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FOREWORD: THE FORMS OF JUSTICE

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THE Constitution establishes the structure of government. It creates the agencies of government, describes their functions, and determines their relationships. The Constitution also identifies the values that will inform and limit this governmental structure. The values that we find in our Constitution — liberty, equality, due process, freedom of speech, no establishment of religion, property, no impairments of the obligation of contract, security of the person, no cruel and unusual punishment — are ambiguous. They are capable of a great number of different meanings. They often conflict. There is a need — a constitutional need — to give them specific meaning, to give them operational content, and, where there is a conflict, to set priorities.

All of us, both as individuals and institutional actors, play a role in this process. In modern society, where the state is all-pervasive, these values determine the quality of our social existence — they truly belong to the public — and as a consequence, the range of voices that give meaning to these values is as broad as the public itself. The legislative and executive

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Many of the ideas in this essay were developed in several courses of mine at the Yale Law School during the 1978–1979 academic year. I am enormously grateful to the students in those courses for their help and also for their curiosity about an era of American history that seemed increasingly distant and that nevertheless seemed to embody the idealism that originally drew them to the law. Their questions forced me to reformulate the lessons of that era in terms that were responsive to the concerns of their generation. I am particularly grateful to two of those students, William Duker and Martin Klotz, who worked with me on the essay during the summer and also to a number of colleagues, students, and friends who read earlier drafts and gave me the benefit of their criticism and counsel: Bruce Ackerman, Geoffrey Aronow, Robert Burt, Robert Cover, Michael Fitts, Ruth Gavison, Jack Getman, Paul Gewirtz, Robert Ihne, Alvin Klevorick, Anthony Kronman, Burke Marshall, Jerry Mashaw, Robert Rabin, and Michael Starr.

branches of government, as well as private institutions, have a voice; so should the courts. Judges have no monopoly on the task of giving meaning to the public values of the Constitution, but neither is there reason for them to be silent. They too can make a contribution to the public debate and inquiry.

Adjudication is the social process by which judges give meaning to our public values. Structural reform — the subject of this essay — is one type of adjudication, distinguished by the constitutional character of the public values, and even more importantly, by the fact that it involves an encounter between the judiciary and the state bureaucracies. The judge tries to give meaning to our constitutional values in the operation of these organizations. Structural reform truly acknowledges the bureaucratic character of the modern state, adapting traditional procedural forms to the new social reality, and in the years ahead promises to become a central — maybe the central — mode of constitutional adjudication.

Structural reform is premised on the notion that the quality of our social life is affected in important ways by the operation of large-scale organizations, not just by individuals acting either beyond or within these organizations. It is also premised on the belief that our constitutional values cannot be fully secured without effectuating basic changes in the structures of these organizations. The structural suit is one in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements. The injunction is the means by which these reconstructive directives are transmitted.

As a genre of constitutional litigation, structural reform has its roots in the Warren Court era and the extraordinary effort to translate the rule of *Brown v. Board of Education*[1] into practice. This effort required the courts to radically transform the status quo, in effect to reconstruct social reality. The courts had to overcome the most intense resistance, and, even more problematically, they had to penetrate and restructure large-scale organizations, public school systems. The imagery was rural and individualistic — the black child walking into an all-white school — but the reality, especially by the mid-1960's, as the focus shifted to the urban centers and the nation at large, was decidedly bureaucratic.

Brown was said to require nothing less than the transformation of "dual school systems" into "unitary, nonracial school systems," and that entailed thoroughgoing organizational reform. It required new procedures for the assignment of stu-

[1] 347 U.S. 483 (1954).

dents; new criteria for the construction of schools; reassignment of faculty; revision of the transportation systems to accommodate new routes and new distances; reallocation of resources among schools and among new activities; curriculum modification; increased appropriations; revision of interscholastic sports schedules; new information systems for monitoring the performance of the organization; and more.[2] In time it was understood that desegregation was a total transformational process in which the judge undertook the reconstruction of an ongoing social institution. Desegregation required a revision of familiar conceptions about party structure, new norms governing judicial behavior, and new ways of looking at the relationship between rights and remedies.

No one had a road map at the outset. No one had a clear vision of all that would be involved in trying to eradicate the caste system embedded in a state bureaucracy, or how the attempt would transform the mode of adjudication. The second *Brown* decision[3] was far from such a vision: it was but a recognition of the magnitude of the task and an attempt to buy time. It delegated the reconstructive task to the lower federal judges. They, in turn, discovered what the task required and adjusted traditional procedural forms to meet the felt necessities. Legitimacy was equated with need, and, in that sense, procedure became dependent upon substance. It was the overriding commitment to racial equality that motivated the procedural innovation and that was seen as the justification for the departures from tradition.

At critical junctures — *Cooper v. Aaron*,[4] the faculty desegregation cases of the mid-1960's,[5] and *Green v. County School Board*[6] — the Warren Court stepped in. The Justices emphasized their continuous commitment to *Brown* and acknowledged the comprehensiveness of the reform required: the dual school system would have to be eradicated "root and branch."[7] The process continued and, in time, the lessons of school desegregation were transferred to other contexts: to protect the security of the person and home from police abuses, to realize the ideal of humane treatment in prisons and mental

[2] *See, e.g.*, Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala.) (per curiam) (three-judge court), *aff'd per curiam sub nom.* Wallace v. United States, 389 U.S. 215 (1967); United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd per curiam*, 380 F.2d 385 (5th Cir.) (en banc), *cert. denied*, 389 U.S. 840 (1967).

[3] Brown v. Board of Educ., 349 U.S. 294 (1955).

[4] 358 U.S. 1 (1958).

[5] United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969); Bradley v. School Bd., 382 U.S. 103 (1965) (per curiam).

[6] 391 U.S. 430 (1968).

[7] *Id.* at 438.

hospitals, to ensure procedural due process in the welfare administration, and to equalize expenditures in state educational systems. In that way school desegregation became a vitally important occasion for procedural innovations that transcended the substantive claim, for the emergence of a whole new conception of adjudication, one that was particularly suited to cope with a new unit of constitutional law — the state bureaucracy.

Today we are at a new phase in the evolutionary process. The change did not occur in 1969, immediately upon the ascension of Warren Burger to the Chief Justiceship. In fact, during the first few years, in cases like *Swann*[8] and *Keyes*,[9] the Supreme Court strongly supported the emergent model of adjudication; in the early 1970's structural reform continued to occur in the lower courts at a brisk pace and with a broad reach, including more and more state bureaucracies. By the mid- and late-1970's, however, a new position had formed on the Supreme Court; a strong bloc of Justices, sometimes obtaining support from the center of the Court, sought to reverse the processes that were still afoot in the lower courts. The major assault occurred, ironically enough, in the school desegregation cases of the mid-1970's — the *Detroit* metropolitan case,[10] the *Pasadena* case,[11] and the *Dayton* case.[12] In other cases, in racial areas and elsewhere, the pattern has been mixed: in a police case the Burger Court was sharply critical of structural reform;[13] in a prison case it was strongly supportive;[14] and so on and so on.[15] In most the Court was deeply divided; even when structural reform survived, there was usually a high-pitched dissent.

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[8] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15–16 (1971). *See also* Wright v. Council of Emporia, 407 U.S. 451 (1972); Davis v. Board of School Comm'rs, 402 U.S. 33 (1971).

[9] Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

[10] Milliken v. Bradley, 418 U.S. 717 (1974).

[11] Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

[12] Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977).

[13] Rizzo v. Goode, 423 U.S. 362 (1976). This case involved the Philadelphia police department, and, with a touch of bravado, the Department of Justice recently filed, in the name of the United States, a similar suit against the Philadelphia police department. N.Y. Times, Aug. 13, 1979, at A1, col. 2. The change from private to government plaintiff may avoid some of the difficulties of the first suit, such as those pertaining to the majority's view of the "case or controversy" requirement or the dictates of "Our Federalism," *see* Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1154–60 (1977), but it may cause some difficulties of its own, *see* Estelle v. Justice, 426 U.S. 925 (1976) (Rehnquist, J., dissenting from denial of certiorari).

[14] Hutto v. Finney, 437 U.S. 678 (1978). On other occasions, the Court has been more ambivalent towards judicial review of prison conditions. *Compare* Bounds v. Smith, 430 U.S. 817 (1977) (obligation to provide law libraries or legal assistance);

The Burger Court counterassault — sniping is probably a more accurate description — has not sealed the door on structural reform — indeed, just this past Term two broad desegregation plans squeaked by, one involving Columbus,[16] and the other involving a return of the *Dayton* case[17] — but it has changed our vision. In the midst of the Warren Court era, the procedural innovations implicit in structural reform were almost invisible. Each step was small and incremental; each seemed unquestionably correct. Now that is past. We have a clearer understanding of the 1960's. The counterassault has brought into focus the changes in adjudication that occurred during those times and, even more importantly, it has called them into question. We have been forced, as perhaps we should, to examine the legitimacy of those changes. That is why the academy is today filled with talk about procedure.[18] That is why we believe we are at a historic moment, a turning point in the history of procedure — not because we are in the midst of an intellectual revolution, but because we are in the midst of a counterrevolution; not because we are at the verge of a new discovery, but because the discovery of an earlier era is now in jeopardy.

I. ADJUDICATION AND PUBLIC VALUES

As a type of adjudication, structural reform is in large part distinguished by the effort to give meaning to constitutional values in the operation of large-scale organizations. This or-

Wolff v. McDonnell, 418 U.S. 539 (1974) (minimum standards required for disciplinary proceedings); *and* Procunier v. Martinez, 416 U.S. 396 (1974) (mail censorship regulations invalidated), *with* Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) (regulations prohibiting prisoners from soliciting other inmates to join union sustained); Meachum v. Fano, 427 U.S. 215 (1976) (no right to factfinding hearing when prisoner is transferred); *and* Pell v. Procunier, 417 U.S. 817 (1974) (prohibition on press and other media interviews upheld).

[15] *See* Hills v. Gautreaux, 425 U.S. 284 (1976) (public housing); Gerstein v. Pugh, 420 U.S. 103 (1975) (pretrial detention); Spomer v. Littleton, 414 U.S. 514 (1974) (prosecutor's office); O'Shea v. Littleton, 414 U.S. 488 (1974) (state court system); Gilligan v. Morgan, 413 U.S. 1 (1973) (National Guard).

[16] Columbus Bd. of Educ. v. Penick, 99 S. Ct. 2941 (1979).

[17] Dayton Bd. of Educ. v. Brinkman, 99 S. Ct. 2971 (1979). Prison reform did not fare that well. *See* Bell v. Wolfish, 99 S. Ct. 1861 (1979) (various regulations affecting pretrial detainees sustained).

[18] My colleague Robert Cover and I have sought to capture the academic flurry in our new book, THE STRUCTURE OF PROCEDURE (1979). Following the completion of that book in January of this year, at least three issues of major law journals appeared which were devoted to procedure: *Dispute Resolution*, 88 YALE L.J. 905 (1979); 78 COLUM. L. REV. 707 (1978) (issue containing three Articles and one student-written Special Project on procedure) (received in February 1979); *Private Alternatives to the Judicial Process*, 8 J. LEGAL STUD. 231 (1979).

ganizational aspiration has important consequences for the form of adjudication, raising new and distinct problems of legitimacy. But much of the criticism of structural reform, and what I wish to begin with, focuses on that characteristic common to all forms of injunctive litigation: the fact that so much power is vested in judges.

The great and modern charter for ordering the relation between judges and other agencies of government is footnote four of *Carolene Products*.[19] The greatness derives not from its own internal coherence, or any theoretical insight, but from its historical position. The footnote codified the hard fought victory of the Progressives and seemed to provide a framework for the judicial activism that was about to transpire. The Progressives, and their 1930's successors, the New Dealers, fought their battles in the legislature, and the footnote reflected the terms of their victory: it posited the supremacy of the legislature. The role of the courts, even on constitutional questions, was defined in terms of "legislative failure": the courts should defer to the legislative branch, the footnote proclaimed, unless there is some reason for assuming that the processes of the legislature are inadequate. The footnote identified two instances of legislative failure: abridgment of the right to vote and victimization of a discrete and insular minority, a group disabled from forming coalitions and thus from effectively participating in majoritarian politics.

Although *Carolene Products* involved a challenge to a statute, it has been taken, as perhaps it was intended, to be a more general statement on the role of courts in our political system. The theory of legislative failure should be understood as a general presumption in favor of majoritarianism: the legislature should be seen as standing for those agencies of government, whether they be the chief executive of the polity, or the local school board, or director of corrections, that are more perfectly tied to majoritarian politics than are the courts. *Carolene Products* and the theory of legislative failure thus have important implications for structural reform; they provide a basis, invoked with increasing frequency these days, for criticizing the strong judicial role implicit in that mode of adjudication.

Structural reform arose in a context that did not test the limits of the theory of legislative failure. The early school desegregation cases, concentrated as they were in the South, could be conceptualized as a compounded type of legislative

[19] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). For a new and highly suggestive commentary on the footnote, see R. Cover, The Origins of Judicial Activism in the Protection of Minorities (1979) (unpublished manuscript on file at the Yale Law School Library and the *Harvard Law Review*).

failure. The normal presumption in favor of majoritarianism clearly did not control. The group being victimized was a discrete and insular minority, indeed it was the paradigmatic discrete and insular minority; the group was also denied formal participation in the majoritarian process — at the time of *Brown,* blacks were disenfranchised. It should be recognized, however, as a first attempt to assess the theory of legislative failure, and to understand its implications, that the politics of race are different today, and, as a consequence, *Carolene Products* and its commitment to majoritarianism pose significant challenges to structural reform even when it seeks to secure the value of racial equality.

The disenfranchisement of blacks has been brought to an end. In some communities throughout the nation, particularly the large cities, blacks represent a sizeable portion of the electorate. On a national level blacks represent a numerical minority, but that circumstance alone would not entitle us to assume the legislative process has failed. The footnote does not entitle any group to have a voice that exceeds its numbers — quite the contrary. Account must also be taken of the fact that blacks are now in a position to form coalitions. They are no longer insular, and their discreteness, their cohesiveness, may in fact give them a certain edge in forming coalitions, especially compared with other groups of their size. True, poverty, or more precisely the absence of large concentrations of wealth in the black community, stands as a barrier to effective political participation of that group. But poverty was not identified by footnote four as a category of legislative failure, and for good reason. The absence of wealth is so pervasive a handicap, it is experienced by so many groups in society, even the majority itself, that to recognize it as a category of legislative failure would stand the theory of the *Carolene Products* footnote on its head — it would undermine the premise of majoritarianism itself.

I might also add that it seems increasingly important, especially as we look to the 1980's, for structural reform to move beyond the bounds of racial justice; and in these new domains the usefulness of footnote four in explaining and justifying the judicial role is also unclear. Structural reform aimed at total institutions — prisons and mental hospitals — may be understood in terms of legislative failure, or more aptly, legislative neglect. These institutions are intended to remove people from the body politic[20] and judicial intervention might be seen as the catalyst of majoritarianism rather than its enemy. Simi-

[20] *See* M. FOUCAULT, DISCIPLINE AND PUNISH (1977); E. GOFFMAN, ASYLUMS 3–124 (1961).

larly, a few of the other state bureaucracies — the public housing authority, the welfare department — might be seen as posing threats to distinct subgroups that are politically powerless. But when the focus shifts, as I believe it must, to the broad-based bureaucracies that typify the modern state — the police, the state university, the taxing authorities, the health maintenance organizations, the state owned industries, and so forth — the theory of footnote four is of little use. The victim of these organizations is the citizenry itself.

With respect to these broad-based organizations, majoritarianism and judicial intervention might seem reconcilable on the theory that bureaucratization causes unique distortions of the legislative process; bureaucrats have special incentives and means for insulating their practices from public scrutiny.[21] But such an approach would expand footnote four far beyond its original scope, and, given the large role of these broad-based state bureaucracies in our social life today, it would undermine the premise of legislative supremacy itself. The commitment to majoritarianism would be a sham. Alternatively, the emphasis may be on egalitarian values, and the threat posed to those values by these broad-based organizations; but it seems to me that the relevant subgroup invoking the claim of equality against these organizations — women, the aged, or the lower and middle classes — is not likely to be one that is disadvantaged in terms of majoritarian politics. Footnote four can be twisted and turned, and expanded,[22] to accommodate these groups and their claims, but only at a price: incoherence. Such an accommodation would require us virtually to assume that whichever group happens to lose the political struggle or fails to command the attention of the legislature or executive is — by that fact alone — a discrete and insular minority.

It is not just a question of usefulness — it now seems clearer than ever that footnote four and the theory of legislative failure that it announces is radically incomplete. The incompleteness derives from two sources. First, the footnote gives

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[21] *See generally* W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971); Niskanen, *Bureaucrats and Politicians*, 18 J.L. & ECON. 617 (1975); Margolis, *Comment*, 18 J.L. & ECON. 645 (1975); *see also* G. ALLISON, ESSENCE OF DECISION (1971).

[22] Professor Ely's we-they theory was intended to explain the asymmetry of the theory of legislative failure in the racial area and why strict scrutiny is appropriate for measures to help blacks but not for those that hurt them; but it may have applicability beyond that sphere. *See* Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974). For my critique of the theory, see *Groups and the Equal Protection Clause*, 5 PHILOSOPHY & PUB. AFF. 107 (1976), *reprinted in* EQUALITY AND PREFERENTIAL TREATMENT 84 (M. Cohen, T. Nagel & T. Scanlon eds. 1977) [hereinafter cited as *Groups*].

no account of the judicial function even in the acknowledged cases of legislative failure. It never explains why legislative failure is to be corrected by judicial action. Second, the footnote never justifies its major normative premise, the one positing the supremacy of the majoritarian branches even when constitutional values are at stake. At the root of both failings is, I believe, a denial of the special character of our constitutional values.

The theory of legislative failure identifies *occasions* for a strong independent use of judicial power, but it does not prescribe what should be done with that power. If there is an abridgement of the right to vote, the judicial function may be clear enough: restore the vote. Majoritarianism is thereby perfected. But there is no simple way of understanding the judicial function when failure arises from other causes, say, from the fact that a discrete and insular minority is being victimized. In such a situation the legislative decision may not be entitled to any presumption of correctness, at least as it affects that group, but the task still remains of determining, as an affirmative matter, what the group is entitled to, either by way of process rights or substantive rights.[23] Even if the legislative resolution is not entitled to a presumption of correctness, there is no reason for assuming that the opposite resolution would prevail if the legislative process were working perfectly; there is no reason for assuming that the discrete and insular group would win rather than lose. Nor would it make much sense in terms of the ideals of the craft to view the judge as a representative of, or as a spokesman for, the otherwise voiceless minority. The judge is not to speak for the minority or otherwise amplify its voice. The task of the judge is to give meaning to constitutional values, and he does that by working with the constitutional text, history, and social ideals. He searches for what is true, right, or just.[24] He does not become a participant in interest group politics.

The function of a judge is to give concrete meaning and application to our constitutional values. Once we perceive this to be the judicial function in cases of admitted legislative failure, then we are led to wonder why the performance of this function is conditioned upon legislative failure in the first place. What is the connection between constitutional values and legislative failure? If the legislative process promised to get us closer to the meaning of our constitutional values, then the theory of legislative failure would be responsive to this

[23] *Groups, supra* note 22, at 131. *See also* Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1184 (1977).

[24] *See* Dworkin, *No Right Answer?*, in LAW, MORALITY AND SOCIETY 58 (P. Hacker & J. Raz eds. 1977); R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

puzzlement. But just the opposite seems true. Legislatures are entirely of a different order. They are not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual, occurrent preferences of the people — what they want and what they believe should be done. Indeed, the preferred status of legislatures under footnote four is largely derived from this conception of their function. The theory of legislative failure, much like the theory of market failure,[25] ultimately rests on a view that declares supreme the people's preferences.

How might such a view be reconciled with the very idea of a Constitution? There is, to be certain, another part of footnote four, one that I have not yet described. It concerns not legislative failure, but textual specificity — highly specific prohibitions of the Constitution. The free speech clause is the example.[26] Footnote four is prepared to recognize these provisions as a limitation on legislative supremacy; they stand as a qualification of the view that postulates the supremacy of the people's preferences. It is assumed that these prohibitions are small in number. The more important point to note, however, is that with respect to these textually-specific prohibitions, footnote four does not condition judicial intervention upon legislative failure, but instead looks to the courts as the primary interpretative agency. Here the judicial function is to "apply" these provisions, or to put the same point somewhat differently, the judicial function is to give the values implicit in these provisions their operative meaning.

This view of the judicial role in the domain of the textually-specific, plus an understanding of the judicial function in cases of legislative failure, is sufficient to call into question the theory

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[25] At one point, the theory of market failure, much like the theory of legislative failure, was monolithic in its prescription in cases of failure (market failure inexorably led to government regulation), though today it has a broader, more pluralistic vision. *See* O. WILLIAMSON, MARKETS AND HIERARCHIES (1975); Coase, *Discussion*, 54 AM. ECON. REV. 194 (1964) (Papers & Proceedings); Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). I am grateful to Judith Lachman for first drawing attention to the parallelism in the intellectual structures of the theories of market and legislative failure.

[26] The example is inferred from the citations, Stromberg v. California, 283 U.S. 359 (1931), and Lovell v. City of Griffin, 303 U.S. 444 (1938), two early Hughes Court decisions heralding a new era for free speech. In discussing the theory of specificity the footnote speaks of the entire Bill of Rights, giving us a further insight into what that Court actually meant by textual specificity. The entire discussion of this branch of *Carolene Products* reads: "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." 304 U.S. at 152 n.4. Then followed the citation to *Stromberg* and *Lovell*.

of legislative failure itself. They imply a view of the judicial function that is not easily cabined. They suggest that in fact courts are not default institutions, that their rightful place does not turn on the failure of another institution, whether it be the legislature or the executive. They suggest that courts be seen as a coordinate source of government power with their own sphere of influence, one that is defined in terms that unify both the *occasion* and *function* of the exercise of power. The judicial role is limited by the existence of constitutional values, and the function of courts is to give meaning to those values.

The values that lie at the heart of most structural litigation today — equality, due process, liberty, security of the person, no cruel and unusual punishment — are not embodied in textually-specific prohibitions; the equal protection clause — no state shall deny any person equal protection of the laws — is as specific as the free speech clause — Congress shall pass no law abridging the freedom of speech — but neither is very specific. They simply contain public values that must be given concrete meaning and harmonized with the general structure of the Constitution. The same is probably true of all the other provisions of the Constitution (*e.g.*, the commerce clause) that have been central to constitutional litigation for almost two centuries. The absence of textual specificity does not make the values any less real, nor any less important. The values embodied in such non-textually-specific prohibitions as the equal protection and due process clauses are central to our constitutional order. They give our society an identity and inner coherence — its distinctive public morality. The absence of a textually-specific prohibition does not deny the importance of these values, but only makes the meaning-giving enterprise more arduous: less reliance can be placed on text.

Of course, the further one moves from text, the greater the risk of abuse; it is easier for judges, even unwittingly, to enact into law their own preferences in the name of having discovered the true meaning, say, of equality or liberty. It was just this risk, elaborated by the Legal Realists, that haunted the Progressives, and that helped sell the theory of legislative failure as the principle governing the interpretation of those values not embodied in textually-specific prohibitions — better the preferences of the people than the preferences of the judges.[27] But the Progressives never explained why one set of

[27] In the case of the textually-specific prohibitions, it would seem that the preferences of the Framers, rather than that of the people or judges, would control. The authors of *Carolene Products* seemed prepared to respect the preferences of that particular social group, and yet some Progressives appeared intent on discrediting those preferences, *see, e.g.*, C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

preferences was a more appropriate basis for a constitutional judgment than the other; both seem inappropriate. Nor did they explain why the risk of abuse, any more than the risk of mistake, was itself a sufficient basis for denying the intelligibility of the meaning-giving enterprise altogether. The judges of *Brown* may have, as the critics of the Right and Left keep reminding us, enacted into law their own preferences, peculiarly reflecting their privileged social position; but it is also possible, indeed, I would say, it is eminently probable, that these judges had given a true account of the constitutional value of equality. The judges involved in contemporary prison litigation may have enacted into law their own preferences, peculiarly reflecting their social background, their squeamishness, when they proscribed the use of torture in all its varieties — the teeterboard, the Tucker telephone, the strap, the failure to provide medical care, the heavy use of armed, mounted, and undisciplined trusties to supervise field labor, and the housing of anywhere from 85 to 150 inmates in a single dormitory room, leaving the weak and attractive to spend each night terrorized by the "creepers" and "crawlers";[28] but it is also possible, indeed, I would say eminently probable, that these judges had given a true account of the constitutional ban on cruel and unusual punishment.

This conception of the judicial function, which sees the judge as trying to give meaning to our constitutional values, expects a lot from judges — maybe too much. The expectation is not founded on a belief in their moral expertise, or on a denial of their humanity. Judges are most assuredly people. They are lawyers, but in terms of personal characteristics they are no different from successful businessmen or politicians. Their capacity to make a special contribution to our social life derives not from any personal traits or knowledge, but from the definition of the office in which they find themselves and through which they exercise power. That office is structured by both ideological and institutional factors that enable and perhaps even force the judge to be objective — not to express

[28] These examples are all taken from a single, but protracted case involving the Arkansas prison system, recently sustained in some particulars by the Supreme Court in Hutto v. Finney, 437 U.S. 678 (1978). *See* Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965); Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967), *vacated*, 404 F.2d 571 (8th Cir. 1968); Courtney v. Bishop, 409 F.2d 1185 (8th Cir. 1969); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Holt v. Hutto, 363 F. Supp. 194 (E.D. Ark. 1973), *aff'd in part and reversed in part sub nom.* Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974); Finney v. Hutto, 410 F. Supp. 251 (E.D. Ark. 1976), *aff'd*, 548 F.2d 743 (8th Cir. 1977). *See also* B. JACKSON, KILLING TIME (1977); M. HARRIS & D. SPILLER, AFTER DECISION (1976).

his preferences or personal beliefs, or those of the citizenry, as to what is right or just, but constantly to strive for the true meaning of the constitutional value.[29] Two aspects of the judicial office give it this special cast: one is the judge's obligation to participate in a dialogue, and the second is his independence.

The judge is entitled to exercise power only after he has participated in a dialogue about the meaning of the public values. It is a dialogue with very special qualities: (a) Judges are not in control of their agenda, but are compelled to confront grievances or claims they would otherwise prefer to ignore. (b) Judges do not have full control over whom they must listen to. They are bound by rules requiring them to listen to a broad range of persons or spokesmen. (c) Judges are compelled to speak back, to respond to the grievance or the claim, and to assume individual responsibility for that response. (d) Judges must also justify their decisions.

The obligation to justify a decision has given rise to never-ending debates as to the proper sources of judicial decisions — text, intentions of the Framers, general structure of the Constitution, ethics, the good of the nation, etc.[30] For the notion of justification, as opposed to explanation, implies that the reasons supporting a decision be "good" reasons, and this in turn requires norms or rules for determining what counts as a "good" reason. My intention is not to participate in the debate about the rules for justification, but to stress two facts that all seem to agree on as to what might count as a "good" reason. The first is that the reason cannot consist of a preference, be it a preference of the contestants, of the body politic, or of the judge. The statement "I prefer" or "we prefer" in the context of a judicial, rather than a legislative decision, merely constitutes an explanation, not a justification.[31] Second, the reason must somehow transcend the personal, transient beliefs of the judge or the body politic as to what is right or just or what should be done. Something more is required to transform these personal beliefs into values that are worthy of the status "constitutional" and all that it implies — binding on society as a whole, entitled to endure, not forever but long

[29] In understanding the role of the objective perspective in adjudication I have been particularly helped by two essays of Thomas Nagel dealing with objectivity in ethics: *Subjective and Objective*, in MORTAL QUESTIONS 196 (1979); and The Limits of Objectivity (1979) (Tanner Lecture at Oxford University) (on file at the *Harvard Law Review*).

[30] *See* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

[31] *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

enough to give our public morality an inner coherence, and largely to be enforced by courts.

The judge is required to listen and to speak, and to speak in certain ways. He is also required to be independent. This means, for one thing, that he not identify with or in any way be connected to the particular contestants. He must be impartial, distant, and detached from the contestants, thereby increasing the likelihood that his decision will not be an expression of the self-interest (or preferences) of the contestants, which is the antithesis of the right or just decision. The norm of impartiality also requires that the judge be independent from politics, in this instance understood as the process of expressing the preferences of the people. The judge must not view his job as one of registering those preferences. Independence is clearly the norm in the federal system with its promise of life tenure, but is present also in those state systems in which judges are elected. The judge might be vulnerable to the body politic when he stands for election, but that does not determine how he should define his job, or how the body politic should use its power.

The task of a judge, then, should be seen as giving meaning to our public values and adjudication as the process through which that meaning is revealed or elaborated. The question still remains of determining the relationship between the courts and the other agencies of government, for structural reform places the courts in the position of issuing directives to other agencies of government. The judiciary's essential function is to give meaning to our constitutional values, but many of these other agencies can perform that function in addition to that of registering the preferences of the people. The legislature or the school board or the warden of a prison is entitled to express the preferences of the citizenry, a function not entrusted to the courts, but these agencies can also strive to give meaning to equality, or to work out the complicated relationship between liberty and equality, or to decide whether the punishment meted out is cruel and unusual. The existing practices in and of themselves cannot be taken as a reflection of the considered judgment of another branch of government on the meaning of a constitutional value, particularly since we are dealing with bureaucracies, in which policy is often determined by internal power plays and default.[32] On the other hand, there can be genuine conflicts. Situations — school desegregation is probably a good example — will arise where the courts and other agencies of government will come to the opposite conclusion

[32] M. CROZIER, THE BUREAUCRATIC PHENOMENON 187–98 (1964).

as to the meaning of a constitutional value, and the need will arise to work out the relationship between the branches.

To simply postulate the supremacy of the more majoritarian branches, the legislative or the executive, as the promoters of footnote four do,[33] is no answer, for, as we saw, the people's preferences are not the standard, and there is no discernible connection between majoritarianism and the meaning of a constitutional value. Courts may have their difficulties in giving a constitutional value its correct meaning, but so would the other branches. History is as filled with legislative and executive mistakes as it is filled with judicial ones. Admittedly, adjudication will have its class and professional biases, because so much power is entrusted to lawyers, but the legislative and executive processes will have their own biases — wealth, dynasty, charisma. It is not clear which set of biases will cause the greatest departure from the truth.

One may be tempted to invoke the democratic ideal to resolve this conflict, and yet it is far from dispositive. There are many places at which the people bind the adjudicatory process, even in the federal system; they elect the officers who appoint the judges, they can pass statutes controlling procedural matters, and they even have the power to overrule a constitutional judgment by amending the Constitution. Of course, it is hard to amend the Constitution, harder than it is to revise the work of common law judges through the passage of statutes, but democracy is not a fixed rule that always prefers a simple majority, as opposed to a special majority, any more than it deifies the subjective preference. Democracy, as an ideal of our constitutional system, allows a role for both subjective preference and public value, and the special majority requirement of the amendment process may well be seen as a way of preserving the delicate balance between those two domains in our political life.

I suspect that the relationship between the branches in the constitutional domain — in giving meaning to the non-textually-specific values, as well as others — is a more pluralistic or dialectical relationship than footnote four permits: all can strive to give meaning to constitutional values.[34] The theory of structural reform, no more than any other form of consti-

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[33] Ely, *The Supreme Court, 1977 Term — Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978); Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978).

[34] The concept of dialogue lies at the heart of the work of two of my colleagues. *See* R. BURT, TAKING CARE OF STRANGERS (1979); B. Ackerman, Social Justice in the Liberal State (1979) (unpublished manuscript on file at the Yale Law School Library and the *Harvard Law Review*).

tutional litigation, does not require that courts have the *only* word or even the *last* word, but that they be allowed to speak and to do so with some authority. Process is the measure of that authority. The right of the judge to speak, and the obligation of others to listen, depends not on the judge's personal attributes, nor even on the content of his message, but on the quality of his process — on his ability to be distant and detached from the immediate contestants and from the body politic, yet fully attentive to grievances, and responsive in terms that transcend preferences and that are sufficient to support a judgment deemed "constitutional." There may be other processes or methods for giving meaning to constitutional values, though what they might be is not clear to me, but the process I have just described — the core of adjudication — is the only one open to the judge. This process is a limitation on his legitimacy, and even more importantly, it has a close conceptual connection — not just a contingent or instrumental one — to the very act of giving meaning to a constitutional value. We impute function largely on the basis of process and at the same time function shapes process. Others may search for the true meaning of our constitutional values, but when they do, they will have to mimic — if they can — the process of the judge.

In the 1960's, the courts played a central role in our social life because they saw that the ideal of equality was inconsistent with the caste system implied by Jim Crow laws. In the decade that followed, they struggled to give meaning to a broader range of constitutional values, and perceived the threat to those values in a wide variety of contexts — the barbarisms of total institutions, the abuses of the police, the indignities of welfare systems. Today we have doubts about the role of courts and, just as we are rediscovering the market, we are quickly resurrecting footnote four and the claim of legislative supremacy. This development cannot be wholly explained in terms of increasing doubts as to the competency of courts; for without a belief in the conceptual connection between function and process, without a belief in the capacity of courts to give meaning to our constitutional values, even the subscribers to *Carolene Products* are at a loss to explain the judicial function in cases of legislative failure or why the void left by legislative failure should be filled by the courts. In my judgment, the resurgence of *Carolene Products* does not stem from doubts about the special capacity of courts and their processes to move us closer to a correct understanding of our constitutional values, but from the frail quality of our substantive vision. We have lost our confidence in the existence

of the values that underlie the litigation of the 1960's, or, for that matter, in the existence of any public values. All is preference. That seems to be the crucial issue, not the issue of relative institutional competence. Only once we reassert our belief in the existence of public values, that values such as equality, liberty, due process, no cruel and unusual punishment, security of the person, or free speech can have a true and important meaning, that must be articulated and implemented — yes, discovered — will the role of the courts in our political system become meaningful, or for that matter even intelligible.

II. Form and Function

At the core of structural reform is the judge, and his effort to give meaning to our public values. This allocation of power raises questions of legitimacy common to all types of adjudication, but the structural mode raises new and distinct issues of legitimacy as well. These issues arise from the organizational setting of the structural suit, from the fact that the judge is responding to a threat posed to our constitutional values by a large-scale organization. He seeks to remove the threat by restructuring the organization, and that ambition has important implications for the *form* of the lawsuit.

The structural mode is most often attacked on the ground that it involves a departure from some ideal form. This criticism obviously presupposes a prototypical or "model" lawsuit, an ideal form, against which all lawsuits will be measured. The usual standard of comparison, the dispute-resolution model, is triadic and highly individualistic: a lawsuit is visualized — with the help of the icon of justice holding the scales of justice — as a conflict between two individuals, one called plaintiff and the other defendant, with a third standing between the two parties, as a passive umpire, to observe and decide who is right, who is wrong, and to declare that the right be done. From this perspective, structural reform surely is a transformation; it looks breathtakingly different.[35] It is important, though, to be clear about the specific terms of the formal transformation before wondering whether the dispute-resolution model can properly be considered an ideal.

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[35] Two of the most spectacular instances of the transformation are Judge Henley's decade-long struggle with the Arkansas prison system, *see* note 28 *supra*, and Judge Weinstein's attempt to reorganize the Mark Twain School in Coney Island, *see* Hart v. Community School Bd., 383 F. Supp. 699, *supplemented*, 383 F. Supp. 769 (E.D.N.Y. 1974) (remedial order), *aff'd*, 512 F.2d 37 (2d Cir. 1975). *See also* Fishman, *The Limits of Remedial Power: Hart v. Community School Board 21*, in LIMITS OF

A. The Transformation

1. The Focus of the Suit: Incident of Wrongdoing v. Social Condition. — The dispute-resolution model presupposes a social world that is essentially harmonious. A set of norms confers rights and duties upon individuals. Individuals make arrangements within those norms, but sometimes incidents occur that disturb the harmony; for example, the farmer may not honor his promise to sell the cow. The aggrieved individual then turns to the courts, either to implement or enforce one of the norms, or, possibly, to fill out the meaning of the norm. The focus of the evidentiary inquiry will be the incident, or in the language of pleading rules, the "transaction" or "occurrence."[36]

In contrast, the focus of structural reform is not upon particular incidents or transactions, but rather upon the conditions of social life and the role that large-scale organizations play in determining those conditions. What is critical is not the black child turned away at the door of the white school, or the individual act of police brutality. These incidents may have triggered the lawsuit. They may also be of evidentiary significance: evidence of a "pattern or practice"[37] of racism or lawlessness. But the ultimate subject matter of the lawsuit or focus of the judicial inquiry is not these incidents, these particularized and discrete events, but rather a social condition that threatens important constitutional values and the organizational dynamic that creates and perpetuates that condition.

2. Party Structure: The Plaintiff. — The concept of a plaintiff consists of three distinct analytic components: (a) victim; (b) spokesman; and (c) beneficiary. The individual who claims that a contract has been breached is the victim of the

JUSTICE 115 (H. Kalodner & J. Fishman eds. 1978); Berger, *Away from the Court House and Into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978); Rosenbaum & Presser, *Voluntary Racial Integration in a Magnet School*, 86 SCH. REV. 156 (1978); Oelsner, *New York's Best Public Schools Defy Racial Stereotyping*, N.Y. Times, Jan. 23, 1978, at B1, col. 1. For a theoretical analysis of the case, see R. Katzmann, Judicial Intervention: Changing the Processes and Policies of Public Bureaucracies (1979) (unpublished manuscript on file at the Yale Law School Library and the *Harvard Law Review*).

[36] Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1290 (1976).

[37] The "pattern or practice" concept plays a pervasive role in structural litigation. Sometimes it is used as an evidentiary requirement, as a necessary predicate for structural relief (only a series of acts that amount to a "pattern or practice" will justify so thoroughgoing relief); sometimes it is used as a technique for marshalling the resources of the Executive Branch (the Department of Justice should sue only when there is a "pattern or practice" of discrimination); sometimes it is even used as a basis for inferring intent. *See generally* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

wrongdoing. He is also the one to gain, primarily, or maybe even exclusively, from the action of the court. And there is every reason to assume he is a highly competent spokesman, in the same sense that there is every reason to assume that an individual is the best judge of his self-interest. The ethic of the market is transferred to the courtroom. In structural reform, the unity implicit in the concept of party disintegrates, the components become separate, and the exclusively individualistic perspective shifts to one that includes social groups and institutional advocates.

The victim of a structural suit is not an individual, but a group. In some instances the group is defined in terms of an institution: the inmates of the prison or welfare recipients. Or the victim may consist of a group that has an identity beyond the institution: in a school desegregation case, for example, the victims are not the pupils, but probably a larger social group, blacks.[38] In either instance, it is important to stress two features of the group. First, it exists independently of the lawsuit; it is not simply a legal construct. Wholly apart from the lawsuit, individuals can define themselves in terms of their membership in the group, and that group can have its own internal politics, struggles for power, and conflicts.[39] Secondly, the group is not simply an aggregation or collection of identifiable individuals. We understand the plight of the inmates of an institution subjected to inhuman conditions without knowing, or, in the case of future inmates, without even being *able* to know, who they are in any particularized sense. The group exists, has an identity, and can be harmed, even though all the individuals are not yet in being and not every single member is threatened by the organization.

Once we take the group perspective on the victim, it also becomes clear that the spokesman need not — indeed cannot — be the victim. A group needs people to speak on its behalf. An individual member of the victim group can be a spokesman, but there is no reason why individual membership should be required, or for that matter even preferred. An individual must be a minor hero to stand up and challenge the status quo: imagine the courage and fortitude required to be the spokesman in a school desegregation suit, or even worse,

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[38] *See generally Groups, supra* note 22; *see also* Note, *Antidiscrimination Class Actions Under the Federal Rules: The Transformation of Rule 23(b)(2)*, 88 YALE L.J. 868 (1979).

[39] *See* Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); *cf.* Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977) (describing the origins of class action suits in terms of more cohesive social groups).

one challenging the administration of a total institution, such as a prison. Individuals are in such a vulnerable position, so much at risk, that it is a cruelty to insist, as some of the Justices have done on occasion,[40] that the spokesman be the individual member of the group, for example, brutalized by the prison guards. Institutional advocates, some governmental (the Department of Justice), others private (the NAACP or the ACLU), are often needed to play a key role as spokesmen for the victim group.[41] Such spokesmen may even be preferred. They may introduce their own biases, but on the whole they are likely to present a fuller picture of the law or facts than would the individual victim.

The relation between the victim and the spokesman in the structural context is entirely instrumental; it is not a relationship of identity. As an affirmative matter this means that the court must determine whether the interests of the victim group are adequately represented. This inquiry is not without parallel in the dispute-resolution context, though there individuals rather than groups or interests are being represented. In either context, it is an extremely difficult inquiry. At the same time, the instrumental character of the relationship between spokesman and victim group, the separation of the two, means that certain technical qualifications for the victim — that he be subject to a risk of future harm,[42] or that he be subject to irreparable injury[43] — need not be satisfied by the spokesman. For the structural suit it is sufficient if these requirements are satisfied by the victim group. What the court must ask of the spokesman is whether he is an adequate representative, and, as difficult a question as that may be, technical

[40] *See, e.g.*, Estelle v. Justice, 426 U.S. 925 (1976) (Rehnquist, J., dissenting from denial of certiorari); Rizzo v. Goode, 423 U.S. 362 (1976).

[41] *See generally* Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); Stone, *Should Trees Have Standing? — Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

[42] A contrary attitude was expressed by the Supreme Court in Rizzo v. Goode, 423 U.S. 362 (1976), *see* note 13 *supra*. On the other hand, in considering related problems of mootness, the Burger Court has been more equivocal. *Compare* Franks v. Bowman Transp. Co., 424 U.S. 747, 752–57 (1976) (a statutorily-based employment discrimination case); Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975); *and* Sosna v. Iowa, 419 U.S. 393, 397–403 (1975), *with* Kremens v. Bartley, 431 U.S. 119 (1977), *and* Board of School Comm'rs v. Jacobs, 420 U.S. 128 (1975). Equally confusing has been the attempt to square the traditional standing requirements with the dictates of the structural suit. *Compare, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975), *with* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). On the topic of standing, and more generally on the relations between public values and adjudication, see the inspiring book by Joseph Vining, LEGAL IDENTITY (1978).

[43] Once again the Burger Court has been highly divided on this issue. *See* Allee v. Medrano, 416 U.S. 802 (1974); O'Shea v. Littleton, 414 U.S. 488 (1974). I discuss these cases in detail in *Dombrowski*, 86 YALE L.J. 1103, 1148–60 (1977).

requirements such as irreparability or the risk of future harm do not have any important bearing on that question. They do not make the question any easier: they are neither necessary nor sufficient conditions of adequacy.

The instrumental connection between spokesman and victim is also conducive to a view that tolerates, or even invites, a multiplicity of spokesmen. In the dispute-resolution model, where the victim is an individual, and that victim is identified with the spokesman, the typical party structure is bipolar: a single plaintiff vied against a single defendant. In a structural lawsuit the typical pattern is to find a great number of spokesmen, each perhaps representing different views as to what is in the interest of the victim group. Moreover, it would be wrong to assume that the relationship between all those on the plaintiff side is equally antagonistic to all those on the defendant's: the physical image of the antagonism is not binary, but an array grouped around a single issue. One spokesman for the victim group may want two-way busing; another, more sensitive to "white flight" or more insistent on "quality education," may want a magnet school; and, in fact, some of those speaking for the defendants may also favor the magnet school or some mild form of busing.[44] The multiplicity of spokesmen does not create these differences. They exist in the real world, and the court must hear from all before it can decide what the ideal of racial equality requires.

Paralleling this separation between victim and spokesman, the structural mode of litigation also contemplates a distinction between the victim and the group who will benefit from the remedy. In a suit for breach of contract, the remedy is aimed at making the victim whole, whether the remedy be damages or specific performance. In the structural context, however, the victims and the beneficiaries need not be coextensive. Though the beneficiary of structural relief is necessarily also a group, it could have a different membership and a different contour than the victim group. Consider, for example, a police brutality case.[45] Let us assume that the concern is with lawless conduct by the police directed at members of racial minorities in the city. The court believes an internal disciplinary procedure should be established within the police department to lessen the threat to constitutional values. The court could make that machinery available only to members of the victim

[44] Conflicts of this nature were acutely present in the Coney Island case, Hart v. Community School Bd., 383 F. Supp. 699, *supplemented*, 383 F. Supp. 769 (E.D.N.Y. 1974) (remedial order), *aff'd*, 512 F.2d 37 (2d Cir. 1975), and also in the famed Norwalk Core school litigation, Norwalk Core v. Norwalk Bd. of Educ., 298 F. Supp. 203 (D. Conn. 1968), *aff'd*, 423 F.2d 121 (2d Cir. 1970).

[45] Rizzo v. Goode, 423 U.S. 362 (1976).

group, say blacks and Chicanos, but it need not. The court may decide that such a limitation would be both inefficient and counterproductive — indeed might even raise its own problems of fairness and constitutionality (reverse discrimination) — and for that reason the court may extend the protection of the decree to a much larger group — all the city.[46]

The separability of victim and beneficiary derives in part from the group nature of the victim since, at best, the limits of that group can only be approximated. More fundamentally, it derives from the instrumental nature of the remedy.[47] The whole judicial enterprise, as is true of any exercise of governmental power, is constrained by considerations of efficacy and fairness, and, in the context of structural reform, these factors may lead the court to structure the beneficiary class so that it is not coextensive with the victim group. There is no reason why the shape of the benefited class is to be determined by one factor and one factor alone, namely, a guess as to the approximate shape of the victim group.

3. Party Structure: The Defendant. — As might be imagined, the disaggregation of roles that I have just discussed on the plaintiff's side is repeated on the defendant's. The defendant envisioned in the dispute-resolution model is expected to perform three different functions: (a) spokesman; (b) wrongdoer; and (c) addressee (or the person who must provide the remedy). The dispute-resolution model assumes that all three functions are unified, or put another way, combined in the same individual, for example, the farmer who refuses to perform his contract. In the structural context, the functions are separated, and even more significantly, one function, that of the wrongdoer, virtually disappears.

The concept of wrongdoer is highly individualistic. It presupposes personal qualities: the capacity to have an intention and to choose. Paradigmatically, a wrongdoer is one who intentionally inflicts harm in violation of an established norm. In the structural context, there may be individual wrongdoers, the police officer who hits the citizen, the principal who turns away the black child at the schoolhouse door, the prison guard who abuses the inmate; they are not, however, the target of the suit. The focus is on a social condition, not incidents of wrongdoing, and also on the bureaucratic dynamics that produce that condition. In a sense, a structural suit is an in rem proceeding where the res is the state bureauc-

[46] Having reached that conclusion, the Court may now redefine the victim group so that it is coextensive with the beneficiary — the victim of police brutality is all the people of the city, not just the racial minority — but that post hoc redefinition does not seem useful or necessary.

[47] *See* pp. 47–50 *infra*.

racy.[48] The costs and burdens of reformation are placed on the organization, not because it has "done wrong," in either a literal or metaphorical sense, for it has neither an intention nor a will,[49] but because reform is needed to remove a threat to constitutional values posed by the operation of the organization.

From the perspective of certain remedies, such as damage judgments and criminal sanctions, this conclusion may seem startling. Those remedies are retrospective in the sense that a necessary condition for each is a past wrong; they require some evaluative judgment as to the wrongfulness of the defendant's conduct in terms of preexisting norms. But the remedy at issue in a structural case is the injunction, and it does not require a judgment about wrongdoing, future or past. The structural suit seeks to eradicate an ongoing threat to our constitutional values and the injunction can serve as the formal mechanism by which the court issues directives as to how that is to be accomplished. It speaks to the future. The prospective quality of the injunction, plus the fact that it fuses power in the judge, explains the preeminence of the injunction in structural reform.[50] Only at later stages of structural reform, after many cycles of supplemental relief, when the directives have

[48] *See* Holt v. Sarver, 309 F. Supp. 362, 365 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) ("This case, unlike earlier cases . . . which have involved specific practices and abuses alleged to have been practiced upon Arkansas convicts, amounts to an attack on the System itself."); Talley v. Stephens, 247 F. Supp. 683, 691 (E.D. Ark. 1965) ("The Court does not think that it should bring this opinion to a close without stating that nothing said herein should be construed as a claim that the respondent personally is an evil, brutal, or cruel man or that he personally approves of all long standing practices of the penitentiary system.").

[49] Washington v. Davis, 426 U.S. 229 (1976), makes the intent to segregate a necessary condition of an equal protection violation, and as such might be regarded as another assault — this time in the substantive domain — on the idea of structural reform. The Court did not come to grips with the theoretical problems created by the use of the concept of "intent" in an organizational setting, such as the problem of aggregation (whose intent shall count as the intent of the organization?), nor has the Court even defined what intent should mean in such a context. These issues are explored in my address before the Second Circuit Judicial Conference in September 1976, on the inappropriateness of the intent test in equal protection cases, *Equality in Education*, 74 F.R.D. 276, 278 (1977), and in Seth Kreimer's brilliant Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976).

[50] *See generally* O. FISS, THE CIVIL RIGHTS INJUNCTION (1978). Other factors, such as the insensitivity of state bureaucracies to market incentives and the decentralized system of initiation, might also help explain the preeminence of the injunction in structural reform. It should be noted that some other remedies (*e.g.*, declaratory judgments, conditional habeas corpus) have many of the same qualities as the injunction, for example, its prospectivity, and could be expected to be found in structural suits. *See, e.g.*, Bell v. Wolfish, 99 S. Ct. 1861, 1867 n.6 (1979) (saving the question whether conditional habeas could be used as the injunction in altering the conditions of pretrial detention).

become very specific, do criminal sanctions or even damage judgments become available (in an independent proceeding or as part of the contempt process).[51] Then the wrongdoing largely consists of disobedience of judicial orders.

In the course of the reconstructive process, the judge must ultimately penetrate the institutional facade, take the lid off the so-called black box, in order to locate critical operatives within the institution to whom the reconstructive directives must be issued. These directives seem addressed to individuals, often to avoid eleventh amendment problems,[52] but in truth they are addressed to bureaucratic offices, not to the persons who happen to occupy those offices at any single point of time.[53] These directives are not predicated on the view that the present or even the prior occupants of the office are guilty of wrongdoing, in the individualistic sense, but rather that the judicially prescribed action — with all its attendant burdens, financial and other — is necessary to eliminate the threat that the institution as a whole poses to constitutional values.[54]

4. The Posture of the Judge. — The dispute-resolution model envisions a passive role for the judge. He is to stand as umpire or observer between the two disputants, relying on all their initiatives for the presentation of the facts and the law and the articulation of the possible remedies. The judge's task is simply to declare which one is right. The appropriateness of such a passive pose is questioned by many factors not the least of which is inequalities in the distribution of resources, whether it be wealth or talent. These inequalities give the judge every reason to assume a more active role in the litigation, to make certain that he is fully informed and that a just result will be reached, not one determined by the distribution of resources in the natural lottery or in the market. These concerns are present in structural litigation, and indeed may intensify when the organization has a clientele that predominantly comes from the lower economic classes, as is true with

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[51] For an attempt to address the problems of harmonizing the criminal law with bureaucratic reality, see Note, *Decisionmaking Models and the Control of Corporate Crime*, 85 YALE L.J. 1091 (1976).

[52] *See Ex parte* Young, 209 U.S. 123, 159–60 (1908). At one point, the personalization of the defendant may have reflected a desire to avoid the special problems of 42 U.S.C. § 1983 (1976), *see* City of Kenosha v. Bruno, 412 U.S. 507 (1973), but those needs have been removed, *see* Monell v. Department of Social Servs., 436 U.S. 658 (1978).

[53] *Compare, e.g.*, Spomer v. Littleton, 414 U.S. 514 (1974), *with* Lankford v. Gelston, 364 F.2d 197, 205 n.9 (4th Cir. 1966), *and* Lucy v. Adams, 224 F. Supp. 79 (N.D. Ala. 1963), *aff'd sub nom.* McCorvey v. Lucy, 328 F.2d 892 (5th Cir. 1964) (per curiam).

[54] *See* p. 49 *infra*.

a prison or a welfare agency. But structural litigation introduces other, quite distinct reasons for abandoning a purely passive judicial posture. They stem from the special character of the parties. Exclusive reliance on their initiatives becomes even more untenable.

As noted earlier, the named plaintiff and his lawyer speak not just for themselves, but also for a group, for example, the present and future users of the institution. There is no basis for assuming they are adequate representatives of the group, for they simply elect themselves to that position. Similarly, there is no reason to assume that the named defendant and his lawyer are adequate representatives of the organization's interests. Here it is not a matter of self-election, but election by an adversary.

The spokesmen for the state bureaucracy usually have a formal connection to the organization; the superintendent of schools may be appointed by a school board, which in turn is duly elected; the warden of the prison may be appointed by the Governor, and his lawyer, the Attorney General, may be elected. The existence of these formal connections, however, should not obscure the fact that the initial choice as to who shall speak or represent the organization *in this proceeding* is made by forces standing in an antagonistic relationship to it, the named plaintiff and his lawyer, the adversaries. The risk is ever present that they may choose an inappropriate officer, or have a too narrow conception of the institutional framework that accounts for the condition. The plaintiff, for example, may see the segregated schools as the responsibility of the school board alone, when in truth both housing and school policies are implicated.[55]

The presence of an improper representative on either side of the lawsuit may have consequences that far transcend the interests of the participants. The court may be led into error. The named plaintiff may also wittingly or unwittingly compromise the interests of the victim group in a way that cannot easily be rectified in subsequent proceedings. The defendant, it must also be remembered, speaks not just for himself in any personalized sense, but for all occupants of the office, past and future; all the other offices within the hierarchy of the institution; and all those who stand outside the institution but who are nonetheless directly affected by any reorganization of the institution, including the taxpayers who finance it and those who depend on the institution to provide some vital service.

[55] *See* Hart v. Community School Bd., 383 F. Supp. 699; *supplemented*, 383 F. Supp. 769 (E.D.N.Y. 1974) (remedial order), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

Starting from this perspective, it seems almost absurd to rely exclusively on the initiatives of those persons or agencies who happened to be named plaintiff and defendant. The judge must assume some affirmative responsibility to assure adequate representation, but what form might that action take? It would seem foolish for the judge to assume a representational role himself; indeed, it would compromise the very ideal of impartiality, which is so important a predicate for judicial legitimacy. The more appropriate response, and the one typically employed in the structural context is for the judge — often acting on his own — to construct a broader representational framework. This might be done in a number of ways that are consistent with the commitment to impartiality.

First, a notice can be sent to many of those who are purportedly represented in the litigation. The notice would explain the litigation, and invite a contest to the fullness and adequacy of the representation. Even here, it should be noted, the judge cannot rely exclusively on the named parties to insist on notice or to formulate its content. On the one hand, extensive notice requirements might compound the adversary's costs of continuing the litigation,[56] while on the other hand, neither party has much of an incentive to make certain that his adversary is the best representative. Second, the judge may invite certain organizations or agencies to participate in the lawsuit, as an amicus or as a party, or as a hybrid — the litigating amicus. Of course, ever mindful of the conditions of his legitimacy, the judge should not limit the invitation to those who would say what he wants to hear, nor has that been the practice. The concept of a litigating amicus first took root in school cases where trial judges invited the United States to participate; the intent was to obtain the Executive's commitment to enforce the decree, and also to broaden the representational structure.[57] More recently, this practice has been transferred to the context of total institutions, prisons and mental hospitals, where it is even more urgently required, given the relative absence of private institutional advocates and the distortion likely to flow from exclusive reliance on complaints from individual victims.[58] Third, the trial courts

[56] *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

[57] *See* Lee v. Macon County Bd. of Educ., 221 F. Supp. 297 (M.D. Ala. 1963); O. FISS, INJUNCTIONS 618–19, 626–28 (1972); note 2 *supra*.

[58] In a dissent from denial of certiorari, three Justices objected to the United States having party status. Estelle v. Justice, 426 U.S. 925 (1976) (Rehnquist, J., with whom Burger, C.J., and Powell, J., join, dissenting from denial of certiorari) (intervenor). *See also* United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977) (plaintiff). Bills have been introduced to remove any doubts about the authority of the United States as a litigant. *See* H.R. 9400, 95th Cong., 2d Sess. (1978) ("An Act

have sometimes found it necessary, perhaps when they could no longer rely on the Executive or private institutional advocates, to create their own agencies, such as special masters, to correct any representational inadequacies. The special master is an institution with many roles, as we will see, but one of them is representational.[59] He sometimes acts as a party, presenting the viewpoints about liability and remedy not otherwise likely to be expressed by the participants in the lawsuit.

5. The Remedial Phase. — The focus in the dispute-resolution model is the incident, the transaction or occurrence, and the remedial phase is largely episodic. The remedy is designed to correct or prevent a discrete event, and the judicial function usually exhausts itself when judgment is announced and the amount of damages calculated or the decree aimed at some discrete event is issued. Under these assumptions, the lawsuit has, as Abram Chayes expressed it at a workshop at Yale this past year, an Aristotelian's dramatic unity, a beginning, a middle, and an end. In some cases involving a recalcitrant defendant, there may be more to the remedial phase — for example, seizure and sale of assets or a contempt proceeding.[60] But these struggles with the recalcitrant defendant are the exception, and in any event they are not considered an integral part of the first proceeding. They often involve a collateral proceeding handled by different personnel, the sheriff or a master, to enforce the remedy given in the initial proceeding.

The remedial phase in structural litigation is far from episodic. It has a beginning, maybe a middle, but no end — well, almost no end. It involves a long, continuous relationship between the judge and the institution; it is concerned not with the enforcement of a remedy already given, but with the giving or shaping of the remedy itself. The task is not to declare who is right or who is wrong, not to calculate the amount of damages or to formulate a decree designed to stop some discrete act. The task is to remove the condition that

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To Authorize Actions for Redress In Cases Involving Deprivations of Rights of Institutionalized Persons Secured or Protected by the Constitution or Laws of the United States"), *reprinted in Civil Rights for Institutionalized Persons: Hearings Before the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 286–88 (1977). *See also* note 13 *supra*.

[59] *See* G. Aronow, The Special Master in School Desegregation Cases: The Evolution of Roles in the Reformation of Public Institutions Through Litigation (1979) (unpublished manuscript on file at the Yale Law School Library and the *Harvard Law Review*) (excerpts are reprinted in R. COVER & O. FISS, *supra* note 18, at 370).

[60] *See* Eisenberg & Yeazell, The Ordinary and the Extraordinary in Institutional Litigation (1979) (forthcoming in the *Harvard Law Review*).

threatens the constitutional values. In some instances, where deinstitutionalization is conceivable, as in the mental health field, closing the institution may be a viable option.[61] For the most part, in cases involving schools, prisons, welfare agencies, police departments, and housing authorities, for example, that option is not available. Then the remedy involves the court in nothing less than the reorganization of an ongoing institution, so as to remove the threat it poses to constitutional values. The court's jurisdiction will last as long as the threat persists.

Limitations on our knowledge about organizational behavior, coupled with the capacity of organizations to adapt to the interventions by reestablishing preexisting power relationships, invariably result in a series of interventions — cycle after cycle of supplemental relief. A long term supervisory relationship develops between the judge and the institution, for performance must be monitored, and new strategies devised for making certain that the operation of the organization is kept within constitutional bounds.[62] The judge may even create new agencies — once again the special master — to assist in these tasks. In doing so, he reflects either doubts about the capacity of the existing parties to discharge these tasks or an awareness of the magnitude of these tasks.

B. The Significance of the Transformation

Assume that the structural lawsuit has the formal features I have just described and also that it can be sharply differentiated from the dispute-resolution model in these particulars. The two lawsuits do not look alike. Gone is the triad, the icon of Justice holding two balances, and in its place a whole series of metaphors are offered to describe the structural suit. Some, emphasizing the distinctive party structure, speak of town meetings,[63] others, emphasizing the posture of the judge, speak of management or the creation of a new administrative agency. Of course, these metaphors decide nothing; they merely express a feeling that something is different. The question still remains as to the significance of the distinctive

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[61] *See, e.g.*, Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977) (appeal pending); New York State Ass'n for Retarded Children v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975) (consent decree) (unpublished decree ordered a gradual phase-out of Willowbrook) (on file at the Yale Law School Library and the *Harvard Law Review*).

[62] O. FISS, *supra* note 50, at 31.

[63] For a sympathetic use of the town meeting metaphor, using it as a predicate for expanding the possibilities of intervention, see Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 U.C.L.A. L. REV. 244 (1977).

form of the structural suit. Differences do not provoke doubts as to legitimacy unless a normative priority can be established for the dispute-resolution model; and that seems to me precisely where the standard critique of structural reform fails.

The ultimate issue is whether dispute resolution, particularly in the individualistic sense just described, has a prior or exclusive claim on the concept of "adjudication"; I might begin, however, by expressing my doubt as to whether it has any claim — any significant claim — on the central adjudicatory institution, courts. I doubt whether dispute resolution is an adequate description of the social function of courts. To my mind courts exist to give meaning to our public values, not to resolve disputes. Constitutional adjudication is the most vivid manifestation of this function, but it also seems true of most civil and criminal cases, certainly now and perhaps for most of our history as well.[64]

Most accounts of the judicial function begin with the same story: two people in the state of nature are squabbling over a piece of property, they come to an impasse, and, rather than resorting to force, turn to a third party, a stranger, for a decision. Courts are but an institutionalization of the stranger. This story, much like the story of the social contract, operates in the ill-defined land between the normative and descriptive. It does not purport to be an accurate portrayal of social history, of how courts actually came into being, but nevertheless is supposed to capture or express the underlying "social logic" of courts, even though no attempt is made to reconcile this story with the underlying social reality.[65] It seems to me, however, that once full account is taken of the role of courts in modern society, in ordinary criminal, constitutional, and statutory cases (*e.g.*, antitrust, environmental, or securities law), and perhaps also in the traditional common law cases, it becomes clear that the familiar story fundamentally misleads. It 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.

Disputation has a pervasive role in litigation. Disputes may arise as to the meaning of a public value or as to the existence of a norm, and thus provide the *occasions* for judicial intervention. Also, courts may rely on the antagonistic relationship between various individuals or agencies for the pres-

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[64] *See, e.g.*, Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); G. CALABRESI, THE COSTS OF ACCIDENTS (1970).

[65] Shapiro, *Courts*, in 5 HANDBOOK OF POLITICAL SCIENCE 321–71 (F. Greenstein & N. Polsby eds. 1975).

entation of the law and facts. The judge hopes that the desire of each to win provides a motivating force. Disputation can thus be viewed as a *mode of judicial operation.* I will also concede that the judge's decision may bring an end to the dispute; dispute resolution may be one *consequence* of the judicial decision. But as pervasive a role as disputation may play in litigation, it is equally important to recognize that the *function* of the judge — a statement of social purpose and a definition of role — is not to resolve disputes, but to give the proper meaning to our public values. Typically, he does this by enforcing and thus safeguarding the integrity of the existing public norms or by supplying new norms. These norms may protect the fruits of one's bargains or labors; they may regulate the use of automobiles or determine responsibility for compensation; they may preserve the integrity of markets by curbing fraud or monopolization; or they may impose limits on the use of state power. In the structural suit, the judge reorganizes the institution as a way of discharging this very same function.

Of course, some disputes may not threaten or otherwise implicate a public value. All the disputants may, for example, acknowledge the norms and confine their dispute to the interpretation of the words of the contract or the price of a bumper. Such disputes may wind their way into court, and judges may spend time on these purely private disputes — private because only the interests and behavior of the immediate parties to the dispute are at issue. That seems, however, an extravagant use of public resources, and thus it seems quite appropriate for those disputes to be handled not by courts, but by arbitrators (though courts may have to act as background institutions enforcing or maybe even creating obligations to arbitrate).[66] Arbitration is like adjudication in that it too seeks the right, the just, the true judgment.[67] There is, however, an important difference in the two processes arising from the nature of the decisional agency — one private, the other public. Arbitrators are paid for by the parties; chosen by the parties; and enjoined by a set of practices (such as a reluctance to write opinions or generate precedents) that localizes or pri-

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[66] *See* Landes & Posner, *Adjudication as a Private Good,* 8 J. LEGAL STUD. 235 (1979). When a court acts as a background institution, it is giving expression to the public value favoring the peaceful resolution of disputes, which is quite different from resolving the dispute itself.

[67] Mediation is also a dispute-resolution process, but distinguished from arbitration or adjudication by its subjective quality: the correct result is defined as that which the parties accept. *See generally* M. GOLDING, PHILOSOPHY OF LAW 106–25 (1975); Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking,* 89 HARV. L. REV. 637 (1976).

vatizes the decision.[68] The function of the arbitrator is to resolve a dispute. The function of the judge, on the other hand, must be understood in wholly different terms: he is a public officer; paid for by public funds; chosen not by the parties but by the public or its representatives; and empowered by the political agencies to enforce and create society-wide norms, and perhaps even to restructure institutions, as a way, I suggest, of giving meaning to our public values.

I may have overstated the position, and have drawn too sharp a distinction between arbitration and adjudication. I may have a too grandiose view of what people expect from judges as opposed to arbitrators. But it must be remembered that wholly apart from the question of whether dispute resolution has *any* claim on judicial resources, the question still remains whether it has a normatively *prior* claim on the office of the judge. The ultimate issue is whether dispute resolution is the ideal against which structural reform is to be judged. How might that priority be established? Three different tacks have been taken — one is instrumental, another is historical, and the third is axiomatic.

The instrumental critique, most strongly suggested by David Horowitz in a recent book, *The Courts and Social Policy*,[69] emphasizes the high risk of error in structural reform as opposed to dispute resolution. The argument is that the judge should be limited to doing what he does best — dispute resolution. Under the instrumental critique, dispute resolution becomes the ideal simply because it is what courts can do best.

Some of the empirical premises underlying this position seem plausible enough. The task of structural reform is fraught with danger, not just in defining the rights, but also in implementing them within the operation of the state bureaucracy. It may also be true — note I only say "may" — that the risk of judicial error in dispute resolution is not nearly as great as it is in structural reform: in many instances there is virtually nothing to the remedial phase in dispute resolution, simply declaring whether plaintiff or defendant wins, nothing to compare to the difficulties inherent in the reorganization of an ongoing social institution, a public school system, a welfare department, or worse yet, an institution we know the least about, a prison. All of this may be safely conceded without, I am certain, accepting the normative conclusion that idealizes dispute resolution.

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[68] *See* Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 920–22 (1979) (describing the incipient departures from this established practice).

[69] D. HOROWITZ, THE COURTS AND SOCIAL POLICY 264 (1977).

In the first place it is not clear why any social institution should be devoted to one and only one task, even the one it does best. Traditional separation of powers doctrine assumes a differentiation of judicial power from that of the executive and legislative branches, but it does not require that the differentiation be along *formal* as opposed to *functional* lines, nor does it require that any branch be devoted to one function alone. (Legislators, for example, spend considerable time on constituent services.) Each of the three great divisions of powers may have several different functions. The performance of one function may interfere with another, failures in one domain impair its capacity to perform in others, but there is no reason to believe that the relationship between the structural and dispute-resolution modes of discharging the judicial function is one of interference, that involvement in the structural litigation will compromise the judiciary's capacity to resolve disputes. The functions may well be independent, or maybe even complementary.[70]

Furthermore, even if a choice must be made between the two functions, the instrumental critique assumes too narrow a criterion of choice in insisting that we preserve that function the institution performs best. Success rate is important in evaluating institutions, but two further factors must be introduced into the analysis: the value of a successful performance, and the success rate of alternative institutions performing comparable tasks. On either criterion, structural reform fares quite well.

The hypothesized low success rate of structural reform is amply compensated by the promise of greater social returns. If the choice be between resolving a dispute between two individuals, such as a dispute between a citizen and a policeman over some alleged incident of wrongdoing, or on the other hand, trying to eradicate conditions of lawlessness through a reorganization of the police department, the claim that the first is more likely to be "successful" clearly does not make it the more socially worthwhile enterprise, in terms of either the breadth of the corrective action or its durability. Success may come more rarely or less perfectly in a structural case, but a structural success, even if it is only partial, may well dwarf all the successes of dispute resolution; it may greatly reduce the need for dispute resolution by eliminating the conditions that give rise to incidents of wrongdoing; and it may even compensate for all its own failures.

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[70] Though each may have its own problem. *See* p. 53 *infra*.

The instrumental critique might have more appeal if it were clear that there were alternative institutions that could better perform this worthwhile but perilous activity. But just the opposite is true. Dispute resolution might be diverted to arbitration, but obviously such a diversion is not available for structural reform. It is among the most public of all forms of adjudication, involving constitutional values and the state bureaucracies. Some have suggested administrative agencies as the alternative, on the theory that these agencies might have some special expertise in the reorganization of ongoing social institutions not otherwise available to courts. But this suggestion also seems without basis. Before explaining why, let me emphasize that my intent is not to deny a role for administrative agencies in the constitutional domain, in the effort to give meaning to our constitutional values through structural reform, but only to suggest that their claim of special competency is not so strong as to altogether oust the courts, to justify transferring structural reform from the courts to administrative agencies, leaving the courts to do nothing more than resolve disputes. The instrumental critique must make a claim as strong as that in order to idealize dispute resolution as the judicial function and to accuse courts of acting illegitimately whenever they undertake structural reform.

The claim for diversion is largely predicated on the view that these administrative agencies possess some expert knowledge, and yet I for one fail to see the evidence to support that position. The instrumental critic in essence makes a comparative argument, one about the superiority of administrative agencies, but only attempts to document one-half of that argument. He typically points to "failures" of the courts, but never considers the "failures" of the administrative agencies, of which there are many. The literature is filled with the evidence of administrative failures,[71] and teaches us to be wary of the claim of administrative expertise, also voiced at earlier times by the Progressives. Admittedly, structural reform is a perilous and arduous activity, but the problem is largely one of knowledge, knowing how large-scale organiza-

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[71] *See, e.g.*, J. FREEDMAN, CRISIS AND LEGITIMACY (1978); J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS (1976). *See also* R. RABIN, PERSPECTIVES ON THE ADMINISTRATIVE PROCESS (1979). The myth of expertise is not confined to administrative agencies, *see, e.g.*, Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527 (1978), nor even to the law, *see, e.g.*, J. HABERMAS, *Technology and Science as "Ideology,"* in TOWARD A RATIONAL SOCIETY 81 (1970); I. ILLICH, TOWARD A HISTORY OF NEEDS (1977).

tions operate, not the distribution of that knowledge among various agencies. I doubt whether there is some special body of knowledge relevant for such a remedial undertaking, but even if there were, it still remains to be seen why it could not be made available to the judge, either through expert witnesses, or through auxiliary structures such as special masters. The evidentiary process of the administrative agency has long promised to be more open, broader, and freewheeling than that available to the judiciary, but it is not clear to me that this promise has ever been fulfilled, that such a liberated process would be consistent with rudimentary notions of due process, or even that such a process is needed for structural reform. The focus of a structural suit is necessarily broad, concerned with social conditions and organizational dynamics, not discrete and particularized incidents of wrongdoing; but the judicial process is capable of that breadth. Some might, I realize, emphasize the insight that comes from accumulated experience, rather than a body of knowledge that could be communicated to a decisionmaker; yet it is hard to see how this reformulation of the claim of expertise advances the cause. Some judges have been engaged in the reconstructive enterprise over a long period of time, say a decade, and though, as we will see,[72] this involvement creates its own problems, it probably dwarfs all the experience presently possessed by administrative agencies on how to reconstruct ongoing social institutions.

The argument for diversion to administrative agencies thus seems to rest on exaggerated claims of expertise, a recurrence of a myth of Progressivism, but even more fundamentally it reflects a misunderstanding of why courts are involved in the first place. Courts are not entrusted with the reconstructive task on the theory that they possess some expertise (either in the form of knowledge or experience) on how best to perform that task. In the domain of instrumentalism, of means-end rationality, courts have no special claim to competency. Their special competency lies elsewhere, in the domain of constitutional values, a special kind of substantive rationality, and that expertise is derived from the special quality of the judicial process — dialogue and independence. The reconstructive endeavor, calling for instrumental judgments, should be seen (for reasons to be elaborated later[73]) as but a necessary incident of that meaning-giving enterprise, as an attempt by the judge to give meaning to constitutional values in practical reality.

[72] *See* p. 53 *infra*.
[73] *See* p. 52 *infra*.

Thus, even if one were to assume, as the instrumental critique would have us do, that administrative agencies possess an expertise in the domain of instrumental rationality, the diversion argument would still be deeply problematic because administrative agencies lack any special competency in this particular domain of substantive rationality. They lack the independence that is so essential for giving expression to our constitutional values.

The specialized jurisdictions of administrative agencies may lend support to the claim of expertise, but it also poses a threat to the independence of the agency: the regulators become too closely identified with the regulated.[74] More fundamentally, administrative agencies are, as the Progressives well-realized, more tied to majoritarian politics than are courts, both because of ideology (they are sometimes allowed to make their judgments on the basis of the preferences of the body politic) and institutional arrangements (appointment for short terms, subject to removal when administrations change). The so-called independent regulatory agencies of the federal system might be seen as standing somewhere between the courts, on the one hand, and Congress and the Executive, on the other, but surely their relationship to the majoritarian branches is close enough as to make us wary of any claim, such as that embodied in the instrumental critique, that would make them the exclusive or even the primary agencies for giving meaning to our constitutional values. The truth of this assertion would be, I venture to say, conceded in most contexts. It seems no less true — maybe even more so — when the threat to those values is posed by the bureaucracies of the modern state and when structural reform is needed to remove that threat.

A second method for establishing the priority of the dispute-resolution model is historical — dispute resolution is "traditional," and structural reform "new." Support for this position comes from Abram Chayes, who in an important, recent article[75] identified a mode of adjudication that is quite similar to the structural one (though he attributes its formal characteristics to the "public" character of the rights, while I see them more linked to the organizational setting — all rights

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[74] The dynamics of cooptation in the administrative field may be especially tied to the linkage of specialized jurisdiction and short term appointments (the administrator develops an expertise that has a limited market). As such, the loss of independence of the regulator from the regulatee may be more severe in the administrative domain than in the judicial, and less curable.

[75] Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281 (1976). For a parallel and important account of contemporary civil litigation, see Scott, *Two Models of the Civil Process,* 27 STAN. L. REV. 937 (1975).

enforced by courts are public). He celebrates the "new" model, but, rather than centrally dealing with the questions of legitimacy, he emphasizes the positivistic or descriptive dimensions of his enterprise. He presents himself as a "biologist" describing the "evolution" of a "new" form of adjudication, which will, he adds secondarily, legitimate itself by winning the assent of the people, provided it is given chance to work.

I have my doubts as to whether the historical claim is wholly accurate as a purely descriptive matter. To my mind, what has evolved has been the *form* of adjudication, but not the *function*. The function of adjudication, whether in the nineteenth century or twentieth century, torts or criminal law, contract or antitrust, *McCulloch v. Maryland*[76] or *Brown v. Board of Education*,[77] has not been to resolve disputes between individuals, but rather to give meaning to our public values. What has changed is social structure, the emergence of a society dominated by the operation of large-scale organizations, and it is these changes in social structure that account for the changes over time in adjudicatory *forms*. Such changes should hardly be a cause for concern. What would, in fact, provoke a genuine crisis of legitimacy would be to insist on procedural modes shaped in a different social setting, to assume that adjudicatory forms created centuries ago should control today.

But, even assuming for a moment that the dispute-resolution model has a claim to historical priority, it remains to be seen what that has to do with legitimacy, which is essentially a normative judgment. One response to this puzzlement may try to link dispute resolution with the "case or controversy" requirement of article III, but this claim is without foundation. There is nothing in the text of article III — in the rather incidental use of the words "cases" or "controversies" — that constitutionally constricts the federal courts to dispute resolution. The late eighteenth century was the heyday for the common law, and, though that litigation may inform the construction of the words "cases" and "controversies," the function of courts under the common law was paradigmatically not dispute resolution, but to give meaning to public values through the enforcement and creation of public norms, such as those embodied in the criminal law and the rules regarding property, contracts, and torts.[78] The courts created our law. They were the central lawmaking institutions. The judicial function implied by contemporary constitutional litigation, of

[76] 17 U.S. (4 Wheat.) 316 (1819).

[77] 347 U.S. 483 (1954).

[78] *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 1–30 (1977). *See also* note 64 *supra*.

which structural reform is part, is continuous with and maybe even identical to that of the common law. The issues have changed, and so has the social setting; that has required a change in the form of adjudication, though not its function.

Alternatively, it may be thought that the historical critique derives its normative power not from article III, but from the application of a theory that sees the people's "consent" as the basis of legitimacy.[79] This argument equates "implied consent" with "actual consent," interprets the people's acceptance of the status quo as implying a consent to the existing institutional arrangements, and then locates the dispute-resolution model — but not the structural one — in the status quo. Such an argument might seem capable of transforming a historical priority into a normative priority, but in truth the argument fails, on a number of grounds.

First, one can wonder about this interpretation of the status quo, which reads dispute resolution in and structural reform out. Some historians, for example, Eisenberg and Yeazell, find antecedents for contemporary institutional litigation in the nineteenth century equity and receivership cases or the antitrust and bankruptcy cases of the early twentieth century.[80] Indeed, following this line of thought one might also argue that the very existence of the structural mode in constitutional litigation for the past decade or so is sufficient to place it within the status quo — it, too, implicitly has received the people's consent.

A second response, primarily exemplified by Chayes,[81] is to table the question of legitimacy, to suggest that it has arisen prematurely. Assent by the people need not be given prospectively, in the way that might be suggested by the social contract metaphor: all the people come together at one historic moment and decide whether they wish to have a particular social institution. Consent can also be *earned*. But that takes time and thus structural reform should be given a chance to operate — a so-called trial run (assuming the past decade has not been sufficient). If it survives, it will then be given the same claim to legitimacy as the so-called traditional model: the institution will have legitimated itself.

A third response — and the one that seems most appealing to me — is to question consent theory itself. In part, the problem with the theory is one of ambiguity. What is it that

[79] The most ambitious attempt to relate consent theory to courts is Shapiro, *supra* note 65. As might be expected, it ultimately rests on the story, discussed p. 29 *supra*, that links dispute settlement and the evolution of courts.

[80] Eisenberg & Yeazell, *supra* note 60. *See also* O. FISS, *supra* note 57, at 325–414; Chayes, *supra* note 75, at 1303.

[81] Chayes, *supra* note 75, at 1313–16.

one consents to when one "accepts" the status quo in adjudication? Is it the form? Or the function? Or is it the substantive results? Consent theory fails to answer these questions, or even to suggest a procedure for working toward answers, and as a consequence transforms the historical argument into an endorsement of the status quo. It might well work a colossal collapse of "is" and "ought." Beyond that, however, one can question the very premise upon which this critique of structural reform rests — the identification of consent with legitimacy. Institutions can seek their justifications in domains other than consent, even in a democracy.

A democratic political system is one ultimately dependent upon the consent of the people, but each and every institution need not be founded on consent. Consent goes to the system, not the particular institution; it operates on the whole rather than each part. The legitimacy of particular institutions, such as courts, depends not on the consent — implied or otherwise — of the people, but rather on their *competence*, on the special contribution they make to the quality of our social life.[82] Legitimacy depends on the capacity of the institution to perform a function within the political system and its willingness to respect the limitations on that function. Legitimacy does not depend on popular approval of the institution's performance, and even less on popular approval of the processes through which that performance is rendered. It is the legitimacy of the political system as a whole that depends on the people's approval, and that is the source of its democratic character.

The people have the power to express their disapproval of how courts are discharging their function. Presumably, they can pass statutes to curb procedural innovations, or they can adopt constitutional amendments for overturning particular outcomes. Some might argue that the failure of the people to exercise this power is "implied approval" of all that the courts are doing today, but such an argument would be mistaken (this is surely a situation when inaction is not tantamount to action), and more importantly, it is unnecessary. The existence of the power of the people to express disapproval should be understood as the means by which institutions such as courts can be integrated into a system ultimately founded on the people's consent. Some institutions — the legislature, the school board, the police chief — may have a tighter, more direct connection to consent: particular incumbents serve at the pleasure of the people. To insist upon a similar consensual

[82] This way of looking at the matter was first suggested by G. Zweifach, Institutional Reform and Paradigms of the Judiciary (1979) (unpublished manuscript on file at the Yale Law School Library and the *Harvard Law Review*).

connection for the judiciary would, however, impair its independence and thus destroy its capacity to discharge its constitutional function within our political system.

For these reasons it seems impossible to ground the historical critique either on article III or on consent theory, and thus it, like the instrumental critique, fails to give dispute-resolution a normative priority. There is one further strategy to be considered, the one I called axiomatic. It postulates some formal attribute of a social process as a morally necessary attribute, on the basis of which the structural and dispute-resolution modes are to be evaluated. As it turns out, that attribute — individual participation, present in dispute resolution, absent in the structural mode — also implicates consent theory and shares many of its difficulties. It places adjudication on a moral plane with two other activities exalted by consent theory, voting and bargaining, and then tries to construct an ideal form of adjudication that preserves this connection with consensual activity, now in a highly individualized form, though it still fails to explain why consent is the touchstone of legitimacy of all institutions.

The most sustained effort to build a case for dispute resolution on the basis of moral axioms is Lon Fuller's essay, *The Forms and Limits of Adjudication.*[83] This essay was written in the late 1950's, shortly before the heyday of structural reform. It was published in 1978, shortly after Professor Fuller's death, but was not updated to account, either as a descriptive or normative matter, for the intervening twenty years, the civil rights era.[84] It is as though the period never occurred — an erasure of some portion of the history of procedure. The essay is nevertheless important for our purposes, for it seems largely motivated by a desire to establish the limits of adjudication, and the one limit Fuller in fact develops is clearly at war with the notion of structural reform. Borrowing an idea of Michael Polanyi, interestingly enough also introduced in the 1950's,[85] Fuller insists that courts cannot perform "polycentric" tasks.

Fuller does not give any single, straightforward definition of polycentrism. It seems to refer to a type of dispute or problem which is many centered, much like, he says, a spider web, in the sense that a resolution of a polycentric dispute

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[83] 92 HARV. L. REV. 353 (1978).

[84] During this 20-year period the essay did not lie dormant: it was used in Professor Fuller's courses at Harvard, it received a wide "underground" circulation in mimeographed form, it was widely cited, and portions appeared in two articles by Fuller: *Adjudication and the Rule of Law*, 54 PROC. AM. SOC'Y INT'L L. 1 (1960), and *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3.

[85] M. POLANYI, THE LOGIC OF LIBERTY (1951).

would necessarily have broad and never-ending repercussions. These disputes are to Fuller inappropriate for adjudication. Fuller explains why through an analysis of a series of examples. One example, appearing near the end of the essay, seems, remarkably enough, to address the problem of structural reform:

> The suggestion that polycentric problems are often solved by a kind of "managerial intuition" should not be taken to imply that it is an invariable characteristic of polycentric problems that they resist rational solution. There are rational principles for building bridges of structural steel. But there is no rational principle which states, for example, that the angle between girder *A* and girder *B* must always be 45 degrees. This depends on the bridge as a whole. One cannot construct a bridge by conducting successive separate arguments concerning the proper angle for every pair of intersecting girders. One must deal with the whole structure.[86]

One is left to wonder why adjudication must proceed on the basis Fuller suggests — angle by angle. Certainly that is not required by rationality; reason, even that of the judge, is not binary; it need not proceed angle by angle, but can encompass whole structures. The explanation seems much more concrete, it has to do with the enormous number of people affected by whole structures — by the construction of the bridge. It is simply impossible, Fuller explains, to have everyone affected participate in the lawsuit in a meaningful way.[87]

At the core then of Fuller's conception of the limits of adjudication and his objection to having courts resolve polycentric problems is the individual's right to participate in a proceeding that might adversely affect him. This right might be preserved in a representative suit that accords with the traditional law of agency, where there is a true consensual bond between representative (agent) and principal, but it should be recognized that this right, taken in its highly individualistic cast, is denied, indeed seriously compromised, by the kind of representation lying at the heart of a structural suit —

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[86] Fuller, *supra* note 83, at 403.

[87] In discussing another example, wage and price controls in a socialist regime, Fuller gives a more complete explanation of the source of the problem:

> [I]t is simply impossible to afford each affected party a meaningful participation through proofs and arguments. It is a matter of capital importance to note that it is not merely a question of the huge number of possibly affected parties, significant as that aspect of the thing may be. A more fundamental point is that [each possible solution] would have a different set of repercussions and might require in each instance a redefinition of the "parties affected."

Id. at 394–95.

the representation of interests by spokesmen for groups and offices rather than identifiable individuals.[88] Just imagine the kind of representation implicit in the famed Arkansas prison litigation, in which the court's conclusion — for example, that the trusty system at Cummins Farm was a form of cruel and unusual punishment — must necessarily affect a never-ending spiral of persons, officers, and interests: inmates, guards, administrators, legislators, taxpayers, indeed all the citizens of the state — present and future.[89] The reconstruction of a prison, or for that matter the reconstruction of a school system, a welfare agency, a hospital, or any bureaucracy, is as polycentric as the construction of a bridge. All require the court to deal with whole structures. The judge must be certain that the full range of interests is vigorously represented, but he need not turn his back on the constitutional claim or deny an effective remedy because each and every individual affected will not or cannot meaningfully participate in the suit.

My conception of adjudication starts from the top — the office of the judge — and works down. I place adjudication on a moral plane with legislative and executive action. I start with the conception of state power embodied in the judge, treat courts as a coordinate source of government power, and see the form of adjudication shaped by function and social setting. Fuller rejects such an approach. He starts from the bottom and works up. Fuller starts with the individual, rather than the judge. He places adjudication on a moral plane with elections and contracts, analyzes these two social processes in terms of how the individual participates in each, through voting and bargaining, and then seeks to distinguish adjudication from these social processes. The distinguishing feature of adjudication, naturally enough, is also cast in individualistic terms, more precisely, in terms of how the individual participates in that process as opposed to elections and contracts — through proof and reasoned arguments. He then treats this right of the individual to participate in the proceeding — the moral equivalent of the right to vote and the right to bargain — as the master idea of adjudication. For Fuller, it explains and justifies certain formal features of adjudication, for example, party structure and the passivity of the judge. It also sets limits on adjudication. The right of individual participation is violated only at a distinct moral risk — the process

[88] *But cf.* Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 427 (1978).

[89] Holt v. Sarver, 309 F. Supp. 362, 373–76 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). *See also* note 28 *supra*.

is deemed not a form of adjudication, or at best a mixed or hybrid form of adjudication, "parasitic" upon the ideal.

At various points Fuller speaks as though he is being merely descriptive. What distinguishes adjudication from other social processes, he says, is the "institutional commitment" of adjudication to a particular mode of individual participation. On a purely descriptive level there is not much to his claim. It is not supported by a presentation of the evidence and it is contradicted by a great deal of the reality or experience that we would consider to be adjudication. Moreover, a purely descriptive account could never yield the normative judgments implicit in his conclusion as to what might constitute "parasitic" adjudication. Fuller's essay should be recognized for what it is: a postulation that the standard for judging the legitimacy of a process that purports to be adjudication is the affected individual's right to participate. I say "postulation," for although much of the essay rightly celebrates the role of reason in human affairs, and sees the important connection between reason and adjudication, there is no explanation of why reason requires the kind of individual participation that Fuller insists upon. In structural reform reason enters the process, not through the arguments of each and every individual affected, but through the arguments of the spokesmen for all the interests represented and through the decision of the judge. Reason is used to give meaning to our constitutional values.

How might an axiom such as Fuller's, proclaiming the sacredness of the individual right of participation, be judged? I realize that it may not be appropriate to demand justification of an axiom, for it is offered as a starting point, a proposition that you cannot look behind. Yet there must be more that can be said about it. Acceptance of an axiom must turn on something more than a momentary flash of intuition. In my judgment, the axiom can be assessed in terms of its consequences and its underlying social vision. An axiom might at first glance seem attractive enough, but its appeal may decline radically once its full implications are understood.

In assessing the consequences of the individual participation axiom it should first be understood that the issue is not whether there should be social processes that can further the participatory right — whether dispute resolution should exist — but whether a form of adjudication that violates that right — structural reform — is legitimate (or permissible). Fuller treats the participation axiom as a necessary condition, and that is the source of the problem. As a necessary condition, the axiom would render structural reform illegitimate, true

enough, but more importantly, it would render illegitimate almost all adjudication — both of the common law and the constitutional variety — in which the courts were creating public norms. It would reduce courts to the function of norm enforcement, and reduce adjudication to a high-class (but subsidized) form of arbitration. It is no mere happenstance that Fuller spent a great deal of his professional life as an arbitrator; throughout the essay he refers to the judge as an "arbiter."

Virtually all public norm creation is polycentric. It affects as many people as structural reform, and equally impairs the capacity of each of the affected individuals to participate in the process. More often than not, there is a myriad of possible rules or solutions that could be formulated in each case. Consider the fellow-servant rule, the stop-look-and-listen doctrine, strict liability, the consideration requirement, the rules respecting offer and acceptance, the norms of the Marshall Court regarding the commerce clause, those of the Warren Court regarding free speech, racial equality, civil and criminal procedure. The list could go on and on. It would probably include all judge-made law, and the doctrine of precedent itself. The list surely includes many "mistakes" or "wrong decisions," but that is not the issue: the issue is whether all these acts of norm creation represent a misuse of the judicial power, an incorrect appropriation of the concept of "adjudication." This is a conclusion that most of us — or maybe even all of us — would reject and yet it is a conclusion that would seem to follow from Fuller's axiom.

It should also be recognized that this axiom — like the liberty-of-contract doctrine of an earlier age — would be but a formal triumph of individualism. The axiom seems to celebrate the individual, but would leave the individual at the mercy of large aggregations of power — in *Lochner,*[90] the corporation; here, the state bureaucracies. Deprived of the opportunity to use the courts to protect himself, to have the full use of these centers of government power that stand apart from the state bureaucracies, the individual is thrown back to those social processes that are supposed to respect his participatory right — dispute resolution, voting, and bargaining. Each of these processes has important roles to play in our social life, but it is hard to believe that any of them enhance the *real* or *effective* — as opposed to the formal — power of those individuals who are abused by the large-scale organiza-

[90] Lochner v. New York, 198 U.S. 45 (1905); *see* W. Duker, Mr. Justice Rufus W. Peckham: The Police Power and the Individual in a Changing World (1979) (unpublished manuscript on file at the Yale Law School Library and the *Harvard Law Review*); Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

tions of the modern state, the school system, the hospital, the welfare department, or, even worse, the prison.

In truth, the individual participation axiom is rooted in a world that no longer exists. It is rooted in a horizontal world, in which people related to one another on individual terms and on terms of approximate equality. It is rooted in a world that viewed the law of contracts as The Law — not so incidentally, Fuller's substantive field of law. Our world, however, is a vertical one; the market has been replaced by the hierarchy, the individual entrepreneur by the bureau.[91] In this social setting, what is needed to protect the individual is the establishment of power centers equal in strength and equal in resources to the dominant social actors; what is needed is countervailing power. A conception of adjudication that strictly honors the right of each affected individual to participate in the process seems to proclaim the importance of the individual, but actually leaves the individual without the institutional support necessary to realize his true self. In fact, the individual participation axiom would do little more than throw down an impassable bar — polycentrism — to the one social process that has emerged with promise for preserving our constitutional values and the ideal of individualism in the face of the modern bureaucratic state — structural reform.[92]

III. The Problem of Remedy

Dispute resolution, either as a statement of form or function, does not represent the ideal for adjudication, and thus the departures from that model of adjudication entailed in structural reform do not in and of themselves deprive that mode of adjudication of its legitimacy. The function of adjudication is to give meaning to public values, not merely to resolve disputes. Structural reform is faithful to that function, and adapts the traditional form of the lawsuit to the changing social reality — the dominance of our social life by bureaucratic organizations. A question of legitimacy might still persist, however, because, wholly apart from any comparisons to the dispute-resolution model, the entitlement of courts to speak the law — to give meaning to our constitutional values — is

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[91] *See generally* M. Weber, The Theory of Social and Economic Organization 329–41 (T. Parsons ed. 1947); O. Williamson, *supra* note 25.

[92] This model of adjudication has a relevance even beyond the state bureaucracy; it may be used to safeguard public values from the threats posed by the so-called private bureaucracies, such as the corporation or union. *See, e.g.*, Stone, *Controlling Corporate Misconduct*, 49 Pub. Interest 55 (1977); Note, *Monitors: A New Equitable Remedy?*, 70 Yale L.J. 103 (1960).

limited. It is limited, as I suggested at the outset, by the judge's willingness and ability to adhere to a process that typifies the judicial branch and constitutes the foundation of its competence — dialogue and independence.

Structural reform does not pose any distinct threats to the dialogic quality of this process — the obligation of the judge to confront grievances he would otherwise prefer to ignore, to listen to the broadest possible range of persons and interests, to assume individual responsibility for the decision, and to justify the decision in terms of the norms of the constitutional system. The transformation of party structure inherent in the structural suit stretches the notion of a dialogue, but to fault the structural suit on that ground is to overread a metaphor, to think that it refers to a conversation between two. The term "dialogue" is simply meant to suggest a rationalistic or communicative process in which the judge listens and speaks back. That process is no less possible in the multiparty context, though the visual imagery shifts from a triad to an array. It just requires a little skill and imagination.

Admittedly, the capacity or even the willingness of judges to engage in this communicative process, to listen to all grievances and to painstakingly justify their decisions, is far from secure. Like an art, it always seems in peril. But the principal threats to this capacity — impatience, self-righteousness, judicial burnout — have nothing to do with structural reform; or to put the same point somewhat differently, these threats to the integrity of the judicial process can be fought in ways that leave the structural suit untouched as a distinctive mode of constitutional litigation. Some of the critics of structural reform also voice the recurrent gripe that judges are overworked.[93] Though overwork might well threaten the integrity of the communicative process that lies at the core of adjudication, it is far from clear why the remedy should lie in the elimination of the structural suit. Each one is complex and difficult, but at the same time it may engage the judge in his most worthy and important function. A more sensible response to the claim of overwork may be to divert to other

[93] This claim has its counterpart in earlier times, though then it was primarily used as part of a criticism of the activism of the newly formed Warren Court, *see, e.g.*, Hart, *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); for a spirited reply *see* Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960). The claim of overwork often appears as the rock bottom defense of a Supreme Court practice that seems very much in tension with the competency-giving process, the failure of the Court to explain its choice of cases. *See* Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

institutions the simpler, less complex cases (individual citizen versus individual policeman, inmate versus guard); they may represent a considerable burden taken as an aggregate. It may also be necessary to increase the social resources committed to the judicial branch. We cannot expect any agency of government to discharge its function adequately when it is forced to operate on a commitment of resources that reflect the needs of an earlier age. It would of course be a sad irony, indeed it would seriously jeopardize his legitimacy, if these resources were used to convert each judge into a minibureaucracy. The dialogue that has so far typified the judicial branch, and that underlies its claim of special competency, envisions individual responsibility for the decision and its justification. The judge must be the one who listens and speaks back.

Though these matters cannot be easily dismissed, my concern is not with the dialogic quality of the competency-giving process, but rather with the ideal of independence and the threat posed to that ideal by the remedy. The remedy expresses the judge's desire to give a meaning to a constitutional value that is more tangible, more fullblooded than a mere declaration of what is right. This desire to be efficacious is manifest in all forms of adjudication, and creates similar dilemmas for the judge, but in structural reform it takes on a special urgency and largely gives this form of constitutional litigation its special cast. The desire to be efficacious leads the judge to attempt the remarkable feat of reconstructing a state bureaucracy, say, transforming a dual school system into a unitary one, and that ambition in turn forces the judge to abandon his position of independence and to enter the world of politics.

A. The New Formalism

To understand the roots of the dilemma it is necessary to understand the complicated relationship between rights and remedies. To do that we must first free ourselves from the hold of what has become known as the tailoring principle — the insistence that the remedy must fit the violation.

At first it seemed that the tailoring principle was of unquestionable validity; indeed, it might be tautological. The problem seemed not to be the principle itself but the definition of the violation — the Court had defined the violation too narrowly. The principle was quietly introduced in *Swann*[94]

[94] 402 U.S. 1, 15–16 (1971). In fact, *Swann* sustained the most untailored remedy imaginable, and the very invocation of the tailoring principle suggested a broad conception of the violation. *See* Fiss, *The Charlotte-Mecklenburg Case — Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697 (1971).

but was first applied in a case in which the Burger Court upset a metropolitan desegregation plan,[95] a result that might be traced to an exceedingly narrow view of the equal protection violation, namely, that it consisted of incidents of wrongdoing — past acts of discrimination — rather than a social condition — the segregated pattern of student attendance.[96] I now believe the problem is deeper: the tailoring principle fundamentally misleads. It does in fact tend to support an artificial conception of "violation" — one that looks back and that sees discrete incidents as the object of the remedy — but it also errs in an even more basic way. It suggests that the relationship between remedy and violation is deductive or formal, and thereby gives us an impoverished notion of remedy.

Deduction, strictly speaking, is never possible in the law, as the authors of the tailoring principle might well concede. There are, however, certain features of the tailoring principle, particularly the concept of "fit," that suggest that the connection between violation and remedy has a highly formalistic, almost a deductive quality, with the violation serving as the premise and the remedy the conclusion: (a) the violation is viewed as the *exclusive* source of the remedy; (b) each *specific* provision of the remedy is explicable in terms of the violation; (c) it is assumed that there is a *unique* remedy, in the same way that there is a single conclusion to a syllogism; and (d) the remedy, also like the conclusion, is thought to follow from the violation with a high degree of *certainty*. In the structural context these formalistic qualities — exclusivity, a fully determined specificity, uniqueness, and certainty — are never present. The structural remedy is decidedly instrumental.

The object of the structural remedy is not to eliminate a "violation" in the sense implied by the tailoring principle, but rather to remove the threat posed by the organization to the constitutional values. The concept "violation" can be used to describe the object of the remedy only if it is understood in a

[95] Milliken v. Bradley, 418 U.S. 717 (1974). *See also* Milliken v. Bradley, 433 U.S. 267, 281–82 (1977); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

[96] This is further suggested by several post-*Milliken I* cases, particularly Washington v. Davis, 426 U.S. 229 (1976), and Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977). *Washington v. Davis* made segregative intent a necessary condition for a violation, and *Dayton* limited the remedy to eliminating the "incremental segregative effect" of the wrongful conduct, 433 U.S. at 420. Looking at the problem of school desegregation from the perspective of these two cases, it seemed that the architects of *Swann* and *Keyes* had been caught in a trap of their own making, for *Swann* and *Keyes* would have us believe that the violations in those cases consisted of the incidents of past discrimination, even though they called for systemwide remedies. *See* Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHILOSOPHY & PUB. AFF. 3 (1974), *reprinted in* EQUALITY AND PREFERENTIAL TREATMENT 155 (M. Cohen, T. Nagel & T. Scanlon eds. 1977).

prospective, dynamic, and systemic sense. It must also be understood that there are many ways of eliminating the threat (the violation, if you insist). Consider the well-known *Lankford* case,[97] in which the police had engaged in a massive manhunt in the black neighborhoods in Baltimore. They conducted searches of suspects without probable cause and in a manner and at a time that the court concluded was wholly unjustified. This misconduct was part of a larger pattern of abuses by the police, and the court perceived an urgent need to protect fourth amendment values. It also became apparent that this might be done in at least three different ways: (a) a decree against the police officers, either at the operative or supervisory level, prohibiting them from engaging in conduct that violated the fourth amendment; (b) a decree requiring the chief of police to establish an internal disciplinary agency that would sanction individual police officers who engaged in such misconduct; or (c) a decree establishing (subject to some minor exceptions such as one for hot pursuits) that searches for suspects be conducted only with a search warrant, not because the fourth amendment required it, but as a means of checking the abuses that occurred in this city. The court confronted with a threat to fourth amendment values must choose among these alternatives (and maybe even others), and the tailoring principle distorts the remedial process by masking this basic fact. It obscures the need for a choice, and the fact that the remedial phase of a structural suit is largely devoted to making that choice.

The tailoring principle also obscures the criteria of choice in suggesting that the violation will be the exclusive source of the remedy: it suggests that the shape of the remedy is exclusively a function of the definition of the violation. The overriding mission of the structural decree is to remove the threat posed to constitutional values by the organization, but there are additional or subsidiary considerations — largely embraced within the traditional concept of "equitable discretion" — that play a critical role in the remedial process. They guide the choice among the host of possible remedies, and shape the terms of the alternative chosen. One set of subsidiary considerations might be considered normative: they express values other than the one that occasions the intervention. For example, a school decree might be predicated on a desire to eliminate a threat to racial equality, but other values — such as respect for state autonomy,[98] evenhandedness, or a min-

[97] Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966). For the decree actually entered on remand see O. FISS, *supra* note 57, at 116.

[98] Hutto v. Finney, 437 U.S. 678, 704 n.1 (1978) (Powell, J., concurring in part and dissenting in part).

imization of coercion — should be considered. Another set of subsidiary considerations go to efficacy. They reflect the judge's best judgment on how he might achieve his objective of removing the threat to the constitutional value most effectively.

These subsidiary considerations have, as we saw earlier, an important bearing on some facets of the party structure — the divergence between victims and beneficiaries of the decree, and also on the identity of the office or agency that bears the burden of the remedy.[99] They also give the structural decree a tentative and hesitant character. The familiar pattern is for the judge to try — sometimes in different cases and sometimes at different times in the same case — the whole range of remedial alternatives. The judge must search for the "best" remedy, but since his judgment must incorporate such open-ended considerations as effectiveness and fairness, and since the threat and constitutional value that occasions the intervention can never be defined with great precision, the particular choice of remedy can never be defended with any certitude. It must always be open to revision, even without the strong showing traditionally required for modification of a decree,[100] namely, that the first choice is causing grievous hardship. A revision is justified if the remedy is not working effectively or is unnecessarily burdensome.

These subsidiary considerations also explain the specifics usually found in the final stages of a structural injunction. The specifics range from the date and content of the reports that must be submitted to the court on performance to the duties of the various institutional operatives. 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?[101] 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. It incorrectly assumes, as the tailoring principle permits, that the violation — viewed as a reciprocal of a constitutional right — is the exclusive source of each and every term of the remedy. It assumes that the remedy fits the violation in the same way that a suit of clothing

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[99] *See* pp. 22, 24 *supra*.

[100] United States v. Swift & Co., 286 U.S. 106 (1932). *See generally* Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 HARV. L. REV. 1303 (1967).

[101] *See e.g.*, Hutto v. Finney, 437 U.S. 678, 711–14 (1978) (Rehnquist, J., dissenting); A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 97 (1976).

fits the body, with each nuance of the suit being traced to a twist in the body.

Specificity is not a fixed rule; there may be some distinct advantages to ambiguity as a technique of control. But when specificity is present, it can usually be traced to considerations of efficacy and sometimes to general considerations of fairness (such as notice). It is these considerations that block the attribution of these specifics "back into" the Constitution. The rights these considerations give rise to might be thought of as instrumental or remedial rights rather than constitutional rights proper, but it is equally important to recognize that these instrumental or remedial rights are created by courts in discharge of their constitutional function. The Constitution does not say anything about reports, showers, or isolation cells; much less does it say anything about the date reports are due, the temperature of showers, or the maximum numbers of days that can be spent in an isolation cell. But it does say something about equality and humane treatment, and a court trying to give meaning to those values may find it both necessary and appropriate — as a way of bringing the organization within the bounds of the Constitution — to issue directives on these matters. The court may also find it necessary and appropriate to be quite specific in these directives, either as a way of minimizing the risk of evasion or as a way of helping the bureaucratic officers know what is expected of them.

B. The Dilemmas of Instrumentalism

The formalism of the tailoring principle fails to capture the true nature of the remedial process required for structural reform (and maybe for other types of relief as well). It is a pretense that must be abandoned. The structural remedy must be seen in instrumental terms. First, the remedy exists for and is determined by some finite purpose, protecting the constitutional value threatened; second, the remedy actually chosen is one among many ways of achieving that purpose; and third, the remedy incorporates considerations that might not be rooted in any direct and obvious way in the constitutional value that occasions the intervention. The remedy is shaped in part — in critical part — by considerations of fairness and strategy.

As an instrumental activity, structural reform will have its share of failures in the sense that the threat to the constitutional value may persist — so much is required to eliminate the threat and so little is known about organizational behavior. Failure is always possible with any instrumental activity; and as a mode of thought, instrumentalism as opposed to

formalism derives its appeal largely from the fact that it recognizes the possibility of failure. What is worrisome about the instrumentalism implicit in structural reform is not the risk of failure itself, but the fact that the reform is being undertaken by a court. Even a "success" might raise questions of legitimacy because the legitimacy of the institution turns on criteria that are independent of result. Legitimacy is largely a point about institutional integrity.

Some might see the instrumentalism inherent in the remedial process as inconsistent with the dictates of formal justice, the requirement of treating similarly those who are similarly situated; it might even be thought to be at odds with the idea of a single, nationwide constitution. The subsidiary considerations that give so much specific content to the remedy might, for example, require a freedom-of-choice desegregation plan in one community, while, in another, a geographic assignment plan would be best. Similar differences may emerge in the reorganization of the prisons, hospitals, or welfare agencies in various communities. Such a varying remedial pattern has, in fact, emerged, but it does not seem to me to be objectionable, for there may well be differences between the various communities that justify the different treatment. Neither formal justice nor the ideal of a single, nationwide constitution requires that *all* communities be treated identically, but only that *similar* communities be treated alike.[102] For me, the real problem arises not from the varying remedial pattern, but from an absence of a conceptual connection between the processes that give courts their special competency and instrumental judgments.[103]

The rightful place of courts in our political system turns on the existence of public values and on the promise of those institutions — because they are independent and because they must engage in a special dialogue — to articulate and elaborate the true meaning of those values. The task of discovering the meaning of constitutional values such as equality, liberty, due process, or property is, however, quite different from choosing or fashioning the most effective strategy for actualizing those values, for eliminating the threat posed to those values by a state bureaucracy.[104] As I noted before, the judge has no

[102] These themes plus the problem of uncertainty are developed more fully in another article of mine, *The Jurisprudence of Busing*, 39 LAW & CONTEMP. PROB. 194, 215–16 (1975).

[103] *See* Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 706–12 (1978).

[104] The competency-giving processes of the judge, dialogue and independence, have a conceptual connection to those subsidiary considerations that enter the remedial process but have a more normative character, *e.g.*, evenhandedness. The problem I perceive relates to strategic considerations, so important to the success of the remedy.

special claim of competency on instrumental judgments, on means-end rationality, whether it be in the bureaucratic context or elsewhere; he may be no worse than others, and now and then be even better, but there is no general or systematic reason for believing he will be better. There is no likely connection between the core processes of adjudication, those that give the judge the special claim to competence, and the instrumental judgments necessarily entailed in fashioning the remedy. Sometimes the best strategy is laid in silence and by someone highly sensitive to the preferences of the body politic.[105] Why then do we entrust the remedial task to the judge?

Rights and remedies are but two phases of a single social process — of trying to give meaning to our public values. Rights operate in the realm of abstraction, remedies in the world of practical reality. A right is a particularized and authoritative declaration of meaning. It can exist without a remedy — the right to racial equality, to be free of Jim Crowism, can exist even if the court gave no relief (other than the mere declaration). The right would then exist as a standard of criticism, a standard for evaluating present social practices. A remedy, on the other hand, is an effort of the court to give meaning to a public value in practice. A remedy is more specific, more concrete, and more coercive than the mere declaration of right; it constitutes the actualization of the right.

If the purpose of the remedy is to actualize the declared right, then the remedy might be understood as subordinate to the right. Yet it is also important to recognize that the meaning of a public value is a function — a product or a consequence — of both declaration and actualization. Rights and remedies jointly constitute the meaning of the public value. The declared right may be one of "racial equality," but if the court adopts a "freedom-of-choice" plan as the mode of desegregation then the right actualized is the right to choose schools free of racial distinction (though subject to all the other restraints inherent in any process that relies on individual choice). A constitutional value such as equality derives its meaning from both spheres, declaration and actualization, and it is this tight connection between meaning and remedy, not just tradition,[106] that requires a unity of functions. It requires

[105] Perhaps this explains one of the most striking features of opinions in structural cases: the failure to discuss the remedy with any specificity at all. This silence is probably more a function of embarrassment than an absence of self-awareness of the factors that shaped the decree.

[106] Compare Professor Bickel's account of the remedial function, suggesting it is somehow tied to the duty of disposing of concrete controversies:

[T]he Court does not sit to make precatory pronouncements. It is not a synod

that the decision about remedy be vested in the judge, the agency assigned the task of giving meaning to the value through declaration. A division of functions, a delegation of the task of actualization to another agency, necessarily creates the risk that the remedy might distort the right, and leave us with something less than the true meaning of the constitutional value. Both sources of meaning must be entrusted to the same agency to preserve the integrity of the meaning-giving enterprise itself.

If the judge's function is to give meaning to our public values, and the remedy must be understood as an integral part of that process, then we can understand — and indeed appreciate — the judge's involvement in reforming the state bureaucracy. It is a necessary incident of his broader social function. This is not, however, the end of the matter. Even though the meaning-giving process may require a unity of functions, the risk is always present that the performance of one function may interfere with the other. This, in fact, occurs in the structural context and constitutes the core dilemma. It is not that actualization and declaration are analytically incompatible, but rather that they are very often in tension. Actualization of the structural variety 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.

To some extent this threat is tied to a peculiar characteristic of the structural remedy — it places the judge in an architectural relationship with the newly reconstituted state bureaucracy. A judge deeply involved in the reconstruction of a school system or prison is likely to lose much of his distance from the organization. He is likely to identify with the organization he is reconstructing, and this process of identification is likely to deepen as the enterprise of organizational reform moves through several cycles of supplemental relief, drawn out over a number of years. There is, however, a deeper and more pervasive threat to judicial independence, one that turns not on the peculiar reconstructive character of the structural remedy, but on the desire of the judge represented by the very attempt to give a remedy, any remedy — the desire to be efficacious.

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of bishops, nor a collective poet laureate. It does not sit, Mr. Freund has remarked, "to compose for the anthologies." If it did, its effectiveness would be of an entirely different order; and if it did, we would not need to worry about accommodating its function to the theory and practice of democracy. The Court is an organ of government. It is a court of law, which wields the power of government in disposing of concrete controversies.

A. BICKEL, THE LEAST DANGEROUS BRANCH 246–47 (1962) (footnote omitted).

Judges are not all-powerful. They can decree some results but not all. Some results depend on forces beyond their control. Judges can issue orders, and perhaps threaten the addressees of these orders — the officers within the hierarchy — with contempt. But the success of the actualization process depends on many other forces, less formal, less identifiable, and perhaps even less reachable. The desegregation of a school system is vulnerable to "white flight," that is, the capacity of white parents to withdraw from the public school system altogether; the reforms of a police system may depend on the cooperation of the Police Benevolent Association; the reform of a total institution depends on preserving the intricate fabric of personal relationship between keepers and inmates; and the reform of the welfare bureaucracy — maybe of all state bureaucracies — may well depend on increased appropriations and increased revenues. In each of these instances, the judge may be able to devise strategies for inducing these forces into supporting the structural reform — judges are among the shrewdest persons I have known.[107] But the issue is not shrewdness, not the capacity of judges to devise strategies for dealing with these limiting forces, but rather the very need to devise these strategies and what the perception of this need does to their sense of independence. Judges realize that practical success vitally depends on the preferences, the will, of the body politic.

This perception of dependence has obvious and important implications for the remedy: no judge is likely to decree more than he thinks he has the power to accomplish. The remedy will be limited, and even more importantly it will be viewed in adaptive terms.[108] The judge will seek to anticipate the response of others, and though he may try to transcend the limits imposed by that response, he is likely to accept the reality of those limits and compromise his original objective in

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[107] The two most spectacular instances that come to my mind are: the New Jersey school finance case, Robinson v. Cahill, 70 N.J. 155, 358 A.2d 457 (1976) (per curiam); *see* R. LEHNE, THE QUEST FOR JUSTICE 128–30 (1978); and the Alabama prison case, Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd as modified sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam) (on 11th amendment grounds); *see* N.Y. Times, Feb. 4, 1979, §1, at 26, col. 1 (describing Judge Johnson's latest strategy).

[108] Compare Chayes, *supra* note 75, at 1298–302, who, adopting a consent theory of legitimacy, celebrates the so-called negotiated quality of the decree, to the point of exaggerating the consensual element in the remedial process. A structural suit can be settled at the remedial stage in the same sense that it can be at the liability stage, but neither type of settlement is consensual in the same way that a bilateral transaction might be.

order to obtain as much relief as possible. He will bargain against the people's preferences. The remedy is, as we saw, a vitally important part of the meaning of the public value, and even if the remedy were all that were affected, all that were compromised, there would be reason to be concerned. But the truth of the matter is that the stakes are likely to be higher — the distortion will be felt in the realm of rights, too.[109] Just as it is reasonable to assume that a judge wishes to be efficacious, it is also reasonable to assume that no judge is anxious to proclaim his impotence. He will strive to lessen the gap between declaration and actualization. He will tailor the right to fit the remedy.

Some measures might seem capable of preserving the independence of the judge, and thus of minimizing the threat to the judicial enterprise. In the early years, recourse was made to a rule of strict passivity in the remedial phase: the judge's role was simply to decide whether the existing arrangements were constitutional. If they were not, it was entirely the defendant's responsibility to propose steps that would remedy the situation. The judge was not to choose the remedy, nor even assume a responsibility for implementing it, but leave the remedial burden entirely on the defendant. If the defendant failed to discharge that responsibility, recourse could be made to the contempt power.

This rule left the judge in the awkward position of choosing between a heavy and frequent use of criminal contempt power or an endless series of declarations of what was unacceptable. It soon became clear — particularly through the New Orleans school crisis of the early 1960's[110] — that neither alternative would effectively desegregate the schools, produce results, and as a consequence the courts abandoned this posture of strict passivity. They began to participate actively in the fashioning of remedies. They made clear their expectations as to what would be acceptable and sometimes even fashioned the remedy itself.[111] In either instance, strategic considerations entered the judicial process: what the judges required was in part shaped by what was obtainable — it was better to have some-

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[109] This point emerged in the course of discussions with the Friday luncheon group — Geoffrey Aronow, Deborah Ashford, Robert Katzmann, Joel Beckman, Martha Minow, Ann Wallwork, Gerson Zweifach. I am particularly grateful to the members of the group for that idea and many others that appear in this essay.

[110] Bush v. Orleans Parish School Bd., 204 F. Supp. 568, *supplemented*, 205 F. Supp. 893 (E.D. La.), *modified*, 308 F.2d 491 (5th Cir. 1962). *See also* R. CRAIN, THE POLITICS OF SCHOOL DESEGREGATION (1968).

[111] *See* cases cited note 2 *supra*. For a modern resurgence of the rule of deference, see White v. Weister, 412 U.S. 783 (1973) (reapportionment).

thing — maybe a grade a year, maybe freedom of choice — rather than nothing at all.

Today, the most vivid expression of the dilemma created by the remedy is the creation of a new procedural institution, the special master. As we saw, the special master serves as an auxiliary spokesman in structural litigation; but he can also be used as an intermediate structure, standing, if you will, between the judge and the organization and also between the judge and the body politic.[112] The special master will assume the responsibility of both fashioning and implementing the relief, on the theory that he will become the architect of the newly reconstructed institution and that he, not the judge, is the one who will become principally dependent on the good will and cooperation of all those forces — the union, the legislature, the angry parents — needed to make the remedial process work. The special master is the judge's appointee, but the hope is that once the authority is infused, the judge will be able to stand in the background, return to his position of independence, judging rather than wheeling-and-dealing.[113]

The "success" of the special master in resolving the core dilemma is largely dependent on preserving the ambiguity of his status,[114] judge and non-judge, and that ambiguity is likely to disappear over time. The success may be more apparent than real. If the special master is not a judge, not an arm of the judge, then the use of a special master represents a division of functions, a denial of the very reason why we entrust the remedial enterprise to the judge in the first place. The special master would be but a new administrative agency, now created by the judge rather than the legislature or executive, appointed by the judge and subject to dismissal by the judge.[115] This administrative agency might be thought to stand a little closer to the courts than to the majoritarian branches than does the typical administrative agency, but heavy reliance on an agency

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[112] G. Aronow, *supra* note 59; M. Starr, Accommodation and Accountability: A Strategy For Judicial Enforcement of Institutional Reform Decrees (1979) (unpublished manuscript on file at the Yale Law School Library and the *Harvard Law Review*).

[113] For a vivid account of the bargaining of the special master, and the judge's attempt to recover his distance, see Berger, *Away from the Court House and into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978). *See also* Harris, *The Title VII Administrator: A Case Study in Judicial Flexibility*, 60 CORNELL L. REV. 53 (1974).

[114] *But cf.* Note, *"Mastering" Intervention in Prisons*, 88 YALE L.J. 1062, 1082–85 (1979) (suggesting that the multiplicity of roles, which may be essential to maintain this "ambiguity," may compromise the special master's legitimacy).

[115] For another way of synthesizing functions, this time using the already established administrative agencies, see Note, *Judicial Control of Systemic Inadequacies in Federal Administrative Enforcement*, 88 YALE L.J. 407 (1978).

that is truly independent of the court would still present many of the dangers to constitutionalism that would be entailed in a division of functions. On the other hand, if the special master is a judge, or a mere extension of the judge, the unity of functions would be preserved, but the special master could not shield the judge from the threats to his independence; the acts of the special master will be attributed to the judge. The original dilemma will remain.

The list of palliatives could be continued. It might include greater use of a multitude of judges[116] or the creation of a strong representational structure.[117] I am afraid, however, it would leave us in the same position — some independence restored, but still searching for a judge who is truly independent — knowing full well that as long as we want to use adjuciation to reform practical reality, that aspiration can never be fully satisfied. Some solace might be found in the fact that the dilemma is not wholly the judge's making. The dilemma arises not just from the judge's desire to be efficacious, but from a desire to be efficacious in a world in which his power is limited and in which the critical social actors are recalcitrant, unyielding to his judgment as to the meaning of the Constitution. On this account, the social order as well as the judge is implicated in the making of the dilemma, but it does not make the dilemma any less genuine. Independence is a critical element in the process that legitimates the judicial function, for having us believe that judges can articulate and elaborate the meaning of our constitutional values, and yet, to fully discharge that function, to give that meaning a practical reality, judges are forced to surrender some of their independence.

At this point one might be tempted to turn back in despair, renounce the adjudicative enterprise altogether, or escape to the formalism represented by the tailoring principle. These alternatives must be resisted at all costs: they deny an important social function, the meaning-giving enterprise implicit in constitutionalism itself, or, in the case of the tailoring principle, distort the nature of an important facet of this enterprise. Alternatively, we could confine the judge to the declarations of rights, and insist that he abandon his desire to be efficacious. That would resolve the core dilemma, and yet it would require a detachment or an indifference to this world

[116] Lessons may be found in the obligation to use a different judge in cases of direct contempt. *See* Taylor v. Hayes, 418 U.S. 488 (1974); Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

[117] *See* George, *The Case for Multiple Advocacy in Making Foreign Policy*, 66 AM. POL. SCI. REV. 751 (1972).

that does not seem to me either to be a virtue or a mode of behavior that is within the reach of most American judges. The desire to be efficacious need not be seen as an assertion of will, but as a willingness of the judge to assume responsibility for practical reality and its consonance with the Constitution.

The 1960's were an extraordinary period in the history of the judiciary in America, and among its many lessons, that era suggests the possibility of still another alternative: to live with the dilemma. The judge might be seen as forever straddling two worlds, the world of the ideal and the world of the practical, the world of the public value and the world of subjective preference, the world of the Constitution and the world of politics. He derives his legitimacy from only one, but necessarily finds himself in the other. He among all the agencies of government is in the best position to discover the true meaning of our constitutional values, but, at the same time, he is deeply constrained, indeed sometimes even compromised, by his desire — his wholly admirable desire — to give that meaning a reality.