From Incompetent Imperialism to Principled Prudence: The Role of the Courts in Restoring "the State"†

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Introduction

Until the sixties, debates about the proper role of courts in constitutional adjudication could focus exclusively on how judges and justices defined the respective spheres of governmental authority and individual rights. The "activist" judge defined the sphere of rights too broadly; he or she "usurped" the authority of the legislature by prohibiting the exercise of what under a more "restrained" interpretation belonged to that branch of government. Burgeoning in the school desegregation cases of the sixties and blossoming with the institutional reform cases of the seventies, a new species of judicial activism has generated a different sort of debate. With the judiciary exercising powers traditionally associated with the legislative, executive, and administrative branches of government, this debate concentrates less upon the extent of judicial power than upon the form or character of that power.

The novelty of this species of court activity, or what shall be called "affirmative activism," should not be exaggerated, for it has roots in the founding document of the "modern" court: footnote four of the *Carolene Products*[1] case. Increasingly concerned with that footnote's reference to "discrete and insular" groups, prejudice against whom

1. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938): "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

"It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

". . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities . . . ; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to

would likely "curtail the operation of those political processes ordinarily relied upon to protect minorities," courts in the sixties and seventies began to define rights in such ways as to require for their vindication not simply the restraint of the other branches of government, but their affirmative action. Taking note of this development, Archibald Cox wrote, "once government is held to have affirmative obligations to promote human rights, much of the responsibility must shift to the legislative and executive branches."[2] The dilemma for the contemporary court occurs when the other branches do not pick up that responsibility.

Continuity between affirmative activism and traditional activism can also be found in the character of the debate on the legitimacy of activism in general. Apologists for activism have always emphasized the fundamental character of the rights, their firm foundation in the Constitution's words or the intention of the Framers, and their absolute need for vindication;[3] critics have always emphasized "the scope of a reasonable man" in the interpretation of these rights and the need in the long run for these rights to be recognized and respected by the political branches on their own initiative, rather than having the "correction" imposed from outside.[4]

But there is also discontinuity and novelty, both in the activity of the courts and in the debate surrounding it. Regarding the context in which the traditional debate took place, Robert McCloskey, with characteristic perspicacity, captured its essence, rooting the conflict in the most fundamental convictions of the American mind—popular sovereignty and fundamental law:

> Popular sovereignty suggests *will*; fundamental law suggests *limit*. The one idea conjures up the vision of an active, positive state; the other idea emphasizes the negative, restrictive side of the political problem.
> . . . Americans were naturally receptive to the development of institutions that reflected each of these values separately. The legislature with its power to initiate programs and policies, to respond to the expressed interest of the public, embodied the doctrine of popular sovereignty. The courts, . . . generally revered

protect minorities, and which may call for a correspondingly more searching judicial inquiry."

On the landmark, indeed charter, status of footnote four, see generally, J.H. ELY, DEMOCRACY AND DISTRUST (1980) and L. LUSKY, BY WHAT RIGHT? (1975).

2. Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 94 (1965).

3. *See, e.g.*, Black, *The Bill of Rights*; 35 N.Y.U. L. REV. 865 (1960).

4. *See, e.g.*, J.B. THAYER, JOHN MARSHALL 106-07 (1901).

> as impartial and independent, fell heir almost by default to the guardianship of the fundamental law.[5]

McCloskey wrote these words in 1960 and they worked well, up to that date, to frame his concise history of the Supreme Court.

That McCloskey's words no longer work so well to frame contemporary court history shows that, despite the deep roots and strands of continuity, something new and important has occurred that merits close examination. "Fundamental law" is now said to require the "active, positive state," and it is "popular sovereignty"—at least as manifest in the legislature, paralyzed from exercising a unitary will by the proliferation of factions[6] situated in the "interior processes of policy formation"[7]—that embodies (in a sense distinct from McCloskey's) the "negative, restrictive side of the problem." In these circumstances the burdens on both the advocates of activism and of restraint become heavier. The former must justify the judicial performance of functions traditionally associated with the political branches of government; the latter, if they still wish courts to encourage responsibility in the political branches, must show that the courts can encourage not only restraint from action that will threaten rights, but action that will protect and implement rights.

This article examines the debate on the new activism in the context in which the affirmative dimension is greatest and most troublesome—reform by the federal courts of state institutions such as prisons, mental institutions, and schools. Without denying that constitutional rights exist whose vindication requires institutional reform, I contend: first, that the critics are accurate in asserting that this is an activity for which the courts are less well suited than the political branches; second, that methods commonly used by the federal courts are illegitimate; third, that a more judicious use of the courts' limited energy and capital lies in the development and application of doctrines that encourage the political branches to perform their constitutional responsibilities; and fourth, that aspects of these doctrines indicate the appropriate manner in which the judiciary should approach the task, when it is necessary, of reforming state institutions.[8]

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5. R. MCCLOSKEY, THE AMERICAN SUPREME COURT 12-13 (1960).

6. *See* King, *The American Polity in the Late 1970s: Building Coalitions in the Sand*, in THE NEW AMERICAN POLITICAL SYSTEM 371-96 (A. King ed. 1978).

7. A. SCHLESINGER, SR., KENNEDY OR NIXON—DOES IT MAKE ANY DIFFERENCE? 43 (1960).

8. These are bold and broad propositions. To develop them adequately would take several papers and a number of empirical studies beyond the existing literature. Here I wish only to set forth a prima facie case for their validity, showing that they are indeed plausible

I. The Province and Character of the "Imperial" Judiciary

A. Province of the "Imperial" Judiciary

To one untutored in the American judicial tradition, the scope and detail of activities currently under judicial control would seem staggering; even to the well-informed, the judiciary's contemporary reach must appear remarkable. Five million students attend schools operating under court-ordered desegregation plans.[9] Prison systems in more than half of the states are operating under court order.[10] State mental institutions have been dismantled[11] and state policy toward the mentally ill redesigned under court order.[12]

Naturally, these reforms have affected state resource allocation. In the year preceding a court order to reform its prisons,[13] Louisiana allocated one million dollars a year for capital improvements and about eighteen million a year for operating expenses of its entire prison system. Following the court order, the state was obliged to appropriate an additional 106 million dollars for capital improvements and an additional eighteen million for operating expenses—all for *one* state prison, which did not meet, even with this reallocation, all of the court's demands.[14] One state estimated that compliance with a court order for the care of its mentally retarded and mentally ill would require it to spend an amount equal to sixty percent of its current *total* budget, excluding school financing.[15] To comply with a desegregation order, Kalamazoo, Michigan was forced to appropriate more than four million dollars over three years, during which time the city lost twenty percent of its school population.[16]

Most observers would have trouble tracing the detail of these requirements to the constitutional provisions upon which they are purportedly based. In prison reform cases, courts have considered such things as how much toilet paper must be issued to a person in solitary

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and that they are either confirmed or, at least, not disproved by the leading literature on the subject.

9. Brief for the United States as Amicus Curiae at 87, Columbus Bd. of Educ. v. Penich, 443 U.S. 449 (1979).

10. N.Y. Times, July 24, 1981, at A11, col. 1.

11. New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975) (concerning constitutional rights of inmates at Willowbrook State Developmental Center).

12. Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971).

13. Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977).

14. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 727 (1978).

15. *Id.* at 716.

16. L. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS 264 (1976).

confinement,[17] how many square feet a prisoner must have in his cell, how many minutes of outdoor recreation must be provided, and how many inches of urinal trough must be installed for each inmate.[18] In school desegregation cases, federal courts have issued decrees on matters traditionally within the discretion of local school boards.[19] In his reform of Alabama's mental institutions, Judge Frank Johnson developed his decree in such detail that Harvard Professor of Law and Psychiatry Alan Stone contended that the judge had effectively appointed himself "Commissioner of Mental Health for Alabama."[20]

Understandably, this "imperialism" has sparked protests proceeding on several fronts (of which, for purposes of this article, the academic ones are of greatest significance). One common criticism concerns the propriety of the activity; another concerns the competence of the courts to handle the activity. The two, of course, are not unrelated. Those who argue that courts are not competent can reasonably contend that the courts were not *intended* to play this role, and that doing so undermines their more important functions in protecting traditional constitutional values.[21] Those who argue, on the other hand, that it is not legitimate for the courts to play this new role can also contend that, as the illegitimacy becomes more widely recognized, disobedience will spread and the courts' competence will be undermined.[22] Separating the two dimensions is therefore somewhat artificial, but is necessary for purposes of analysis. Before developing the propositions that the courts are incompetent at institutional reform and their methods imperialistic, it would be useful to develop more fully how the new adjudication differs from the old.

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17. Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 474 (1980).

18. *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318, 332-34 (M.D. Ala. 1976).

19. These decrees have dealt with issues such as school renovation, school closure, program development, program implementation, and, of course, assignment of particular students and teachers to particular schools. *See, e.g.*, Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974). *See generally* L. GRAGLIA, *supra* note 16; Glazer, *Should Judges Administer Social Services?*, 50 PUB. INTEREST 64, 71 (1980).

20. Stone, *Overview: The Right to Treatment—Comments on the Law and Its Impact*, 132 AM. J. PSYCHIATRY 1125, 1129 (1975).

21. *See generally* Horowitz, *The Hazards of Judicial Guardianship*, 37 PUB. AD. REV. 148 (1977).

22. *See generally* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT (1964); Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 103-06 (1979).

B. Character of "Imperial" Judiciary

Commentators describe the details of this new role of the courts in various ways, but seem to agree on its key characteristics and how these mark a departure from the past. The traditional model of civil litigation[23] pictures courts as passive bodies, called into action by a plaintiff who claims that he or she was injured by the defendant. Both parties attempt to convince an impartial judge by proofs and arguments that an event did or did not occur and that certain principles are or are not appropriate to decide the case. If the plaintiff is successful in showing legal injury, he or she is made whole again by the court's ordering the defendant to pay damages or perform a specific deed. Even judicial review may be regarded as "simply an incidental by-product of the ordinary judicial function";[24] when a relevant statute conflicts with the Constitution, the judge does nothing more than refuse to give effect to the former.

The new litigation deviates decisively from this model.[25] First, whereas the dispute in the traditional model focuses on a discrete historical incident, in structural reform litigation the dispute focuses on patterns of behavior emanating from social structures of institutions. It is not a question of whether Dr. Smith did negligently impair the vocal chords of Mr. Jones while performing a tonsillectomy; the question is whether, in a prison, the medical facilities, the recruitment, pay, promotion of doctors and nurses, and the system by which injury or disease is reported combine to provide medical care so poor as to constitute cruel and unusual punishment.

Second, in the traditional model the dispute is bipolar; in the new litigation it is multipolar. In the traditional model Mr. Jones is the alleged "victim" of a wrongdoing, the "spokesman" (through his attorney) for his cause, and if successful is the "restored." Dr. Smith is the alleged "wrongdoer," "spokesman," and "restorer." Structural litigation renders each of these elements abstract and disaggregated. In the prison example, the "victims" are past and present inmates who have been unable to receive minimally adequate medical attention. The "spokesman" may be from this group—perhaps even an official representative—but more likely the effective spokesman will be a public in-

23. See, *e.g.*, the portrayal in Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978).

24. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 2 (10th ed. 1980).

25. *See generally* 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). The following discussion relies, for the most part, on the description and language of Fiss, *supra*, at 18-28.

terest law organization, or perhaps several of them representing diverse and sometimes conflicting versions of the interests of the victims. The "restored" or beneficiaries may be, by the time the remedy is provided, a quite distinct population from the "victims."[26] While a large number of people may have contributed to the cruel and unusual condition, no individual may be sufficiently responsible to be charged with a damage suit or to be called the "wrongdoer"; the wrong is a condition that may have been the accretion of decades of neglect or the product of countless, de minimis wrongful contributions.[27] The respondents may be named individuals, but it is actually their office that is required to respond. And the "restorer" may ultimately be the citizens of the state who have to pick up a substantially heavier tax burden.[28]

Most troubling are those situations in which the party structure is not simply multipolar, but what Professor Lon Fuller called "polycentric."[29] The two concepts are related but distinct. While multipolar means that there are several distinct parties with distinct interests in the lawsuits, polycentric means that the problem confronting the judiciary has many interdependent elements to it, constituting a sort of "system," such that action with regard to one element will have complex and unpredictable repercussions throughout the entire system.

Whether the situation is polycentric or "simply" multipolar, the complex party structure and the focus on patterns of behavior rather than on a discrete historical event makes problems of fact finding much more difficult. An adequate presentation of the facts and interests as well as the feasibility and possible repercussions of any proposed remedy often cannot be left simply to the plaintiff and the named respondents. Hence, the third characteristic of structural litigation: the judge typically takes a more active part in the development of a full and accurate picture. He may take steps to satisfy himself that the spokesmen do represent the interests of the victims, beneficiaries, and restorers, and that other groups significantly affected by any proposed remedy will have their interests placed before the court.[30]

Finally, because the remedy seeks to change a pattern of behavior rather than to recompense a wronged individual, the court's jurisdiction does not usually end with the issuance of the decree. The judge

26. Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 874 (1978).

27. *Cf.* Thompson, *Moral Responsibility of Public Officials: The Problem of Many Hands*, 74 AM. POL. SCI. REV. 905 (1980).

28. *See supra* text accompanying notes 13-16.

29. Fuller, *supra* note 23, at 394-95.

30. *See, e.g.*, Chayes, *supra* note 25, at 1296-98.

will continue to hear arguments regarding the implementation and effectiveness of the decree, making adjustments where necessary. As Owen Fiss writes, "The court's jurisdiction will last as long as the threat persists."[31] That can be a long time.[32]

II. The Incompetent Judiciary

With the foregoing characteristics in mind, we can investigate the charge of "incompetence" in affirmative activism. Judicial competence, of course, must be measured not simply on an absolute scale but in relation to the other branches of government, which (it has not gone unnoticed) have competence problems of their own.[33] There is a dearth of concrete, empirical investigation into comparative competence, however, and none has been attempted here. Therefore, this brief inquiry focuses on inabilities resulting from characteristics of the judiciary not shared, or not fully shared, by the other branches of government.

A. The Critique

No doubt the most troubling contention is that the incompetence of the courts at structural reform derives from the distinctive qualities that allow them to perform their traditional functions well; becoming more competent at structural reform may then entail becoming less competent in traditional adjudication. Evaluating this general proposition may best be accomplished by examining how tightly the specific charges are tied to essential qualities of the adjudicatory process. By widespread agreement,[34] these qualities are: (1) the presence of legal principles by which to decide the dispute, (2) the impartiality of the judge, and (3) the opportunity for a fair hearing for all significantly affected by the court's judgment.

To have effective and appropriate articulation of the principles of law, the Anglo-American tradition has for the most part relied upon, or at least idealized,[35] generalists: lawyers who are broadly and deeply

31. Fiss, *supra* note 25, at 28.

32. *See, e.g.*, Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971).

33. *See, e.g.*, J.Q. WILSON, AMERICAN GOVERNMENT 88-92 (1980) (author notes decline in public confidence in competence of American institutions).

34. See, *e.g.*, a criticism of affirmative activism, Fuller, *supra* note 23, at 364, and a defense, Cavanagh & Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371, 378 (1980).

35. See, *e.g.*, Learned Hand's famous statement on the subject: "I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Car-

trained in law, the nation's history, its values, and the philosophical foundations of those values. But the new territory encompassed by the expansion of judicial authority demands more specialized knowledge, even to understand the limits and question the reliability of what is proffered to the courts, than the judges, talented though they may be, will have time and inclination to absorb.[36]

Also, the focus on legal principles imports a style of thought at odds with that used in structural reform cases. When a dispute is decided on the basis of legal principles, the judge thinks in terms of rights and duties.[37] It thus seems inappropriate to ask "how much will it cost" or "how intensely will the decision be opposed," for example, to give a mass murderer a fair trial. Yet these questions do arise and must be considered by the courts in structural reform cases. The costs are often well beyond those in traditional constitutional adjudication and vitally affect funds for services equal in importance to those before the court.[38] In addition, potential opposition must be taken into account if the judge hopes to put forward a proposal with a chance of succeeding.[39]

The lack of familiarity with such policy planning styles of thought may affect judges' ability to render competent decisions in such cases. On the other hand, if they do become accustomed to policy planning, there is danger of this style of thought spilling over into the definition of rights. A similar point can be made about "reversibility." If something is declared to be a "right," it should not lightly be reconsidered if it is found to be "inexpedient," and although one can separate right from remedy, a decree also bears the characteristic of absolutism, not to be modified unless it is causing "grievious hardship." Yet court decrees

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lyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne, and Rabelais, with Plato, Bacon, Hume, and Kant as with books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly everything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability," as quoted in the New York Times Magazine, Nov. 28, 1954, p. 14 *quoted in* H.J. ABRAHAM, THE JUDICIAL PROCESS 59-60 (4th ed. 1980).

36. *See, e.g.*, D. HOROWITZ, THE COURTS AND SOCIAL POLICY 28-31 (1977); Moynihan, *Social Science and the Courts*, 54 PUB. INTEREST 12, 15 (1979); O'Brien, *The Seduction of the Judiciary: Social Science and the Courts*, 64 JUDICATURE 8, 12 (1980).

37. D. HOROWITZ, *supra* note 36, at 34-35.

38. Glazer, *supra* note 19, at 71.

39. Diver, *supra* note 22, at 63; Fiss, *supra* note 25, at 50-56.

in structural reform cases must be readapted if they are to work.[40]

Further, structural reform cases have typically involved the courts in polycentric problems that effectively resist resolution by legal principles.[41] Altering the structure of an institution and the patterns of behavior therein so that they no longer pose a threat to constitutional principles frequently requires new systems of exchange or bargaining among the participants and new understandings of mission and goals.[42] Restructuring an organization on the basis of legal principles, rather than on factors culled from systems of exchange and a focus upon mission, often decreases the effectiveness of an organization,[43] and further brings consequences that are not only unanticipated but diametrically opposed to the desired result. "Stringent new legal standards" imposed by the courts on the operation of mental institutions have emptied psychotics into the streets or placed them in institutions totally unsuited to their treatment.[44] Busing has often achieved "racial balance" at the price of a decline in the quality of schools for the poor, both black and white.[45] The judiciary's solicitous concern for student "rights" has cowed schools into abandoning their authority, creating an atmosphere where students are far more threatened by one another than they ever were by principals and teachers.[46]

Closely related to the problem of polycentrism is the fact that legal principles can pertain only to a legal problem. Even giving legality a broad definition, we can see that often the legal problem that the court focuses on is an inextricable part of a much larger whole.[47] The prob-

40. *See* Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338, 1375-76 (1975).

41. D. HOROWITZ, *supra* note 36, at 59; Fuller, *supra* note 23, at 374-75.

42. *See generally* Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89 YALE L.J. 513 (1980).

43. *See* Fuller, *supra* note 23, at 358-59, 370-71.

44. For example, many psychotics have been turned over to nursing homes, where order can only be preserved by massive medication. *See, e.g.*, Reich & Siegel, *The Chronically Mental Ill: Shuffle to Oblivion*, 3 PSYCHIATRIC ANNALS 11, 35 (1973); Stone, *supra* note 20, at 1133.

45. The literature on this subject is both extensive and controversial. *Compare* L. GRAGLIA, DISASTER BY DECREE (1976), A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 115-51 (1970), *and* Ravitch, *The "White Flight" Controversy*, 51 PUB. INTEREST 135 (1978) *with* G. ORFIELD, MUST WE BUS? SEGREGATED SCHOOLS AND NATIONAL POLICY (1978) *and* Goodman, *De Facto Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972).

46. *See, e.g.*, Adelson, *What Happened to the Schools*, 71 COMMENTARY 3, 36-37 (1981); *see also* Wynne, *What Are the Courts Doing to our Children*? 64 PUB. INTEREST 3-4 (1981).

47. *See, e.g.*, Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40, 112-15 (1974); Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 436 (1977).

lem may be shockingly inadequate medical care for inmates, but when the court addresses this question it affects the rest of the prison system. The court can take this into account, leading it into highly polycentric considerations based on a multitude of factors, each only peripherally connected to the legal problem but together circumscribing it. Alternatively, the court can ignore the effect on the rest of the system, until, that is, those effects themselves reach the dimensions of legal problems.

Given the magnitude of the reallocation of resources necessary for compliance, the system in question is likely to be the state. Professor Archibald Cox, for example, reports that New York complied with a court order to update a hospital "by transferring to the hospital all the funds appropriated for the prevention and relief of alcoholism."[48] Nathan Glazer speculates that Judge Frank Johnson's court order requiring a fourfold increase in expenditure for mental institutions may have contributed materially to the shocking conditions found in the state prisons a few years later,[49] and further, that increased expenditures on these institutions may mean less fiscal ability to develop and maintain the conditions thought to keep people out of the institution in the first place—education, welfare, jobs, and police.[50] In short, unanticipated and perhaps uncontrollable consequences seem inherent in the match—or mismatch—of policy problems with judicially devised remedies.[51]

The structures and procedures designed to protect other essential elements of the adjudicatory process—the need for impartiality and an opportunity for a fair hearing—further impair the courts' competence in dealing with institutional reform. Impartiality and fair hearing guarantees, for example, restrict the sort of evidence that may be introduced. Developed through centuries of experience, the rules of evi-

48. Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791, 827-28 (1976).

49. Glazer, *supra* note 19, at 71.

50. *Id.*

51. The character of these consequences, shifting a hardship from one "discrete and insular minority" to another, does not seem accidental. As Gerald Frug notes: "The mentally ill involuntarily committed to an institution may receive additional services under court order at the expense of those voluntarily committed to the same institution, or those not committed but using outpatient facilities at public hospitals or mental health centers. Prisoners may receive better medical care at the expense of the parolee who seeks it at a public hospital, or they may receive training or addiction services at the expense of the public at large who need identical services. Many beneficiaries of court orders are not entitled to vote, but neither are the children whose access to education, libraries, or welfare benefits might be curtailed to pay for the court order. The allocation of scarce resources by court order is not likely to be from the fortunate to the powerless; it is already the powerless to whom the state largely directs its resources." Frug, *supra* note 14, at 741-42.

dence, while not perfect,[52] have stood the test of time for reliability in determining "historical" or "judicial" facts, that is, for establishing what happened in a discrete incident. But when the focus is on "social" or "legislative" facts, for example, patterns of social behavior or their relation to a social structure, the effectiveness of the rules may be questioned. For instance, in his inquiry into judicial competence, Professor Horowitz demonstrates that the hearsay rule, which works tolerably well in determining historical facts, introduces both less and more than is appropriate in investigating social facts.[53] Traditionally, social science studies themselves (with a few exceptions) cannot be introduced, for they are mere "hearsay" evidence.[54] On the other hand, "experts" can report on and evaluate these studies as well as give their opinions on matters that have not been subjected to rigorous analysis and on which their opinions should be accorded no special weight.[55]

Fair hearing also implies that the principal litigants will have the opportunity for a full presentation of the issues pertaining to their interests. In institutional reform cases, however, the larger number of individuals and groups who are in some way significantly affected makes it difficult for the court to give the primary litigants the attention they deserve.[56] Even with regard to the primary litigation, the disjunction of "spokesmen" from the victim and the restored, the wrongdoer and the restorer, raises troubling questions of adequate representation. "Spokesmen" have been known to assume that they "know best" either because of their greater "expertise" or their "idealism."[57] A striking example of this occurred in the Boston desegregation litigation. Acting "on behalf of the Coordinated Social Services Council, a confederation of forty-six public and private agencies serving minority groups in the Boston area," a group of Boston's black leaders drafted a statement protesting the plans for massive busing.[58] The NAACP, the "legal" spokesman for the black community, however, chose to press ahead

52. *See, e.g.*, E. LOFTUS, EYEWITNESS TESTIMONY (1979).

53. D. HOROWITZ, *supra* note 36, at 48-49.

54. *Id.*

55. *Id.* The problem of giving too much attention to "experts" beyond their sphere of competence and knowledge is not limited, of course, to the judiciary. *See, e.g.*, J.Q. WILSON, THINKING ABOUT CRIME 43-63 (1975).

56. *See, e.g.*, Special Project, *supra* note 26, at 870-909.

57. *Id.* at 886.

58. The statement read: "We think it neither necessary, nor proper to endure the dislocations of desegregation without reasonable assurances that our children will instructionally profit." Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976), (quoting from Freedom House Institute on Schools and Education, Critique on the Boston Schools City Plan, at 2, (1975) (on file with Yale Law Journal)).

with a "single-minded commitment to racial balance."[59]

Impartiality requires that the courts be relatively "passive" bodies. If they search out a problem for adjudication, they may be regarded as having a predisposition towards it.[60] Passivity, a virtue in traditional adjudication, may present several disabilities in structural reform. Proper reform of an institution may work best in a particular sequence of incremental changes.[61] Before the medicine chest at the prison is stocked with a greater supply of painkillers, drug dealing by the staff must be controlled. Inadequacy of medical supplies, however, may well come to the court's attention first. Moreover, the case that comes before the court may not be at all representative of its type of conflict. Indeed, as Horowitz argues, the courts are likely to get "not the most representative case but the most extreme case"[62] simply because plaintiff's counsel will find that to be the most effective litigation strategy. Finally, passivity means that courts do not have any built-in mechanism for overseeing the effectiveness of their decrees. In traditional litigation no serious problem results from the lack of oversight devices because the parties (and their interests) are concrete. If, for example, the defendant refuses to pay the damages or perform a simple act required by a traditional decree, the plaintiff can be counted on to trigger routine relief mechanisms provided by the courts. In structural reform litigation, on the other hand, the implementation is likely to be much more complex. Disputes may arise over the meaning of the decree; subjects clearly and closely bearing on the effectiveness of the decree may not have been addressed by it; certain provisions may not work towards the end desired or may bring unanticipated consequences. Given the diffuse character of the interests involved and the parties speaking for them in court, there is no guarantee that these matters will find their way back into court. If they do find their way back, they often are even less "legal" problems than the initial question the court confronted in the dispute.[63]

A final consideration, not easily placed under the heading of legal principles, impartiality, or fair hearing, but pertaining to them all, is the sort of tools courts can use; formally, at least, they are few but severe. To an extent unparalleled by our other institutions, courts are

59. Bell, *supra* note 58, at 516.

60. *See, e.g.*, Fuller, *supra* note 23, at 385-86.

61. *See, e.g.*, D. HOROWITZ, *supra* note 36, at 39-41; Glazer, *supra* note 19, at 71.

62. D. HOROWITZ, *supra* note 36, at 41.

63. *See generally* Note, *supra* note 40.

empowered to rule by command rather than by persuasion,[64] but they have this authority only over a narrow range of disputes. This accords perfectly with their claim to rule on the basis of legal principles: one either has a right or one does not, one either owes a duty or one does not. Courts are not "half-loaf" institutions. Therefore, the powers backing these rights are as absolute as the rights themselves. Failure to comply with a court decree is traditionally met with a stiff fine, jail, or attachment of one's property.

The powers of the other branches of government are much more flexible. The "rights" or goals they establish emerge from a process of bargaining, halving loaves, and accommodating-expediency. In implementing these rights, the legislature can choose to encourage or discourage an activity (for example, by tax or subsidy) rather than simply to prohibit or require it. Further, the drastic tools that the courts do have are often inappropriate when the defendant is the government. Courts can hardly command that the legislature spend a few million dollars for the reform of the penitentiary in the same way they command Dr. Smith to pay Mr. Jones for his impaired voice.[65] The state's property, for one thing, is not so easily attached.[66] Courts cannot jail the governor who fails to provide hot showers for prisoners in the same way that they can jail a witness who refuses to give testimony.

In sum, the charge of incompetence seems well founded and deeply placed; indeed, it seems imbedded in the very structure of a judiciary. If the courts could be granted the power of the sword and of the purse, and if they were to take the initiative, ignore the constraints of legal principles, and at the same time keep their independence from the political process, they might be the most competent branch. It hardly needs to be pointed out that they would then be the most dangerous branch. Perhaps, however, the charge is overstated, so it is worth examining the counterarguments.

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64. *See, e.g.*, Diver, *supra* note 22, at 46-47. *But cf.* Horning v. District of Columbia, 254 U.S. 135, 139 (1920) (Brandeis, J., dissenting); R. NEUSTADT, PRESIDENTIAL POWER (1980).

65. But compare Mandel v. Myers, 29 Cal. 3d 531, 629 P.2d 935, 174 Cal. Rptr. 841 (1981), and Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), in which the California Supreme Court directed the state legislature and state treasurer, respectively, to provide funds for abortion and attorneys' fees, respectively, from current budget appropriations.

66. But see Wyatt v. Stickney, 344 F. Supp. 373, 377, 378 n.8 (M.D. Ala. 1972), in which Judge Johnson threatened to "take affirmative steps . . . to ensure that proper funding is realized" for provision of adequate health care in Alabama. Such steps would be "to add various state officials and agencies . . . to [the] litigation, and to utilize other avenues of fund-raising."

B. The Defense

A common starting point for defending the judiciary against the charge of incompetence is to distinguish between rights and remedies. The distinction does make a difference. For instance, while rights should be based upon clear legal principles, remedies, it is argued, often cannot be. There may be several ways in which "cruel and unusual" punishment resulting from prison structures can be eliminated, and the choice among them cannot be "principled"—especially not the details. As Fiss notes:

> For some, these specifics are baffling: how can it be that the Constitution requires a report on September 15, or showers at 110°F, or a thirty-day limitation on confinement in an isolation cell? The bafflement, it seems to me, results from a failure to recognize the instrumental character of the remedy, and the important role played by considerations of efficacy and fairness in shaping that instrument.[67]

As long as the chosen remedy is fair and brings about the relief intended, we cannot complain, it is said, that no principled distinction commends it over another not chosen.[68]

If we grant the clarity of this distinction between rights and remedies, other aspects of judicial activity seem less troubling. With the decision as to "rights" already made, a judge might, without breach of his duty of impartiality, play a more active role in bringing in expert advice, soliciting representatives for unrepresented interests, and requiring more "feedback" regarding the efficacy of his or her decree.[69] Reform proposals have also been suggested with this distinction in mind. One calls for a relatively narrow opportunity for participation at the "rights" stage of the hearing in order to grant a *full* hearing to those primarily affected, and a much broader opportunity at the "remedy" stage in order to provide an adequate hearing for all significantly affected by possible reforms.[70] At this stage, more relaxed rules of evidence and procedure may be appropriate, admitting what would be inadmissible in a regular court proceeding.

One can go only so far, however, with this distinction. First, it is not that neat. In defining rights, courts should have at least some glim-

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67. Fiss, *supra* note 25, at 49.

68. *Id.*

69. Chayes notes that in the Louisville desegregation dispute the judge "personally drafted the decree with the aid of school officials and the plaintiff's attorney. No formal hearings were held. Instead, the judge formulated the decree in an informal working conference." Chayes, *supra* note 25, at 1300 n.85.

70. *See, e.g.*, Special Project, *supra* note 26, at 909-27.

mering of possible remedies, for it is idle to speak of rights that cannot conceivably be accommodated by the political structure,[71] and in devising a remedy a court must of course show the linkage between the remedy and the right in question. Moreover, relaxing the rules of procedure and taking expediency into account in decree formulation may, with some justification, cause the public to regard the courts as less impartial, less principled. Even as ardent an apologist as Owen Fiss recognizes this danger of spillover: "Actualization of the structural variety [that is, remedying structures] creates a network of relationships and outlook—a dynamic—that threatens the judge's independence and the integrity of the judicial enterprise as a whole."[72]

In the second place, even accepting that this distinction has some validity, it is important to note that what gives the courts competence in the sphere of rights does not fit them for designing and implementing complex remedies. The reasoning in the two spheres is distinct. As noted above, the discourse involved in determining rights resists consideration of alternatives, costs, or strengths of opposition, all of which should be considered in developing an effective remedy.[73] Furthermore, the tools the court has for dealing with remedies are quite limited compared to those of the other branches. Still, the distinction between rights and remedies is real, and how it can be used to the courts' advantage in handling institutional reform will be developed below. First, however, we should consider two comprehensive defenses for the competence of the courts' affirmative activism.

In the last year two important and lengthy articles have appeared, sharply challenging the above charges of judicial incompetence. Theodore Eisenberg and Stephen C. Yeazell, in *The Ordinary and the Extraordinary in Institutional Litigation*,[74] contend that the apparently "extraordinary" character of institutional litigation has deep roots in "ordinary" litigation and that the only thing remarkable about the new litigation is that some regard it as remarkable. Ralph Cavanagh and Austin Sarat, in *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*,[75] contend, both on the basis of theory

71. Laconic though it is, Justice Holmes' comment is worth noting: "In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make." Giles v. Harris, 189 U.S. 475, 487 (1903). Similarly, some apologists for affirmative activism have counseled greater realism in setting the "standards" by which the remedy will be measured. *See* Note, *supra* note 47, at 457.

72. Fiss, *supra* note 25, at 53; *see also* Diver, *supra* note 22, at 104.

73. *See supra* text accompanying notes 37-39.

74. Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

75. Cavanagh & Sarat, *supra* note 34.

and practice, that the worries of the critics are without foundation; courts can and do adapt to the new demands placed upon them, the authors argue, without endangering their essential functions. Both of these defenses deserve attention.

Eisenberg and Yeazell claim that the courts' critics fail accurately to portray the ordinary judicial process. The critics, they argue, regard the difficult part of ordinary litigation as the determination of "what happened" and "what legal doctrines are applicable."

> Once that is done, the result flows smoothly. If the plaintiff has failed to convince the court of the merits of his claim, he will slink off to a corner, and perhaps litigate another day; if the defendant is judged liable he will pay, assuming he has money. The court's involvement in the affairs of the adversaries is terminated when a judgment issues; the dramatic finality of its decree prevents the dispute from boiling over again.[76]

They conclude, "[w]hat such a picture ignores, of course, is reality."[77]

For the next several pages, the authors tell us what "every first-year student"[78] knows: that occasionally a defendant does not gleefully hand over the money due, that sometimes a defendant does not even appear for the trial, that even before the trial property of the defendant may be attached, that if the defendant does not pay the damages due, courts have mechanisms for transforming his other assets into money.[79] Now it would be devastating to the critics' argument to discover that they had ignored things that "every first-year student" knows, but it is not hard to see that Eisenberg and Yeazell have devastated a man of straw. No critic claims that the courts operate in the way these commentators describe. The only source they cite as putting forth this view is Abram Chayes,[80] who is clearly more an apologist than a critic.[81] Furthermore, Chayes acknowledges that his portrayal is overdrawn and a mere "capsule" description.[82]

Of greater interest is their contention that the "complexity" of institutional litigation is not new. In probate administration, the law of trusts, and bankruptcy cases, courts have been forced to oversee the operation of complex enterprises (including, as Eisenberg & Yeazell note,[83] the Penn Central Railroad) to see that, among other things, as-

76. Eisenberg & Yeazell, *supra* note 74, at 474.
77. *Id.* at 475.
78. *Id.* at 477.
79. *Id.* at 477-81.
80. *Id.* at 474 nn.52 & 53.
81. *See generally* Chayes, *supra* note 25.
82. *Id.* at 1283.
83. Eisenberg & Yeazell, *supra* note 74, at 485.

sets are preserved and creditors appropriately satisfied.[84] It is true that reorganizing a large railroad corporation is not markedly less complex than restructuring a state prison, and the authors should be credited for this point, but several entries are prominent on the other side of the ledger. First, courts of general jurisdiction have not done that well at these tasks.[85] For that reason, specialized tribunals have often been established to handle them.[86] Second, to the extent that courts have been able to handle these endeavors at all, they have stood behind the front line of conflict. That position is assumed, for example, by personal representatives of the decedent, trustees, or receivers. Thus courts do not have to worry about which move to make among several alternatives, a decision that cannot be justified by reference to principle, but rather they decide whether the front line decisionmaker acted with "reasonable care," or some like standard—a decision that can be justified by reference to legal principle.

One might argue, of course, that courts can and do assume a second line status in institutional cases as well; masters, monitors, mediators, administrators, receivers,[87] all may be appointed to take the courts off the front lines. In this situation, however, the question of "reasonableness" is more complex, because the subject matter involves incommensurable values. Examples abound: neighborhood schools versus ones more "balanced" racially, the security of prison guards versus the dignity of prisoners, academics' versus practitioners' views of what constitutes adequate treatment of inmates of mental institutions.[88] Perhaps more important (though this consideration shades into a question of propriety rather than capacity), the doctrine of separation of powers limits the authority of courts to use receivers and monitors in cases of institutional reform.[89] When a court puts a railroad into receivership it displaces people who do important things, but it does not displace people who perform "executive" functions in the governmental sense. Beyond separation of powers is the question of power per se: a court can issue orders to officers of a corporation with expectations of compliance, and if such is not forthcoming, the court has the drastic

84. *Id.* at 482-86.

85. *See, e.g.*, Cavers, *Foreword-Railroad Reorganizations*, 7 LAW & CONTEMP. PROBS. 365 (1940).

86. *See, e.g.*, 11 U.S.C. §§ 711-13 (1976) (describing the original jurisdiction of courts of bankruptcy).

87. For a breakdown of this "confusing plethora of titles," see Special Project, *supra* note 26, at 826.

88. *See* Diver, *supra* note 22, at 64-88; Glazer, *supra* note 19, at 78-80.

89. Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974); Carter v. Jury Comm'n, 396 U.S. 320 (1970).

tools to insure obedience. Government, as noted earlier, stands on a different ground.[90] Extraordinary litigation seems extraordinary after all.

More substantial and probing is the analysis by Cavanagh and Sarat. They connect allegations of incompetence to the essential qualities of due process, dismiss some allegations as insubstantial or inappropriately identified with due process, and investigate the rest on the basis of the courts' track record in areas deemed revealing. They conclude that courts have adapted and continue to adapt to the demands of affirmative activism without impairing their commitment to due process.

The allegations they investigate are: that courts hear unrepresentative cases and are unable effectively to implement decisions "imposing significant and long-term obligations on the parties"[91] (these faults deriving from passivity and the need for "impartiality"); that the parties to a suit provide an inadequate portrayal of the problem that a court confronts[92] (this deriving from procedural requirements of a "fair hearing"); that courts inappropriately escalate disputes involving intimacy and mutual interdependence[93] (this deriving from the need to resolve decisions by "legal principles"); and that courts cannot deal effectively with polycentric problems.

The "inadequate expertise" allegation, identified by some as a disability resulting from the structural requirements of impartiality,[94] is dismissed by Cavanagh and Sarat as unfounded and unconnected to any element of due process.[95] Citing a couple of instances of successful court involvement in complex environmental cases, they contend "[j]udges need not be untutored to be impartial."[96] The aphorism is of course true.[97] Few would complain if someone with the background of Justice Powell handled an education case, or of Justice Douglas, a securities case. But the matching of such expertise with such problems seems necessarily fortuitous. Our federal district courts are courts of general jurisdiction; judges rotate "from problem to problem."[98] There is nothing accidental about this tradition. If our courts were divided

90. *See supra* text accompanying notes 64-67.
91. Cavanagh & Sarat, *supra* note 34, at 378.
92. *Id.* at 380.
93. *Id.* at 380-83.
94. *Cf. supra* text accompanying notes 35-40.
95. Cavanagh & Sarat, *supra* note 34, at 380.
96. *Id.*
97. *But see, e.g.*, sources cited *supra* note 36.
98. D. HOROWITZ, *supra* note 36, at 28-31.

into specialized tribunals—schools, environment, energy—the process of appointment would likely become dominated in these areas by the most powerful groups with the greatest stakes.[99] To the extent that we seated "tutored" judges, they probably would be "partial."

Cavanagh and Sarat are correct, however, in indicating that our courts of general jurisdiction have tangled competently with complex problems. But it must be noted that when courts have done this, as is true in the cases they cite,[100] they most often are simply reviewing administrative decisions. In such cases, as noted above, the courts are placed behind front line decisionmakers and are concerned with traditional judicial questions, such as whether the original decisionmaker had "substantial evidence" or a "rational basis" for his or her decision.

The "unrepresentative parties and cases" and "partial portrayal" charges are also summarily dismissed by Cavanagh and Sarat. They contend that a fair hearing and impartiality do not mean that only the principal parties can bring matters before the court, and point out that a judge can solicit expert testimony on his own initiative, investigate the unity of a class interest in a class action suit, or appoint "guardians *ad litem* for unrepresented individuals."[101] If this means that a judge can employ all the investigative tools of the administrative and legislative branches of government, their conclusion is sound that "[i]t is difficult to see how any other institutional actor is better equipped to become informed of the ramifications of comparable decisions."[102] One must wonder, however, if this competence does *not* come at the expense of impartiality and fairness in traditional functions. Can such a relaxation of the rules of procedure and evidence be cabined to a hearing on "social facts" and remedies and not be allowed to adversely affect hearings on "historical facts" and rights? Is such a neat separation between rights and remedies possible?[103] Even if it is possible, can the rules be relaxed without damaging the judge's reputation for impartiality? Perhaps. But the literature, the evidence, and the arguments to the contrary are too weighty[104] for the charge to be dismissed this lightly.

Four charges are left for a more detailed empirical investigation. These concern the judiciary's inability to monitor decrees, to deal with

99. *See* Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 80, 85 (1975).

100. *See generally id.*; Smith, *The Environment and the Judiciary: A Need for Co-operation or Reform?*, 3 ENVTL. AFF. 627 (1974).

101. Cavanagh & Sarat, *supra* note 34, at 381.

102. *Id.* at 381-82.

103. *See supra* text accompanying notes 71-72.

104. *See supra* text accompanying notes 52-62.

polycentric questions, to get a full picture of the litigation when defendants do not appear, and to resolve disputes without escalating them. Since the latter two charges and investigations have only indirect bearing on the courts' capacity for institutional reform, only the first two will be examined.

Cavanagh and Sarat seem to grant that the polycentric problems presented in institutional reform are not well suited for "principled" solutions, but are better resolved through a process of compromise and negotiation. They repeatedly contend, however, that it is misguided to focus exclusively on court capacity to reach and enforce decisions,[105] but that we should look as well at a court's capacity for facilitating negotiated settlements, or "bargaining in the shadow of law."[106]

Bargaining in the shadow of law is of course bargaining that would *not* take place *beyond* the shadow of law. Without a court in the background, plaintiffs—inmates or minority schoolchildren—would not get the defendant government to listen nearly so carefully. The shadow, however, is not of fixed dimensions; it is highly dependent on the actions of the judge. Cavanagh and Sarat's argument thus invites an inquiry into the capacity of judges to play the role of "power-broker."[107] Their answer to this question is not entirely satisfactory.

The authors note that one way for the judge to facilitate bargaining is to threaten "a judgment inferior to an alternative arrangement the parties can work out on their own."[108] This thought appears to grant the principal thrust of the critics' "inability to handle polycentric problems" argument, and then, almost perversely, to make a virtue of it. Following this reasoning, we would have to say that the most capricious judges would be the most competent.

A judge, of course, can facilitate bargaining in a more reasonable manner. To gain assent to the sort of outcome thought adequate, a judge can structure incentives and disincentives for the several actors through a variety of techniques. These include "awarding attorney's fees, excluding a named defendant from some aspect of remedial planning, closing an institution, removing an officer, or appointing a re-

105. Cavanagh & Sarat, *supra* note 34, at 373, 402, 405, 407, 412.

106. *Id.* at 373 (citing Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979)). Cavanagh and Sarat suspect that "most extended impact decrees [are] the product not of judicial fiat but of negotiated settlements." Cavanaugh & Sarat, *supra* note 34, at 406. Although there is little by which one can gauge the latter estimation, they are no doubt correct that both aspects of judicial authority—enforcement and negotiation—should be examined.

107. *See* Diver, *supra* note 22.

108. Cavanagh & Sarat, *supra* note 34, at 405.

ceiver,"[109] in addition to the more drastic tools of contempt citations. This reasonable, active, powerbroker role, however, raises a number of questions: "Are judges sufficiently skilled in the art of political bargaining? Can they devote the amount of time necessary to supervise extended negotiations? Do they have access to necessary information?"[110] Both quoted passages in this paragraph are from a cautious assessment of "judges as powerbrokers," by Colin Diver.[111] Both passages are quoted by Cavanagh and Sarat,[112] but notably absent is any discussion of Diver's skeptical conclusions.

Diver argues that for political, strategic, and legal reasons, the above-noted tools (except the award of attorneys' fees) are seldom used. Citing an individual for contempt is apt to make a martyr of him; further, his support often will be necessary for an effective implementation. Displacing a key figure by a receiver has similar effects and raises serious separation-of-powers questions. Closing institutions often will mean the mere rearrangement of inmates into similarly inadequate institutions outside the courts' purview.[113] The only functional power that a court has, according to Diver, is its reputation for "strict impartiality"[114]—its legitimacy. But to the extent that the judge plays the powerbroker role, this legitimacy is undermined. Diver concludes:

> If this assessment is correct, the very source of the judge's political power is, ultimately, its limitation. A judge's actions must conform to that narrow band of conduct considered appropriate for so antimajoritarian an institution. Whenever a court appears to manipulate the rules of litigation for the attainment of social outcomes, its authority wanes.[115]

Cavanagh and Sarat seem to think it is unnecessary to answer the questions raised by Diver or address his skeptical conclusion, for they suggest that masters may be appointed to perform the task of facilitating negotiation.[116] Certainly there is virtue in the use of masters. They

109. Diver, *supra* note 22, at 99-100.

110. *Id.* at 94.

111. *Id.*

112. Cavanagh & Sarat, *supra* note 34, at 406, 408.

113. *See* Diver, *supra* note 22, at 101-02.

114. *Id.* at 103.

115. *Id.* at 104.

116. Cavanagh & Sarat, *supra* note 34, at 406. Indirectly, Cavanagh and Sarat do touch on Diver's conclusion by arguing at the outset of their article that questions of legitimacy can be separated from questions of capacity. They contend: "There is certainly no evidence that the difficulty of the courts today in securing compliance with controversial decisions is primarily attributable to any widely held conviction that they are usurping powers reserved to other institutions—whatever the rhetoric of the opposition to those decisions. Implementation of particular decrees *is* sometimes difficult, but no general challenge to court power

can compensate for the judge's lack of expertise and save considerable time. But their ability to act as powerbrokers depends utterly upon their relations with the court. If the court refuses to back them in their manipulation of the rules of litigation, they will not be effective. If the court backs them in this manipulation, they may be effective in the short run, but the legitimacy of the court, on which they ultimately depend, will, in the long run, be impaired.[117]

As to capacity to monitor decrees, Cavanagh and Sarat point to commonly suggested devices such as "requiring compliance reports, scheduling periodic hearings on the progress of implementation, and—if a master participated in the formulation of the decree— retaining his services during the implementation phase."[118] There are problems, though, with each of these devices. If the court relies simply on the defendant for the compliance report, its accuracy may be questioned.[119] If the court relies upon hearings, accuracy may be enhanced, but the cooperation of the defendants, resentful of the intrusion, may be diminished.[120]

All of this may be regarded as mere friction in the machinery, for perfection is not the appropriate standard. On the other hand, these are problems of sufficient magnitude that here we might compare the capacity of courts with that of administrators. J. Woodford Howard's conclusion of twelve years ago still seems valid: given structural incapacities of the courts, administrators are superior at social reform—they need not wait for litigants to spring into action, and their tools are sharper and more numerous.[121]

If proof beyond a reasonable doubt is required for holding the courts incompetent at handling polycentric problems and monitoring

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has occurred. Sporadic resistance to judicial commands has not led in recent years to retrenchment in judicial power to hear any class of cases or to grant any form of relief." *Id.* at 374 (emphasis in original).

This does not seem an adequate response to Diver's conclusions. First, a perception of illegitimacy, or partiality, in a *specific* endeavor to reform an institution, can undermine the court's capacity to deal with that problem without there being a "general challenge" based on a *general* perception of illegitimacy. Public officials in South Boston could thwart the goals of Judge Garrity (at least temporarily), *see* Morgan v. Hennigan, 379 F. Supp. 410, 482 (D. Mass. 1974), without supporting a federal statute limiting the jurisdiction of the federal courts. Second, for the courts to be successful in institutional reform, they need the *affirmative* cooperation of public officials, not simply their *passive* restraint.

117. *See* Diver, *supra* note 22, at 104-05.

118. Cavanagh & Sarat, *supra* note 34, at 408.

119. Note, *supra* note 47, at 436-37.

120. *See* Note, *supra* note 40, at 1360-73.

121. *See* Howard, *Adjudication Considered as a Process of Conflict Resolution: A Variation on Separation of Powers*, 18 J. PUB. L. 339, 365-70 (1969).

complex decrees, the arguments of Cavanagh and Sarat should prevent such a judgment. But if the case is to be decided by a preponderance of evidence their arguments do not appear sufficient. Considering this, their too quick dismissal of other charges, and the host of charges that they did not address—the tension between legal reasoning and policy planning, the mismatch between the legal and the larger social problem, difficulties in approaching a problem in the proper sequence—the general charge of "incompetence" must stand.

It should be noted, however, that my argument compares the courts with the political institutions, *as if the latter were willing* to pursue these problems. It can be argued that if the other institutions are not willing, then the courts, unless they are totally disabled, have greater "competence" in the sense of making some progress toward the goal. The choice between unwilling but competent political institutions and willing but incompetent courts is of course not a happy one, and the burden of this article is to show how the courts may render this choice less stark. Any discussion of the proper role of the courts, however, must be preceded by a discussion of legitimacy—and the charge of "imperialism"—of the new affirmative activism.

III. The Imperial Judiciary

As a term of popular discourse, "the imperial judiciary" lacks precision and suggests a tone of alarm that may be excessive. Nevertheless, it is apt for discussing the new affirmative activism because it denotes control beyond one's borders and connotes illegitimacy, meanings that are properly attached to some judicial activity in structural reform. In numerous instances courts have usurped powers belonging to the states and to the executive, administrative, and legislative branches of government.

A. Usurpation of State Functions

Three recent Supreme Court cases, bespeaking the continued vitality of federalism in constitutional adjudication, suggest support for the change of usurpation of state authority. In *National League of Cities v. Usery*,[122] the Court set aside the extension of minimum wage and maximum hour regulations to state employees since this extension served "to directly displace the state's freedom to structure integral operations in areas of traditional governmental functions."[123] The Court in

122. 426 U.S. 833 (1976).
123. *Id.* at 852.

Younger v. Harris[124] held that federal courts could not give injunctive relief against pending state criminal proceedings, except in special circumstances. In *Rizzo v. Goode*,[125] the Court reversed a decree requiring the Philadelphia police department to develop new procedures for police training, handling of grievances, and disciplinary action in order to prevent violations (such as had occurred in the past) of constitutional rights.[126]

These cases could be distinguished from institutional reform situations. *Usery* did not involve federal law redressing constitutional violations; *Younger* dealt only with cases then pending before state courts; and *Rizzo* lacked essentials of a "case" since there was not sufficient conjunction between those officials sued, those against whom the injunction would operate, and those who performed the actual misdeeds.[127] On the other hand, one finds in these cases concern for federalism likely to go beyond their specific circumstances. In *Rizzo*, for example, the Court stated that distinct from the general limitations on equitable relief, federalism was an "additional factor" weighing against the legitimacy of the decree:

> Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as petitioners here.[128]

Justice Rehnquist, speaking for the majority, is not as explicit as one would wish in developing "these principles of federalism." He does, however, refer to "comity," which suggests the need to respect the discretionary authority of state officials except when it bears a clear and close relation to constitutional violations. Thus a reasonable inference from *Rizzo*, *Younger*, and *Usery* is that when the relief requested is the restructuring of a state institution performing a traditional government

124. 401 U.S. 37 (1971).

125. 423 U.S. 362 (1976).

126. " '[P]rinciples of equity, comity, and federalism' " restrict federal court supervision of state administrative agencies. *Id.* at 379 (quoting Mitchum v. Foster, 407 U.S. 225, 243 (1972)).

127. The Court in *Rizzo* also found lacking a sufficiently pervasive pattern of police violations to warrant an injunction. 423 U.S. at 371.

128. *Id.* at 380.

function, courts must require a showing of a "tight fit"[129] between the constitutional violation and the remedy requested. This casts doubt on the argument of Owen Fiss that often "[t]he constitutional wrong is the structure itself."[130] Most frequently we deal with structures that cause the violation with some degree of frequency and proximity and remedies that reduce to some extent that degree of frequency and proximity.

This "federalism" objection to affirmative activism has been constructed largely on the basis of how the Supreme Court has interpreted the Constitution. In light of the vigor of dissenting opinions in these cases and the academic criticism,[131] it might be thought necessary to go further in this analysis if my charge of "imperialism" were to rest on these grounds of federalism alone. The analysis of separation of powers, however, supports essentially the same conclusion on when and how courts should intervene.

B. Usurpation of Legislative and Executive Functions

The concept of separation of powers raises several questions about the legitimacy of institutional reform by the judiciary. Article III limits courts to the resolution of "cases and controversies,"[132] but as suggested by the *Rizzo* case, the disjunction in structural reform cases between the wrongdoers and the restorers, the victims and the restored, can reach such extremes as to deprive a conflict of the character of a "case."[133] Partly in response to this contention, Fiss has advocated a reinterpretation of the judicial function in our political system. Traditional Article III interpretation, he says, is derived from the story of disputants who, rather than fight out their conflict, go to a neutral third

129. Compare the similar concept of a "tailoring" principle in Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 417 (1977) (concerning imposition of a systemwide remedy in a school desegregation case, which was held to be in excess of court's authority because it was not tailored to address solely the three specific violations involved).

130. O. FISS, THE CIVIL RIGHTS INJUNCTION 11 (1978).

131. *See, e.g.*, Fiss, Dombrowski, 86 YALE L.J. 1103 (1977); Weinberg, *The New Federalism*, 29 STAN. L. REV. 1191 (1977). According to Fiss, the Court's pronounced concern for federalism in these cases, especially *Rizzo*, is actually "a proxy for another set of values." Fiss, *supra*, at 1159. The latter, he asserts, "is a hostility toward the activism of judges, not just federal judges" and a desire to curb "some of the more ambitious—more idealistic projects of . . . judges." *Id.* at 1160. Weinberg contends that *Rizzo* marks an unsupported and unsupportable departure from the principles of *Ex Parte* Young, 209 U.S. 123 (1908), and Brown v. Board of Educ. II, 349 U.S. 294 (1955), as well as from the traditional understanding of § 1 of the Civil Rights Act of 1871 (now codified in 42 U.S.C. § 1983 (1979)). Weinberg, *supra*, at 1219. She even goes so far as to claim that *Rizzo* was intended "to gut the equity clause of section 1983" and that "*Rizzo*'s 'principles of federalism' turn the grand institutions of our judicial federalism upside down." *Id.* at 1222.

132. U.S. CONST. art. III, § 2.

133. *See* 423 U.S. 362, 371-73 (1976).

party. This, he argues, "does not capture the 'social logic' of courts and might well be replaced by another story: the sovereign sends out his officers throughout the realm to speak the law and to see that it is obeyed."[134] The candor with which it blends executive and judicial power lends this story charm, and its vision of justice with dispatch is alluring, but the plot runs counter to the most basic premises of separation of powers.

The "discoverable and manageable standards" strand of the political question doctrine, which also finds its roots in the Article III case and controversy requirement,[135] suggests further limits to institutional reform, especially in the design of equitable remedies. In *Gilligan v. Morgan*,[136] the Supreme Court considered a request to reform the training and operations of the Ohio National Guard so as to make less likely such incidents as the shooting of demonstrators at Kent State. Dismissing the case, the Court argued that such an injunction would

> plainly and explicitly require a judicial evaluation of a wide range of possibly dissimilar procedures and policies approved by different law enforcement agencies or other authorities . . . . It would be inappropriate for a district judge to undertake this responsibility [even] in the unlikely event that he possessed requisite technical competence to do so.[137]

This case has also been explained on the basis of a lack of causal connection between the training and shooting.[138] But these two lines of reasoning may not be wholly distinct. As the relation between a social pattern and constitutional violations gets tighter, the course of action for providing relief becomes more clear. In that sense there are "discoverable and manageable standards." If this is the case, then again we find another requirement for a "tight fit"— *i.e.*, causal connection— that would render numerous cases of institutional reform illegitimate.[139]

134. Fiss, *supra* note 25, at 29. *See also* Fiss, *supra* note 131, at 1154-60.

135. *See* Baker v. Carr, 369 U.S. 186 (1962).

136. 413 U.S. 1 (1972).

137. *Id.* at 8.

138. *See* Eisenberg & Yeazell, *supra* note 74, at 500.

139. Compare Justice Frankfurter's dissent in Baker v. Carr, 369 U.S. 186, 268 (1962): "Even assuming the indispensable intellectual disinterestedness on the part of judges in such matters, they do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgements. To charge courts with the task of accommodating the incommensurable factors or policy that underlie these mathematical puzzles is to attribute, however flatteringly, omnicompetence to judges. The Framers of the Constitution persistently rejected a proposal that embodied this assumption and Thomas Jefferson never entertained it."

Less "clause-bound" reservations derived from separation of powers have been expressed by other commentators, most notably Gerald Frug[140] and Robert Nagel.[141] Starting from the hardly controversial premise that there must be limits to the "judicial power of the purse," Frug reasons that, since courts have recognized (although usually in *obiter dictum*) that "at some point" costs must be taken into account in the definition of rights, clearly "at some point" costs must affect the formulation of remedies.[142] With this and the generally discretionary character of resource allocation in mind, Frug argues that, in structural reform cases, courts should limit themselves to the definition of rights, and if they must address the institutional standards that accord with those rights, they must state them generally rather than specifically.[143] Specific reforms and a timetable must be articulated by the state (under court order to formulate such a remedy). Beyond that the courts should retain jurisdiction only to resolve disputes concerning the state's "particularization of the constitutional standard" and to insure that the state proceeds "in good faith" to meet those obligations.[144] "It is the direction and rate of change that is important, not the details of timing, staffing, and planning for capital construction. These details should not become the business of the courts."[145] The thought is attractive, but it is not easily translated into doctrine and decisions. Furthermore, Frug does not address the problem of state intransigence.

Somewhat more helpful in defining separation of powers limitations is the article by Robert Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies.*[146] His argument consists of three points. First, notwithstanding recent Supreme Court decisions to the contrary, the concept of separation of powers does limit the federal judiciary's ability to adjudicate vis-à-vis the states; second, the courts should apply to themselves the same separation of power limitations they apply to the other branches of the federal government; and third, when applied, these doctrines would sharply reduce the scope of judicial activities in reforming state institutions.[147] On each of these points, he is persuasive. He provides convincing documentation that the

140. Frug, *supra* note 14, at 715.

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

142. Frug, *supra* note 14, at 777.

143. *Id.* at 790.

144. *Id.*

145. *Id.* at 791.

146. Nagel, *supra* note 141, at 661.

147. *Id.* at 667-81, 681-706, 706-23.

Framers did intend the separation of powers principles to apply to federal-state relations,[148] and that case law until *Baker v. Carr*[149] was faithful to this intent.[150] That courts should apply to themselves the same separation of powers limitations that they apply to the other branches of government seems intuitively fair, and the consequences of their failure to do so are often sobering.[151]

The most intricate part of Nagel's argument is his explanation of the nature of the limits imposed by the separation of powers doctrine, for the Court has not spoken with a single voice on the subject.[152] Nagel's conclusion, setting forth a doctrine of "comparative functional

148. Nagel points out that a major concern of the Framers of the 10th Amendment was that state authority might be impaired if the federal government did not adhere to the doctrine of separation of powers. He supports this view by reference to a) the state ratification debates, *id.* at 668-69, and b) the evolution of the 10th Amendment as part of the Bill of Rights in the First Congress, *id.* at 669-70, and by resort to c) commonsense reasoning about historical data (*e.g.*, that when Hamilton wrote in *Federalist No. 78* that "[t]he judiciary . . . has no influence over either the sword or the purse," he did not mean to add a qualification, "except when dealing with state institutions)," *id.* at 671-72.

149. 369 U.S. 186 (1962).

150. Nagel points out, for instance, that the basic proposition of the Court in *Baker*—that preceding holdings of nonjusticiability had "nothing to do with . . . state governmental organization," Baker v. Carr, 369 U.S. 186, 218 (1962)—rests upon a non sequitur. "The Court," he observes, "distinguished cases that undeniably had involved limitations on the judicial power with regard to state matters by asserting that 'these decisions explicitly reflect only a traditional limit upon equity jurisdiction, and not upon federal courts' power to inquire into matters of state governmental organization.' This answer simply ignores the possibility that 'traditional equity jurisdiction' had been limited by the courts as an implementation of separation of powers." Nagel, *supra* note 141, at 674. That possibility, Nagel goes on to develop, was "precisely the concern" of previous courts, *id.* at 674-78 (citing among other cases Yost v. Dallas County, 236 U.S. 50 (1915); Thompson v. Allen County, 115 U.S. 550 (1885); Meriwether v. Garrett, 102 U.S. 472 (1880)).

151. See *In re* Debs 158 U.S. 564 (1895), in which the Court upheld the authority of federal courts to issue an injunction against strikes threatening the free flow of commerce and to punish those violating the injunction. The case helped shape the influential book by Felix Frankfurter and Nathan Greene, THE LABOR INJUNCTION (1930), which gave renewed strength to the argument that injunctions *are* extraordinary remedies. Owen Fiss has recently attacked this thesis, arguing that courts should regard the injunction as neither lower nor higher among other remedies, but should simply ask what remedy will most effectively vindicate fundamental rights, *i.e.*, personal rather than property rights. O. FISS, *supra* note 130. When used for these rights, the injunction, he contends, should not have the stigma Frankfurter and Greene attached to it and we should not be concerned about objections derived from democracy and separation of powers. *Id.* at 5-6.

152. Because of the intricacy of Nagel's argument it cannot be given full exposition here. In brief then, Nagel identifies four distinct formulations: the basic "hydraulic" model, *supra* note 141, at 689-92; the models distinguishing between "internal and external functions," *id.* at 692-99; the models distinguishing between "essential and non-essential functions," *id.* at 694-95; and Mr. Justice Jackson's "fluctuating" model of The Steel Seizure Case, 343 U.S. 579 (1952). Nagel, *supra* note 141, at 695-97.

differentiation,"[153] incorporates the most useful elements of preceding doctrines and builds upon the reasoning in *United States v. Nixon*.[154] The doctrine would operate as follows: "With respect to two inconsistent claims for power, deny the claim that represents the greater intrusion into, but not necessarily a more effective 'check' of, the classically or textually defined function of the competing branch."[155] The question of which claim is more "intrusive" would be investigated by examining the "depth" and the "breadth" of the intrusion. The spatial metaphors are, of course, not self-explanatory, and their full import would presumably have to be worked out on a case-by-case basis. Basically, "depth" raises an "essentialist" inquiry, that is, a determination of which claim represents the greater intrusion into the "character" of the other function of government. "Breadth" raises a more "empirical" inquiry, that is, establishing which claim more frequently or more extensively trespasses on the function of the competing branch of government.[156]

Applying these ideas to institutional reform, one sees quickly that much of the activity of the lower federal judiciary is rendered suspect. The detail with which decrees are formulated intrudes "deeply" and "broadly" into the executive and legislative functions. Regarding depth, Nagel argues:

> When the constitutional language is broad, the judicial function is to articulate the broad policies contained in the Constitution, and to determine whether existing conditions are in compliance. The classical function of the executive is to decide detailed questions about how to implement constitutional policies. Therefore, a judicial decree specifying in detail how policy should be implemented intrudes deeply into the executive function.[157]

Breadth is significant as well:

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153. Nagel, *supra* note 141, at 697.

154. 418 U.S. 683 (1974).

155. Nagel, *supra* note 141, at 697-98.

156. Illustrating how this model works, Nagel argues that it was correctly applied in the *Nixon* case. Regarding the question of "depth," he says: "The claim [of the Court] represented by the highly specific subpoena was persuasively related to the classical judicial purpose of trying criminal cases. The highly general claim of executive secrecy was less clearly related to the executive purpose of operating the machinery of government." *Id.* at 699. Regarding breadth, he states: "An undifferentiated institutional need is more likely to be claimed frequently. The subpoena in *Nixon* specified exact information required for a specific criminal case; such claims for executive information are unlikely to be made frequently . . . . In contrast, generalized claims of executive privilege could be asserted over a broad range of circumstances and thus intrude frequently into the judicial function." *Id.* at 699-700.

157. Nagel, *supra* note 141, at 709.

> The amount of detail in a decree is an index of the extent to which executive and legislative decisionmaking is limited with regard to matters not under litigation. For example, to the extent that a decree mandates the specific amounts of space or time that must be devoted to prison recreation, resources available for other prison programs, programs that might not be challenged in the lawsuit, are diminished . . . . In short, to the extent that a decree is so detailed as to approximate judicial operation of school or prison systems, the relative displacement of executive and legislative authority is extremely broad, extending even to matters not under adjudication.[158]

As Nagel further argues, the wide-ranging impact that institutional reform remedies have on people who are neither the wronged nor the wrongdoer, also raises questions of legitimacy under this model. It is characteristically a legislative or executive function to regulate the affairs of people who have done no legal wrong, while it is for the judiciary to coerce individuals to make amends for legal wrongs.[159] Of necessity, the judiciary affects people who are not parties to lawsuits, but separation of powers under this model would require the judiciary "to demonstrate that it could not redress the adjudicated violation by involving [fewer] third-party consequences."[160]

If the above arguments are correct—that judicial legitimacy requires a "tight fit" between the structure in question and the constitutional wrong, and between the structural remedy and the vindication of the constitutional right; that there must be a discernible connection between the wrongdoers and the restorers, between the victims and the restored; and that the remedy must not disproportionately displace legislative and executive authority—a good deal of affirmative activism must be regarded as imperial as well as incompetent.

"Imperial," however, is not an apt description, for the term suggests that the people upon whose territory the imperial authority imposes its rule do not welcome it. In this area, to the contrary, they often do. Widespread is the "Alabama Federal Intervention Syndrome," in which elected officials, fearing loss of their constituents' support, and perhaps even publicly attacking judicial intervention, privately bless the courts' lifting of controversial decisions from their shoulders.[161] The syndrome may be characterized as pathological, but the courts' homeopathic solution—more reform of the neglected institutions—

158. *Id.* at 710-11.

159. *Id.* at 711.

160. *Id.* at 712.

161. *See, e.g.*, McCormack, *The Expansion of Federal Question Jurisdiction and the Prisoner Complaint Caseload*, 1975 WIS. L. REV. 523, 536.

only aggravates the disease. Increasingly, legislators embrace the opportunity to be denuded "of the dignity and burden of their own responsibility."[162] To put James Bradley Thayer's famous comment in its modern setting, "It is no light thing to do that."[163]

IV. From Restructuring Institutions to Restoring "the State"

The preceding analyses adumbrate the theme of this section. It attempts to pick up some of the burden of the argument for judicial restraint in the modern context, by making less stark the choice between competent but unwilling political branches and willing but incompetent courts, and by returning the "dignity and burden" of moral choice to the political branches, especially the legislatures. It deals with those doctrines and devices that occupy an intermediate position between the "old" judicial review, which slaps political hands for reaching into forbidden territory, and the "new," which performs with judicial hands tasks to which the political branches refuse to reach.

It is also written with no small degree of sympathy for affirmative activism, for incompetent and imperialistic though the courts may be, it is difficult not to find something admirable in a judge's drive to reform prisons, treat the mentally ill, and integrate society. As Fiss wrote regarding desegregation: "It was not reasonable to expect the judges to be heroes, but the truth of the matter is that many lived up to these unreasonable expectations—they fought the popular pressures at great personal sacrifice and discomfort."[164] What Fiss finds heroic about the judiciary is its capacity to rise above the mere "subjective preferences" voiced in the representative institutions and to give "reasoned elaborations"[165] and concrete meaning, through positive action, to "our public values."[166]

Positive action in the name of public values suggests the concept, in the continental sense, of "The State." An entity rising above "civil society" and its clash of individual wills concerned with personal and economic affairs, The State is concerned with a "general" or "universal" will that should be understood wholly apart from the summation

162. A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AND THE BAR OF POLITICS 24 (1962).

163. J.B. THAYER, JOHN MARSHALL 107 (1901).

164. O. FISS, *supra* note 130, at 90.

165. Fiss, *supra* note 25, at 15.

166. *Id.* at 12.

of particular interests.[167] It embodies, articulates, and enforces the polity's idea of Right.

An attractive concept, it is also dangerous. The longing for a pure statement of "public values"—an authentic *volonte generale*, unblemished by narrow selfish interests—leads to an impatience with representative institutions, which seem inevitably to reflect partisan interests. Fiss, for example, does not even regard it as reasonable to expect that our elected representatives could "give meaning to our public values"[168] and argues that we must rely on the judiciary, which (with his advocacy of the structural injunction) he seems to suggest making into The State itself.[169] But this reliance is doomed to failure. Even stretching their role well beyond present legitimacy and capacity, the courts still would depend on the other institutions for the implementation of their affirmative activism. If the "public values" that the courts articulate are not valued by the public, their plans cannot succeed. The role that Fiss and others envision for the judiciary would be appropriate in a more aristocratic regime, one in which the members of the judiciary would have the powers to carry out their plans, for it is characteristic of an aristocracy that its values are not fully appreciated by the masses. But in a democratic republic, where the rulers are expected to share the values of the ruled, where in an ultimate sense the rulers are the ruled, this role must fail—or transform the character of the polity.

At the same time, our representative institutions were designed to do better than merely to summarize competing social interests or to yield vectors from the clash of diverging social forces. They were designed to elevate to office citizens "whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to contemporary or partial considerations."[170] While our Framers may have had unrealistically high expectations, it seems not unreasonable to expect our representatives to do better than they have in addressing the issues the courts have taken unto themselves. Not so elevated as The State, nor so base as "civil society," the alternative concept of "the State"[171] suggests the appropriate ideal: a set of institutions giving expression and meaning to public

167. The concept of The State has been expressed by thinkers as diverse as Rousseau and Hegel. *See* G. HEGEL, THE PHILOSOPHY OF RIGHT (1821); J. ROUSSEAU, THE SOCIAL CONTRACT (1762).

168. Fiss, *supra* note 25, at 2.

169. *See generally id.*

170. THE FEDERALIST No. 10 (J. Madison).

171. *See* M. ARNOLD, CULTURE AND ANARCHY *passim* (1869).

values but deriving these from an "enlightened self-interest."[172]

Ideas for lifting politics above society, and the state above politics, are not wanting. But the relevant question here is what can the *judiciary* do to restore the State? The remainder of this article will address this question, primarily by reviewing and assessing doctrines and theories that have been put forth as enhancing those qualities associated with the idea of the State. This cannot be an exhaustive investigation, but by outlining the most prominent theories and doctrines, we can at least see the promise of the proposed intermediate mode of judicial review.

A. The Passive Virtues

Alexander Bickel's *The Least Dangerous Branch*[173] represents one of the first and perhaps most ambitious of endeavors to restore the State. In this work he set forth the doctrine and devices—the "passive virtues"—designed to encourage the other branches of government to be less satisfied with action that does not conform to the aspirations of the Constitution, to elevate the horizon of their concern from the immediate and merely expedient, and to cause them to reflect more carefully on the nature of constitutional principles.

The doctrines fall into two categories. The first are the "jurisdictional" passive virtues—utilizing the doctrines of standing, ripeness, mootness, and political question—which permit courts, particularly the Supreme Court, to avoid addressing issues that would oblige them to "legitimate," that is, uphold, legislation that can at best be justified on the basis of expediency. Second are the nonjurisdictional, or "socratic," passive virtues, utilizing such doctrines as vagueness, desuetude, and delegation of authority, which enable the courts to "remand" the question before them to the political branches for a "second look." These are more "active" than the jurisdictional passive virtues because they do involve taking a case and voiding the law or its application, yet they are still "passive" because they work no binding interference (not directly at least) with the political branches. They are "socratic" because they seek to engage these branches in a colloquy, causing them to reflect more precisely, and thus more responsibly, about the principles they affect. If, for example, a court voids a statute for vagueness, it does not block the legislature from reaching any particular result, but it does require that the legislature be clear about what it is doing. Similarly, the doctrine of desuetude requires the legislature to decide

172. *See* A. DETOCQUEVILLE, DEMOCRACY IN AMERICA *passim* (1840).

173. A. BICKEL, *supra* note 162.

whether it wishes to see enforced again a statute that has been unenforced for so long that an individual is deprived of notice that such is the law. In the same vein, limiting the extent to which the legislature can delegate authority blocks no substantive outcome, but it does narrow the gulf between the exercise of power and the responsibility for its exercise.

The theory holds great promise, but it also suffers structural weakness and lends itself to abuse largely because Bickel did not define its boundaries with sufficient care. Regarding the latter concern, courts have used these procedural devices as covers to reach substantive results which themselves cannot be justified on principle. For example, courts have pretended to use vagueness (or its first cousins, overbreadth and least restrictive alternative) but have made such demands of precision or "tight fit" between ends and means that it has become virtually impossible for the legislature to reach the result it desires.[174] Additionally, Lawrence Tribe has transformed desuetude into a doctrine justifying the voiding of laws when a moral consensus no longer appears to back them, but before a new consensus comes into being.[175] Determining when there is no longer a moral consensus invites the manipulation of doctrine. Moreover, Tribe's model, by requiring an "irrebuttable presumption" analysis if the morality of the old consensus is reasserted in law,[176] holds an unprincipled and nearly insurmountable presumption against that morality. Again, these are abuses rather than uses of Bickel's theory, but by failing to make clear the occasions for its exercise, the theory is at least mildly responsible, though not culpable, for its abuse.

Even if the theory is not abused, its structure and the premises on which it is built reveal weakness. It was designed to achieve an accommodation between the courts' role in articulating "endurable principles" and the political demands for expediency. The passive virtues were intended to be prudential rather than principled. With some justification, Gerald Gunther, in his widely cited commentary on *The Least Dangerous Branch*, argues that Bickel exaggerates the extent to which courts need to be concerned with expediency.[177] Gunther asserts that Bickel overaccommodates expediency in his passive virtues, and

174. *See, e.g.,* Shelton v. Tucker, 364 U.S. 479, 492-93 (1960) (Frankfurter, J., dissenting); A. BICKEL, *supra* note 162, 51-55; Gunther, *Reflection on* Robel, 20 STAN. L. REV. 1140, 1140-49 (1968). *But see, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601 (1973).

175. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 298-310 (1975).

176. *Id.* at 305-08.

177. Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 9-10 (1964).

thus effects not an accommodation, but rather a "surrender of principle to expediency," in which the Court would be one hundred percent principled twenty percent of the time.[178] Bickel's concern for expediency was most manifest in his wish to avoid "legitimating" undesirable legislation.[179] There may be something to the thesis that the Court "legitimates" legislation when it declares acts "not unconstitutional," but "verifiable" evidence for it is not strong;[180] or, as Gerald Gunther argues, the notion of legitimation is too thin a hypothesis to support the elaborate edifice of the passive virtues.[181]

This criticism has greatest relevance to the jurisdictional devices, however, and the more socratic devices, if not abused, may be considered still to make a valuable contribution to restoring the State. Though valuable, their scope and effect—except for that of delegation of authority[182]—must be considered limited.

B. "Newer" Equal Protection

Gunther tried his hand at enhancing the integrity of the political process on a broader basis through a reformulation of the Equal Protection Clause.[183] He designed his "newer" equal protection as an intermediate level of analysis between the "strict scrutiny" that courts use when legislation disadvantages a "suspect category" (for example, race) or restricts a fundamental right or interest (for example, voting) and the minimal scrutiny that courts use otherwise. The key characteristic of Gunther's equal protection is that it would take seriously the often-stated requirement that the legislative means bear a "rational relation" to the legislative classification or "substantially further" the legislative end. Courts would evaluate the relationship, first, by focusing on the "articulated purposes" of the legislation, rather than supplying "justifying rationales by exercising its imagination," and second, by examining the evidence brought before them rather than "hypothesizing" a set of

178. *Id.* at 3, 5.

179. A. BICKEL, *supra* note 162, at 69-71.

180. *See, e.g.*, C.L. BLACK, THE PEOPLE AND THE COURT 34-55 (1960); J. CHOPER, *supra* note 22, at 82-83; Adamany, *Law and Society: Legitimacy, Realigning Elections, and the Supreme Court*, 1973 WIS. L. REV. 790; Murphy & Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 LAW & SOC'Y REV. 357 (1968). *But see, e.g.*, A. BICKEL, *supra* note 162, at 29-33.

181. Gunther, *supra* note 177, at 8-9.

182. *See infra* text accompanying notes 213-72.

183. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

facts that could support the "rationality"[184] of the relationship.[185]

This doctrine has several attractions. Apparently, it would not obstruct legislative ends; it would not involve "ultimate value judgments about the legitimacy and importance of legislative purposes";[186] and more to the point of our inquiry, it could "improve the quality of the political process . . . by encouraging a fuller airing in the political arena of the grounds for legislative action."[187] Legislatures would have to be more certain that there were, in fact, grounds to support their classifications, and perhaps even more significantly, they would be forced to consider honestly the purposes for their legislation. Examined in the glare of public scrutiny and public discourse, purposes of simple favoritism might not stand up.

To illustrate the workings of this model we should consider a classic case of minimal scrutiny. In *Williamson v. Lee Optical, Inc.*,[188] the Supreme Court reviewed an Oklahoma statute that barred opticians from placing old lenses in new frames or grinding new lenses calibrated to match the old ones without the written prescription of a licensed ophthalmologist or optometrist. The Court, per Justice Douglas, rejected the opticians' contention that, since opticians could reproduce the prescriptive terms of the lens working simply from fragments of the glass, there was not sufficient relation between the means and possible health end.[189] In doing so, however, the Court relied upon both imagined purposes and hypothesized facts.[190] Under the Gunther model, the legislature would have had to consider the evidence that a prescription really was necessary in some cases (and how frequent those cases were) to grind lenses properly or that this legislation would encourage more frequent eye examinations. If this evidence were thin, the legislature would have had to put forth what was in fact a more likely purpose—to aid optometrists and ophthalmologists over opticians. The model would not itself void such a preference, but it would force the legislature to discuss it publicly. The model would serve two

184. *Id.* at 21.

185. There seems no principled reason for limiting the inquiry to legislative classifications rather than extending it to legislative ends, that is, making this into a "due process" rather than an "equal protection" doctrine. Gunther gives only a "tactical" argument for placing his model in the equal protection clause. "[D]ue process carries a repulsive connotation of value-laden intervention for most of the Justices, of the Burger, as well as the Warren, Court." *Id.* at 42.

186. *Id.* at 21-22.

187. *Id.* at 44.

188. 348 U.S. 483 (1955).

189. *Id.* at 491.

190. *See id.* at 487-91.

purposes: it would make legislators more readily accountable to the public, and would reduce the likelihood of arbitrary legislation.

Gunther's model does sound attractive, but there are a number of reasons to doubt whether the model would serve its purpose well. First, any legislative classification can be given a purpose, usually suggested by the legislative terms, that corresponds with it perfectly. As one commentator[191] has perceptively argued, only by using deceptive devices such as "ignoring a purpose," "stating the purpose as a unit rather than as a mix of policies," and "manipulating the level of abstraction at which the purpose is defined,"[192] are courts able to find a mismatch between the ends and the means.[193] The model is spared the full force of this criticism, however, by the fact that the purpose in question is not what appears from the terms of the legislation, but what is in fact articulated.

The next question, then, is who can so articulate. In addition to the legislature, Gunther argues that the state courts or the attorney general should be able to articulate the purpose that the federal courts would consider.[194] But these bodies would not have to state the true purpose, nor would their accountability be enhanced greatly if they did, since the individual legislator could deny that he or she had a particular articulated purpose in mind when voting for the legislation.[195]

The relevant articulation could possibly be limited to the legislature, but that would also beget problems. Many legislative bodies keep no records and for those that do, the record is generally unreliable as an indicator of intent.[196] We might require that the purposes be stated in a preamble, but since purposes may be as varied as the legislators, this could become a laundry list or a meaningless umbrella of vague generalities.[197] One solution might be to require a clear and specific statement of purpose. This probably would increase accountability, but considering the variety of purposes that may lie behind a single act, such a requirement might unjustifiably bottleneck the legislative pro-

191. Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

192. *Id.* at 132.

193. *See also* Trimble v. Gordon, 430 U.S. 762, 777-86 (1977) (Rehnquist, J., dissenting).

194. Gunther, *supra* note 183, at 47.

195. *See, e.g.*, P. BREST, PROCESSES OF CONSTITUTIONAL DECISION-MAKING 1016 (1975); J.H. ELY, DEMOCRACY AND DISTRUST—A THEORY OF JUDICIAL REVIEW 126 (1980); Fiss, *Groups and the Equal Protection Clause*, in EQUALITY AND PREFERENTIAL TREATMENT 90 (M. Cohen ed. 1977).

196. *See, e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1921).

197. J.H. ELY, *supra* note 195, at 128.

cess, and most significantly, the Constitution has no readily discernible "clear and specific preamble" requirement.

In sum, newer equal protection cannot deliver on its promises to lift politics above partial concerns and to cause legislators to be more reflective and more responsible. Its effectiveness is wholly dependent upon the discovery of a disjunction between means and ends and the placing of the responsibility for that disjunction on the legislature. But looking strictly at the terms of the legislation, a disjunction can be introduced between the means and the ends only through disingenuous manipulation; looking beyond the terms of the legislation, there is simply no way to introduce the disjunction in a manner that realistically places responsibility on the legislator. In short, newer equal protection cannot restore the State.

C. Representation-Reinforcing Judicial Review

In his book, *Democracy and Distrust*,[198] John Hart Ely, one of the most effective critics of the Gunther and Bickel models, has put forth his own proposal for enhancing the political process, what he calls "representation reinforcing" judicial review.[199] Unlike Gunther's model, Ely's is process oriented rather than means oriented, but like Gunther's, his purports not to block substantive outcomes. In fact, avoiding value judgments on legislative products is one of Ely's chief concerns. Beyond a proposal for enhanced speech protection,[200] the key objective is to insure that all who are significantly affected by legislation are accorded "equal concern and respect"[201] in its formulation.

To be sure, there is something "warm and comforting"[202] about this thought, but one must question whether it has any discernible boundaries, whether it can be located in the Constitution, and whether it works to the end that Ely desires.[203] Upon perceiving how Ely would place this ideal in operation, one must conclude either that it would bring outrageous consequences, or that it is not really process oriented after all. Attempting to ground his approach in footnote four,[204] Ely

198. *Id.*

199. *Id.* at 73-104 *passim*.

200. *Id.* at 77-81.

201. *Id.* at 82.

202. Pangle, Book Review, *Rediscovering Rights*, 50 PUB. INTEREST 157, 159 (1978) (reviewing R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977), from whence Ely takes the concept of "equal concern and respect.")

203. For a more extensive criticism of Ely's theory of judicial review, see Brubaker, *Fear of Judging*, 12 POL. SCI. REVIEWER 207-42 (1982).

204. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). *See supra* note 1.

argues that strict scrutiny should be exercised when legislation disadvantages a "discrete and insular" minority, against whom the lawmaking majority holds a prejudice. The key then becomes how to determine whether prejudice exists. In accordance with his desire to prevent making a value judgment that would displace that of the legislature, Ely argues that prejudice must be determined on an empirical basis. The question is not whether the prejudice is *justified*, only whether it exists.[205]

According to Ely, there are two types of prejudice. First is the obvious case of known hostility, what he calls "first degree" prejudice.[206] Examples include, historically, racial prejudice, and currently, (since we're not worried about justification) hostility against robbers and rapists. Then there is second degree prejudice, which results from an "inaccurate" (again, not necessarily unjustified) stereotype that works to a group's disadvantage.[207]

When taken to its logical conclusion, Ely's definition of first degree prejudice leads to ludicrous results. Criminal penalties apply to a suspect class—namely criminals. Thus, these laws would be subject to strict scrutiny. Disarmingly honest, Ely admits that this is exactly what this theory does. He sees no problem, however, because these classification schemes would pass constitutional muster without difficulty. The goal is substantial, the fit "so close, that whatever suspicion such a classification might under other circumstances engender is allayed so immediately it doesn't even have time to register."[208]

But let's think slowly. First, we must realize that when Ely speaks of "fit," he is actually talking about "cause."[209] The causal relation that Ely has in mind when he speaks of a close fit in the context of criminal sanctions presumably works on several dimensions. We incapacitate an individual from committing future crimes by imprisoning him. We modify his behavior (or, as was said in more hopeful days, we rehabilitate him) either through changing his attitude or by causing him to recalculate the costs and benefits of criminal behavior. And we deter others by making known to them the consequences of criminal inclinations.

205. J.H. ELY, *supra* note 195, at 153-54.

206. *Id.*.

207. *Id.*

208. *Id.* at 154.

209. Requiring robbers to carry water pistols and rapists to wear polka-dotted underwear "fits" the goal of protecting person and property in the sense that these distinctive requirements are reserved for those who commit these crimes. But the means would do little to promote any rational goal.

If we think this causal connection tight enough to pass strict scrutiny and justify punishing criminals, we should also note that it would justify punishing innocents. Imagine, for example, two people—one guilty of committing a crime and the other innocent, but criminally *prone* to precisely the same extent as the guilty.[210] On each of the dimensions mentioned above—incapacitation, behavior modification, and deterrence—the argument would be as strong for punishing the innocent as the guilty. Incapacitation of the innocent as much as incapacitation of the guilty would, by hypothesis, lead to a reduction in crime. Behavior modification of the innocent as much as of the guilty is warranted, since both pose an equal threat to person and property. Deterrence might be thought to introduce a distinction since the public may be deterred more by seeing someone punished whom they believe actually committed a crime, rather than one who is merely prone to commit a crime. But even if this is true, all that is necessary is that the public *believe* the criminally prone to have committed a crime. The causal connection between punishment and protection of person and property would be the same.

In sum, if the causal connection between punishment and protection is strong enough to justify punishing the guilty, it is also strong enough to justify punishing the innocent; if the causal connection is too weak to justify punishing the innocent, then it is too weak to justify punishing the guilty. However tight one finds the causal connection, the result is perverse. The only way one can distinguish punishing the innocent from punishing the guilty is to admit the legitimacy of a concern that Ely denies—retribution—and thus the presence of a justifiable hostility toward a class of persons.

Ely's analysis of "second degree" prejudice is no less vulnerable than that of first degree. It too attempts to avoid value questions such as what is "unfair" discrimination: "The cases where we ought to be suspicious are not those involving a generalization whose incidence of counterexamples is 'too high,' but rather those involving a generalization whose incidence of counterexamples is significantly higher than the legislative authority appears to have thought it was."[211] Taken seriously, this approach would permit *any* value judgments and therefore any amount of discrimination against women, aliens, homosexuals, and

210. For purposes of this hypothetical, we assume a method exists that is unquestionably reliable for predicting one's propensity to commit crime.

211. J.H. ELY, *supra* note 195, at 157.

others, as long as the empirical judgments were accurate.[212]

Thus, while Ely does endeavor to enhance the integrity of the process of democratic decisionmaking, he does not put forth a proposal with any promise of restoring the State. In his enthusiasm to prevent courts from imposing their value judgements on the rest of the polity, he articulates a method of judicial review that not only prevents the polity from making value judgments that are necessary to avoid perverse results, but that permits the polity to discriminate in a manner that few would find tolerable. If this theory builds a State, it would not be one in which many would choose to reside.

D. Delegation of Authority

So far, the inquiry into state-enhancing doctrines has not been terribly fruitful. The next two approaches—reinvigoration of the nondelegation doctrine and of constitutional common law—suggest more promise and provide a firmer foundation for the goals of the preceding approaches: to force deeper reflection on legislative tasks, encourage greater appreciation of constitutional values, and enhance the accountability of the legislators. We start with the nondelegation doctrine.

The concept of the State articulated above suggests a set of institutions designed to facilitate the expression and implementation of the public interest.[213] The institutions are to be accountable to the people, but must appeal at least as much to their reflective opinion of what is good as to their immediate interests in what is pleasant. The State would thus not overaccommodate the powerful and well-organized, nor underaccommodate the needs of the weak and unorganized. The concept, of course, is idealistic and imprecise, but it nonetheless serves as a useful standard. It has at least enough content so that we can see how delegation of authority works to its destruction.

The leading account of the effect on the State of modern government's massive delegation of authority is Theodore Lowi's *End of Lib-*

212. Ely in fact seems not at all serious about this approach if his attempt to "operationalize" his "ideal" indicates his real intention. He would make "suspect" all generalizations that give advantages to the decisionmakers or that have developed without adequate social intercourse between the decisionmakers and the group disadvantaged by the legislation. *Id.* at 158, 161. Under these standards, his "operational" criteria achieve the opposite effect of his "ideal" criterion: no matter how accurate are the legislators in their generalizations, they will not likely be able to implement them since the legislation will have to survive a strict scrutiny test.

213. *See supra* text accompanying notes 167-72.

eralism.[214] Given the seemingly innate American distrust of government, every expansion of it, he argues, has led to "a crisis in public authority. And each crisis of public authority has been accompanied by demands for expansion of representation."[215] The New Deal followed in this tradition but also introduced something novel by extending representation into "administration"—that is, by giving the most powerful organizations affected by an agency a special place in the decisionmaking processes of that agency. This representation could be effective only if "administration" involved broad policymaking authority, and this the legislature willingly provided.

What began in the New Deal largely for the sake of expediency—to gain consent for the massive expansion of government—later became praised as something good in itself by proponents of a corrupt version of pluralism.[216] This ideology held that all interests were organized into groups (not factions) and that all groups accurately represented the interests for which they spoke. Updating the ideology of capitalism, pluralism also held that these groups were in perfect competition with one another and that the public good would therefore be served by their interaction.[217] All that was necessary was to bring these groups into the "interior processes of policy formation."[218] On each of its presuppositions, Lowi argued—and his argument has become the conventional wisdom[219]—pluralism was wrong. Many interests—especially those of the poor, ethnic and racial minorities, and the "public" in general—are not, or at least were not, well-organized. Moreover, organizations do not necessarily represent the interests they claim to, and most importantly, competition among the groups is far from perfect.[220] Bringing already oligopolistic groups into "the interior processes" of government—that is, into administration—and specializing policy processes affecting them, has introduced the infamous "iron triangles" wherein major policy questions are resolved by an interest group, a congressional subcommittee, and an administrative agency.[221]

214. T. LOWI, THE END OF LIBERALISM (2d ed. 1979). Lowi's account has become so famous that only a brief recapitulation is necessary. For more extensive commentary on Lowi's work, see Downing & Thigpen, *A Liberal Dilemma: The Application of Unger's Critique of Formalism to Lowi's Concept of Juridical Democracy*, 44 J. POL. 230 (1982), and Thomas, *Review of T. Lowi's* End of Liberalism, 74 AM. POL. SCI. REV. 206 (1980).

215. T. LOWI, *supra* note 214, at 61.

216. *Id.* at 40.

217. *Id.*

218. A. SCHLESINGER, *supra* note 7, at 43, *quoted in* T. LOWI, *supra* note 214, at 54.

219. *See, e.g.*, J.Q. WILSON, REGULATION 360 (1980).

220. T. LOWI, *supra* note 214, at 58.

221. *Id.* at 67-77.

In effect then, what the government gave away to get consent in the 1930's was its authority. The power to make policy now lies parceled among a variety of agencies and interest groups. Obviously there are a number of problems with such a system. In traditional theory, and significantly so in practice, the State rose above the myriad social interests. Now, the State has become what the pluralists envisioned in their modern theory—one more bargaining agent among many others. Drawing upon Walter Lippmann's[222] terminology, Lowi speaks of this as producing a "derangement of power" from the public to the "special imperiums" of special interests. It is a system that maintains old and creates new "structures of privilege" and that resists change.[223] From an individual's perspective the unstructured delegation means that he or she is subject to the force of law when there is no rule of law. There is no ascertainable standard providing the individual with fair notice and guarding him or her against discriminatory enforcement.

Lowi's argument is overstated, and in being restated so briefly it has been exaggerated further. Lowi portrays all of our policy processes as "clientele" oriented, but, drawing upon the language of James Q. Wilson,[224] it is obvious that much of the policy process is best characterized as majoritarian, entrepreneurial, or interest group oriented.[225] On the other hand, he is correct, no doubt, in asserting that too much public policy has become alienated from the public. The very vocabulary of popular discourse—special interests, unholy alliances, iron triangles, issues networks, capture—indicates that there is at least a popular belief to that effect.

To the extent that Lowi is correct, limiting legislative delegation of authority is tantamount to restoring the State. In a purely formal sense, it is apparent why this should be true. Preventing the delegation of authority means that policy would be made in the legislature where, again formally, there is the greatest representation of the public's interest and opinion. Coming from rather large geographical entities rather than directly representing interest groups, representatives may be expected, in the words of Madison, "to refine and enlarge" factious, partisan interests, into a reasoned expression of the public interest.[226]

Few people today really dispute that restoring more policymaking to the legislature would be a good thing. The arguments against non-

222. W. LIPPMANN, ESSAYS IN THE PUBLIC PHILOSOPHY (1955).

223. T. LOWI, *supra* note 214, at 60.

224. J.Q. WILSON, AMERICAN GOVERNMENT: INSTITUTIONS AND POLICIES 410-23 (1979); J.Q. WILSON, POLITICAL ORGANIZATIONS 327-45 (1973).

225. The pluralist model of countervailing forces *is* occasionally accurate.

226. THE FEDERALIST No. 10, at 82 (J. Madison) (C. Rossiter ed. 1961).

delegation seem to be that a truly legislative legislature is an impossible ideal, that informal aspects of American politics are so dominant and adverse to the idea of the State that formal change would make very little difference, and that indirect effects of limiting delegation would in fact enhance these adverse informal aspects. Each element of this argument merits examination.

The impossible ideal argument rests on two related contentions, one having to do with what Congress is regulating, the other with Congress itself. Congress is regulating a gigantic, complex, and highly technical economy and society. Thus, to demand that Congress supply "precise legislative directives"[227] to guide administrative decisionmaking, is to require it to abandon regulation. Moreover, some subjects of regulation, such as wage and price controls, are said to be so "politically and economically volatile" that "constant changes in the basic parameters of the problem may preclude the development of a detailed policy that can consistently be pursued for any length of time."[228] Finally, it is argued that when approaching a new subject of regulation, it is best to proceed one step at a time: deal with a concrete problem, assess the consequences of the rule dealing with the problem, and then move on to another, rather than attempt to formulate the rules in the abstract apart from experience regarding how they work.[229]

Most of this argument attacks a straw man. The advocates of a nondelegation doctrine do not demand "precise" and "detailed" standards; they advocate a requirement for "clear" standards or concrete subjects.[230] Very often simple but clear standards can overarch highly complex and technical areas and supply sufficient guidance to the administrators. A law need not have the precision and specificity of a tax code in order to structure adequately the discretion of administrators.[231] To draw from a different but analogous context, Learned Hand's relatively simple conception of what constitutes "unreasonable risk" in tort law—"[t]he degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it

227. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1694 (1975); *see also* Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 715 (1969).

228. Stewart, *supra* note 227, at 1695.

229. *See* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 49 (1969); Stewart, *supra* note 227, at 1695.

230. T. LOWI, *supra* note 214, at 97-107, 124.

231. The fact that Congress does legislate so specifically in the tax arena, however, should give pause to those who speak of congressional incapacity.

happens, and balanced against the interest which he must sacrifice to avoid the risk"[232]—while not uncontroversial, has for decades given adequate guidance to juries and judges as they have refined the conception in case-by-case adjudication of exceedingly complex problems.

On the other hand, it seems true that dealing with some problems is best done through a highly inductive approach. This was the method, of course, through which our common law developed, and much of the practical virtue of our system is owed to the method. Any argument for a nondelegation doctrine must meet this contention.

Beyond the technicality and complexity of what Congress regulates is the question of Congress itself: its political capacity. Getting consensus on an objective such as "clean air," while vague and attractive in the abstract, is much easier than agreeing upon a standard that will make clear the increased cost of industrial production and the increased price or decreased availability of some goods or services—that is, a standard that is likely to mobilize discontent and opposition. Making this point in arguing against the nondelegation doctrine, Stewart writes: "Individual politicans often find far more to be lost than gained in taking a readily identifiable stand on a controversial issue of social or economic policy."[233] Many political scientists would agree,[234] but facilitating a politician's wish to avoid taking responsibility hardly seems a desirable goal.

The more serious objection, and what must undergird Stewart's argument, is the belief that we are better off to have an area of the economy or society regulated, even if aspects of that regulation lack majority backing of our representatives. Unless one wishes to be ruled by philosopher-kings, however, "better off" must have something to do with majority backing. Perhaps it is this: offered a package of regulations, the contents of which are unknown and unknowable except in a most general sense, the majority would prefer to take it rather than to leave the area unregulated. Some political decisions do have to be boxed in large packages—for example, an individual's decision between the state of nature and a government with a number of imperfections, or between several such governments, and the voter's decision between one candidate and another, both of whom hold several policy perspectives with which the voter disagrees. It is doubtful, however, that generality is inherent in the subject of regulation, or that Congress

232. Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940).

233. Stewart, *supra* note 227, at 1695.

234. *See, e.g.*, M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977); D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

is incapable of giving us packages that are held together by "intelligible principles" or "meaningful standards." Moreover, if in some areas the legislators are not capable of giving us meaningful packages, then our political system does give a presumption in favor of liberty from governmental restraint.[235]

The argument that nondelegation could make only a miniscule difference compared to other factors has been most concisely stated by Norman Thomas.[236] He argues that a reaffirmation by Congress of its authority to regulate—*i.e.*, restoration of the "rule of law"—

> would do little to strengthen political parties, lessen the tendency of disgruntled citizens to direct their energies into a single-issue interest groups, and enable Congress to provide independent policy leadership. Nor will [it] increase citizen trust and confidence in government, expand direct individual participation in politics, or produce effective executive leadership.[237]

Of the first three factors that Thomas mentions—parties, single interest groups, and congressional leadership—the latter two seem closely tied to the first, for strengthening parties (assuming there remain only two) will likely strengthen Congress and weaken single-interest groups.[238] The key relationship to be explored, then, is that between nondelegation and coherent parties. The possibility of restoring the State seems to rest on them both. Accordingly, a recent argument of Richard Bensel[239] is particularly troubling, for he contends, on the basis of an empirical investigation, that the rule of law and responsible party government are "incompatible."[240]

Drawing from the arguments of Lowi and Friedrich Hayek,[241] Bensel constructed a standard by which he could determine a congressman's support for rule of law. The instances in which members of the House in four terms supported the rule of law position (which most

235. J.H. ELY, *supra* note 195, at 134; Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 585 (1972).

236. *See* Thomas, *supra* note 214, at 206.

237. *Id.* at 207. It is not clear that delegation of authority is unrelated to all of these elements. Lowi, for example, argues that executive leadership would be more effective under a nondelegation doctrine. T. LOWI, *supra* note 214, at 301-02. The thrust of Lowi's main argument is that the crisis in authority—which must bear on trust and confidence—is rooted in the massive delegation of authority. *Id. passim*.

238. *See, e.g.*, E. BANFIELD & J.Q. WILSON, CITY POLITICS 18, 19 (1963); Zeigler & Dalen, *Interest Groups in State Politics*, in POLITICS IN THE AMERICAN STATES 93-136 (3d ed. H. Jacob & K. Vine eds. 1976).

239. Bensel, *Creating the Statutory State: The Implications of a Rule of Law Standard in American Politics*, 74 AM. POL. SCI. REV. 734 (1980).

240. *Id.* at 743.

241. F. HAYEK, CONSTITUTION OF LIBERTY (1960); F. HAYEK, THE ROAD TO SERFDOM (1944).

frequently occurred when the member supported an amendment with more specific language for a portion of a bill) were divided by his or her total number of roll call votes. This gave each member a "score" for rule of law support. As Bensel reports, his important findings were:

> Congressional support for a rule of law is inversely correlated with partisan control of the presidency; Republicans tend to support a rule of law slightly more, on the whole, than do Democrats; and, finally, both party leaders and committee chairs provide less support for the standard than the remainder of their respective parties.[242]

The conclusion of incompatibility between the rule of law and responsible party government is connected to these findings by several observations. Responsible party government requires close cooperation between the executive branch and Congress "within a relatively strong party organization." That cooperation seems facilitated by relaxed standards of specificity. Committee chairmen favor broad delegations of authority because in working with the agency implementing that delegation they are able to get actions that "would not survive scrutiny on the floor if they were explicitly articulated in a statute."[243] Similarly, "[t]he president and the party leaders have an opportunity to share and trade influence over those executive decisions which are either too visible or too wide-ranging to remain within the prerogatives of committee-agency spheres of discretion."[244]

These findings do not compel Bensel's conclusion, although they do show that Congress is unlikely to be the immediate source of support for a revived nondelegation doctrine. Contemporary power holders find delegated authority congenial to their interests, and not insignificantly, these interests include avoiding accountability.[245] Yet this indicates little about what would happen if Congress and the executive branch found the nondelegation doctrine imposed on them by the courts. Such action would remove some of the bargaining chips between congressional and executive actors and shift other chips from the implementation stage to the lawmaking stage of the political process. We might speculate that, given the lack of party control, leaders would simply be unable to get the support for clear bills that they were able to get for vague ones; that is, some regulatory action would not take place. Alternatively, and of equal plausibility, congressmen might realize that

242. Bensel, *supra* note 239, at 739 (emphasis deleted).

243. *Id.* at 741-42.

244. *Id.* at 742.

245. Greanias & Windsor, *Is Judicial Restraint Possible in an Administrative Society?*, 64 JUDICATURE 400, 412 (1981).

their individual power has become more tightly bound to their party's power, and would work to establish a more coherent congressional party system. To be sure, such a party would be distinct from one that is held together by bargaining off hunks of lawmaking authority. It would more likely be "programmatic"—somewhat more ideological and principled—which would be all the more conducive to the restoration of the State.

It is one thing to assert that the nondelegation doctrine would be conducive to restoring the State, it is another thing to say that support for the doctrine can be drawn from the Constitution, and yet another to define the boundaries of the doctrine. Although the converse of the principle—that Congress may delegate all of its authority to whomever it pleases—is outrageous, many commentators have asserted that the nondelegation doctrine has no foundation in the Constitution.[246] This assertion rests principally on the fact that the Constitution does not explicitly forbid the Congress to delegate authority but does explicitly grant Congress authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution [its enumerated] Powers, and all other Powers vested by [the] Constitution in the Government of the United States, or in any Department or Officer thereof."[247]

The first point, however, is not sufficient to prevent placing the nondelegation doctrine in the Constitution, since most doctrines applied by the courts are not immediately text-given, but are "mediating principles"[248] or "conceptions"[249] inferred from the Constitution's text, its structure, or the intentions of the Framers. Regarding the second point, it is true that the spirit of the Necessary and Proper Clause is to enable the federal government to exercise its "great Powers,"[250] but the terms in which the spirit is expressed are "to make law," not to make lawmakers.[251] Thus, depending on how one interprets the phrase "to make law," one can develop the nondelegation doctrine as an appropriate conception inferred from the text.

The second traditional mode of constitutional interpretation—reliance on the intentions of the Framers—also provides for a nondelega-

246. *See, e.g.*, A. MASON & W. BEANEY, AMERICAN CONSTITUTIONAL LAW 210-11 (5th ed. 1972); R. TRESOLINI, AMERICAN CONSTITUTIONAL LAW (4th ed. 1975); Roche, *Distribution of Powers*, in 3 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 305-06 (D. Sills ed. 1968).

247. U.S. CONST. art. I, § 8, cl. 18.

248. Fiss, *supra* note 195, at 84.

249. R. DWORKIN, *supra* note 202, at 134-36.

250. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404 (1819).

251. *See* J. LOCKE, SECOND TREATISE § 141 (1689).

tion model. While the Framers' specific intentions are ambiguous regarding the boundaries of congressional power to delegate,[252] it is hard to quarrel with Sotirios Barber's conclusions that, at a minimum, the Framers wished "to maintain the constitutional arrangement of offices and powers," and that extensive delegation of authority amounting to "abdication" of responsibility of office produces a new and unauthorized arrangement of offices.[253]

Finally, it is also plausible to develop the doctrine from the methodology that Charles L. Black has called "inference from structure and relationship."[254] Few would dispute that an essential element of the structure and relationship of our government is found in the concept of a "republican form of government," the heart of which is the idea that law is to be made by representatives of the people.[255] Although one could argue that the President then qualifies as a lawmaker, both the American tradition and the idea of separation of powers suggest that the authority to make law, broadly conceived, is to be vested in representative assemblies.[256] If this is an accurate interpretation of the structural implications of republican government, then we may combine this methodology with that of textual exegesis to yield a discovery of no small significance: the nondelegation doctrine should also apply to the states through the constitutional guarantee of a republican form of government.[257]

Supported by inferences from the text, structure and relationship, and the intentions of the Framers, the nondelegation doctrine should find a legitimate place in the Constitution. But what is its content? Barber's work, *The Constitution and the Delegation of Congressional Power*, is no doubt the most systematic study of this question to date and his proposal is well worth examining. To avoid abdication of its constitutional responsibilities, he argues, Congress must decide "between conflicting proposals presented by clashing interests" and not

252. *See, e.g.*, K. DAVIS, *supra* note 229, at 47-48; Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 308-09 (1975).

253. S. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER 17 (1975). T. Lowi, in order to underscore his contention that this is in fact what has happened, chose to subtitle his second edition of *The End of Liberalism*, "The Second Republic of the United States." *See* T. LOWI, *supra* note 214.

254. C.L. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

255. *See, e.g.*, THE FEDERALIST No. 10 (J. Madison).

256. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 54 (1965); Ehmke, *Delegata Potesta Non Potest Delegari: A Maxim of American Constitutional Law*, 47 CORNELL L.Q. 50 (1961).

257. *See* U.S. CONST. art. IV, § 4. *See also* J.H. ELY, *supra* note 195, at 240 n.78. *But see infra* note 272.

delegate such decisions to others.[258] Congress can delegate authority but "only as an instrument of decision," not "as a substitute for decision."[259]

While there is much to commend this approach, it asks too much of the uncertain dynamics of the policy process to expect a clash of interests that will present congressmen with salient alternatives. In clientele politics,[260] a situation of concentrated benefits and distributed costs, a bill might be written in deliberately vague language by the committee that will oversee it. Because the costs are widely distributed and the language is not offensive, the bill may not mobilize sufficient opposition to present the Congress with alternatives. In majoritarian politics, on the other hand, a system with distributed costs and distributed benefits, the goal might be expressed at such a high level of abstraction that the whole question of salient alternatives simply would not arise. For example, the proposal might simply be for "safe products," a goal that, presumably, no one would oppose.

Because the political process may not bring forth salient alternatives, a slightly different standard—one derived from Learned Hand's *Bill of Rights*[261] lectures—is preferable. Despite the fact that Hand urged one of the most extreme forms of judicial restraint, he did advocate a form of the nondelegation doctrine. For an act of the legislature to be considered law by the courts it must have the character of legislation. This means, he argued, that the "existing status quo must have occasioned discontent" and "[t]o set matters right the legislature must first understand the facts as they are, and follow this by some sort of prophetic forecast of the effect of the measure proposed."[262] To make a judgment regarding its effects, of course, the legislature must have before it a reasonably clear measure. Failure to supply one, Hand argued, amounts to "abdication of authority over the subject matter by a transfer to others of authority that the legislature alone may exercise."[263]

This notion suggests the now abandoned requirement of "an intelligible principle"[264] to guide the administrators and (although it is a

258. S. BARBER, *supra* note 253, at 38.

259. *Id.* at 41.

260. *See supra* text accompanying note 224.

261. L. HAND, THE BILL OF RIGHTS (1958).

262. *Id.* at 37.

263. *Id.* at 49.

264. See J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928), in which the Court held that § 315(a), Title III, of the Tariff Act of September 21, 1922, authorizing the President to increase or decrease duties in order to compensate for differences in costs of production in competing foreign countries, contained an "intelligible principle to which the

less significant component of the doctrine and difficult to implement for reasons outlined above)[265] the requirement that the legislation be backed by a "rational basis" for inferring that its means will promote its ends. This approach does not differ a great deal from Barber's.[266] What it does is emphasize an affirmative obligation on the part of the legislature to investigate what it regulates well enough to see salient alternatives for handling the problem. It also requires that the legislature choose an alternative in a manner sufficiently intelligible to forecast its consequences and to guide administrators.

As mentioned above, however, there are circumstances in which the territory is new, its problems complex, but the need for regulation is great. In these cases it may be best to develop regulation through experimentation, focusing on discrete and concrete aspects rather than formulating abstract comprehensive principles. Pragmatism, however, does not require abandoning the nondelegation principle. Rather, as Barber suggests,[267] the legislature should be permitted delegation that would otherwise be unconstitutional in order to develop policy, if it also provides for legislative review as experience is gained. Perhaps the most promising approach for accommodating accountability to pragmatism is Lowi's suggestion of periodic legislative review and codification of administrative rulings.[268]

Because this article is concerned with doctrines for developing the State, it has focused on delegation of authority from the perspective of legislative duty. But attempts have been made to articulate constitutional limitations from the perspective of individual rights: mainly the right to be free from arbitrary rule and the right to have fair notice of what is unlawful.[269] An administrative agency, however, even if given an authority unbounded by anything resembling an intelligible principle, could meet these requirements by developing clear rules to guide itself and inform the public.

On the other hand, there is a sense in which the two approaches merge. It is a premise of our political system that liberty should not be impaired unless there exists or has existed a consensus for its impair-

person or body authorized to fix such rates is directed to conform" and for that reason was "not a forbidden delegation of legislative power." 276 U.S. at 409.

265. *See supra* text accompanying notes 183-98.

266. His approach may perhaps be regarded as a means of implementing it except in unusual cases. In fact, he expresses accord with the "intelligible principle" concept. *See supra* note 253, at 108.

267. *Id.* at 51.

268. T. Lowi, *supra* note 214, at 305.

269. *See, e.g.*, K. Davis, *supra* note 229, at 54-59.

ment.[270] The Supreme Court has pursued this notion, albeit in an inchoate fashion, by indicating that when individual rights, coming at least in the shadow of constitutional protection, are threatened by administrative action, the Constitution requires a clearer statement that the legislature does indeed wish that action to take place; the more closely the force of law approaches an individual right, the tighter must be the fit between power and responsibility for its exercise.[271] Since one may reasonably doubt whether the nondelegation doctrine should apply to the states strictly on the basis of the Guarantee Clause,[272] this approach, bridging foundations in individual rights and legislative duties, will prove to be relevant when we return to the question of institutional reform.

E. "Common Law" Dimensions of Constitutional Adjudication

It has become increasingly clear that some constitutional decisions do not have the sort of finality that one expects of rulings based upon fundamental law. Rather, they are subject to revision by the legislature and thus may be considered a type of "common law." The least controversial of these revisions occur regarding admiralty cases and disputes among the states and foreign nations. These come under the jurisdiction of federal courts because of the parties to the dispute rather than because they concern federal law, treaties, or constitutional provisions.[273] Thus, although the authority to decide the cases comes *from* the Constitution, the decisions are not based *on* the Constitution.[274]

But other areas where Congress can revise the courts' decisions are not so easily explained away. Although congressional authority to do so was once questioned,[275] it is now well-established constitutional law that Congress can overturn federal court decisions limiting state au-

270. *See supra* note 235.

271. *See, e.g.*, Garner v. Louisiana, 368 U.S. 157, 185-207 (1961) (Harlan, J., concurring); Kent v. Dulles, 357 U.S. 116, 128-30 (1957).

272. On the premise that the nondelegation doctrine is inherent in the definition of a republican form of government, it was argued above that the doctrine could be applied to the states through the Guarantee Clause, U.S. CONST. art. IV, § 4. *See supra* text accompanying notes 254-57. This assumes a great deal, however. The Court has, in the past, declined to rule on the "political questions" presented by the Guarantee Clause. *See* Luther v. Borden, 48 U.S. (7 How.) 1 (1849), *cited in* Baker v. Carr, 369 U.S. 186, 216, 218 (1962). The Court in *Baker* stated that, since *Luther v. Borden*, the Court has "refused to resort to the Guaranty Clause . . . as the source of a constitutional standard for invalidating state action." 369 U.S. at 223.

273. U.S. CONST. art. III, § 2, cl. 1; Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

274. *See In re* Garnett, 141 U.S. 1 (1891); Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214 (1954).

275. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

thority to regulate commerce.[276] More controversial is a recent development in which the Court has indicated that its decisions regarding the scope of individual rights under the Constitution are "to some extent" subject to revision by Congress.

This aspect of the debate was initiated by the Voting Rights Act of 1965,[277] which was passed under congressional authority to enforce the Fourteenth and Fifteenth Amendments[278] and which banned, in various circumstances,[279] the use of literacy tests. In several cases, the Supreme Court upheld this ban in spite of the fact that it almost certainly would not itself have declared the particular tests in question unconstitutional.[280] Various rationales were put forth to justify the act: superior congressional authority to find and evaluate facts (in accordance with rules of law announced by the Court) regarding discrimination;[281] independent authority to interpret the Constitution, modifying (in a fashion binding on the courts) the Court's interpretation;[282] and congressional authority to pass "remedial" legislation, with remedies different from those articulated by the Court.[283]

Of the rationales supporting the Voting Rights Act, the most persuasive seems to be a broadly understood "remedial" explanation.[284] Adding some support to this interpretation is the explicit invitation in *Miranda v. Arizona*[285] to Congress and the states "to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal

276. Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946).

277. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1976)).

278. 42 U.S.C. § 1973s (1975).

279. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, tit. 1, § 4 (codified as amended at 42 U.S.C. § 1973b (1976)).

280. See, *e.g.*, South Carolina v. Katzenbach, 383 U.S. 301 (1966), which upheld the Act's ban of literacy tests in the South despite the fact that in Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45 (1959), a unanimous Court, through Justice Douglas, had rejected an attack upon North Carolina's literacy test. See also Katzenbach v. Morgan, 384 U.S. 641 (1966), which upheld the Act's ban of literacy tests to anyone who had completed the sixth grade in an accredited school in Puerto Rico, and Oregon v. Mitchell, 400 U.S. 112 (1970), which upheld the 1970 nationwide extension of the literacy test ban.

281. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 328-30, 334 (1966).

282. Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966).

283. *Id.* at 648-50.

284. *See* Rome v. United States, 446 U.S. 156 (1980) (upholding refusal of Attorney General of United States, under authority of 1965 Voting Rights Act, to permit Rome, Georgia, to change its electoral system and annex surrounding territory in spite of fact that city had no discriminatory purpose in these acts). *Rome* shows that "remedies" can be understood broadly enough to encompass most of the congressional actions that could be taken under an independent congressional authority to reinterpret the Constitution.

285. 384 U.S. 436 (1966).

laws"[286]—ways that might be adopted in place of the Court-imposed rules of procedure. This interpretation rests on the theory that constitutional adjudication may be divided into two sectors. The first has been called "true"[287] or "pure"[288] constitutional interpretation. It is an inquiry into the "values"[289] themselves that the Constitution protects. The second has been variously referred to as supplying "judge-made supplements of at least quasi-constitutional magnitude,"[290] "filling in the blanks,"[291] working "around the edges,"[292] "impure"[293] interpretation, or simply "constitutional common law."[294] By whatever name, its key characteristic is that it supplies possible, but not necessary, means of implementing constitutional principles. The distinction is akin to that between rights and remedies.[295]

Because the Supreme Court has considered only congressional acts broadening the Court-articulated remedies, there has been no occasion to confront directly the question of whether Congress can restrict or replace Court-designed remedies. Justice Brennan has indicated that Congress can work only to broaden Court-articulated doctrine[296] (the "ratchet" theory),[297] but most commentators have found the rationale unpersuasive.[298] Burt argues that Congress should be able to work in either direction, as long as it simply makes adjustments " 'around the edges' of the Court's proclaimed doctrine."[299] Cox similarly argues for a two-way authority, limited, however:

> (a) to situations in which the Court has formulated a governing principle but the legislative and judicial branches have different

286. *Id.* at 467.

287. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 33 (1975).

288. *Id.*, *cited in* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 29 (1978).

289. *See* Burt, Miranda *and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81.

290. Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 252 (1971).

291. Burt, *supra* note 289, at 118.

292. *Id.* at 129.

293. L. TRIBE, *supra* note 288, at 29.

294. Monaghan, *supra* note 287, at 33.

295. Some "remedies" fit into the first category, however, because they are essential to protection of constitutional values. *Id.*

296. *See* Oregon v. Mitchell, 400 U.S. 112, 249 n.31 (1970); Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966). Justice Brennan was actually speaking of congressional authority to modify the substantive content of the 14th Amendment, but his argument applies with equal strength to congressional authority to provide remedies.

297. Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975).

298. *Id.* at 606-08; Burt, *supra* note 289, at 118-34; Cox, *supra* note 290, at 253-61.

299. Burt, *supra* note 289, at 121.

> perceptions of the conditions to which the principle applies; and (b) to instances in which the Court has formulated some corollary to a constitutional command upon a different view of contemporaneous conditions from the legislature.[300]

Part of the power of revision would appear to depend on how the Court views its task of supplying remedies for constitutional principles. Henry Monaghan, for example, suggests that since the Court's decisions in this sphere are subject to revision, it need not attempt to articulate the remedy that is least intrusive or "minimally adequate," but rather should feel free to "proceed on a frankly experimental basis in the hope of achieving the 'best' implementing rule on a cost-benefit analysis."[301] Clearly these remedies could be treated differently by Congress from those that are essential to the protection of constitutional principles.

This is not the place to establish the precise scope of congressional authority to contract the remedies or implementing rules articulated by the courts, except to say that the courts must deem as boilerplate constitutional law those rules that are indispensable to the protection of a principle of "true" constitutional interpretation.[302] But, in accord with this basic premise, commentators have suggested that a number of constitutional decisions could be subjected to significant contracting revision. Robert Burt argues for the constitutionality of Title II of the 1968 Omnibus Crime Control and Safe Streets Act,[303] which calls for the admission of confessions in federal courts if, according to specified criteria (somewhat short of the *Miranda* warnings), they were given "voluntarily."[304] John Kaplan,[305] joined later by Monaghan,[306] suggests that *Mapp v. Ohio*'s exclusionary rule may be overturned by a legislative alternative that is equally effective in protecting the individual from unreasonable search and seizure. For example, the legislature could create a right of tort action against the offending officer, or a police training and disciplinary program. Robert Bork has argued that Congress can restrict the remedy of busing as a means to implement the *Brown* decision.[307]

Although the commentators are not necessarily enthusiastic about these potential restrictions, they indicate that the benefits of congres-

300. Cox, *supra* note 290, at 255.
301. Monaghan, *supra* note 287, at 26.
302. *Id.* at 33.
303. Pub. L. No. 90-351, 82 Stat. 197 (codified at 18 U.S.C. § 3501 (1976)).
304. Burt, *supra* note 289, at 129.
305. Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1030 (1974).
306. Monaghan, *supra* note 287, at 5-9.
307. R. BORK, CONSTITUTIONALITY OF THE PRESIDENT'S BUSING PROPOSALS (1972).

sional involvement in constitutional determinations outweigh the costs. As Burt points out:

> Congress can make distinctions among classes that the Court would itself be hard put to explain on principled grounds both because Congress is more sensitively tuned to the competing social interests that demand accommodation and because the institutional legitimacy of a legislative act depends not so much on the rational persuasiveness of its decisions as on the simple fact that a majority of "responsible" elected officials were willing to vote for the proposition.[308]

And despite some arguments to the contrary,[309] congressional fact finding capabilities do seem superior to the courts'.[310] Moreover, the tools belonging to Congress for dealing with the problem are much broader and more flexible than those available to courts.[311] All of these factors are more pronounced when we move from rights that correlate with negative limits on the political branches to rights that correlate with affirmative obligations.[312]

Actively encouraged by the courts' more deliberate delineation of the "pure" and "impure" dimensions of constitutional adjudication, Congress is likely to lift its sights from a nearly exclusive concern with constituency interests and join the courts in the dialogue that articulates our public philosophy. Of course, it could work the other way. A frank admission that not all constitutional pronouncements of the courts are chiseled in stone may encourage a usually wary Congress to do battle,[313] not simply upon grounds that the courts would be willing to yield, but upon that portion courts regard as pure constitutional law. And tied more closely to the people, Congress might not provide remedies quite as expansive as the courts and many commentators would wish. But with new responsibility Congress is likely to grow more responsible.[314] Remedies might not be as expansive, but they would be built on a broader, and in the long run firmer, foundation.[315]

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308. Burt, *supra* note 289, at 113-14.

309. *See, e.g.*, Cavanagh & Sarat, *supra* note 34, at 381-82; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 240 (1973).

310. *See, e.g.*, Cox, *supra* note 290, at 200; Cox, *supra* note 2.

311. *See supra* text accompanying notes 74-121 *passim*.

312. Cox, *supra* note 2, at 94.

313. *See generally* Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978).

314. A. BICKEL, *supra* note 162, at 22.

315. Prediction is hazardous regarding whether contraction or expansion would be more likely, but the political dynamic seems to favor expansion. When the courts make clear that they are operating on a common law basis, they do not need to worry as much about their "counter-majoritarianism." They can look, as Monaghan urges, beyond the minimally in-

The practice of the commentators on constitutional common law has been to speak only of a role for Congress rather than of one for the states. As the language of *Miranda* suggests,[316] however, there is no reason why the states may not enter this dialogue with the courts. The benefits of "nonprincipled" remedies, fact finding capability, and broader tools for dealing with a problem, attributed to Congress, also apply to the states.

Monaghan is one of the few commentators to make an explicit case against extending to the states the authority he would grant to Congress to revise constitutional common law:

> As a general matter it does not appear appropriate that federally guaranteed rights, particularly when their basis is constitutional, should have materially different dimensions in each of the states when both the source of the right and any ultimate interpretation is unitary. Given the limited and important nature of the rights involved, I find unconvincing any argument that a uniform common law of individual liberty would undermine the values inherent in having fifty different laboratories for social experimentation. Rather, the constitutional rights and their implementing components establish a nationwide floor below which state experimentation will not be permitted to fall.[317]

If the Court were to limit its pronouncements to rights and implementing rules indispensable for the protection of those rights, this argument would be persuasive. But as Monaghan himself advocates, the Court should go beyond the indispensable remedies to ones thought likely to work well.[318] Also, since we do not know what remedy is likely to work or to work well, we would be wise to allow a "courageous State . . . , if its citizens choose, [to] serve as a laboratory."[319]

In the sphere of revisable constitutional law, the supremacy of federal law is clear whenever Congress decides to act. As long as Congress is silent, however, there seems to be no principled basis for maintaining Court-designed rules in preference to state-designed ones. In arguing the contrary, Monaghan seems to have been overly influenced by the workings of adjudication regarding the Commerce Clause. There, it is true, that when the Court voids a state practice, it articulates a rule that can only be overridden by Congress. But the value that the Court vin-

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trusive approach, to the one that is best for protecting a constitutional value. This opens a dialogue with the political branches, but as Monaghan notes, it is "one in which the factor of inertia is now on the side of individual liberty." Monaghan, *supra* note 287, at 29.

316. *See supra* text accompanying note 285.

317. Monaghan, *supra* note 287, at 19.

318. *Id.* at 29. *See supra* text accompanying note 301.

319. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

dicates in articulating its rule is one that *requires* nationwide application. It is the value of a national free market. Even if the rule has only common law status, if it is to have any effect at all, it *must* be nationwide. The same cannot be said of a rule implementing an individual right. There is another sense in which the situations are not analogous. When courts void state commerce law, they articulate an implementing rule for a constitutional principle that Congress is free to reject. The value of a national free market has, then, only a quasi-constitutional status; the Constitution gives Congress plenary authority to accept or reject it. Regarding individual rights, the principles are subject to revision by *no* party, state or federal. The implementing rules, however, should be.

Conclusion: Back to Institutional Reform

We would do well to surmount the dilemmas of institutional reform, I have argued, by restoring the State. While the doctrines outlined above should contribute to this end, it must be admitted that their general application will not send the political branches scampering off to reform prisons and mental institutions. We must consider then, in light of the above arguments, what federal courts should do when they confront unconstitutional conditions in state institutions. Even when directly confronting the institutional cases, courts should take what steps they can to encourage the political branches to pick up the task. Toward that end the doctrines outlined above have some relevance. What is developed below is a sketch in rough chronological order of how courts could proceed to maximize the chances of the political branches picking up their responsibility, to minimize incompetence, and to eliminate imperialism.[320]

How often such a case would arise is uncertain, but where the institutions are operating without clear guidelines from the legislature or sufficiently detailed administrative rules, their authority to hold inmates should be considered void unless, within a reasonable period, the legislature and the relevant agencies develop standards. Potentially, each of the three nondelegation models discussed above could come into play. Where there are not clear guidelines structuring the administrators' discretion, the legislature has failed in its constitutional duty. Where rules are inadequate to give an inmate fair warning of the consequences of his or her behavior, or to prevent the capricious applica-

320. Much of what follows will have relevance to prisons and mental institutions, but not to schools.

tion of penalties and rewards, individual rights are violated. Where the liberty in question is fundamental and thus falls in the shadow of constitutional protection, the limitations must come from the legislature itself.

The immediate effect of a nondelegation holding would be to throw the problem to the legislature, to force the issue of institutional reform onto the political agenda. Once there, it may be sensible to speak of relief that comes "through an aroused popular conscience that sears the conscience of the people's representatives."[321] It seems safe to assume, at least, that institutional conditions are often more the product of neglect than design. Once attention is focused on the problem, some improvement can reasonably be expected.

Unconstitutional standards, however, might be articulated, or practices might continue in total disregard of the standards, or the legislature and the administrators might simply refuse to address the questions. In these events, the ball is back in court. Forced to make a more direct inquiry into the constitutionality of confinement, the court should take care to establish clearly, though not necessarily specifically, the standards by which it finds the conditions deficient. It should then issue a decree to the officials to provide a plan for a remedy and a timetable for its implementation. This step is common, but occasionally it is skipped and the court develops its own remedy in the belief that the state will not produce an adequate plan.[322] What sound justification may be given for this practice is not apparent. In his reform of Alabama prisons,[323] Judge Frank Johnson, for example, chose to foreclose this opportunity for a state response because four years after the state had devised a comprehensive medical plan for the prisons in response to court order, "at least some" aspects of the plan had not been implemented.[324] By that standard no method is likely to be a success. It is also notable that today the medical improvements in the Alabama prisons are among the most successful part of the reforms.[325] Whether this is because the litigation concerning medical facilities began four years earlier than the comprehensive order, because medical reforms could be more easily accomplished, or because of the state's involvement in the design of the plan, is not certain, but it hardly warrants the

321. Baker v. Carr, 369 U.S. 186, 270 (1962) (Harlàn, J., dissenting).

322. Special Project, *supra* note 26, at 798, 865.

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

324. 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, 911-12 n.116 (1977).

325. N.Y. Times, May 4, 1981, at A16, col. 2.

conclusion that to be effective a plan must be judge-made.[326]

If the political branches refuse to come forward with an adequate plan, greater intervention will be necessary. To the fullest extent possible, the court should rely on traditional, even though drastic, techniques—for example, monetary damages[327] and the release of inmates. Yet damage awards may not be sufficient to prevent future violations of civil rights, and there will often be difficulty getting the cases to court and proving violations there. Release of inmates is a simple, yet comprehensive, solution, and since it comes after the state has clearly shown itself unwilling to make reforms, it may be the appropriate remedy in some circumstances. The political fallout from such a move, however, may be so overwhelming that, except for the case of overcrowding, it is probably best reserved until after there has been noncompliance with the court-ordered plan.

So, as the next-to-last resort, the court may have to design a plan. Yet even here it should insure that the state has adequate opportunity to participate in hearings on the remedy. To avoid violating principles of separation of powers, this plan should be no more detailed and no broader (in terms of the effect on nonparty participants) than necessary to vindicate the rights involved. As Nagel argues, "lower courts should be required to specify how deference to general legislative policies or to the specifics of executive decisionmaking would impede their efforts to redress the constitutional violation. This would require federal courts to state explicitly the less intrusive alternatives considered and the reasons for their rejection."[328]

Within these confines, however, the court need not develop remedies that would only be minimally adequate to meet constitutional standards. That is, it may be free from the "tight fit" requirements indicated above. It may look for the "best" remedy, because the remedy should have the status of common law. This should not mean that partial compliance with the decree by administrative officials should be approved if minimal standards are met, but rather an alternative design put forth by the legislature[329] could be submitted to the court for approval if the alternative met minimal standards.

326. *But see* Eisenberg & Yeazell, *supra* note 17, at 492; Robbins & Buser, *supra* note 324, at 923.

327. *Cf.* Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281.

328. Nagel, *supra* note 141, at 719-20. *Contra* O. FISS, *supra* note 130, at 13-15.

329. Because the issue involves fundamental rights, only a legislative response should be regarded as adequate. *See supra* text accompanying note 271.

The benefits of this approach over the more "imperial" plans of a Judge Johnson are several. Most notably, this approach extends the scope and opportunity for a political response; it emphasizes more clearly the state's responsibility for handling the problem (making it more difficult to shift the moral burden to the courts); and it limits the manner of judicial involvement to a more judicial form. Here, judicial decisionmaking is more principled; it occurs on more familiar terrain; it does not involve the court itself in a powerbroker position; and it maintains the appearance and much of the reality of impartiality. If, as seems to be the case, judicial capital is limited,[330] this approach certainly seems a wiser investment of resources.

Situated in a political universe, courts must adapt to changing circumstances and accommodate the exigencies of power. They must, in short, abide by the rule of politics, that is, prudence. But charged by tradition and "by the hard facts of [their] position in the structure of American institutions to be a voice of reason,"[331] courts derive their authority from adhering to the rule of law, that is, principle. This tension between principle and prudence, inherent in the exercise of judicial review and heightened in the context of institutional reform, cannot be dissolved, but it can be mediated. By substituting, when possible, socratic colloquies for direct and abrasive confrontations with the political branches, the doctrines outlined above suggest rule by principles that are at the same time prudential.

330. *See* J. CHOPER, *supra* note 22, at 161-64.

331. Hart, *The Supreme Court 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959).