105 (1973); Note, *Developments—Injunctions*, 78 HARV. L. REV. 994, 1061-63 (1965).

47. Lon Fuller briefly hints at the significance of the distinction in the context of private, primarily contract law. Fuller, *supra* note 4, at 404-05.

48. *But see* Note, *Courts, Corrections, and the Eighth Amendment: Encouraging Prison Reform by Releasing Inmates*, 44 S. CAL. L. REV. 1060 (1971). The *threat* to release prisoners, or at least to close the facility in which they are imprisoned, is not all that uncommon. For example, in one case a district court warned that "[t]he handwriting is on the wall, and it ought not to require a Daniel to read it. Unless conditions at the Penitentiary farms are brought up to a level of constitutional tolerability, the farms can no longer be used for the confinement of convicts." Holt v. Sarver, 309 F. Supp. 362, 383 (E.D. Ark. 1970). In a similar case, the court warned:

> Unless the defendants meet the terms and conditions set forth herein, the Charles St. Jail will be closed on October 2, 1978, to any inmate awaiting trial. Were the jail to close without interim arrangements being made available pending a long range solution, the public safety would obviously be threatened. The community would have been badly served by those leaders who, though long ago notified as to what must be done, resolutely refused to take appropriate action. So that there may be no last minute claims of misunderstanding and that the burdens of responsibility be placed squarely where they belong, we state the following: [setting forth various conditions].

Inmates of Suffolk County Jail v. Kearney, 573 F.2d 98, 100 (1st Cir. 1978). An earlier district court order appears at Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 690-91 (D. Mass. 1973). Judge Frank Coffin, who sat as a member of the three-judge panel on the court of appeals in *Inmates of Suffolk County Jail v. Kearney*, describes the court's tactical thinking in Coffin, *supra* note 18, at 987-88.

49. Note the striking parallel in the analysis here to the explanation, *see infra* pp. 689-90, of the Supreme Court's holding in O'Connor v. Donaldson, 422 U.S. 563 (1975), in which an unconstitutionally confined mental patient was given a damage remedy under 42 U.S.C. § 1983 (1976).

officials, and the state in general, to choose among possible affirmative remedies for the constitutional deficiencies of the prison, or to implement and enforce an affirmative injunctive decree in what is frequently a hostile political environment. If a judge releases the prisoners on habeas corpus, or threatens to do so, the political branches of the state rather than the federal court are required to resolve the non-legal polycentricities of the suit. The judge establishes clearly the one legal right involved—the right to be free from unconstitutional conditions of confinement—and then leaves to the state the task of devising the most acceptable solution to the non-legal polycentric problem.[50]

A habeas corpus remedy in this setting resembles Polanyi's recommended solution of a polycentric problem: it triggers the spontaneous mutual adjustment of the constituent parts of the problem itself. The analogy is not perfect because in refusing to resolve the problem the court is yielding to another governmental decisionmaker rather than directly to the people affected. But the habeas remedy is nevertheless an appreciable gain, for the political decisionmaking apparatus of the state, precisely because it is political, is likely to be more sensitive to the needs of the constituent parts of the problem than is a federal court.

2. *The School Busing Cases*

Habeas corpus in prison cases is a relatively clear example of a negative injunction in an institutional case. But habeas corpus is seldom anything but a threat because of the obvious reluctance of judges to order that prisoners be released into the society. In school busing cases there does not appear to be an easy analogue to the negative injuction. The difficulty of busing cases is that the courts require more than that certain illegal behavior be ended; they require, further, that the effects of past illegal behavior be remedied by affirmative action. Thus, in this setting, while the command of the Constitution is negative—do not discriminate on the basis of race—the requirements of a fully adequate remedy exceed the mere implementation of that negative command by an order to cease.

The appropriate affirmative remedy for past illegal school discrimination is a formidably difficult matter. For those students already educated or mis-educated under a discriminatory system, damages may, in practical terms, be the only possible remedy since irreparable harm has already

50. The release of prisoners as a practical remedy for unconstitutional conditions of confinement would have seemed preposterous as recently as a year or two ago. That no longer seems to be the case. *See, e.g.*, Graddick v. Newman, No. A-72 (Powell, Circuit Justice, July 25, 1981) (declining to stay order of district court releasing 400 inmates). *See also* N.Y. Times, July 24, 1981, § 1, at 8 (western ed.) (overcrowding in Arkansas prisons); Wall St. J., August 18, 1981, at 1, col. 1 (general survey of overcrowding in state prisons).

been inflicted by the discrimination.[51] For those students now being educated or who have yet to be educated, an injunctive remedy is appropriate, but the task of isolating and curing the effects of past discrimination is almost beyond human capacity. For example, where new schools were built in the middle of one-race neighborhoods in order to produce racially identifiable schools, it would be an analytically coherent remedy to bus students in order to duplicate the racial patterns that would have existed if the schools had been built on the borders between racially identifiable neighborhoods. But it is not constitutionally forbidden, absent a discriminatory purpose, to build new schools in the middle of racially identifiable neighborhoods; nor is it constitutionally required to build new schools on the borders between such neighborhoods. What is described as an analytically "coherent" remedy is thus not an analytically compelled remedy, for busing to achieve the racial balance that would have existed if new schools had been built on neighborhood borders does not necessarily duplicate the racial balance that would have existed in the absence of unconstitutional action. It only duplicates the racial balance that one of a number of constitutionally permissible past actions would have produced.

3. *The Avoidance of Court-Originated Remedies*

For different, and in each case somewhat complicated, reasons district courts tend to issue affirmative remedial injunctions in both prison and school cases. In neither, however, are courts generally eager to devise the terms of the injunction themselves. In prison cases, while the desired result may be clear—the avoidance of unconstitutional conditions of confinement—there are various ways to achieve that result. In school busing cases, even the proper result is impossible to specify except by reference to the almost hopelessly general requirement that the effects of past discrimination be eliminated. Given the range of permissible end states, the variety of permissible means is virtually limitless. Courts are hesitant to impose court-originated remedies in both prison and school suits for the obvious reason that they would be choosing among permissible solutions

51. Though beyond the scope of this Article, the legal questions behind a damage remedy are considerable. They include the scope of liability under 42 U.S.C. § 1983 (1976), *see, e.g.*, Monell v. Department of Social Servs., 436 U.S. 658 (1978); Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965); the ability to infer a private cause of action from the Fourteenth Amendment, *see, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971); the ability of the state and its subdivisions to assert the Eleventh Amendment as a defense, *see, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Edelman v. Jordan, 415 U.S. 651 (1974); *see also* Lincoln County v. Luning, 133 U.S. 529 (1890); and the ability of state and local officials to assert official immunity as a defense, *see, e.g.*, Wood v. Strickland, 420 U.S 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974). *See generally* B. BITTKER, THE CASE FOR BLACK REPARATIONS (1973).

to non-legal polycentric problems.[52] The common technique for avoiding court-originated remedies is to ask the parties to propose various remedial plans, and, if possible, to get the parties to agree on one that is acceptable to the court.[53]

Soliciting remedial plans from the parties is closely analogous to the spontaneous solution of Polanyi's paradigm, though two things still prevent the analogy from being precise. First, the court almost never asks all the people who will be affected by the plan to agree on an acceptable plan. Thus not all the constituent parts of the problem are involved in its solution. Second, the presence in the background of a court with the power to impose a decree if the parties are unable to agree almost necessarily affects the nature of the plan to which the parties are willing to consent.

The distorting effect of the court's power to order an affirmative remedy in the absence of an agreement among the parties contributes to a curious phenomenon. Because of a defendant's desire to obtain a court order requiring it to do something that it would like to do but does not have the political power to do absent a court order,[54] or because of fears induced by the threat of continued litigation or of still less attractive remedies that are within the power of the court to order, the parties may agree on a plan that is beyond the scope of the court's remedial power even broadly construed. In a sense, this is nothing more than a settlement, and parties in most suits may settle on terms of their own choosing without

52. The Supreme Court has indicated on numerous occasions that local authorities are the preferred sources of remedial plans in institutional suits. *See, e.g.*, White v. Weiser, 412 U.S. 783, 794-95 (1973) ("In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.' "); Reynolds v. Sims, 377 U.S. 533, 586 (1964) ("[T]he court below acted with proper judicial restraint . . . so as not to usurp the primary responsibility for reapportionment which rests with the legislature."). Note, however, that if the federal district court defers to the redistricting desires of the state legislature, it is deferring to a body whose non-representative quality is the very basis of the constitutional necessity for redistricting. *See* Note, *The Case for District Court Management of the Reapportionment Process*, 114 U. PA. L. REV. 504, 514-17 (1966). *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 11, 16 (1971); Brown v. Board of Educ., 349 U.S. 294, 301 (1955).

53. A useful technique for producing agreement among the parties is to encourage the plaintiffs to propose several plans. If the district court finds all of the plans constitutionally acceptable, it asks the defendant to choose whichever one it likes best, or to propose one of its own. This was done, for instance, in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 11 (1971). In the San Francisco elementary school litigation, the district judge approved the plans submitted by *both* the NAACP and the school board. Johnson v. San Francisco Unified School Dist., 339 F. Supp. 1315, 1321 (N.D. Cal. 1971). David Kirp suggets that this was an important factor in "securing acquiescence in, if not support for, [the district court's] actions." Kirp, *supra* note 12, at 470.

54. In one case, for example, "[t]he board of education quietly welcome[d] the lawsuit. It apparently favored desegregation, yet lacked the political will to implement it. . . . The court [resolved] the board's dilemma by ordering it to do what the board felt was right, but which politically it could not undertake on its own." *See id.* at 445. For a complicated attitude on the part of a defendant mental health commissioner, see Stickney, *Problems in Implementing the Right to Treatment in Alabama: The* Wyatt v. Stickney *Case*, 25 HOSP. & COMMUNITY PSYCHOLOGY 453 (1974).

regard to the power of the court to require such a settlement, and without the court even passing on its terms.

Not all settlements, however, are independent of the court. In a class action, which is somewhat analogous to an institutional suit, a court must approve any settlement to ensure that the class representative has adequately represented the interests of the class.[55] In an institutional suit, there is also a danger that the plaintiff class was poorly represented.[56] Sometimes, however, the interests of the plaintiff class may not be too poorly but *too well* represented by the plan to which the parties agree. That is, the defendant may agree to more than it must, so that the plan is incorporated into a mandatory injunction, enforceable by contempt against the defendant, who by hypothesis had a legal right to object to it. This result is encouraged by the first element that prevented the analogy to Polanyi from being precise. The defendant may be willing to consent to terms particularly favorable to plaintiffs because those who will be affected adversely by the plan are not present in court. For example, prison officials may consent to a plan requiring the expenditure of $10,000,000 on prisons because the parts of the state government that are (or would have been) competitors for those funds may not be represented in the negotiations that result in the decree.

Despite these imprecisions in the analogy to Polanyi's method, and despite the difficulties of permitting a court to enforce an agreement of the parties that the court could not have imposed upon them, the technique of soliciting plans and encouraging agreement is enormously useful. To a considerable extent, it permits those most directly affected by the suit to protect their interests from avoidable harm, and it relieves the court of the need to decide what is best for the parties when interests not protected by any legal rule are at stake. In other words, this technique enables a trial court to avoid exercising discretion to solve a non-legal polycentric remedial problem, and puts the burden of the solution on at least some of the constituent parts that are most directly affected.

B. *Affirmative Injunctions and Informed Discretion*

If the trial judge cannot issue a negative injunction, and if the parties

55. *See* 3B J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 23.80[4] (2d ed. 1982); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1797 (1972). Indeed, many institutional suits *are* class actions.

56. Michele Hermann contends, for instance, that the New York City jail litigation was, on the plaintiffs' side, "controlled almost exclusively by the lawyers." Hermann, *supra* note 10, at 54. Hermann concludes that many of the prisoners were ill-served by the litigation brought in their names: "[T]he major victory in the case [the closing of the 'Tombs'] is not one which the plaintiffs wholeheartedly desired, and it has deprived them of favorable circumstances which they formerly enjoyed." *Id.*

are unwilling to agree on a remedial plan, the judge may have no practical alternative but to exercise his or her own discretion. For example, several alternative plans for busing school children may be submitted to the trial court, each of which would protect the children's constitutional right to be free from the effects of past racial discrimination. If each plan would have a different impact on the school system, on the state budget, and on the residents of the district, and if one assumes that no one has a legal right to be free from the impact of an otherwise valid decree, the judge has no legal basis on which to choose among the plans. The most satisfactory response, of course, would be for the judge not to choose at all; rather, if each of the plans is constitutionally adequate, the defendant school board should exercise its own judgment as to which it thinks is most appropriate. But if the school board refuses to cooperate, and if the need for quick action is great, the only realistic option may be for the court to choose one of the plans itself.[57]

In making that choice, the court faces two questions, the first conceptually easy though sometimes practically difficult, and the second almost impossibly difficult at any level. The first question is how can the court inform itself about the non-legal interests involved so that it does not act in ignorance of the effect the contemplated plans would have on those interests. The second question is what should the court do with the information it obtains.

1. *Toward an Informed Discretion*

Since there will frequently be a wide range of interests affected by a plan, about which the parties ordinarily will not, and possibly cannot, inform the court, the initial problem for a judge is to find out what the effects of a contemplated plan will be. Attempts to obtain such information have taken a course familiar to both administrative agencies and federal courts. The general expansion of rights to participate in proceedings before administrative agencies has been a continuing theme of administrative law for the past twenty years.[58] There has also been a corresponding willingness in the courts, though on a distinct intellectual foundation,[59] to

57. Federal courts have sometimes deferred to state bodies other than those that actually should have formulated a remedy in the first instance. For example, the Supreme Court has ordered the federal district courts to defer to state courts as well as to state legislatures when drafting reapportionment plans. Scott v. Germano, 381 U.S 407 (1965); *see also* Scranton v. Drew, 379 U.S. 40 (1964). As another example, Judge Johnson has appointed the Governor of Alabama as a receiver in both prison and mental hospital litigation. *See supra* note 18 & *infra* note 169.

58. *See* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

59. When the issue is whether a person may institute a suit in federal court, the analysis, at least since the 1930's, has proceeded under the rubric of "standing." That concept is both complicated and elusive. Probably the most commonly cited general formulation is that of Baker v. Carr, 369 U.S. 186,

permit interested people to participate in proceedings that are likely to have a substantial impact on interests other than those of the parties.[60] The most striking example of this phenomenon at the appellate level is the great expansion in this century of the use of the amicus curiae brief in the United States Supreme Court.[61] Today the amicus brief is a common vehicle for the expression of views by non-parties; indeed, in some cases the filings by amici considerably outnumber the filings by the parties themselves.[62]

To some extent at the liability stage, and overwhelmingly during the remedy stage, a federal district court in an institutional suit has much the same informational need as an appellate court. The obvious way to obtain the information is to permit the people affected to participate in the suit.[63]

204 (1962) ("Have the [plaintiffs] alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?") Of the enormous body of academic literature, see particularly Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974); Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?* 78 YALE L.J. 816 (1969); Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353 (1955); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961).

Standing to sue in federal court is tied to the "case or controversy" requirement of Article III of the federal Constitution, whereas administrative agencies are not Article III adjudicatory bodies. *See* Crowell v. Benson, 285 U.S. 22 (1932). It is occasionally suggested that standing determinations in administrative agencies and Article III federal courts are governed by the same standards. *See, e.g.*, Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1000 n.8 (D.C. Cir. 1966) (Burger, J.). At the very least, such a conclusion is not constitutionally compelled, for administrative adjudicative bodies, since they are not created under Article III, are not confined to deciding only "cases" or "controversies."

60. As Justice Black argued when he objected to Court rules promulgated in 1954 limiting the freedom of amici to file briefs:

> Most of the cases before this Court involve matters that affect far more people than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against *amicus curiae* briefs.

Order Adopting Revised Rules of the Supreme Court of the United States, 346 U.S. 945, 947 (1954).

61. *See* Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963); Vose, *Litigation as a Form of Pressure Group Activity*, 319 ANNALS 20 (1958). *See also* L. FULLER, ANATOMY OF THE LAW 104 (1968) ("A judicial hearing may take on . . . something of the nature of a legislative hearing. The analogy to such a hearing becomes even stronger when the brief *amicus curiae* is employed.")

Amicus briefs are only one example of the Supreme Court's effort to obtain information from sources other than the parties and the trial record. *See* Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975). The "Brandeis brief" filed in Muller v. Oregon, 208 U.S. 412 (1908), was an early attempt to overcome some of the traditional limitations on the ability of parties to inform the Court of the social context in which it acted. When on the Court, Justice Brandeis continued to feel that the Court needed more information than it received in the normal course of events. Alexander Bickel recounts that during the summer of 1923 Justice Brandeis had his law clerk "interview appropriate officials" in the Department of Agriculture and the Federal Trade Commission, and collect documents in preparation for a grain case scheduled to be argued that fall. In addition, he solicited information from his brother Alfred, who ran the Brandeis family grain-shipping business. A. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 172 (1957).

62. In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), for example, the parties filed six briefs, while amici filed fifty-nine.

63. Intervention has been the focus of serious dispute in institutional suits. *See, e.g.*, Bell, *Serving*

The most structured form of such participation is that provided by the Federal Rules of Civil Procedure, which allow intervention as of right under Rule 24(a),[64] or permissively under Rule 24(b).[65] But Rule 24 by no means exhausts the mechanisms for participation by non-parties. Another method is a special form of intervention—participation by the United States either as an outright intervenor or as an amicus.[66] A certain amount of additional information may also be provided by witnesses who are neither parties nor intervenors, but who are potentially affected by the suit. A special form of such participation occurs when an expert witness testifies before the court to a consensus among the members of his or her particular profession, which in turn may represent a consensus or compromise among the various constituencies served by the profession.[67] Finally, court-appointed masters or special administrators may also bring valuable information before the court.[68]

2. *The Elusive Question of Rights*

It is understandable, and probably even predictable, that federal judges wish to inform themselves by encouraging these varied means of participation in institutional suits. But such information may be obtained only at the cost of hearing a large number of people who assert interests that the law does not protect by any set of formal rules or standards. Superficially, this cost may be seen only as one of adjudicatory efficiency. But the issue

Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L. J. 470 (1976); Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 U.C.L.A. L. REV. 244 (1977). *See generally* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721 (1968).

64. Rule 24(a) provides:

> Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

FED. R. CIV. P. 24(a).

65. Rule 24(b) provides:

> Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

FED. R. CIV. P. 24(b).

66. *See In re* Estelle, 516 F.2d 480 (5th Cir. 1975) (denying motion for mandamus ordering district judge not to permit United States to participate as amicus or plaintiff-intervenor). *See also* Special Project, *supra* note 7, at 871-72 & n.4.

67. For criticism of the impact of experts in a school case, see E. WOLF, TRIAL AND ERROR: THE DETROIT SCHOOL SEGREGATION CASE 251-82 (1981).

68. Curtis Berger's story of his experiences as a special master makes clear that he was the source of a great deal of information for the district court. *See* Berger, *supra* note 16.

is also much deeper. The judge may be broadly informed about the consequences of judicial action, but to what end?

Once a judge has been informed, he or she may choose a remedial decree that protects the legal right at issue but that at the same time minimizes any adverse effects on those who assert non-legally protected interests.[69] At this level of analysis, the legally unicentric conceptual framework is preserved, for the court is free to choose only among variations as to which the plaintiff is legally indifferent. But even in this circumstance, the judge is faced with a complicated non-legal polycentic problem, for in trying to avoid adverse effects he or she will be required to assess normatively the effects of the possible decrees on all those asserting non-legally protected interests, and necessarily to do so without reference to legal norms.

Further, the cost of a court's listening to many people who assert interests that are not protected by legal norms may be more than merely to force the judge to solve a non-legal remedial problem. The right of the legally protected party may be vulnerable to modification or even redefinition because of the court's solicitude for the interests of those who are not legally protected. In fact, though not in theory, the problem may not be legally unicentric, for a judge may choose among variations of right and remedy as to which the plaintiff is *not* legally indifferent, depending on the degree to which he or she seeks to protect the interests of those who assert no legally protected substantive rights. For example, the legal right at stake in a prison case is a present right of prisoners not to be subject to unconstitutional conditions of confinement. Under this definition, habeas corpus is not only an easy but also the obviously correct remedy. For if the court enjoins state officials to improve prison conditions, the present right will not be vindicated because there will inevitably be delays in im-

69. This appears to be Charles Reich's proposal. *See* Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1260-61 (1966). Reich was writing about administrative law, however, where it may be a sufficient answer merely to require that an agency be broadly informed, without specifying precisely what consequences the information should have for the agency's decision.

Louis Jaffe's description of the obligation of an administrative agency to exercise what this Article calls "informed discretion" is apt here:

> Congress has seen fit to command the ICC to consider as relevant to decision a complex of complementary and conflicting interests. . . . It is not possible to formulate these interests in traditional right-duty terms. But I would emphatically reject the conclusion that because there can be no rights—no "legal injury" in the traditional sense—we are driven to the opposite pole that there is only a "public interest." *Where the legislature has recognized a certain "interest" as one which must be heeded, it is such a "legally protected interest" as warrants standing to complain of its disregard.*

L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 508 (1965) (emphasis in original). Note that Jaffe refers only to the ability to complain that an interest has not been "heeded" or has been "disregarded." This is different from an ability to complain that the decision on the merits is, as a substantive matter, incorrect.

For an exploration of the implications of this concept in administrative law, see Stewart, *supra* note 58, at 1760-1802.

proving the prison.[70] But district courts ordinarily refuse to grant habeas corpus in such cases, which suggests that a somewhat complex relationship exists between the constitutional right and its possible remedies.

The refusal to grant habeas corpus suggests strongly that the courts do not view prison cases as strictly legally unicentric. By permitting unconstitutional conditions of confinement to persist, a court is, in fact if not in theory, weighing the vindication of the constitutional right against society's interest in protecting itself against potentially dangerous criminals and in punishing and deterring criminal behavior. The analytic question is then whether the legal right is not fully vindicated because of these conflicting interests, or whether, instead, the legal right is something other than a present right to be free from unconstitutional conditions of confinement.

If the answer is that the right is a present right, and that delay in improving prisons is *pro tanto* a denial of that right, the *threat* of habeas corpus in order to coerce the state political branches to act is also an act that violates the prisoners' legal rights. That is, a court will threaten to employ a writ of habeas corpus in order to force the state authorities to take the discretionary action the court wishes to avoid taking itself. The process of so threatening, with its inevitable attendant delays, may be seen as a denial of the constitutional rights of the prisoners, and to that degree is a discretionary (and in one sense even an illegal) balancing of the rights of the prisoners against the non-legal interests of the society.

The courts' desire to act in institutional suits on the basis of a realistic assessment of the probable consequences of their acts, and to tailor their handling of requests for participation in institutional suits to achieve that end, thus brings to the surface important questions about the legitimate bases for the exercise of such judicial power. A court may inform itself broadly about the interests of the people who will be affected by the suit, and exercise its discretion to resolve the non-legal polycentric problem it then perceives. But this in itself does nothing to legitimate the exercise of that discretion, for it does not permit the judge to apply legal criteria to the non-legal interests that have been asserted. At one level, the task facing courts trying to legitimate solutions to such polycentric problems is therefore to devise some way to make the criteria of choice more limited, and somehow more legal. As it were, the task is to domesticate the discretion. At another level, the even more formidable—perhaps impossi-

70. The notion that a present right may not, in fact, be enforceable in the present is not confined to prison reform cases. *See, e.g.*, Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 22 (1970) ("[*Brown II*] asked of the laity an understanding of which lawyers are scarcely capable—an understanding that something could be unlawful, while it was nevertheless lawful to continue it for an indefinite time.")

ble—task facing courts is to design remedies that enforce a particular right rather than, in effect, create different rights depending on which remedy is chosen.

C. *The Attempt to Domesticate Discretion through Appellate Control*

Legal norms operate to control judicial behavior at two levels. At one level, they serve as a means of internal judicial control, enabling a conscientious judge to follow the law by conforming to applicable legal norms; at another, they serve as a means of external control, enabling an appellate court to control the behavior of a lower court judge who fails to conform to the applicable legal norms. Though the congruence between the legal norms that guide internally the decision of a lower court judge and those that permit an appellate court to exercise external control is not complete, legal norms are the primary and perhaps the sole legitimate means of appellate control over trial courts. Institutional suits, however, substantially involve non-legal polycentric problems resolvable only by reference to non-legal criteria, and questions of tactical and political judgment in implementing the chosen remedies. In such cases, there are no legal norms to guide the trial judge internally, and the traditional means of appellate control through legal norms are of very little use. Yet courts of appeals in institutional cases still attempt to control or at least to guide the district courts in the exercise of their discretion. These efforts at appellate control, and the limits on their ability to succeed, provide important insight into the nature of what is at stake.[71]

In normal usage, when describing the relationship between a trial and an appellate court, discretionary action refers to behavior of the trial judge that is beyond the power of an appellate court to control. Only when there has been an abuse of discretion can the appellate court correct the trial judge. Though it would be a clear abuse of discretion for a judge to employ certain forbidden criteria in drafting a remedial decree—for example, racial distinctions that harm blacks in a prison case—such issues rarely arise, among other reasons because the law forbidding the use of such criteria is so clear.[72] A trial court remedial decree may also involve an abuse of discretion if it exceeds the permissible scope of equity in remedying a constitutional violation. For example, a judge in a remedial order

71. There is surprisingly little academic literature on the subject. For a helpful beginning, see Hinkle, *Appellate Supervision of Remedies in Public Law Adjudication*, 4 FLA. ST. U.L. REV. 411 (1976), and Rosenberg, *Judicial Discretion of the Trial Court Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971). *See generally* K. LLEWELLYN, *supra* note 30; Orfield, *Appellate Procedure in Equity Cases: A Guide for Appeals at Law*, 90 U. PA. L. REV. 563 (1942).

72. *But see* Lee v. Washington, 390 U.S. 333, 334 (1968) (Black, Harlan, & Stewart, JJ., concurring) ("racial tensions" may be taken into account "in maintaining security, discipline, and good order in prisons and jails").

may do more than bring a prison system up to the line between the unconstitutional and the bad-but-constitutional; he or she may require further that the prison system be made a humane and decent place.[73] Or, in a more subtle version of the same thing, the judge may pressure the parties into agreeing to a plan that would accomplish this, and then incorporate their agreement into a decree. As will be seen below, the Supreme Court has occasionally tried in such cases to use as an instrument of appellate control a holding that a district court has exceeded the scope of its permissible remedial discretion.[74] But for the most part, this abuse of discretion rationale appears to permit effective control over only aberrational or idiosyncratic trial court behavior. More important, it does not permit appellate control over the trial court's resolution of the non-legal polycentric problems that are inescapably present whether or not the remedy exceeds the scope of the violation.

Beyond their control over the scope of remedial orders, the courts of appeals have not been able to base on legal norms the exercise of significant control over trial court actions. The exercise of further control has taken the form of attempts to influence district judges' handling of non-legal criteria that should, in theory at least, have been entirely within their discretion. It is conceivable that a non-legal remedial problem has a single right or best solution, though some agreement as to non-legal criteria would be an antecedent requirement; even if there is no single best answer, there may be a small group of good answers; or there may be a large group of good answers, and a few bad answers. The problem for an appellate court is not only to distinguish between good and bad answers, but to do so in a way that permits it legitimately to direct the trial court to choose a good instead of a bad answer.

If an appellate court confines itself to a conventional appellate role, most of the critical actions of the trial court in framing and implementing a decree in an institutional suit will go unreviewed. Yet many courts of appeals are unwilling to allow their role to be so limited. Judge Frank Coffin has explicitly addressed this problem in a recent article, contending that in institutional litigation the "[c]ontribution of [the] appellate court to policy, strategy, and tactics [is] more important than monitoring fact finding or legal principles."[75] Coffin suggests that the relationship between a court of appeals and a district court in an institutional suit should resemble a consultative process more than conventional appellate review. For instance, he proposes that at the stage of devising a remedy an "outside expert" judge sit with and advise the trial judge, or even that one or two

73. *See*, Mishkin, *supra* note 2, at 956.
74. *See infra* p. 679.
75. Coffin, *supra* note 18, at 989.

appellate judges sit in on "critical arguments" in the district court in order to gain a better understanding of the case than can be obtained from a cold record.[76] Coffin further suggests that the district judge participate in the appellate argument as either "questioner or questionee," and generally as a "resource person" throughout the appellate process.[77]

At one level, such suggestions are entirely sensible. District judges in institutional suits make decisions that are part of everyday life for administrative and political officials, and a district judge would find useful the same sort of informal advice and consultation that an administrator or politician receives. Some of Coffin's ideas may already be approaching fact. For example, one may see something like the "outside expert" idea in two Arkansas prison cases that were consolidated, with the two district judges involved sitting as a two-man trial court panel in the consolidated case.[78] Further, it is clear that appellate court dicta—as a form of consultative process—take on a special importance in institutional cases.[79]

Yet there remains the troubling question of what these means of control legitimately have to do with an appellate court system. This sort of appellate review does not correct errors of law. It merely adds the discretion of appellate judges to the discretion of the district judge. It may be that such a collaborative, or two-layered, discretion improves in some way the quality of the ultimate decision by the district judge. But even if there were some way to make such a determination, such formulation and enforcement of remedial decisions in institutional suits would still lie outside the conventional law-declaring function of the courts of appeals.[80]

It is possible that the courts in dealing with what are now perceived as non-legal polycentric problems in institutional suits are beginning to

76. *Id.* at 996.

77. *Id.* at 996-997.

78. Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967).

79. In one prison reform case, for example, the Eighth Circuit affirmed the judgment of the trial court in an opinion that included suggestions and advice for the district judge "for the purpose of being of assistance to the district court and to the parties [as much] as for any other purpose." Burks v. Teasdale, 603 F.2d 59, 62 (8th Cir. 1979) (Henley, J.). The circuit judge making the suggestions and giving the advice had been the district judge in the lengthy Arkansas prison litigation that culminated in Hutto v. Finney, 437 U.S. 678 (1978). *See infra* pp. 685-86.

80. Martin Shapiro points out the anomaly in our society of a judicial system that leaves important decisions unreviewable by an appellate body:

> Thus [courts] are one of the few agencies of government in which rank-and-file operators are subject to almost no supervision at all in the wielding of enormous discretion [in criminal sentencing]. Imagine the loss of legitimacy that any bureaucratic agency would suffer if the clients were told that the clerks at the window had broad discretion and their decisions were not reviewable by their superiors.

M. SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 53-54 (1981). He suggests that limitations on the power of appellate review predictably lead to other forms of control in addition, "such as judicial conferences, centralized personnel systems, and administrative reporting, to increase [appellate judges'] control over their subordinates." *Id.* at 51. *See also* Shapiro, *Islam and Appeal*, 68 CALIF. L. REV. 350 (1980).

transform wholly discretionary decisions into decisions guided by legal norms. In another guise, this appears to be what happened in the English equity courts as the impulse to "do equity" was gradually transformed into a system of rules and maxims. It is also possible that the implicit norm of judicial craft—reasoned elaboration or explanation—will tend to establish sufficiently consistent patterns of district court remedial behavior that some normative standards will eventually emerge.[81] This tendency might be reinforced if courts of appeals give markedly greater deference to remedial decrees in which district judges carefully set out the facts and arguments justifying the decrees and showing how they took into account the range of affected interests.

Yet such possibilities seem unlikely ever to be realized. The range of factors to be considered in drafting a remedial decree is simply too broad, and their non-legal quality too stubborn, to be susceptible to any such domestication. Except in the most general sense, a trial court drafting a remedial decree may never be able to follow an earlier court's remedial decree, and an appellate court sitting in review will probably never be able to establish law that a trial court can later follow. And, perhaps most important, even if such domestication were possible, the very act of bringing discretion under the control of legal norms may so reduce its flexibility that it can no longer serve its previous function. That is, courts exercising discretion in this restricted way may not have enough flexibility to respond effectively to the social, bureaucratic, and political problems they face.

The dilemma for the judicial process is deep and unavoidable. Discretion in resolving non-legal polycentric problems is inevitable in institutional decrees. And a court can never succeed in domesticating such discretion sufficiently to make it legal in nature while still permitting it to serve the function of discretion. Can discretion be illegitimate and essential at the same time? Though somewhat complex, the answer may be that when judicial remedial discretion is truly necessary, it is for that reason legitimate. The difficulty is defining necessity.

81. The elusive character of trial judge behavior is, however, well-known. The views of two district judges are of some interest here. Judge Frankel notes that "[m]ost of the social scientific writing on the 'judicial role' concerns appellate judges. . . . In the nature of their performances, trial judges are less orderly, less comfortably observable, more fugitive, but also more dramatic and possibly more challenging for the scholar." Frankel, *The Adversary Judge*, 54 TEX. L. REV. 465, 486-87 (1976). Judge Wyzanski asks, "Are the usages followed by trial judges anything more than patterns of behavior? Are they law in any sense? And even if they are law, are they too disparate and detailed ever to have an honored place in the study of jurisprudence?" Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1302 (1952).

IV. The Supreme Court and Institutional Suits: The Definition of Constitutional Rights, the Possibility of Legal Rules, and the Inevitability of Remedial Discretion

The Supreme Court has been able, by its formulation or choice of legal rule, to determine the occasions for the exercise of judicial remedial discretion in institutional suits. To a considerable extent, the Court has acted to limit the exercise of discretion to those occasions where it is "necessary."[82] But this approach raises the question, "necessary for what?" If trial court discretion is necessary in the sense that it must be exercised to achieve certain substantive goals, an analysis of the actions of the Court must encompass not only the discretion, but also the goals the Court seeks to achieve. If the legitimacy of the goals, and of the courts' being the agents for achieving those goals, is assumed or conceded, then discretion itself is no longer illegitimate; it is merely inevitable.

The behavior of the Supreme Court in several categories of institutional suits reveals a number of complex and important assumptions by the Court both as to the significance of several constitutional values and as to the legitimacy of trial court discretion. In crude summary, the greater the importance the Court has attached to a constitutional value, the more judicial remedial discretion it has been willing to tolerate as a consequence of its definition of the right that gives effect to that value. As a corollary, the Court has tried to reduce the role of discretion by its formulation or choice of legal rule, so that in those areas where it has been able effectively to eliminate or reduce remedial discretion the Court has been more willing to recognize constitutional rights than it might otherwise have been.[83] This reading of the Supreme Court cases not only helps to explain the cases themselves, but also suggests an analogous rationale for the exercise of trial court remedial discretion in any particular case where, because of an established rule of constitutional liability, institutional reform is required.

The foundation of modern institutional cases lies in the apportionment and school segregation cases of the Warren Court. In both areas, the Court decided that the importance of the constitutional values at stake justified departures not only from prior rules of law, but also from the relatively passive and non-interventionist procedural posture that had ac-

82. *See* K. DAVIS, *supra* note 22, at 27.

83. There is a reductionism in generalizing so straightforwardly from the cases. The variables are so many and so complex that rigorous proof is impossible, and in individual cases other factors may so predominate that the relationships postulated here are obscured. But significant relationships may be perceived among the nature of the constitutional value at issue, the possibility of giving effect to that value by a legal right requiring little or no discretion for its implementation, and the necessity for trial court discretion to remedy a violation of a legal right.

companied those prior rules. Encouraged by the example of the Warren Court, and even to a degree by that of the Burger Court, many lower federal courts have responded sympathetically to plaintiffs' claims for relief not only in apportionment and school discrimination cases, but in state prison and mental hospital cases as well. A close analysis of the cases suggests, however, that the interventionist posture and the accompanying lower court remedial discretion do not rest on the same basis in all four categories of cases.

In the apportionment cases, the Court intervened to correct a malfunction in the political process; in the school cases, it intervened to protect against a possibly uncorrectable bias in the political process. To some degree in the apportionment cases, and to a markedly lesser degree in the school cases, the Court was able to devise a legal rule of liability that effectively eliminated discretion that might otherwise have been necessary for the trial court to fashion remedies for constitutional violations. Prison cases stand off to one side. Though prisoners are politically powerless—and though, as an analytically distinct factor, courts may have a special interest in prisons because they are part of the criminal justice system—the political institutions are not malfunctioning or biased in as deep and systemic a fashion in prison cases as in the apportionment and race cases. The position of prisoners is reflected, though still somewhat obscurely, in recent cases in which the Court has found a right to be free from unconstitutional conditions of confinement, but has formulated the right so that the grounds, and hence the occasions, for judicial intervention and remedial discretion are carefully limited. Finally, the mental hospital cases suggest that where there appear to be few systemic political defects—and where the courts are otherwise little connected with the institution whose practices are challenged—the Court's desire to avoid trial court remedial discretion so strongly affects the definition of the right that no constitutional right requiring the exercise of judicial remedial discretion will be found.

A. *The Apportionment Cases: One Person-One Vote and Beyond*

In the apportionment cases, the Supreme Court intervened in redistricting decisions that had previously been the sole preserve of the states. The Court did so even though it was clear that federal trial courts would then almost necessarily be forced to exercise considerable discretion to solve some of the non-legal polycentric problems inherent in such decisions. The Supreme Court's willingness to intervene can be explained by several related elements. First, the Court was able to devise a legal rule of constitutional liability that legitimated its intervention, both because of its simple, "legal" quality, and—perhaps more important—because it found a

deep resonance in the political assumptions of our society. Second, the Court was able to insist, though with only partial success, that the role of the district courts in devising remedies be limited. Finally, the Court saw as a goal of great, even overriding, importance the preservation of an electoral system of sufficient integrity that elected bodies' political decisions could themselves be legitimate.

1. *The Development of One Person-One Vote*

In 1946, in *Colegrove v. Green*,[84] the Court affirmed the dismissal of a suit alleging malapportionment among Illinois electoral districts and seeking to enjoin Illinois officials from conducting a state election. Justice Frankfurter, in a plurality opinion, wrote that "the appellants ask of this Court what is beyond its competence to grant."[85] Frankfurter went on to say that, in his view, the particular form of judicial institutional incompetence derived from the political question doctrine, sounding in questions of separation of powers and the superior competence of the political branches to make certain determinations. Sixteen years later, the Court overruled *Colegrove* in *Baker v. Carr*,[86] a case that Chief Justice Warren later described as the most important of his tenure.[87] The Court held that a suit alleging malapportionment among Tennessee electoral districts was neither political nor nonjusticiable, and remanded to the district court without specifying the nature of the appropriate relief. Justice Frankfurter, in dissent, elaborated on the themes of his *Colegrove* opinion, arguing vigorously that the Court was entering a "political thicket" in which the normal criteria for judicial decisions were lacking.[88]

Justice Frankfurter was, of course, correct. Manageable judicial standards were absent in apportionment cases as the law then stood. Acceptable methods of apportionment were many and varied. History, geography, accident, and political gerrymandering were all permissible factors, and the discretion of the political branches to establish electoral bounda-

84. 328 U.S. 549 (1946).

85. *Id.* at 552.

86. 369 U.S. 186 (1962). The decision received a great deal of prompt academic attention. *See, e.g.*, Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1; Bickel, *The Durability of* Colegrove v. Green, 72 YALE L.J. 39 (1962); Black, *Inequities in Districting for Congress:* Baker v. Carr *and* Colegrove v. Green, 72 YALE L.J. 13 (1962); McCloskey, *The Supreme Court, 1961 Term—Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54 (1962); Neal, Baker v. Carr: *Politics in Search of Law*, 1962 SUP. CT. REV. 252.

87. E. WARREN, THE MEMOIRS OF EARL WARREN 306 (1977); N.Y. Times, July 6, 1968, at 1, col. 8.

Alexander Bickel thought this a "curious judgment." "Actually," he wrote, "Chief Justice Warren is quite wrong." Bickel, *The Supreme Court and Reapportionment*, in REAPPORTIONMENT IN THE 1970S, at 58 (N. Polsby ed. 1971). Bickel was a consistent doubter on the reapportionment decisions. *See* A. BICKEL, *supra* note 38, at 151-73.

88. 369 U.S. at 266-330.

ries was limited only by a very few clear commands against the employment of forbidden criteria. Within the scope of permissible political discretion, a number of different substantive and process-related purposes could be served, and the balancing and compromising among those purposes were left to the political branches.[89] The primary difficulty for Frankfurter was not that courts were unable to perceive the interaction of the different purposes that might be served by different electoral arrangements. Judicial incompetence derived rather from the lack of legitimate judicial criteria, since the criteria available for choosing among electoral arrangements were non-legal in nature. In other words, though he couched it in terms of the political question doctrine, Frankfurter perceived apportionment as a non-legal polycentric problem.

The majority of the Court shared Frankfurter's perception not only of the non-legal polycentricity of the problem, but also of the ability of the judiciary to resolve such a problem. And because Frankfurter was correct, the Court molded the political system to fit the institutional needs of the judiciary. The result was the "one person-one vote" formula of *Reynolds v. Sims*,[90] which eliminated the polycentricity in numerical malapportionment by making that part of the problem legal in nature. Though the Supreme Court exercised its own discretion in formulating the *Reynolds v. Sims* rule, the application of the rule by the trial court required essentially no exercise of discretion. Perhaps more important, the one person-one vote rule established a legal standard by which trial court behavior could be controlled on appeal.

The choice of the one person-one vote standard produced a sort of excessive cure of the constitutional disease. At the time suit was brought in *Baker v. Carr*, the malapportionment in Tennessee was such that 37% of the voters elected 60% of the state senators, and 40% of the voters elected 63% of the state representatives.[91] If malapportionment in Tennessee (or in the states generally) had been of lesser magnitude, the Court in *Baker v. Carr* might have found that no cause of action had been stated. Yet once the Court plunged into the "political thicket," it felt obliged to create a more orderly universe than it previously had felt compelled to protect.[92]

89. *Id.* at 301-24.

90. 377 U.S. 533 (1964).

91. 369 U.S. at 253.

92. Phil Neal complained, even before *Reynolds v. Sims* was decided, that a principle of "equality of voting weight" was "about as adequate an instrument as would be a ruler for judging a work of sculpture or a metronome a symphony orchestra." Neal, *supra* note 86, at 284. Leaving the aesthetic appeal of his analogies aside, one must conclude that Neal misses the point. The Court in choosing the one person-one vote rule did not merely measure the sculpture; it resculpted it. Stated another way, the one person-one vote rule may be seen as an end in itself rather than merely a means of approximating some other, more fluid political reality. *See also* Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 232 (1972).

The desire to make remedy congruent with right, and the desire to make the remedy as well as the finding of liability reviewable on appeal, impelled the Court to redefine the disease.

In sum, the Court in the one person-one vote cases reformulated a highly polycentric political problem to make it amenable to conventional judicial criteria. The reformulation entailed a sacrifice, for political problems that might have been best resolved by some form of deviation from the one person-one vote principle could no longer be resolved in that way.[93] Yet the sacrifice was inseparable from the benefit produced for the judicial process, for it enabled the courts to state, to apply, and to review on appeal a non-discretionary legal rule. One should not conclude, however, that the Court will always deal easily or readily with a highly polycentric problem. It did so in the apportionment cases only because it perceived the constitutional value at stake as sufficiently substantial to warrant such action; because the one person-one vote rule struck such a responsive chord in the political value system of the country; and because the Court could, by the choice of the one person-one vote rule, eliminate some of the unreviewable trial court remedial discretion otherwise attendant on the resolution of a polycentric problem.

2. *The Limits of One Person-One Vote*

But one person-one vote may be less significant for what it accomplishes than for what it does not. It fails to accomplish two notable things. First, the one person-one vote formula does not remove the necessity for the exercise of substantial remedial discretion.[94] Second, it has had only a limited impact on voting inequality.

One person-one vote says nothing about the internal composition of political districts. In this area, Frankfurter's position has prevailed in the sense that no federal legal standards have been imposed. But there is a fatal twist. Frankfurter would have kept the federal courts out of redistricting altogether, and avoided any judicial involvement in the resolution of the non-legal polycentric problems of political redistricting. In contrast, the one person-one vote rule forces the federal judiciary to become involved in redistricting decisions that necessarily present such problems. For whenever districts are redrawn to comply with the one-person-one vote standard, the question of where to draw the new district lines—and

93. *See* Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 991 (1967) ("It is, of course, one of the risks of subjecting complex controversies to judicial determination that the rules evolved compel arbitrary simplification.")

94. Several good student Notes were written on the subject in the mid-1960's: Note, *supra* note 52; Note, *Legislative Reapportionment—The Scope of Federal Judicial Relief*, 1965 DUKE L.J. 563; Comment, *supra* note 16.

with what political effect—automatically arises.

The Court directly addressed this difficulty in *Reynolds v. Sims*, stating that "judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so."[95] This recognition of the desirability of the state legislature's performing its own redistricting indicates the discomfort the Court felt in injecting a federal court into the remedial process. The degree of the Court's discomfort is underlined by the Court's willingness to defer to the legislature whose non-representative quality has resulted from the very constitutional violation that is the basis for the redistricting.[96] Further, in those situations in which the district judge must draw up a proposed plan, the Court has tried to reduce the non-legal quality of the district court's intervention by requiring that it be subject to requirements that do not apply to the legislature: for instance, a court-imposed plan may not contain multimember districts, though a legislative plan may;[97] and a court-imposed plan may not deviate from precise mathematical equivalence as much as a legislative plan may.[98] But despite these attempts to minimize district courts' remedial discretion, in a number of cases federal district courts do make discretionary remedial decisions whose unavoidable effect is to resolve the non-legal polycentric problems inherent in redistricting.

A second problem is that because of the continued availability of gerrymanders, the one person-one vote formula has only a limited impact on voting inequality.[99] The explanation for the Court's unwillingness to for-

95. 377 U.S. 533, 586 (1964). *See also* Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656, 676 (1964).

96. *See* Note, *supra* note 52, at 515. The Court has also required federal courts to defer to state court redistricting decisions. Scott v. Germano, 381 U.S. 407 (1965); Scranton v. Drew, 379 U.S. 40 (1964).

97. Chapman v. Meier, 420 U.S. 1 (1975).

98. Conner v. Finch, 431 U.S. 407 (1977).

99. The failure of the one person-one vote rule to control gerrymanders was obvious very early. Many commentators argued for a new rule, or set of rules, that would protect against gerrymanders as well as against numerical malapportionment. *See, e.g.*, R. DIXON, *supra* note 7, at 458-99; Baker, *Gerrymandering: Privileged Sanctuary or Next Judicial Target?* in REAPPORTIONMENT IN THE 1970S, at 121 (N. Polsby ed. 1971); Clinton, *Further Explorations in the Political Thicket: The Gerrymander and the Constitution*, 59 IOWA L. REV. 1 (1973); Dixon, *The Warren Court Crusade for the Holy Grail of One-Man-One Vote*, 1969 SUP. CT. REV. 219, 253-68. Other commentators, particularly political scientists, have pointed out that the ability to gerrymander electoral districts largely cancels out any theoretical gains in representativeness obtained under the one person-one vote rule. Ward Elliot reports that "the available evidence seems more than sufficient . . . [to] rank reapportionment as a trivial political influence compared to such traditional forces as parties, personalities, interest groups, and the perversities of popular fashion." Elliot, *Prometheus, Proteus, Pandora, and Procrustes Unbound: The Political Consequences of Reapportionment*, 37 U. CHI. L. REV. 474, 481 (1970). He also points out, with some glee, that "a gerrymander, to be effective, must be kept up to date, and nothing offers itself so readily to redrawing gerrymanders as reapportionment." *Id.* at 483. *See also* Casper, *Apportionment and the Right to Vote: Standards of Judicial Scrutiny*, 1973 SUP. CT. REV. 1, 2 ("[I]t remains unclear . . . what, if any, right 'to be represented' is entailed in the right to

bid or control gerrymanders lies in the combination of the difficulty in defining a non-gerrymandered district, and the difficulty of formulating an acceptable rule of liability that would effectively eliminate gerrymandering without requiring district courts to exercise substantial discretion in redressing a violation of the rule. The Court's approach to gerrymandering may be best understood by analyzing two rules that would eliminate or restrict gerrymanders, but that the Court has refused to adopt: a rule requiring proportional representation, and a rule prohibiting multimember districts.

The case in which the Court came closest to adopting a system of proportional representation is *United Jewish Organizations v. Carey*,[100] in which Hasidic Jews in Brooklyn challenged a redistricting plan that split their community between two predominantly black districts. The redistricting plans were so drawn because United States Justice Department officials had indicated that they would not approve New York redistricting plans under the Voting Rights Act of 1965[101] unless four predominantly black state senate and state assembly districts were created. Justice White wrote a plurality opinion for the Court, concluding that the redistricting was valid. One of his grounds, with which only two other Justices agreed, was that a proportional system of "fair representation" should be a permissible part of a redistricting plan required by the Attorney General;[102] the other five Justices were unwilling to adopt this rationale.[103] Their reluctance to endorse a proportional representation system under the Civil Rights Act almost necessarily implies that the Court will not impose such a rule as a constitutional requirement.

A second rule, the prohibition of multimember districts, would eliminate a special sort of gerrymander. A multimember district is one in which several members of a governing body are elected from a single large district rather than separately from as many districts as there are members. The possibilities for gerrymandering are obvious. For example, the voters in a large multimember district with a twenty-five percent black population could elect four white representatives, though if the same area were divided into four smaller districts, one of which contained a primarily black population, the same voters might well elect one black and three white representatives.[104] Though the Court has prohibited district courts

vote."); Sickels, *Dragons, Bacon Strips and Dumbbells—Who's Afraid of Reapportionment?* 75 YALE L.J. 1300 (1966).

100. 430 U.S. 144 (1977).

101. 42 U.S.C. § 1973c (1976).

102. 430 U.S. at 168.

103. Justice Marshall did not participate in the case.

104. Multimember districts have received a substantial amount of academic attention. *See, e.g.*, R. DIXON, *supra* note 7, at 503-20; Carpeneti, *Legislative Apportionment: Multimember Districts and*

from using multimember districts in reapportionment plans that the courts themselves devise, it has never prohibited state political entities from using them.[105]

The only exception is a multimember district in which it can be shown that the purpose behind its adoption is racial discrimination.[106] In 1973, in *White v. Regester*,[107] the Court unanimously upheld a three-judge district court opinion striking down two Texas multimember districts. Though the Court did not squarely hold that discriminatory purpose was a necessary element of a constitutional violation, its opinion relied heavily on detailed findings in the district court from which purposeful racial discrimination could easily be inferred. Seven years later, in *City of Mobile v. Bolden*,[108] the Court held that a finding of racially discriminatory purpose is essential for holding a multimember district unconstitutional.[109]

Fair Representaion, 120 U. PA. L. REV. 666 (1972).

John Banzhaf has argued that multimember districts are incompatible with the one person-one vote rule, irrespective of their potential for racial discrimination. He contends that more populous multimember districts have a disproportionate advantage in a representative body over less populous districts, whether single member or multimember. Banzhaf, *Multi-member Electoral Districts—Do they Violate the One Man-One Vote Principle?* 75 YALE L.J. 1309 (1966). In *Whitcomb v. Chavis*, however, the Court noted "that [Banzhaf's] position remains a theoretical one." 403 U.S. 124, 145 (1971).

105. The United States Department of Justice, however, under the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1976), may object to a change from single member to multimember districts even in the absence of proof of discriminatory purpose. Georgia v. United States, 411 U.S. 526, 531-32 (1973); Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969). *But see* Beer v. United States, 425 U.S. 130 (1976) (two at-large New Orleans City Council seats left undisturbed because only changes in manner of electing other five City Council members were proposed).

106. Of course, gerrymanders with a racially discriminatory purpose were forbidden even before *Baker v. Carr* was decided. Gomillion v. Lightfoot, 364 U.S. 339 (1960) (alteration of city limits of Tuskegee, Alabama, from perfect square to "uncouth twenty-eight sided figure," so that all but four or five of about five hundred black voters were excluded from city, held unconstitutional). *But see* Wright v. Rockefeller, 376 U.S. 52, 56 (1964) (eleven-sided step-shaped boundary drawn to separate 86.3% black and Puerto Rican congressional district from 94.9% white district allowed because plaintiffs "failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines").

107. 412 U.S. 755 (1973). For an adumbration of *White v. Regester*, see Whitcomb v. Chavis, 403 U.S. 124 (1971) (challenge to multimember districts not sustained). Carpeneti, *supra* note 104, provides a helpful chronological study of the cases preceding *White v. Regester*.

108. 446 U.S. 55 (1980).

109. In City of Rome v. United States, 446 U.S. 156 (1980), decided on the same day as *Mobile*, Justice Rehnquist wrote in dissent:

> At least four Members of the Court in *Mobile* held that purposeful discrimination would be prerequisite to establishing a constitutional violation in a case alleging vote dilution under the Fourteenth and Fifteenth Amendments. . . . *While a majority of the Court might adopt this view*, see *ante*, [446 U.S. at 94] (opinion of White, J.), the voting procedures adopted by Rome would appear to readily meet the standard of constitutionality established by Mr. Justice Stevens. See *ante*, [446 U.S. at 90].

Id. at 210 n.3 (emphasis added).

Rehnquist's caution in reading *Mobile* is probably influenced by his argumentative purpose in *Rome*. He is attempting to establish that the electoral practices of the city of Rome were constitutional *under any possibly applicable standard*, and thus in this context wants to read the standard in *Mobile* as a possibly lenient one. The thrust of Justice White's and Justice Blackmun's opinions in *Mobile* seems sufficiently clear, however, that one may safely conclude that they would require a finding of purposeful discrimination to support a constitutional violation under the Fourteenth or Fifteenth

This is not a wholly satisfactory rule—as the Justices themselves must know—because difficulties of proof will protect some multimember districts that in fact exist because of purposeful discrimination.[110] But the Court appears to have seen any other rule as even less satisfactory.

Rules requiring proportional representation or prohibiting multimember districts are unacceptable as a matter of constitutional compulsion because they ask more of the federal courts than they can deliver. It is striking that the cases in which questions of proportional representation and multimember districts arose generally involved race. But even here, where one might expect the Court to have been most willing to intervene, the Court did not formulate any legal rule analogous to one person-one vote. Even under the Voting Rights Act, where the originator of a redistricting plan would be the Attorney General rather than a federal court, the Court refused to adopt a proportional representation plan.

Absent purposeful racial discrimination, a rule of proportional representation cannot easily be limited to particular groups, even racial groups, that demand electoral strength in proportion to their numbers; and a rule that prohibits multimember districts merely because of unfavorable impacts on certain groups proves too much. Any voting scheme, good or bad, is designed to measure weights or preferences and thus to give strength to particular voting groups. A rule that forbids apportionment schemes with certain impacts because they hurt particular groups will almost certainly be unable to distinguish between unfavorable election results that should be forbidden as discriminatory and those that should be permitted to stand because they measure accurately, even if unfavorably for a minority group, the preferences of the majority. Finally, even if a court could adequately define a few impermissible impacts, the task of devising a remedy for an impermissible scheme would require a trial judge to operate substantially without controlling legal norms, for the judge would have to choose among remedial electoral plans with a wide variety of permissible impacts, but with no basis in law for deciding which to prefer over the others.

Amendments.

110. The requirement of discriminatory purpose was probably inevitable in light of comparable requirements in other cases. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). *See also* Schwenn, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L.F. 961; Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977). The question of what is purposeful discrimination has, of course, long bedevilled both the courts and academic commentators. The standard law review articles on the subject include Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, and Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). *See also* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

In the end, political decisions to gerrymander contain so many non-legal polycentric elements that the potential gains from requiring proportional representation or prohibiting multimember districts are not worth the cost of formulating rules to restrict or eliminate them. As legal formulae, such requirements would too narrowly restrict the permissible range of solutions to the complicated polycentric problems inherent in American political arrangements. Some problems are simply best resolved without legal rules, and thus are best resolved by non-judicial bodies.

The Court in the reapportionment cases has assured numerical equality among voting districts, but the practical impact on political life is debatable. It is at least a plausible conclusion that the representative quality of electoral systems after *Reynolds v. Sims* is not substantially better than it was before.[111] Even if this is true, however, it does not follow that the apportionment cases were wrongly decided. For a sufficient justification for the cases may be the one Hans Linde has suggested: "[T]he premise of equality of citizenship [is] a *constitutive principle* in American politics for its own sake, as a means to no 'realistic' end other than a renewed sense of the principled legitimacy of the whole political enterprise."[112] But legitimacy runs both ways. The legitimacy of the federal courts' intervention rests on several complementary bases, perhaps none of which is independently sufficient. The intervention has been on the basis of a fairly elementary legal rule that provides a controlling standard. Further, to the extent that judicial discretion is necessary in choosing among various plans that would remedy numerical malapportionment, the Court has directed district courts to confine their discretion more narrowly than the discretion of the political bodies. Finally, and possibly most important, the basic legitimacy of the courts' intervention depends on the purpose it serves—the restoration of legitimacy to the electoral process.

B. *The School Cases: Remedial Discretion and the Choice between Desegregation and Integration*

In the school cases, the Court initiated, in the face of predictable and frequently strenuous political opposition, a fundamental restructuring of a significant part of American society. The Court's initial willingness to intervene was due primarily to the overriding importance of the constitutional value at stake, combined with the Court's sense that it could prevail over the political opposition. The Court's continued willingness to intervene is still attributable primarily to the importance of the constitutional value at stake; but in recent years its willingness appears to be increas-

111. See *supra* note 99.
112. Linde, *supra* note 92, at 232 (emphasis in original).

ingly dependent on a definition of the legal right that substantially reduces the possibility of continuing or recurring judicial involvement in particular cases, and on a sporadic reduction of the remedial discretion of the district court. Even in the school cases, the Court has felt the constraints of process-oriented judicial norms, and these norms have affected the nature both of the rules of constitutional liability and of the remedies for their violation.[113]

1. Brown *and the Beginning of School Desegregation*

In 1954, in *Brown v. Board of Education*, the Court held that racially separate educational facilities were "inherently unequal" and hence unconstitutional.[114] A year later, in *Brown II*, the Court held that the constitutional violation should be remedied with "all deliberate speed," and with reliance on the "traditional attributes of equity power."[115] Neither *Brown I* nor *Brown II* drew a distinction between desegregation and integration. Possibly it seemed then, as it does not today, that there was little significant difference between them.[116] If desegregation and integration meant the same or almost the same thing, dismantling the apparatus of segregation should, without more, have cleared the way to integration. But it is no longer possible, if it ever was, to entertain that notion. The history of the Court's decisions since *Brown* is largely the history of the growing doctrinal recognition of this fact, and of the Court's growing discomfort

113. For a useful, though somewhat dyspeptic, tracing of the Supreme Court desegregation decisions from 1954 to 1979, see Kurland, *The School Desegregation Cases in the United States Supreme Court: 1954-1979*, 1979 WASH. U.L.Q. 309. *See also* J. WILKINSON, FROM *Brown* TO *Bakke* (1979).

114. 347 U.S. 483, 495 (1954).

115. Brown v. Board of Educ. II, 349 U.S. 294, 300-01 (1955). For a non-lawyer's account of *Brown* and the litigation leading up to it, see R. KLUGER, SIMPLE JUSTICE (1975). For a sophisticated historical account of the Justices' deliberations in the school cases between 1948 and 1958, see Hutchinson, *Unanimity and Desegregation: Discrimination in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1 (1979). *See also* Tushnet, *Thurgood Marshall as a Lawyer: The Campaign against School Segregation*, 1945-1950, 40 MD. L. REV. 411 (1981).

116. If indeed that was the case, such optimism could not persist. In 1955, the three-judge district court in the South Carolina case that had been one of the four cases consolidated in *Brown* wrote, in a per curiam opinion commonly attributed to Fourth Circuit Judge Parker, "The Constitution . . . does not require integration. It merely forbids discrimination." Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C.), *on remand from* Brown v. Bd. of Educ., 349 U.S. 294 (1955). For a later view, see United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 389 (5th Cir. 1967) (en banc) ("The court holds that boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system. . . . Expressions in our earlier opinions distinguishing between integration and desegregation must yield to this affirmative duty we now recognize.")

By 1964, Alexander Bickel could say that it was "no novelty to suggest that [desegregation and integration] are very substantially different matters." Bickel, *The Decade of School Desegregation*, 64 COLUM. L. REV. 193, 194 (1964). In response to Bickel's article, John Kaplan wrote: "Desegregation may be the problem of the last decade and integration of this one." Kaplan, *Comment on* The Decade of School Desegregaton: Progress and Prospects, 64 COLUM. L. REV. 223, 229 (1964).

over its significance for the role of the federal judiciary.[117]

For the first few years after *Brown*, the remedial efforts of the federal district courts resembled the preferred judicial posture—ordering that certain things not be done. At that time, the practices of many states and local school boards were so obstructionist that it was still possible to imagine that the cessation of such behavior was remedy enough.[118] *Cooper v. Aaron*,[119] in which the Court in 1958 refused to permit a two and one-half year delay in desegregating schools in Little Rock, and *St. Helena Parish School Board v. Hall*,[120] in which the Court in 1962 invalidated a Louisiana statute permitting local school boards to close the public schools and rent out the buildings for use as private schools, are good examples. The holdings in these cases correspond approximately to resolutions of legally unicentric problems. The Constitution prohibited the challenged behavior, and the Court therefore required that it cease.[121]

The recognition that the elimination of legal segregation would not of itself lead to integrated schools did not make its way into a Court opinion until 1968, in *Green v. County School Board of New Kent County*.[122] In

117. The strain on the judicial process was felt early. *Compare* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) *with* Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960), *and* Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959). *See also* A. BICKEL, *supra* note 31, at 49-65; Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

118. For detailed accounts of desegregation efforts through 1957, see McKay, *"With All Deliberate Speed": A Study of School Desegregation*, 31 N.Y.U. L. REV. 991 (1956), and McKay, *"With All Deliberate Speed": Legislative Reaction and Judicial Development 1956-1957*, 43 VA. L. REV. 1205 (1957).

119. 358 U.S. 1 (1958).

120. 368 U.S. 515 (1962).

121. J. Harvie Wilkinson roughly divides the school cases after *Brown* into four stages: "absolute defiance," from 1955 to 1959; "token compliance," from 1959 to 1964; "modest integration," after 1968; and "massive integration," after 1968. J. WILKINSON, *supra* note 113, at 78. Significant Supreme Court school cases prior to 1968 are Cooper v. Aaron, 358 U.S. 1 (1958) (unanimous opinion, signed individually by each Justice, denying delay in desegregating public schools in Little Rock, Arkansas); St. Helena Parish School Bd. v. Hall, 368 U.S. 515 (1962) (per curiam opinion invalidating Louisiana statute under which local school board, upon a vote of electorate, could close public schools and rent them for use as private segregated schools); McNeese v. Board of Educ. 373 U.S. 668 (1963) (eight-justice majority holding that black plaintiffs alleging unconstitutionally segregated schools need not exhaust their state administrative remedies before coming to federal court; Justice Harlan dissenting); Goss v. Board of Educ. 373 U.S. 683 (1963) (unanimous opinion invalidating plan that permitted students to transfer out of school in which they were a minority without showing good cause, but required students wishing to transfer into school in which they would be a minority to show good cause); Griffin v. County School Bd., 377 U.S. 218 (1964) (seven-justice opinion holding that district court may order that public schools be reopened after school board closed them in 1959 in order to avoid integration); Bradley v. School Bd., 382 U.S. 103 (1965) (per curiam opinion holding that desegregation plan involving only students and delaying full inquiry into allegations of bias in faculty assignment was deficient); Rogers v. Paul, 382 U.S. 198 (1965) (per curiam opinion holding that plan that desegregated one grade a year was too slow).

122. 391 U.S. 430 (1968). J. Harvie Wilkinson describes *Green* as "travel[ling] far beyond the Court's previous pronouncements on school desegregation." J. WILKINSON, *supra* note 113, at 116. Owen Fiss describes *Green* as the "first significant development in Supreme Court doctrine" on the question of integration versus desegregation. Fiss, *The Charlotte-Mecklenberg Case—Its Significance*

Green, the county school board had adopted a freedom-of-choice plan that allowed students to choose which of two schools they wished to attend. In the three years the plan had been in operation, some black children had chosen to attend the previously all-white school, but no white children had chosen to attend the previously, and still, all-black school. The Court held that this plan was constitutionally insufficient, and that the school board should be required to formulate a new plan that would "promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."[123]

2. *Choosing Between the Historical and the End-Result Principle*

Two important analytic matters underlie *Green*. First, and most important, the problem of defining the constitutional right at issue was becoming acute. If the right was merely to be free of unconstitutional segregation by law, the freedom-of-choice plan seemed sufficient to vindicate that right.[124] But the freedom-of-choice plan was not sufficient to achieve the end the Court had in mind, the creation of a system in which there were "just schools." The meaning of "just schools" is, of course, not obvious beyond what it does *not* mean in this case. It is not obvious, for instance, that the Court meant to require substantially integrated schools in all circumstances. What is clear is that the Court either had a view of the constitutional right at issue as different from a narrow right to be free from unconstitutional discrimination, or it had an expansive view of the appropriate remedy for the effects of past illegal school segregation.[125] Perhaps it had both.

The choice, reduced to unambiguous terms that the Court in *Green* was unwilling to employ, was between an historical principle and an end-result principle.[126] An historical principle would have mandated that a stu-

for Northern School Desegregation, 38 U. CHI. L. REV. 697, 698 (1971).

123. 391 U.S. at 442.

124. *See* Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 452-53 (1973).

125. Frank Read and Lucy McGough in their history of desegregation cases in the Fifth Circuit describe that court's reaction to *Green*:

> Vigorously pushing desegregation pursuant to the *Green* mandate, [the Fifth Circuit] was at the same time seeking innovative ways to force school districts to come forward with plans that promised "realistically to work now." The Circuit focused more and more on the "figures"—what would be the percentage of integration if a particular proposed school board plan were approved? Because of *Green*'s indication that fifteen per cent integration was not enough, the percentage of black children attending previously all white schools became *the* critical factor. . . . Chief Judge Brown stated succinctly what was to become the overriding concern of the Circuit: "The result is in figures."

F. READ & L. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH 476 (1978).

126. I am borrowing the terminology from R. NOZICK, ANARCHY, STATE, AND UTOPIA 153-55 (1974), but the distinction, expressed in these words or others, is an essential part of virtually all

dent had a right to attend a school that had never been unconstitutionally segregated, or if it had been so segregated, to a remedial decree that insofar as possible undid the effects of the past unconstitutional segregation. Any segregation attributable to factors to which the Constitution does not speak would not be prohibited by an historical principle. An end-result principle would have provided that a student had a right to an integrated school. Under an end-result principle, history would be irrelevant, for it would be the fact of segregation rather than the history behind it that would be unconstitutional.

Second, the Court in *Green* faced a choice intimately related to the choice between an historical and an end-result principle—the choice of remedy. The range of permissible injunctive remedies can obscure the nature of the wrong being remedied, and in extreme cases the remedy may be so sweeping that the narrow right actually violated may take on a secondary importance. The scope of remedial choice may help to keep ambiguous the nature of the right at issue, for so long as the remedy does not need to be tied closely to the right being violated, the nature of the right can escape precise definition.

The history of school cases after *Green* is the history of the Court's reluctance to choose between the historical and the end-result principles for determining whether a constitutional violation has occurred. This difficulty is, in turn, mirrored in the Court's difficulty in formulating consistent principles for the fashioning of remedies. Three years after *Green*, the Court in *Swann v. Charlotte-Mecklenburg Board of Education*[127] affirmed a district court decree in which school attendance boundaries were redrawn. Students were reassigned among schools to eliminate one-race schools and to achieve some degree of racial "balance" in the school system, and busing was ordered to achieve these objectives. In affirming the decree, the Court emphasized that the goal was still "to eliminate from the public schools all vestiges of state-imposed segregation,"[128] but the Court was vague about the permissible scope of the remedial decree. The Court's unwillingness to define the wrong precisely and to specify with particularity the corresponding remedy was, if anything, more obvious in a companion case, *Davis v. School Commissioners of Mobile County*, in which the Court said: "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest pos-

critical writing on the subject. *See, e.g.*, Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHIL. & PUB. AFF. 3 (1974); Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972). The historical and end-result principles have, of course, taken their form in the school cases as the de facto and de jure principles. *See* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

127. 402 U.S. 1 (1971).

128. *Id.* at 15.

sible degree of actual desegregation, taking into account the practicalities of the situation. . . . The measure of any desegregation plan is its effectiveness."[129]

In two subsequent cases, *Keyes v. School District No. 1, Denver Colorado*,[130] and *Pasadena City Board of Education v. Spangler*,[131] the Court began to clarify its choice between the historical and end-result principles. In *Keyes*, decided in 1973, the Court took its first school segregation case from a major city outside the South.[132] The Denver schools were typical of many northern urban schools in that they were largely segregated even though there had been no history of unlawful discrimination even remotely comparable to the systematic segregation laws and practices of the South. The legal framework the Court chose for the Denver schools, however, followed the model developed for southern schools: a court should order the elimination of the segregative effects of past de jure discrimination rather than order the creation of an integrated school system without regard to the history behind the existing system.[133] The Court tried to reduce the awkwardness of applying the historical principle in a northern setting (and to preserve the ability of federal courts to achieve some degree of actual integration) by establishing an elaborate scheme of presumptions from which illegal, purposeful segregation on a system-wide basis could be inferred from a comparatively narrow evidentiary base, and by which a broad remedy could be justified.[134] But however ameliorated by eviden-

129. 402 U.S. 33, 37 (1971). Stephen Kanner reads the passage to mean that a federal district court "should seek to achieve the maximum level of integration that [is] practical." Kanner, *From Denver to Dayton: The Development of a Theory of Equal Protection Remedies*, 72 NW. U.L. REV. 382, 382 (1977).

Judge J. Braxton Craven describes the lower courts' reaction to the Supreme Court's ambiguity as follows: "Many an inferior court, overreading [*Green*, *Swann*, and *Davis v. School Commissioners of Mobile County*], thought that the Court's dogma mandated racial balance despite occasional cryptic disclaimers." Craven, *The Impact of Social Science Evidence on the Judge: A Personal Comment*, 39 LAW & CONTEMP. PROBS., Winter 1975, at 150, 153.

130. 413 U.S. 189 (1973).

131. 427 U.S. 424 (1976).

132. The problem of applying school desegregation rules and practices developed in the South to northern schools had, of course, been long apparent. *See*, Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 NW. U.L. REV. 157 (1963).

133. *See* Keyes v. School Dist. No. 1, Denver Colo., 413 U.S. 189, 217, 223-24 (1973) (Powell, J., concurring in part and dissenting in part).

134. This is an interesting example of a general jurisprudential point. Legal rules designed to operate effectively in one society may operate rather badly in another, and for some rather complex reasons. Something of the sort is happening here. The de jure rule can be made to work with some efficiency in the South to achieve a substantial degree of school integration, even without an open admission that integration is an aim of the rule. In the North, however, where there is a different background of assumptions and past practices, it is much more difficult to achieve actual integration through a de jure rule. In a sense, what happens in moving from the South to the North is that the change of conditions either requires a greater degree of forthrightness if the effect of the de jure rule in the South is to be achieved, or exacts a penalty for the articulation of one rationale when another was actually determinative. Compare a situation in which A says he cannot accompany an acquaintance to a football game beause he has a cold when the real reason is that A hates football. If the

tiary presumptions and remedial scope, the choice of the historical principle was clearly made.[135]

The Court's decision three years later in *Pasadena City Board of Education v. Spangler* showed what that choice meant.[136] In 1970, a district judge ordered reassignment of teachers, system-wide busing, and other measures to desegregate the schools in Pasadena, California. In 1974 the school board petitioned the district court to eliminate the portion of the Court's order that required the school district to accomodate shifts in Pasadena's population by redrawing its busing plans in order to maintain racial balance in the schools. The Supreme Court held that such a constant-state or end-result order was not properly within the power of the district court, for once the court implemented a racially neutral attendance pattern it "had fully performed its function of providing the appropriate remedy for previously racially discriminating attendance patterns,"[137] and was without power to remedy later re-segregation of the schools arising from permissible causes.

3. *Tying the Remedy to the Violation*

Nevertheless, the Court's choice of the historical de jure principle has not resulted in a stable doctrinal resolution, for the Court has not stated clearly how closely an injunctive remedy must be tied to a constitutional violation. This may be a seen in a pair of cases decided on the same day in 1977, *Dayton Board of Education v. Brinkman*[138] and *Milliken v.*

acquaintance later changes his mind and goes fishing (which A loves to do), A will either have to be more forthright about hating football or stay home from fishing.

135. Frank Goodman contends that the choice was not finally made until Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977), though he says *Dayton* was only a "short step" from the resolution in *Keyes.* Goodman, *Some Reflections on the Supreme Court and School Desegregation*, in RACE AND SCHOOLING IN THE CITY 45, 46 (A. Yarmolinsky, L. Liebman, & C. Schelling eds. 1981). *See also* Milliken v. Bradley I, 418 U.S. 717, 744 (1974) ("The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation.") (quoting Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 16 (1971)).

136. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976). In an effort to avoid what the historical principle could mean, and apparently does mean under *Pasadena*, Ronald Dworkin has argued that causal links between past illegal segregation and present status should not be required. Dworkin contends that an "interpretive" rather than a "causal" judgment should be made in school cases, with the result, for him, that judicial integration orders should be more widely available. Dworkin, *Social Science and Constitutional Rights—the Consequences of Uncertainty*, 6 J.L. & EDUC. 3 (1977). His definition of an "interpretive" judgment is none too clear (it is a judgment that "locates a particular phenomenon within a particular category of phenomena by specifying its meaning within the society in which it occurs,") *id.* at 4, but he concludes that an "interpretive" theory can successfully justify integration orders where causal theories cannot, *id.* at 12.

For a less complex attempt to avoid the narrow view of harm as causally related to prior state-imposed segregation, see Note, *School Desegregation After* Swann*: A Theory of Government Responsibility*, 39 U. CHI. L. REV. 421 (1972) (proposing broader theory of "governmental responsibility").

137. 427 U.S. 424, 437 (1976).

138. 433 U.S. 406 (1977).

Bradley II.[139] In *Dayton*, the Court drew a tight circle around the right and the corresponding remedy, and remanded to the district court to "determine how much incremental segregative effect [the constitutional] violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations."[140] "The remedy," continued the Court, "must be designed to redress that difference."[141] But in the second case, *Milliken II*, the Court was distinctly vague about the precise link between the "remedial" education programs ordered and the prior unconstitutional behavior, much of which had taken place before the beneficiaries of the educational programs were of school age. Finally, the Court has more recently affirmed lower court desegregation orders of considerable scope. In *Columbus Board of Education v. Penick*,[142] the Court affirmed a system-wide desegregation order by the district court; and in *Dayton Board of Education v. Brinkman II*, the Court affirmed a court of appeals order to the district court to implement a system-wide desegregation remedy.[143] In both cases, the Court appears to have returned to an analytical approach in which the tie between constitutional violations and remedial orders is extremely loose.[144]

The Court's definition of the substantive constitutional rights at stake in these cases must be traced in part to a basic premise that the Constitution in this area protects only equality of opportunity, not equality of result—or, to state it in a more restrictive way, that the Fourteenth Amendment only protects individuals against state-sanctioned denials of equal opportunity. In addition, the conclusion is inescapable that the political unpopularity of mandatory school busing has played some part in the Court's choice of the historical principle as the basis for the substantive rule of liability.[145] The Court's choice is reinforced by the fact that the

139. 433 U.S. 267 (1977).
140. 433 U.S. 406, 420 (1977).
141. *Id.*
142. 443 U.S. 449 (1979).
143. Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).
144. Frank Goodman characterizes *Columbus* and *Dayton II* as significantly relaxing the *Dayton I* requirement of a causal relationship between the constitutional violation and the harm suffered. Goodman, *The Desegregation Dilemma: A Vote for Voluntarism*, 1979 WASH. U.L.Q. 407, 408-11. The disparity between Milliken v. Bradley I, 418 U.S. 717 (1974), *Pasadena*, and *Dayton I* on the one hand, and United Steelworkers of America v. Weber, 443 U.S. 193 (1979), *Columbus*, and *Dayton II*, on the other, has led one hostile critic to ask whether the earlier cases were merely a "tactical feint, designed to delay and complicate the implementation of quotas and busing in the light of public opposition." Kitch, *The Return of Color-Consciousness to the Constitution: Weber, Dayton, and Columbus*, 1979 SUP. CT. REV. 1, 14.
145. *See, e.g.*, J. BOLNER & R. SHANLEY, BUSING: THE POLITICAL AND JUDICIAL PROCESS (1974); R. BORK, CONSTITUTIONALITY OF THE PRESIDENT'S BUSING PROPOSALS (1972). Eleanor Wolf, a critic of mandatory school busing, describes it as "a costly program that is widely disliked, divisive in its effects on the labor-liberal political coalition, uncertain in its effects on academic achievement and racial attitudes, and leaves demographic sorting-out processes much as before." Wolf,

historical principle limits the grounds, and hence the occasions, on which a federal court may intervene in school cases, but this is a complicated proposition.

If the end-result principle had been chosen, the legal standard probably would have been something like substantial de facto integration in attendance patterns. This would have been a clear, mathematically based standard analogous to the one person-one vote rule in the apportionment cases. The primary problem with such a standard, however, is apparent from the apportionment cases: the necessity for reapportionment—and the strong probability of judicial involvement—recurs continually as population shifts make the previous apportionment scheme outdated. An end-result rule in school cases would require a comparable continuing involvement, as the Court clearly saw in the *Pasadena* case when it reversed the district court order accommodating population shifts. Yet the de jure rule necessarily entails substantial discretion. As seen above, it is almost impossible to specify precisely how to undo the effects of past illegal discrimination. Further, to the extent that actual integration remains a covert goal despite the choice of the historical principle as the rule of constitutional liability, a court will be little inclined to require a tight link between violation and remedy. Thus, while the choice of the historical principle may have reduced the number of federal court interventions, in those cases in which a constitutional violation is actually found, it may have increased rather than decreased the pressure on the trial judge to exercise discretion in formulating a remedy.

Despite (and perhaps to some degree because of) its choice of the historical principle, the Court has been willing to disregard to a remarkable degree in the school cases the normal constraints on the judiciary. First, it has been willing, within broad limits, to permit district courts to find facts and grant remedies without strict limitations. Chief Justice Burger's statement for the Court in *Swann* is representative of the Court's approach: "[I]n seeking to define the scope of remedial power of courts . . . words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern, and we have sought to suggest the nature of limitations without frustrating the appropriate scope of equity."[146] The "suggested" limitations have left to the lower courts, and particularly to the district courts, considerable freedom to balance competing interests without fear of close appellate scrutiny.[147]

Northern School Desegregation and Residential Choice, 1977 SUP. CT. REV. 63, 85.

146. 402 U.S. 1, 31 (1971).

147. That is not to say that in school cases the courts of appeals effectively ignored the district judges in the South; far from it, in fact. Occasionally, they intervened forcefully to supervise particularly recalcitrant judges. Alexander Bickel clearly recognized the existence of these "opposition judges," as he called them, but he characterized them as a "resistant minority." Bickel, *supra* note

Second, the Court has been generally uninterested in procedural and tactical details in school cases. The Court not has set out principles to govern the use of experts, masters, or supervisory committees; nor has it discussed issues of intervention and participation, or of permissible strategies of inducing settlement. In addition, it has not spoken significantly to permissible means of solicitation of and selection among desegregation plans.[148] Beyond its consistent exhortation for quick action in the decade from the late 1950's to the late 1960's,[149] the Court has generally not spoken to the tactical questions that arise when a district judge attempts to obtain cooperation from recalcitrant parties. The result has been that the lower courts have been left largely on their own to encourage by informal means the achievement of school desegregation, and even school integration.[150] It is probably not too much to say that until about ten years ago the Court expected and desired such behavior by district judges. And in

116, at 209. The 1969 report of the United States Commission on Civil Rights, however, gives several striking examples of district judges "demonstrat[ing] a pro-segregation bias." U.S. COMM'N ON CIVIL RIGHTS, FEDERAL ENFORCEMENT OF SCHOOL DESEGREGATION 41, 39-46 (1969). In one such case, the district judge refused for two and one-half years to order the school board to submit a desegregation plan to the court. The Fifth Circuit issued a writ of mandamus on July 9, 1964, ordering the district judge to require that the school board submit a plan, or to fashion his own plan, to take effect at the start of the fall term two months away. Hall v. West, 335 F.2d 481 (5th Cir. 1964). In the course of its opinion, the court of appeals characterized the district judge's actions as showing a "startling, if not shocking, lack of appreciation of the clear pronouncements of the Supreme Court." *Id.* at 484. (In a separate case, this district judge had earlier referred to the "now famous Brown case as one of the truly regrettable decisions of all times." Davis v. East Baton Rouge Parish School Bd., 214 F. Supp. 624, 625 (E.D. La. 1963)).

The definitive study remains to be written, but the dynamics of the relationship between district and appellate judges in such cases is of great interest; a promising topic of inquiry is how much discretion, or "benefit of the doubt," a court of appeals gives someone whom they consider a bad, or "opposition" judge, compared with someone whom they consider a good judge. For portraits of many southern federal judges acting in school cases, see J. PELTASON, FIFTY-EIGHT LONELY MEN (1961).

148. A rare exception is Green v. County School Bd., 391 U.S. 430 (1968), in which the Court suggested possible measures that could be incorporated into a remedial plan. *Id.* at 442 n.6. *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (approving a particular desegregation plan that included busing).

149. *See* Cooper v. Aaron, 358 U.S. 1 (1958); Griffin v. County School Bd., 377 U.S. 218, 234 (1964); Bradley v. School Bd., 382 U.S. 103, 105 (1965); Rogers v. Paul, 382 U.S. 198, 199 (1965); Green v. County School Bd., 391 U.S. 430, 439 (1968); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969); Keyes v. School Dist. No. 1, 396 U.S. 1215, 1216-17 (1969) (Brennan, J., Circuit Justice).

150. Frank Read and Lucy McGough describe the Supreme Court's role as follows:

> Throughout the desegregation battles from 1955 to 1970, the Supreme Court of the United States had been content with prodding its lower courts toward more rapid compliance with its mandates. Even in its decisions in *Green*, *Alexander*, and *Carter*, the Supreme Court issued terse "do it now" commands[;] it did not provide "how to do it" instructions. Lacking firm directives from the Supreme Court on *how* to accomplish desegregation, the lower federal courts—with the bulk of the activity centering in the Fifth Circuit—were abandoned to their own devices in determining appropriate methods of compliance. . . . From pupil placement acts to freedom-of-choice to neighborhood zoning to majority-to-minority transfer options to clustering and pairing of schools to busing, the federal courts of the South had struggled with the "how" of integration while the Supreme Court had been content with "hurry-ups."

F. READ & L. MCGOUGH, *supra* note 125, at 523.

the last decade the Court has discouraged it only sporadically.

In sum, the Supreme Court's actions in school cases, particularly in recent years, have reflected considerable ambivalence. On the one hand, a traditional judicial role would require that courts in school cases define precise constitutional violations, prescribe remedies narrowly tailored to those violations, and cease judicial involvement at the earliest opportunity. This has resulted in the choice of the de jure historical principle, which greatly lessens the chance of recurring or continuing involvement in a particular case. The consequences of this choice of rule appear prominently in *Pasadena* and the first *Dayton* case. On the other hand, the goal of achieving significant and enduring racial integration in the public schools has pushed in the opposite direction. This tendency appears in the early cases where the Court spoke only to urge the dismantling of dual school systems; in *Green*, where the Court was unwilling to adopt unambiguously the historical principle of constitutional liability; and in later cases like *Keyes*, *Columbus* and *Dayton II*, where even after the historical principle was clearly established the Court refused to require that remedial decrees be tied closely to the constitutional violation. The result has been that federal courts in school cases have been permitted and to some extent required to exercise considerable discretion in soliciting and formulating remedial decrees that resolve the highly complex polycentric problems inherent in desegregation cases, and in devising procedural mechanisms and political strategies to ensure the effective implementation of those decrees.

It is significant that the Supreme Court showed its greatest toleration for, and encouragement of, district court remedial discretion in the first two decades or so after *Brown* when lawless resistance in southern communities was at its peak, and when the need for district court enforcement power was greatest. In those years after *Brown*, the Supreme Court and the lower federal courts undertook in the face of strenuous political opposition to stimulate, and to a degree to require, the construction of a new social order. In this process, the wonder may be not that they acted so little, but rather so much, like conventional courts.

Yet the lesson to be drawn is not that the Supreme Court has, in general, forsaken an allegiance to the conventional judicial role. On the contrary, the lesson of the last decade is that even in race cases the Court has to some degree sought to limit the occasions for federal judicial intervention, and has sporadically sought to control the scope of the district courts' discretion.

C. *The Prison Cases: Finding a Middle Course*

The federal court system has, over the last decade, been responsible for substantial reforms in the financing and administration of a number of

state and local prison systems.[151] Given the number of cases decided by the lower federal courts,[152] the Supreme Court has heard relatively few prison

151. Judicial intervention in the management of prisons is a relatively recent phenomenon. In the early 1960's, law review articles described and deplored the traditional "hands-off" doctrine under which courts ignored conditions of confinement. *See, e.g.*, Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA.L. REV. 985 (1962); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

Beginning in the late 1960's and the early 1970's, however, courts became considerably more willing to intervene. *See, e.g.*, Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175 (1970); Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969); Kimball & Newman, *Judicial Intervention in Correctional Decisons: Threat and Response*, 14 CRIM. & DELIN. 1 (1968); Note, *The Role of the Eighth Amendment in Prison Reform*, 38 U. CHI. L. REV. 647 (1971); Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841 (1971). Chief Justice Burger also indicated his interest in prison reform, though not necessarily as a matter of constitutional law, at about this time. Burger, "*No Man Is an Island*," 56 A.B.A. J. 325 (1970); Burger, *A Proposal: A National Conference on Correctional Problems*, 33 FED. PROBATION, Dec. 1969, at 3.

By the end of the decade, federal courts and academic commentators had become quite sophisticated about goals and methods of prison reform. *See, e.g.*, Robbins & Buser, *Punitive Conditions of Prison Confinement: An Analysis of* Pugh v. Locke *and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893 (1977); Note, "*Mastering*" *Intervention in Prisons*, 88 YALE L.J. 1062 (1979); Comment, *Cruel But Not So Unusual Punishment: The Role of the Federal Judiciary in State Prison Reform*, 7 CUM. L. REV. 31 (1976).

152. In February 1981, it was estimated that the state prison systems of twenty-five states, the District of Columbia, Puerto Rico, and the Virgin Islands were under court order stemming from unconstitutional conditions of confinement, and that suits were pending in ten more states. *Corrections*, 12 CRIM. JUST. NEWSLETTER No. 4, at 6-7 (Feb. 16, 1981).

Reported opinions in state prison litigation include: *Alabama*: Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948; Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part and rev'd in part*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded sub. nom.* Alabama v. Pugh, 438 U.S. 781 (Eleventh Amendment issue), *cert. denied*, 438 U.S. 915 (1978); Newmann v. Alabama, 466 F. Supp. 628 (M.D. Ala. 1979); *Arkansas*: *see infra* note 155; *Colorado*: Ramos v. Lamm, 485 F. Supp. 122 (D. Colo. 1979), *aff'd in part, rev'd in part, and remanded*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981), *on remand*, 520 F. Supp. 1059 (D. Colo. 1981); *Delaware*: Anderson v. Redman, 429 F. Supp. 1105 (D. Del. 1977) (state law), 480 F. Supp. 830 (D. Del. 1979) (staying order and abstaining pending state court determination); *Florida*: Costello v. Wainwright, 397 F. Supp. 20 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir.), *rev'd after rehearing*, 539 F.2d 547 (5th Cir. 1976) (three-judge court required), *rev'd*, 430 U.S. 325 (1977) (three-judge court not required); on remand, 553 F.2d 506 (5th Cir. 1977) (opinion and judgment of panel at 525 F.2d 1239 reinstated); *Louisiana*: Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977) (affirming unpublished district court order); *Maryland*: Johnson v. Levine, 588 F.2d 1378 (4th Cir. 1978) (en banc); *Michigan*: Glover v. Johnson, 478 F. Supp. 1075 (E.D. Mich. 1979), 510 F. Supp. 1019 (E.D. Mich. 1981); *Mississippi*: Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd* 501 F.2d 1291 (5th Cir. 1974); 390 F. Supp. 482 (N.D. Miss. 1975); 407 F. Supp. 1117 (N.D. Miss. 1975); 423 F. Supp. 732 (N.D. Miss. 1976), *aff'd*, 548 F.2d 1241 (5th Cir. 1977); 454 F. Supp. 567 (N.D. Miss. 1978); 454 F. Supp. 579 (N.D. Miss. 1978), *aff'd*, 606 F.2d 115 (1979); *Missouri*: Burks v. Teasdale, 603 F.2d 59 (8th Cir. 1979); 492 F. Supp. 650 (W.D. Mo. 1980); *New Hampshire*: Laaman v. Helgemoe, 437 F. Supp. 269 (D.N.H. 1977); *Oklahoma*: Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974), 447 F. Supp. 516 (E.D. Okla. 1977), *aff'd*, 564 F.2d 388 (10th Cir. 1977); 457 F. Supp. 719 (E.D. Okla. 1978), *remanded for evidentiary hearing*, 614 F.2d 251 (1980); *Oregon*: Capps v. Atiyeh, 495 F. Supp. 802 (D. Ore. 1980), *order stayed*, 101 S. Ct. 829 (Rehnquist, Circuit Justice), *motion to vacate stay denied*, 101 S. Ct. 1506 (1981) (Brennan & Stevens, JJ., dissenting); *Rhode Island*: Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977), *remanded*, 599 F.2d 17 (1st Cir. 1979); 448 F. Supp. 659 (D.R.I. 1978); 466 F. Supp. 732 (D.R.I. 1979), *aff'd*, 616 F.2d 598, *cert. denied*, 101 S.Ct. 115 (1980); *Texas*: Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), *motion to stay granted in part and denied in part*, 650 F.2d 555 (5th Cir. 1981).

cases in which large-scale institutional reforms were at issue.[153] As a result, one may infer only tentatively the motivating factors underlying the Court's formulation of the constitutional right at stake and the Court's attitude to the corresponding remedies. The available evidence suggests, though somewhat weakly, that the prospect of substantial remedial discretion by the district court in prison cases has had an appreciable effect on the Court's formulation of the rules of constitutional liability.

The best-known example of federal court intervention is a group of cases involving Arkansas prisons, one of which came before the Supreme Court in 1978 as *Hutto v. Finney*.[154] At the time litigation was begun in the mid-1960's, Arkansas state prisons were "farms" run on the theory that they should be financially self-sufficient, which meant in practice that inmates were ill-housed, poorly provided with medical and dental care, and poorly protected from physical violence. From 1965 to 1976, federal district courts intervened six times to enjoin prison practices including the use of whipping and electric shocks to maintain prison discipline, the use of "trusty" guards, which resulted in corruption and occasional killing, the condonation of widespread violence and homosexual attacks among the prisoners, and the use of punitive isolation for long periods.[155] Thirteen years after Arkansas prison practices were first challenged in federal court, the Supreme Court finally reviewed one of the district court orders.

153. The Court, however, has decided a number of cases in recent years that involve small, frequently procedural reforms. *See, e.g.*, Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) (permitting prison officials to forbid prisoners to organize union); Bounds v. Smith, 430 U.S. 817 (1977) (approving plan for law libraries in prisons); Estelle v. Gamble, 429 U.S. 97, 104 (1976) (holding that "deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment); Meachum v. Fano, 427 U.S. 215, 216 (1977) (permitting prisoner to be transferred from one prison to another with "conditions which are substantially less favorable" without requiring hearing under due process clause); Wolff v. McDonnell, 418 U.S. 539 (1974) (holding, *inter alia*, that due process hearing is required before prisoner may be deprived of good time credits); Pell v. Procunier, 417 U.S. 817 (1974) (upholding prison rule prohibiting interviews between individual prisoners and press); Procunier v. Martinez, 416 U.S. 396, 399 (1974) (upholding district court injunction against enforcement of prison rule forbidding inmates from sending letters in which they "unduly complain" or "magnify grievances"); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (holding that due process hearing required before probation may be revoked); Preiser v. Rodriguez, 411 U.S. 475 (1973) (holding that remedy of prisoner seeking release from confinement is habeas corpus, requiring exhaustion of state remedies); Cruz v. Beto, 405 U.S. 319 (1972) (holding that prisoner's complaint regarding free exercise of religion states cause of action under 42 U.S.C. § 1983); Johnson v. Avery, 393 U.S. 483 (1969) (holding that prison officials may not forbid prisoners from helping other prisoners to prepare writs).

154. 437 U.S. 678 (1978).

155. Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965); Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Holt v. Hutto, 363 F. Supp. 194 (E.D. Ark. 1973), *aff'd in part, rev'd in part sub nom.* Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974); Finney v. Hutto, 410 F. Supp. 251 (E.D. Ark. 1976), *aff'd*, 548 F.2d 740 (8th Cir. 1977). The importance of the Arkansas prison litigation was perceived early on. *See, e.g.*, Case Note, 20 DRAKE L. REV. 188 (1970); Case Note, 84 HARV. L. REV. 456 (1970). It was the subject of a case study in 1977, before the Supreme Court heard the case. *See* Spiller, *A Case Study of* Holt v. Sarver, in AFTER DECISION, *supra* note 7, at 31-142.

The question before the Court[156] was the validity of an order limiting to thirty days the time spent in punitive "isolation."[157] The Court held that the thirty-day limit was justified in light of the "long and unhappy history of the litigation," and as a measure designed to "insure against the risk of inadequate compliance."[158]

The Court did not base its conclusion on a per se finding that thirty days is the maximum period permitted by the Constitution for punitive isolation. Rather, the Court emphasized two factors justifying the order in this case. First, the constitutional violation was in the totality of circumstances concerning confinement in isolation, not in the time of confinement alone. The district court could have ordered that only one person at a time be confined in an isolation cell; in that event, an order limiting the time spent in isolation to thirty days might not have been justifiable because there would have been no crowding in the isolation cells, and the confinement would therefore have been less onerous.[159] But the district court addressed the issue in terms of the length of confinement rather than in terms of overcrowding, and the Court permitted this discretionary choice among the possible remedial measures.

Second, the Court stressed that the long and unhappy history not only of the Arkansas prison system but of the litigation itself helped justify an easily enforceable, "mechanical" thirty-day time limit.[160] This is an odd twist, for it suggests that at the remedy stage some form of historical principle has crept into what is otherwise an area of law governed by an end-state principle. Prison conditions are constitutional or unconstitutional as a matter of objective present fact; it does not matter whether a well-meaning or a malicious legislature or prison administrator made them that way.[161] Yet at the remedy stage, the history behind the prison system's present condition appears to be relevant. Given this history, and the need for a remedy that will be effective against chronically uncooperative defendants, the Court was willing not only to accept a mechanical thirty-day limit, but a limit that it might otherwise have struck down as an "excessive cure" for a constitutional violation.

156. The Court also dealt with an Eleventh Amendment issue, not relevant here, concerning the availability of an award of attorneys' fees against the state. 437 U.S. 678, 689-700 (1978).

157. The term "isolation" is something of a misnomer, since inmates so confined, though separated from the main body of inmates, were in fact crowded together in small cells.

158. 437 U.S. at 687.

159. *See* Note, *Equitable Remedies Available to a Federal Court After Declaring an Entire Prison System Violates the Eighth Amendment*, 1 CAP. U.L. REV. 101, 110-11 (1972) (discussing Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971)).

160. 437 U.S. at 688 n.11.

161. There is one exception to the end-state principle in Eighth Amendment conditions of confinement law. Estelle v. Gamble, 429 U.S. 97 (1976), holds that bad medical care alone is not enough to confer a cause of action on a prisoner under 42 U.S.C. § 1983 (1976). Such care must, in addition, be the product of "deliberate indifference." 429 U.S. at 104.

To understand the significance of *Hutto*, however, one must examine two recent cases in which the Court refused to permit institutional reform. Both involved modern, well-designed prison facilities that had been filled beyond their design capacity. In 1979, in *Bell v. Wolfish*,[162] the Supreme Court reversed an extensive remedial order in which the district judge had required a federal prison constructed only four years earlier to change a number of its practices.[163] The Court warned against the federal courts becoming "enmeshed in the minutiae of prison operations," and pointedly concluded that the "wide range of 'judgment calls' that meet constitutional and statutory requirements are confined to officials outside the Judicial Branch of Government."[164] Two years later, in *Rhodes v. Chapman*,[165] a case involving a state prison built in the early 1970's and described by the district judge as a "top-flight, first-class facility,"[166] the Court reversed a district court order requiring that only one person be confined to a cell.

Hutto, when read together with *Bell v. Wolfish* and *Rhodes v. Chapman*, may be seen as standing for both a rather practical proposition and its limitation. *Hutto* suggests that when a prison system has a long history of atrocious conditions and political neglect, and, possibly more important, when the district court has attempted over a long period to get prison officials to correct the unconstitutional conditions, the district court may properly exercise a degree of remedial discretion that it should not otherwise exercise. Such a proposition must be narrowly stated, however, for the only question actually before the Court in the long and complex *Hutto* litigation was the thirty-day limit on confinement in punitive isolation; it is unclear what the Court would have said or done about a long list of judicial "suggestions" scattered through many of the district court's opinions, or about other specific orders entered by the district court. *Wolfish* and *Chapman* establish, first, and most obviously, that modern prison facilities that are at least relatively comfortable and well-run do not violate the Constitution.[167] Second, they suggest—though obliquely—that even if

162. 441 U.S. 520 (1979). The case primarily involved pretrial detainees rather than convicted criminals, but this did not significantly affect the Court's analysis. *Cf.* Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941 (1970) (arguing that different analysis should be applied to pretrial detention than to postconviction confinement).

163. A preliminary injunction restraining prison officials from instituting "less liberal" visiting regulations during the pendency of the litigation was issued in January, 1976, two months after the suit was filed. United States *ex rel.* Wolfish v. Levi, 406 F. Supp. 1243, 1250 (S.D.N.Y. 1976). The court found in January, 1977, that a variety of prison conditions were unconstitutional, and requested that the plaintiffs file a proposed decree. 428 F. Supp. 333 (S.D.N.Y. 1977). The order itself was issued nine months later. 439 F. Supp. 114 (S.D.N.Y. 1977). The Court of Appeals for the Second Circuit affirmed in part, and reversed and remanded in part. Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978). The Supreme Court then reviewed the judgment of the court of appeals.

164. 441 U.S. 520, 562 (1979).

165. 101 S. Ct. 2392 (1981).

166. Chapman v. Rhodes, 434 F. Supp. 1007, 1009 (S.D. Ohio 1977).

167. It may also be that the Court now sees prison conditions as sufficiently ameliorated that it

prison conditions are arguably unconstitutional, a district court may not move too quickly to supplant the normal political control over a prison; for the alacrity with which the district courts acted in *Wolfish* and *Chapman* stands in marked contrast to the district court's patience in *Hutto.*

There have not yet been enough prison reform cases before the Court to infer clear principles from what the Court has done. *Hutto* was too easy in one direction, and *Wolfish* and *Chapman* possibly too easy in the other. But it seems obvious that the Court will take a course somewhere between the two extremes. The Court has defined the constitutional right to be free from unconstitutional conditions somewhat narrowly, probably in part because of the remedial judicial discretion that is almost necessarily required to enforce such a right by institutional reform. But at the same time the Court has explicitly permitted a federal trial court sufficient remedial discretion to enforce the right when the political authorities appeared to be chronically unable or unwilling to enforce it themselves. In sum, the Court may limit federal judicial involvement in institutional suits by defining a constitutional right narrowly, or by limiting the scope of discretion available to a district judge to correct a constitutional violation. In the prison cases, the Court so far appears to have done some of both.

D. *The Mental Hospital Cases: Defining a Constitutional Right to Avoid Remedial Discretion*

What is now referred to as a legal right to treatment for involuntarily confined mental patients traces its origins back only to about 1960, with the publication of two law review articles advocating the legal recognition of such a right.[168] It was not until 1971, in *Wyatt v. Stickney,*[169] that a

need not encourage district courts to intervene vigorously in state prison administration. In the late 1960's when the institutional reform prison cases began, atrocious prison conditions were widespread and well known. *See, e.g.,* THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT: CORRECTIONS 45-59 (1967); Hirschkop & Millemann, *supra* note 151; Teeters, *State of Prisons in the United States: 1870-1970,* 33 FED. PROBATION, Dec. 1969, at 18. Yet there is reason to believe that prison conditions are still a serious problem today. *See* ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 75-80 (1981).

168. Birnbaum, *The Right to Treatment,* 46 A.B.A. J. 499 (1960); Kittrie, *Compulsory Mental Treatment and the Requirements of "Due Process,"* 21 OHIO ST. L.J. 28 (1960).

169. 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

For an interesting study of the effect of Judge Johnson's remedial decrees, see Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change,* 84 YALE L.J. 1338 (1975). For a more recent study, see Drake, *Judicial Implementation and* Wyatt v. Stickney, 32 ALA. L. REV. 299 (1981). For Judge Johnson's views, see Johnson, *Observation: The Constitution and the Federal District Judge,* 54 TEX. L. REV. 903, 908-10 (1976). Johnson recounts that in late 1979 the Governor of Alabama "advis[ed] the courts that 'the Albama mental health system [was] in a distress situation.' " Johnson, *The Role of the Federal Courts in Institutional Litigation,* 32 ALA. L. REV. 271, 278 (1981). In early 1980, Judge Johnson appointed the Governor as a temporary receiver for Alabama's mental illness and retardation facilities. (In a separate case, Judge Johnson had earlier appointed the Governor as a temporary receiver for Alabama's penal and correctional institutions. *See*

federal court held that involuntarily committed mental patients had a constitutional right to minimally adequate treatment.[170] Both the Fifth and Eighth Circuits have now found a right to treatment in the Constitution,[171] but it appears unlikely that the Supreme Court will agree with them. Two Supreme Court cases suggest strongly that while the Court is not indifferent to the needs of involuntarily committed mental patients, it does not attach overriding constitutional importance to those needs, and that the virtual necessity of judicial remedial discretion in enforcing a right to treatment will militate strongly against finding such a right in the Constitution.

The first case is *O'Connor v. Donaldson*,[172] decided in 1975. Donaldson had been committed involuntarily to a Florida mental hospital as a "paranoid schizophrenic," and had been kept in custody for nearly fifteen years with "little or no psychiatric care or treatment."[173] He brought a suit against the superintendent of the hospital that, by the time it came to trial, sought only damages because Donaldson by then had been released. Both the trial court and the court of appeals found a constitutional right to treatment, but the Supreme Court held for Donaldson on another ground, avoiding what it referred to as "the difficult issues of constitutional law dealt with by the Court of Appeals."[174] Since Donaldson had been found not dangerous either to himself or to others, the Court held that irrespective of whether any treatment was provided the state could not confine him involuntarily in a mental hospital. The significance of *O'Connor* is not that the Court found a right that is more easily derived from the text of the Constitution than a right to treatment, for it is not clear that this is

Newman v. Alabama, 466 F. Supp. 628, 636-39 (M.D. Ala. 1979); *supra* note 18).

170. In Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1967), a panel of the Court of Appeals for the District of Columbia Circuit, in an opinion by Judge David Bazelon, found a statutory right to treatment for the involuntarily committed.

Rouse attracted virtually immediate academic attention. *See, e.g.*, Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1153-55 (1967); Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 YALE L.J. 87 (1967); *Case Comment*: Rouse v. Cameron, 80 HARV. L. REV. 898 (1967). *See also* Birnbuam, *Some Remarks on "The Right to Treatment,"* 23 ALA. L. REV. 624 (1971); Katz, *The Right to Treatment—An Enchanting Legal Fiction*, 36 U. CHI. L. REV. 755 (1969); Symposium, *The Right to Treatment*, 57 GEO. L.J. 673 (1969); *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1316-44 (1974). For Judge Bazelon's own view of his decision, and his view of those who doubted its wisdom, see Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742 (1969).

171. See Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977); Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *rev'd on other grounds*, 422 U.S. 563 (1975). For academic treatments of recent doctrinal developments, see Levine, *Disaffirmance of the Right to Treatment Doctrine: A New Juncture in Juvenile Justice*, 41 U. PITT. L. REV. 159 (1980); Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 ARIZ. L. REV. 1 (1978); Note, *The Right to Treatment—A 'Fabled' Right Receives Judicial Recognition in Missouri*, 45 MO. L. REV. 357 (1980).

172. 422 U.S. 563 (1975).

173. Donaldson v. O'Connor, 493 F.2d 507, 509 (5th Cir. 1974).

174. 422 U.S. 563, 576 (1975).

so. What is significant is that the right found in *O'Connor* required no judicial remedial discretion for its vindication.

The court of appeals in *Wyatt* had thought that a right to treatment required institutional reform for its vindication.[175] The Supreme Court appears to have agreed, and therefore to have defined Donaldson's right precisely in order to avoid such judicially managed institutional reform. The right the Court found in *O'Connor* is essentially the right to be free, which can be vindicated by a writ of habeas corpus plus a possible damage judgment.[176] For someone already released, as Donaldson was, a damage remedy is sufficient. Such remedies may affect the institution because of its desire to avoid court-ordered releases or damage judgments, but the manner in which the institution is affected is within the control of the administrators rather than the court. In effect, the remedy in *O'Connor* is the functional equivalent of a habeas corpus remedy in a prison case, in which the non-legal polycentric problems are resolved by the political entities involved rather than by the court.

The second case is *Pennhurst State School and Hospital v. Halderman*,[177] decided in 1981. In a class action brought on behalf of the mentally retarded residents of a Pennsylvania state institution, the district court found that state and federal statutory rights and a federal constitutional right to "minimally adequate habilitation" in a least restrictive environment[178] had been violated. The Supreme Court reversed, holding that the state statutory ground required further consideration by the lower courts on remand, and that the federal statute in question did not confer any substantive rights.[179] As to the court of appeals' holding that there was a constitutional right to "minimum adequate habilitation," the Court was hostile though somewhat cryptic. The Court suggested in a footnote that Congress might not have power to provide by statute a minimum right to treatment since "this Court has never found that the involuntarily committed have a constitutional 'right to treatment,' much less the volun-

175. The court of appeals wrote:

> We are unable to agree that injunctive relief is inappropriate merely because damages or habeas corpus relief may be available to some or all individual plaintiffs. While habeas corpus and tort remedies should play a valuable, indeed essential, role in enforcing the constitutional rights we recognized in [*O'Connor*], those remedies are not capable of ensuring what the plaintiffs seek to ensure in this case.

Wyatt v. Aderholt, 503 F.2d 1305, 1316 (5th Cir. 1974).

176. Paul Mishkin first suggested this line of analysis to me when he asked, during a faculty seminar, why habeas corpus was not a sufficient remedy in *Wyatt v. Stickney*. The seminar was given by Charles Halpern at the University of California, Berkeley, School of Law (Boalt Hall) in the spring of 1978. Indeed, Donaldson had orginally sought habeas corpus as well as damages, but his habeas claim became moot when he was released before trial. 422 U.S. at 565 n.1.

177. 101 S. Ct. 1531 (1981).

178. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1322-24 (E.D. Pa. 1978), *aff'd in relevant part*, 612 F.2d 84 (3d Cir. 1979).

179. 101 S. Ct. at 1545 n.21.

tarily committed."[180] In support, it cited a lone concurrence by Chief Justice Burger in *O'Connor* arguing against finding a constitutional right to treatment,[181] and a 1970 Supreme Court dismissal of an appeal from a Supreme Court of New Mexico decision for want of a substantial federal question.[182] The Court's actual disposition in *Pennhurst* also suggests its hostility to a right to treatment. In refusing to afford relief, the Court may have meant to hold *sub silentio* that the plaintiffs were without *any* federal cause of action, including a federal constitutional claim of a right to treatment, though this conclusion may be premature in light of the Court's remand on the state law question.

Whatever the precise meaning of the opinion in *Pennhurst*, it seems unlikely that the Court will find a federal constitutional right to treatment for people involuntarily committed to mental institutions.[183] Because of the intractable nature of questions concerning treatment for mental patients, the Court may conclude that constitutional rules of liability are ill-suited to define and protect whatever non-procedural interests the mentally ill and retarded may have. Further, the Court's reluctance to find a federal constitutional right to treatment might be increased by an inability to find convincing textual support in the Constitution itself. But the Court's holding in *O'Connor* clearly suggests that these factors are reinforced, and probably substantially overshadowed, by the Court's reluctance to find a right that would require for its vindication the exercise of substantial remedial discretion by the trial court. Perhaps the Court simply has not found in the Constitution a right to treatment. But that may be another way of saying that the importance the Court attaches to the mental patients' needs does not outweigh the cost to the legitimacy of the judicial process necessarily entailed in enforcing such a right.

180. *Id.* at 1539 n.12.

181. 422 U.S. at 578.

182. Sanchez v. New Mexico, 396 U.S. 276 (1970). The state court opinion is short and ambiguous, but appears to hold only that a mentally ill person may be committed involuntarily to a mental institution after careful compliance with procedural protections. State v. Sanchez, 80 N.M. 438, 457 P.2d 370 (1969).

The problems of interpreting Supreme Court dismissals of state appeals for want of a substantial federal question are considerable. *See, e.g.*, Mandel v. Bradley, 432 U.S. 173, 176 (1977); Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913 (1976) (Brennan, J., dissenting). The jurisdictional statement filed with the United States Supreme Court is frequently useful in interpreting dismissals, but in an *in forma pauperis* appeal (which *Sanchez* was), copies of the jurisdictional statement are available only from the National Archives in Washington, D.C. A copy of the jurisdictional statement has been obtained from the National Archives and is now on file in the Boalt Hall Law Library.

183. Two student Notes have recently suggested that a right to treatment can be better found under the cruel and unusual punishment clause than under the due process clause. *See* Comment, *The Eighth Amendment Right to Treatment for Involuntarily Committed Mental Patients*, 61 IOWA L. REV. 1057 (1976); Note, *Right to Treatment of the Civilly Committed: A New Eighth Amendment Basis*, 45 U. CHI. L. REV. 731 (1978). It seems unlikely, however, that the Supreme Court will be any more willing to find the right under one clause than the other.

V. Overcoming the Presumption of Illegitimacy

In those cases in which a constitutional violation has been found and in which some sort of institutional remedy is required, the critical issue is whether the district court should exercise its discretion to devise the remedial decree. In other words, when is the presumption of illegitimacy that attaches to such remedial discretion overcome? The gradations between legitimate and illegitimate judicial intervention are sufficiently subtle, and each institutional case sufficiently fact-specific, that this is inescapably a difficult judgment. Yet an analytic framework that permits one to assess the legitimacy of judicial remedial intervention does emerge from the analysis of the previous sections. The framework operates at two levels: the legitimacy of a constitutional rule of liability formulated by the Supreme Court requiring intervention in an entire category of cases; and the legitimacy of judicial intervention by the district court when the application of a rule of liability in a particular case requires the restructuring of a state institution.

The cases decided by the Supreme Court fall in a pattern that provides an obvious rationale for discretionary judicial remedies in constitutional institutional suits. In both the voting and the school busing cases, the Court addressed fundamental structural problems of our political society. In *Baker v. Carr*, the Court redressed an electoral imbalance that the legislature might have been incapable of redressing. The Court's intervention, in John Ely's phrase, is best understood—perhaps *only* understood—as a "representation reinforcing" decision.[184] A similar premise in *Brown* is revealed in Justice Jackson's famous comment during oral argument: "I suppose that realistically the reason this case is here is that action couldn't be obtained from Congress."[185] Indeed, the proposition may be stated even more broadly. A racial minority is a "discrete and insular minority"[186] that the majoritarian political institutions—not just Congress—may never protect fully. *Baker v. Carr* and the apportionment cases are designed to correct the malfunctioning of the political system on which the legitimacy of political decisions depend. *Brown* and the school cases are designed to counteract a deeply engrained, possibly permanent, structural bias of majoritarian political institutions in a society with our racial history. But whether attempting to correct, or to counteract the uncorrectable, the Court in both cases intervened because it perceived a serious and generalized malfunctioning of the political processes.

The prison and mental hospital cases do not raise the issue of genera-

184. J. ELY, DEMOCRACY AND DISTRUST 101 (1980).
185. 22 U.S.L.W. 3158, 3161 (1953), *quoted in* A. BICKEL, *supra* note 38, at 7.
186. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

lized malfunctioning of the political process to the same degree as the apportionment and school cases. It is, of course, possible to argue that prisoners and mental patients are "discrete and insular minorities" in the sense of the *Carolene Products* footnote.[187] John Ely, for one, contends that this is so for at least some prisoner rights.[188] Indeed, this argument may account for the Supreme Court's greater willingness in the prison cases than in the mental hospital cases to formulate a rule of constitutional liability that sometimes requires institutional reform for its implementation.

Whether or not the prison cases are grouped with the apportionment and school cases, it is obvious that the Supreme Court by its choice of rule has encouraged, and to a degree even required, the exercise of trial court remedial discretion primarily in those areas where constitutional rights derive from a need to correct or to counteract a generalized malfunctioning of the political process. Indeed, this explanation of the cases is so familiar that it would not bear repeating here except for what it indicates about the Court's general hostility to judicial intervention where substantial remedial discretion is required, and for what it suggests by analogy about the appropriate role of the federal district courts in particular cases where a rule of constitutional liability has been violated, and where the only issue is the manner in which a violation will be remedied. Just as the central explanation at the level of rule formulation is that the federal courts have intervened only when there is a structural defect in the political process as a whole, so a federal district judge in remedying a constitutional violation in a particular case should take over the functions of a political body only when that body is in such serious and chronic default that it clearly cannot or will not remedy that violation itself.

When a district court devises or even chooses among remedial plans in an institutional case, it is taking over a political function that would ordinarily be fulfilled by a politically responsive entity—a legislature in an apportionment case, a school board in a busing case, or a board of corrections in a prison case. When it takes over these political functions, a court ordinarily tries to carry them out in the same way the political entity would, or should, if it were functioning properly. First, a court tries to inform itself by permitting many people to participate in the suit who have no legal claim of right. It does this because its remedial order will affect these people, and because it wishes, as a political body ordinarily

187. *Id.*

188. J. ELY, *supra* note 184, at 97, 173-76. Ely's argument, however, focuses on the severity of punishment, particularly the death penalty, rather than on conditions of confinement. A student Note, heavily influenced by Ely's "we-they" distinction, has argued that mental patients should also be regarded as "discrete and insular minorities." Note, *Mental Illness: A Suspect Classification?* 83 YALE L.J. 1237 (1974).

does, to take their interests—even though non-legal—into account as much as possible. Second, a court in an institutional suit may amend a decree as conditions change or as it becomes apparent that the earlier decree did not accomplish that which it was intended to do, much as a political or administrative body will sometimes try out various solutions to a polycentric problem until it finds a solution that works well enough that no further experimentation is needed. Third, appellate courts have tried, in a limited way, to inject themselves into the discretionary remedial process in somewhat the same way an administrative or executive superior will intervene in an essentially discretionary decision of a subordinate.

Stephen Yeazell has commented on a hearing in a Los Angeles school busing case: "Once one comprehends that the court is displacing the [school] board, . . . the occasionally circus-like quality of the hearing becomes more explicable, if not more orderly. It doesn't, as the judge has remarked upon occasion, look much like a court, and for good reason: it really isn't one."[189] When resolving a non-legal polycentric problem, the political decisionmaker mimics the manner of decisionmaking advocated by Polanyi—the spontaneous mutual adjustment of the constituent parts of the problem—by the exercise of discretion. When a court resolves a non-legal polycentric problem ordinarily resolved by a political body, it mimics the manner of decisionmaking of the political body. But even if the mimicking is skillfully done, a critical element is, and always must be, missing. As an unavoidable structural matter, a federal judge is not controlled by the elements of the problem that he resolves. This control by the problem's constituent parts is what legitimates the exercise of discretion by a political body. Since this political control cannot exist over a federal judge, his or her discretionary resolution of the same problem simply cannot be legitimated on the same basis. And since the problem is non-legal in nature, the conventional means of control within the judiciary—legal rule and principle applied through the traditions of judicial reasoning and craft—are also unavailable as bases upon which to legitimate this exercise of power. Finally, since the problem is non-legal in nature, the district judge lacks even the internal control that would permit him or her to distinguish as a legal matter between appropriate and inappropriate remedial solutions.

The only legitimate basis for a federal judge to take over the political function in devising or choosing a remedy in an institutional suit is the demonstrated unwillingness or incapacity of the political body. It will be a matter of subtle judgment in a particular case whether such a serious and

189. Yeazell, *supra* note 63, at 259. Yeazell described a California state court rather than a federal court, but the observation is no less apt for a federal court.

chronic default of the political entity exists. Such a default clearly existed in *Griffin v. County School Board of Prince Edward County*,[190] when the county closed the public schools for five years rather than permit them to be integrated, and in *Hutto v. Finney*,[191] when Arkansas prison conditions still violated the Eighth Amendment after more than ten years of federal court litigation. Short of these fairly clear cases there is a considerable gray area, and individual judges may disagree as to whether a federal court must intervene to choose or devise a remedy itself. But the framework within which such intervention may be justified is relatively clear.

In practice, a federal district court that has found a constitutional violation should do everything possible to permit, to encourage, and even to coerce the relevant state political entities to resolve the non-legal polycentricities inherent in constitutional institutional suits. Though the Supreme Court has done little specifically to require that this be done in individual cases, it has made clear in general statements that district courts should defer to state political bodies in devising remedies. In *Swann v. Charlotte-Mecklenberg Board of Education*, the Court sustained the power of a district court to fashion a remedy only "[i]n *default by the school authorities* of their obligation to proffer acceptable remedies."[192] Similarly, in apportionment cases, the Court has repeated that " 'the federal courts are often going to be faced with hard remedial problems' in minimizing friction between their remedies and legitimate state policies."[193]

The means available to a district judge to force state political entities to resolve their own non-legal polycentric remedial problems in institutional suits are many. They range from soliciting acceptable plans from the parties and permitting the defendant to choose among them, to threatening contempt if a defendant refuses to choose and implement an acceptable plan, to threatening to close a prison facility or to release prisoners if the state refuses to improve conditions, and even to threatening to appoint a receiver to take over the political function that the defendant has failed to perform. For these mechanisms to work, the threats of the district court must have enough credibility that the political bodies will prefer to solve the problem rather than run the risk of having the court solve it for them. Such credibility depends ultimately on the court having the legitimate

190. 377 U.S. 218 (1964).
191. 437 U.S. 678 (1978).
192. 402 U.S. 1, 16 (1971) (emphasis added).
193. Taylor v. McKeithen, 407 U.S. 191, 194 (1972) (quoting Sixty-Seventh Minn. State Senate v. Beens, 406 U.S. 187, 204 (1971) (dissenting opinion)). *See also* Connor v. Finch, 431 U.S. 407, 415 (1977) ("In the wake of a legislature's failure constitutionally to reconcile these conflicting state and federal goals, however, a federal court is left with the unwelcome obligation of performing in the legislature's stead, while lacking the political authoritativeness that the legislature can bring to the task.")

power in exceptional circumstances to do so. Indeed, the greatest benefit of legitimating judicial remedial power may not be that it permits the court to act, but rather that it may force the political bodies to perform their functions. In this sense, the exercise of judicial remedial discretion is not a good in itself; it is, rather, the high but necessary price of maintaining a credible threat.

The corollary of presumptively illegitimate judicial intervention is legitimate intervention when the presumption is overcome. The same analysis that condemns the unnecessary exercise of remedial judicial discretion affirmatively justifies that discretion when there exists no practical alternative for the protection of the constitutional right at stake in a particular case. Just as the analysis presented here demonstrates the illegitimacy of such discretion when the political bodies are capable of providing an adequate remedy, it provides a rationale for its legitimacy when the state's political entities are in serious and chronic default. But even then a federal district court is not, and should not permit itself the illusion that it can be, anything more than a temporarily legitimate substitute for a political body that has failed to serve its function.

Conclusion

Political bodies and courts respond to different institutional imperatives. They overlap in many ways, and may be equally capable of performing a number of functions, albeit in their characteristic institutional fashions. Devising remedies for constitutional violations in institutional suits, however, is not such a function. Legal standards for devising institutional remedies are absent because the problems they pose are, and inevitably must be, polycentric and non-legal in nature. As a matter of fundamental structure, even where a constitutional violation has been found, a court cannot legitimately resolve such a problem unless the political bodies that ordinarily should do so are in such serious and chronic default that there is realistically no other choice.

It may be that in the end brute fact will be too strong for any theoretical or normative structure. Professor Charles Black is fond of referring to the "great logicians" of Gettysburg who by force of arms established many of the basic legal premises from which we, as lawyers, now reason.[194] We may be witnessing, in a gentler form, a transformation of our law that incorporates institutional suits and remedies, and the accompanying exercise of judicial discretion, into our legal system. Eventually, the task of legal theory may no longer be to hold these suits up against the background of our received premises about law and legal process, and to

194. Lectures by Charles Black in Yale College Constitutional Law courses in the mid-1970's.

analyze the ways in which they are different and therefore illegitimate. It may be that the new task will eventually be to erect a new structure in which institutional suits and remedies become part of the basic premises against which other legal phenomena are evaluated.

That day has not arrived, and the importance of this Article is the conclusion that it need not. The framework proposed here not only has the virtue of preventing federal courts from inappropriately interfering with political decisions. It has the equal and opposite virtue of legitimating federal court intervention when it is necessary. When the failure of the political bodies is so egregious and the demands for protection of constitutional rights so importunate that there is no practical alternative to federal court intervention, there is no need for a new legitimating normative or theoretical structure. Such intervention, for so long as it is essential for the protection of constitutional rights, is already legitimate.