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School Desegregation and Federalism: The Court inside the Schoolhouse Door

G. Michael Kirkman
University of Dayton

COMMENTS

SCHOOL DESEGREGATION AND FEDERALISM: THE COURT INSIDE THE SCHOOLHOUSE DOOR

I. INTRODUCTION

Alexander Hamilton characterized the federal judiciary as having "no influence over either the sword or the purse; no direction either of the strength or wealth of society."[1] In the years since the landmark decision in *Brown v. Board of Education*,[2] however, federal courts have taken an increasingly active role in controlling the use of resources in school districts where *de jure* segregation has been found to exist. In examining facts which are more legislative than adjudicative in nature,[3] the courts have often shaped relief which intervenes in the functions of an elected body of officials, in some cases involving the court or its appointed special master in the day to day operation of the school.[4]

This judicial activism has not been limited to schools. Federal court orders have controlled the operations of prisons,[5] police depart-

1. THE FEDERALIST No. 78, at 504 (1976).

2. 347 U.S. 483 (1954) [hereinafter cited as Brown I]. In *Brown I*, the Supreme Court overruled the long standing "separate but equal" doctrine announced by the Massachusetts Supreme Court in Roberts v. City of Boston, 59 Mass. 198 (1850) and adopted by the Supreme Court of the United States in Plessy v. Ferguson, 163 U.S. 537 (1896). The Court held that separate schools for different races were inherently unequal, based in part on the psychological impact on the minority children caused by segregation. For an excellent history of the *Brown* case, see R. KLUGER, SIMPLE JUSTICE (1975).

3. *See* notes 107-114 and accompanying text *infra*. Professor Kenneth Culp Davis has advanced a theory which basically establishes two types of facts which may be considered by an administrative agency or of which a court may take notice. Legislative facts deal with broad questions of law and social policy which often surround the case before a court in a civil rights action. Adjudicative facts are the traditional facts to which the law is applied in a case. Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955). For a discussion of how this factual dichotomy works in public law litigation see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

4. In the Boston school desegregation case, the judge ordered that he would personally review which teachers the school district would lay off to solve its financial problems. *See* The Boston Globe, Mar. 21, 1976, at 1, col. 5, *cited in* Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791 (1976). See also the discussion of the Cleveland case, notes 79 to 91 and accompanying text *infra*.

5. Morgan v. Sproat, 432 F. Supp. 1130 (S.D. Miss. 1977); Rhem v. Malcom, 432 F. Supp. 769 (S.D.N.Y. 1977); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*,

ments,[6] and state mental health systems.[7] These decrees can be incredibly detailed; the order enforcing the judgment in *Wyatt v. Stickney* even specifies the temperature of the hot water supply in Alabama's mental health facilities.[8]

The propriety of such relief, and particularly the degree to which federal equitable relief may intrude into what have traditionally been locally controlled activities, has recently been called into question. By combining the traditional limitations of equity jurisprudence with notions of federalism, the Supreme Court has established a delimiting doctrine for the lower federal courts when they exercise equity jurisdiction in civil rights cases. This comment will examine the growth of equitable relief in school desegregation cases and the impact which this limiting doctrine has had.[9] The propriety of using the federal/state relationship as a guide for relief where a violation of the Constitution has been found to exist will also be analyzed.[10]

II. THE STATUS OF REMEDIAL ORDERS

A. *The Proper Measure of Relief*

After its ruling in *Brown I* that separate schools are unequal,[11] the Supreme Court turned its attention to fashioning a remedy for the wrong.[12] In *Brown II* the Court directed that the lower federal court

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442 F.2d 304 (8th Cir. 1971). These courts have held that the conditions in prison systems which were called into question were violative of the cruel and unusual punishment clause of the eighth amendment or the due process clause of the fourteenth amendment of the Constitution of the United States.

6. Council of Organizations on Philadelphia Police Accountability & Responsibility v. Rizzo, 357 F. Supp. 1289 (E.D. Pa. 1973), *rev'd sub nom.* Rizzo v. Goode, 423 U.S. 362 (1976) (hereinafter cited as COPPAR v. Rizzo).

7. Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala.), *hearing on standards ordered* 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

8. 344 F. Supp. at 382 (110° F. for residential use, 180° F. for dishwashing and laundry use).

9. *See* section II *infra*.

10. *See* section III *infra*.

11. *See* note 2 *supra*.

12. After ruling on liability in *Brown I*, the Supreme Court requested further arguments on questions which had been previously propounded by the Court at the end of its 1952 term, under Chief Justice Vinson:

> 4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
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> (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
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> (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?
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> 5. On the assumption on which questions 4(a) and (b) are based, and assuming

which originally heard the cases[13] should fashion the appropriate remedies "[b]ecause of their proximity to local conditions, and the possible need for further hearings."[14] This was done to allow the courts to monitor the action of local school officials and determine whether the local authorities were, in good faith, implementing the governing constitutional principles.[15] Further monitoring was required because the Court placed the burden for desegregating the schools on local authorities. "School authorities have the primary responsibility for elucidating, assessing, and solving these problems. . . ."[16]

In fashioning their orders, the lower courts were to be guided by equitable principles.[17] The Court was concerned with the individual problems which would arise at the lower level, and felt that the "practical flexibility [of equity] in shaping its remedies" would minimize delays and allow the lower court to overcome obstacles which might arise in the desegregation of schools.[18] Although it emphasized equity's flexibility in balancing private and public interests, the Court stressed that "the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."[19]

Given this broad language,[20] the district courts began implementing desegregation plans, often in the face of strong resistance from

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further that this Court will exercise its equity powers to the end described in question 4(b)

(a) should this Court formulate detailed decrees in these cases;

(b) if so, what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

Brown v. Board of Educ., 349 U.S. 294, 298 n.2 (1955) [hereinafter cited as Brown II].

13. Decided with *Brown II* were *Briggs v. Elliott* (South Carolina); *Davis v. County School Board* (Virginia); and *Gebhart v. Belton* (Delaware). *See also* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that the schools of the District of Columbia were illegally segregated in violation of the due process clause of the fifth amendment to the United States Constitution). In *Gebhart*, the Court remanded to the Supreme Court of Delaware for further proceedings in light of the opinion in *Brown II*.

14. 349 U.S. at 299.

15. *Id.*

16. *Id.*

17. *Id* at 300.

18. *Id.*

19. *Id.*

20. While the Court's language is broad, the purpose in not using more specific language seems to have been the same as the purpose in requiring the lower courts to fashion the relief in equity; i.e., there was lack of certainty about the impact of the decision at the lower court level.

local and state authorities.[21] For example, in *Griffin v. County School Board*,[22] the district court was faced with a school board which had closed the entire school system rather than allow the schools to be desegregated. The district court had ordered the school board to exercise its power to levy taxes and generate revenue to reopen the schools, and this order was affirmed by the Supreme Court. The Court said the orders were necessary if the lower court was "to assure these petitioners their constitutional rights would no longer be denied them."[23]

Additionally, the lower courts had to deal at length with various desegregation plans offered by local authorities, most of which failed to pass constitutional muster.[24] In *Green v. County School Board*,[25] the Supreme Court held that a "freedom of choice" plan, which allowed students to voluntarily transfer throughout the school district, was insufficient to meet the school board's duty to create a unitary school system.[26] After three years in operation, the plan had left the schools racially identifiable, with 85% of the black students attending an all-black school.[27] The Court held that the school board could not transfer its duty to the parents and students of the school system, and required the board to form a new plan which would succeed in dismantling the dual school system.[28]

The main thrust of decisions like *Griffin*, and particularly *Green*, centered around the powers available to a court if local officials failed

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21. In Cooper v. Aaron, 358 U.S. 1, 18 (1958), the Court responded forcefully to the recalcitrance of state officials in effectuating the mandate of *Brown I*. Based on the supremacy clause of the Constitution and Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the unanimous opinion stated in extensive dicta that the "interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land . . . . Every state legislator and executive and judicial officer is solemnly commited by oath taken pursuant to Article VI, cl. 3, 'to support this Constitution.'" *See also* Bush v. Orleans Parish School Bd., 364 U.S. 500 (1960).

22. 377 U.S. 218 (1964). This was one of the cases originally decided in *Brown I*.

23. *Id.* at 234.

24. *See, e.g.*, Goss v. Board of Educ., 373 U.S. 683 (1963) (striking down minority to majority transfer plans).

25. 391 U.S. 430 (1968). *Green* marks a major shift in the Court's focus in desegregation cases, moving from an attitudinal analysis to an empirical one, based on the racial breakdown of the school district. The district court was placed under an obligation to determine "the effectiveness of a proposed plan in achieving desegregation." *Id.* at 439. If the school board failed to offer a plan which provided "meaningful and immediate progress toward disestablishing state-imposed segregation," the court was required to weigh the situation "in light of any alternatives which may be shown as feasible and more promising in their effectiveness." *Id.* Further, the district court was required to evaluate whatever plan was adopted in practice, to insure "that state-imposed segregation has been completely removed." *Id.*

26. *Id.* at 441.

27. *Id.*

28. *Id.* at 441-42.

to implement a satisfactory desegregation plan in response to a court's order. The burden was on school officials to offer a plan which "promised to work."[29] But the district court retained jurisdiction over the case and was required to assure the plan would eliminate racial separation "root and branch."[30]

The district court, therefore, could only act when the local authorities failed in their affirmative duty to desegregate. If such failure occurred, the burden shifted to the court to use its equity powers to mold a proper remedy. The impatience of the Supreme Court with the dilatory tactics of local officials was clear. In *Griffin*, the Court stated that "[t]he time for mere 'deliberate speed' has run out. . . ."[31] In *Green* the burden was placed on a school board to "come forward with a plan that promises realistically to work, and promises realistically to work *now*."[32] Thus while the district courts were urged to weigh circumstances "and the options available in each instance,"[33] they were clearly expected to ensure enforcement of the plaintiffs' constitutional rights.

B. The Current Supreme Court Approach

In recent years, the Court has chosen to concentrate on defining the limits of federal equity power. While limits have always existed,[34] the earlier cases were concerned with an affirmative duty to desegregate. The recent decisions have concentrated on the nature of the constitutional violation, the relationship of that violation to the remedy ordered, and the relationship of the remedy to the powers of the local authorities.[35]

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29. Green v. County School Bd., 391 U.S. at 439.
30. *Id.* at 438.
31. Griffin v. County School Bd., 377 U.S. at 234.
32. 391 U.S. at 439 (emphasis in original).
33. *Id.*
34. *Brown II* and its progeny require the judge to balance state and private interests in formulating a remedy, thus implying that at some point the need to desegregate might be overcome by a valid state interest.
35. It is difficult to speculate why the shift away from concern with the need for a remedy occurred. Initially, the politically oriented observer will note that major changes in Court personnel and the conservative viewpoint of the new appointees affected the direction of the Court. A second possible reason for the shift is the Court's decision in Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). While the desegregation of southern schools involved dual school systems mandated by statute, *Keyes* established that the acts of local officials absent a statutory enactment, could constitute *de jure* segregation. Without a clear statutory structure to dismantle, the appearance of intrusiveness by the lower courts increased, and it is possible the Court was reacting to a perceived threat of overactive lower courts. *See* Milliken v. Bradley, 418 U.S. 717, 814 (1974) (Marshall, J., dissenting). *See generally* Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.C.L.L. REV. 1 (1978).

The trend first appeared in *Swann v. Charlotte-Mecklenberg Board of Education*.[36] The district court found that a dual school system existed and had approved a desegregation plan based on geographic zoning with a free transfer provision.[37] After the Court's decision in *Green*, the plaintiff moved for further relief, based on the inadequacy of the plan then in force. The district court ordered the board to come forward with a new plan. Upon review, the plan was deemed unacceptable, and the court appointed a special master to draw up another plan which was placed in effect and in which the school board acquiesced.[38] Chief Justice Burger, writing for a unanimous Court, affirmed the orders of the district court as lying within the equitable discretion of the court.[39] The Court reaffirmed its stand in *Brown I*, but acknowledged the difficulty which the district courts had encountered in implementing desegregation plans based on the broad language of *Brown II*.[40] Because of these problems, the Court felt compelled to delineate guidelines, "however incomplete and imperfect, for the assistance of school authorities and courts."[41]

In establishing the guidelines, the Court reiterated its earlier language in *Green* which had placed the burden to act on the school authorities. Should the authorities fail in that duty, the district court must use its equitable power to remedy the constitutional violation.[42] But the *Swann* Court added:

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36. 402 U.S. 1 (1971). While the holding in *Swann* approved of a systemwide desegregation plan, that plan was allowed only because it was held to be consistent with the violation. *See* notes 42-44 and accompanying text *infra*.

37. Swann v. Board of Educ., 243 F. Supp. 667 (W.D. N.C. 1965), *aff'd*, 369 F.2d 29 (4th Cir. 1966), *aff'd*, 402 U.S. 1 (1971).

38. 402 U.S. at 8-11.

39. *Id.* at 22-31.

40. *Id.* at 14. The Chief Justice wrote that district courts were confronted with:

> [t]he failure of local authorities to meet their constitutional obligations [which] aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems. This process has been rendered more difficult by changes since 1954 in the structure and patterns of communities, the growth of student population, movement of families, and other changes, some of which had marked impact on school planning, sometimes neutralizing or negating remedial action before it was fully implemented. Rural areas accustomed for half a century to the consolidated school systems implemented by bus transportation could make adjustments more readily than metropolitan areas with dense and shifting population, numerous schools, congested and complex traffic patterns.

Id. (footnote omitted). The Chief Justice cited statistics on the growth of student population as indicative of the problems involved. From 1954 to 1969 elementary school enrollment nationwide increased from 17,447,000 to 23,103,000 students; secondary school enrollment in the same period grew from 11,183,000 to 20,775,000. *Id.* at 14 n.6.

41. *Id.* at 14.

42. *Id.* at 15.

> In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.[43]

The Court emphasized the traditional powers of the school authorities and stated that such powers include the power to desegregate schools as a matter of educational policy. Thus the district court was required to analyze the nature of the violation, and determine the scope of the remedy based upon that analysis, while exercising care to avoid usurping local plenary powers.

In *Swann* the Supreme Court found that the remedy ordered by the district court was consistent with the nature of the violation. The Court affirmed orders requiring that certain racial ratios be used as starting points or "goals" for the desegregation plan, as well as orders altering attendance zones and reassigning students outside of their neighborhoods.[44]

Since 1971, however, the remedial equation announced in *Swann* has been used in overturning court ordered desegregation plans in several major cases. In each of these cases, the Court found that the plan's scope exceeded the nature of the violation and, therefore, improperly imposed on the plenary powers of local authorities.

Milliken v. Bradley[45] involved an action to desegregate the Detroit school system. The district court concluded that the official policies of local and state government "at all levels . . . have combine[d] with those of private organizations . . . to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area."[46] The court further determined that the school authorities of both the city and the state were among the governmental agencies whose actions had caused the segregation,[47] and that both were con-

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43. *Id.* at 16.

44. *Id.* at 22-31. The racial goals discussed by the Court are not quotas in the strictest sense of the word. Rather, the Court characterized the use of mathematical ratios as "no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement" which must be met. *Id.* at 25.

45. 418 U.S. 717 (1974).

46. Bradley v. Milliken, 338 F. Supp. 582, 587 (1971), *order* 345 F. Supp. 914 (E.D. Mich. 1972), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

47. *Id.* The Detroit Board had maintained optional attendance zones within neighborhoods undergoing racial transition, as well as drawing boundaries in such a manner as to further segregate the schools. The State of Michigan failed to authorize

stitutionally liable for the segregation of the Detroit schools. Thus, while the Detroit system was ordered to submit a Detroit-only desegregation plan, the state was ordered to submit a plan which included the eighty-six outlying districts in the three-county metropolitan area.[48]

In announcing its opinion, the district court acknowledged that it had not received proof on whether the eighty-six school districts had committed acts of *de jure* segregation by drawing boundaries or other means.[49] Nevertheless, based on the liability of the state school board, the court announced that the outlying school districts would be included in the "desegregation area,"[50] and that all the outlying districts would be represented by only one member on the desegregation panel while the Detroit Board was represented by three members.[51] The court ordered that a plan be drawn up by the panel which would "achieve the greatest degree of actual desegregation to the end that, upon implementation, no school, grade or classroom [would] be substantially disproportionate to the overall pupil racial composition."[52] The Court of Appeals for the Sixth Circuit upheld the liability portion of the district court's decision, but remanded for fur-

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requisite funds for transportation in urban Detroit while providing the neighboring suburban districts with full support for their transportation programs. *Id.* at 589. *See also* 418 U.S. at 26-27. Additionally, the state was found to have impeded and delayed integration in Detroit schools through legislation designed to create "free choice" and "neighborhood schools" which "had as their purpose and effect the maintenance of segregation." 338 F. Supp. at 589. *See* MICH. COMP. LAWS § 388.182 (1970). Finally, the district court held that the state was vicariously liable for the unconstitutional acts of its subordinate, the Detroit Board.

48. 345 F. Supp. 914, 920 (E.D. Mich. 1972), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974). The court subsequently allowed the outlying districts to intervene, but granted the motions subject to the following conditions:

> 1. No intervenor will be permitted to assert any claim or defense previously adjudicated by the court.
> 2. No intervenor shall reopen any question or issue which has previously been decided by the court.
> . . . .
> 7. New intervenors are granted intervention for two principal purposes: (a) To advise the court, by brief, of the legal propriety or impropriety of considering a metropolitan plan; (b) To review any plan or plans for the desegregation of the so-called larger Detroit Metropolitan area, and submitting objections, modifications or alternatives to it or them, and in accordance with the requirements of the United States Constitution and the prior orders of this court.

418 U.S. at 731. The district court promptly gave the intervenors only seven days to brief the question of the legal propriety of a metropolitan plan. *Id.*

49. 345 F. Supp. at 920.

50. *Id.* at 917.

51. *Id.*

52. *Id.* at 918.

ther hearings in order to give the intervenors an opportunity to be heard regarding the scope and implementation of the remedy.[53]

The Supreme Court reversed, holding that the district court had erred in requiring a particular racial balance contrary to principles announced in *Swann*.[54] In addressing the metropolitan plan announced by the district court, the Supreme Court stressed the need for local control of school districts, stating that absent a finding of liability based on segregative acts by the outlying districts, *Swann* would not permit a remedy which involved those districts.[55] Such a remedy would make the court a "*de facto* legislative authority,"[56] and a "school superintendant" for the entire area,[57] because of the unnecessary intrusion on the plenary state and local power to establish school district lines. Because the finding of liability was limited to the Detroit Board, the scope of the remedy was limited by the boundaries of the Detroit school district.[58]

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53. Bradley v. Milliken, 484 F.2d 215, 249-52 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

54. 418 U.S. at 740.

55. *Id.* at 740. *Milliken* may actually have limited *Swann* through a narrow view of the facts of the case. The state school board was found liable for the segregation of the Detroit schools. As subdivisions of the state board, the local boards of the outlying communities might have been included in the remedy. The Supreme Court, however, did not impute liability to the local districts, and chose, for the most part, not to address the question of the state board's liability. *See* note 58 *infra*.

56. *Id.* at 743-44.

57. *Id.* at 744.

58. The Court did recognize, for example, that state laws which establish school boundary lines may come in conflict with constitutional principles. Under such circumstances, the remedy prescribed may disregard the lines. The Court required, however, that "it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a *substantial* cause of interdistrict segregation." (emphasis added). *Id.* at 745. *Cf.* United States v. Board of School Comm'rs, 419 F. Supp. 180 (S.D. Ind. 1975), *aff'd*, 541 F.2d 1211 (7th Cir. 1976), *vacated and remanded*, 429 U.S. 1068 (1977), *on remand*, 573 F.2d 400 (7th Cir.), *on remand*, 456 F. Supp. 183 (S.D. Ind. 1978). The district court in the Indiana case found that a state statute, which created a metropolitan form of government for Indianapolis and its outlying counties but excluded school districts from consolidation, was enacted with sufficient discriminatory purpose to justify a metropolitan remedy. *See also* Rosenbaum & Gale, *Interdistrict Relief for Segregated Schooling in California: The Constitution Crosses the District Line*, 7 SAN. FERN. V. L. REV. 117 (1979) (edited version of an *amicus* brief submitted by the authors as lawyers for minority children in a Los Angeles school desegregation case).

Vigorously dissenting in *Milliken*, Justice Marshall chastised the majority for taking "a giant step backwards" in the process of reaching the goals pronounced in *Brown I*, and for attempting to find in the simple equation announced in *Swann* the answers to the complex questions of school desegregation. Rather than focus on the *nature* of the violation, Marshall would have the Court establish a remedy which *cures* the violation. 418 U.S. at 782, 806-07.

Two years later, again relying on its holding in *Swann*, the Court rejected the lower court's desegregation plan in *Pasadena City Board of Education v. Spangler*.[59] In 1970, the District Court for the Central District of California had ordered the implementation of the "Pasadena Plan" to establish a racially neutral system of student assignment in that city's school system.[60] After initially complying with the plan,[61] the board requested that the court dissolve the implementing injunction. The district court denied the motion, stating that it would retain jurisdiction and require annual readjustment of the attendance zones in order to prevent more than 50% of the student body at any school from being composed of minority students.[62]

The Supreme Court ruled that there was no "substantive constitutional right [to a] particular degree of racial balance or mixture."[63] and that "having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violation on the part of the defendants, the district court had fully performed its functions of providing the appropriate remedy for previous racially discriminatory attendance patterns."[64] Having performed its function, continued enforcement of the order exceeded the district court's authority, and, by implication, caused the court to interfere with powers otherwise reserved for local authorities.

Finally, in *Dayton Board of Education v. Brinkman*,[65] the Supreme Court did not specifically rely on *Swann*, but used a similar rationale to reverse a desegregation plan implemented by the district court. After briefly reviewing the history of the case,[66] Justice Rehnquist wrote:

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59. 427 U.S. 424 (1976). This case, as well as other California cases, is highlighted in *Ninth Circuit Review, The History of School Desegregation in the Ninth Circuit*, 12 LOY. L.A.L. REV. 481 (1979).

60. Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501 (C.D. Cal. 1970).

61. There was apparently some confusion about the extent to which the board had complied with an order that there not be a majority of any minority in any Pasadena public school. Spangler v. Pasadena City Bd. of Educ., 519 F.2d 430 (9th Cir. 1975), *vacated*, 427 U.S. 424 (1976). After literally complying during the first year, performance in subsequent years declined, and, eventually, there was general recognition that the board had "slipped out of complaince." *Id.* at 433 n.3. For the purpose of the proceedings before the Supreme Court, however, the parties stipulated that there had been no violations of the plan up to and including the time of the hearing. 427 U.S. at 432.

62. 375 F. Supp. 1304 (C.D. Cal. 1974), *aff'd*, 519 F.2d 430 (9th Cir. 1975), *vacated*, 427 U.S. 424 (1976).

63. 427 U.S. at 434.

64. *Id.* at 436-37.

65. 433 U.S. 406 (1977) [hereinafter cited as Dayton I].

66. The *Dayton* case has a long and complex procedural history, most of which is not pertinent to the discussion at hand. For a review of the case from its inception

> There is no doubt that federal courts have authority to grant appropriate relief of this sort when constitutional violations on the part of school officials are proved . . . . But our cases have just as firmly recognized that local autonomy of school district is a vital national tradition . . . . It is for this reason that the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles.[67]

The Court then proceeded with a review of the facts. The district court had found that the school board had operated racially imbalanced schools and optional attendance zones, which, combined with other board actions created a "cumulative violation" of the equal protection clause.[68] The Supreme Court found this phrase to be ambiguous, and that the facts did not warrant a finding of systemwide segregation. Therefore, under *Swann*, the systemwide remedy ordered was not justified by the nature of the violations.[69] The case was remanded to the district court for further factual findings and conclusions of law consistent with the Supreme Court's findings in *Washington v. Davis*,[70] and to have a remedy fashioned "in light of the rule laid down

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through the first Supreme Court review, *see* Comment, *From Denver to Dayton: The Evolution of Constitutional Doctrine in Northern School Desegregation Litigation*, 3 U. DAY. L. REV. 115 (1978). The judgment in *Dayton I* was by a unanimous court, with Justices Stevens and Brennan filing separate concurrences. Justice Marshall did not participate. 433 U.S. 406. For a discussion of further review of the *Dayton* case, see note 71 and accompanying text *infra*.

67. 433 U.S. at 410 (citations omitted).

68. *Id.* at 413.

69. *Id.* at 413-14. The district court had originally proposed a plan which included requirements that optional attendance zones be dropped, and that faculty hiring practices be revised to achieve proper racial distribution in the schools. Additionally, the district court ordered a "freedom of enrollment priorities" plan which allowed students to pick their school, and provided for a random selection from those wishing to attend a particular school, as well as requiring board furnished transportation for all students choosing to attend a school outside their neighborhood attendance area. Brinkman v. Gilligan, No. 72-137 (S.D. Ohio, Feb. 7, 1973). On two separate occasions, the United States Court of Appeals for the Sixth Circuit reviewed the findings and order of the district court, and on both occasions remanded the case with instructions to institute a systemwide remedy. *See* Brinkman v. Gilligan, 503 F.2d 684 (6th Cir. 1974); 518 F.2d 853 (6th Cir. 1975). After the second remand, the district court reluctantly reached the conclusion that massive transportation of students was required to desegregate the Dayton system. Brinkman v. Gilligan, No. C-3-75-304, slip op. at 2 (S.D. Ohio, Dec. 29, 1975). The Supreme Court observed that "the District Court would have been insensitive indeed to the nuances of the repeated reversals of its orders . . . had it not reached this conclusion." 433 U.S. at 418.

70. 426 U.S. 229 (1976). The Court's decision in *Davis* was an attempt to clarify the relationship between discriminatory acts and segregative effect. Justice White, writing for the majority, enunciated a test which required a finding that the acts of the

in *Swann*."[71]

With the decision in *Dayton I*, the Court had fully and clearly enunciated the limiting principle on the power of a federal court to

state agency had been motivated by a racially discriminatory purpose, and that these acts had caused the segregation in question. In other words, proof only of differential impact which had a segregative effect was insufficient to prove a constitutional violation. *See also* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (in which the Court suggested examples of various types of proof which plaintiffs may offer to show discriminatory purpose).

In adopting the *Davis* standard for school cases, the Court reaffirmed its stand in Keyes v. School Dist., 413 U.S. 189 (1973), that to differentiate *de facto* segregation from *de jure*, purpose must be shown. *Keyes* allowed, however, for a court to infer purpose where the board had consistently acted in a racially neutral manner, but was aware of the segregative impact of its actions. *Id.* at 207-08. The language of the Court in *Davis* does not seem to allow the lower court to speculate on what knowledge the acting body may have had at the time the action was taken. *Davis* also may have effectively destroyed the "*Keyes* presumption" that a finding of intentional segregative intent in a "meaningful portion of the school system" establishes "a *prima facie* case of unlawful segregative design on the part of school authorities and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions." *Id.* at 208.

More recently, however, in the Supreme Court's second hearing of the *Dayton* case, Dayton Bd. of Educ. v. Brinkman, 99 S. Ct. 2971 (1979) [hereinafter cited as Dayton II] (heard in conjunction with Columbus Bd. of Educ. v. Penick, 99 S. Ct. 2941 (1979)), the Court announced a standard which seemed to reaffirm *Keyes*, and which one early commentator argues may go beyond *Keyes*, placing an impossible burden on school authorities. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW (9th ed. Supp. 1979). In *Columbus*, Justice White, writing for the seven to two majority, acknowledged and affirmed the previous desegregation cases. He wrote at length, however, about the need for deference to the trial court's finding of fact, which previously had not been a stated concern of the Court. Secondly, he upheld the lower court's ruling that the board had a continuing affirmative constitutional duty to desegregate the school system, and that this duty had existed in 1954, after the decision in *Brown I*. Because the board had failed to remedy the dual system *at that time*, it had ignored the adequate notice which it had been given, and could now be held responsible for the foreseeable consequences of that failure. 99 S. Ct. at 2948-49.

The Court also held that the district court had correctly applied the *Davis* test in that it had found "actions having foreseeable and anticipated disparate impact," and that these intentional actions showed segregative purpose. *Id.* at 2950. By introducing a "foreseeable effects standard" for the lower courts to use in their determinations, while at the same time stressing the importance of the trial court's findings of fact, *Columbus* may go beyond *Keyes* in allowing the court to speculate regarding the purpose of past acts which have a segregative impact.

Justice Rehnquist dissented in *Columbus*, arguing that by building presumption on top of presumption the majority had effectively destroyed any distinction between *de facto* and *de jure* segregation.

Columbus leaves many open questions for the Court. Does it effectively overrule *Davis*? May it be extended to other areas of equal protection law, or does the *Brown* affirmative duty only extend to school systems? So far as remedies are concerned, however, if the district courts can use *Columbus* to discover a systemwide violation, then the limitations of *Swann* and its progeny on equitable relief will be erased, and a systemwide remedy will be appropriate. *But see* text accompanying notes 89-91 *infra*.

71. 433 U.S. at 419. Dayton II, 99 S. Ct. 2971 (1979), dealt by and large with the nature of the violation, without addressing the question of the scope of the remedy.

establish an equitable remedy in a desegregation case, which the Court had first raised in *Swann*. A federal court must define the nature of the constitutional violation which it has found and shape the remedy so its scope does not exceed the scope of the violation. The purpose of this analysis is to avoid unnecessary intrusion into plenary state powers. The Court has established that local control of the schools is a "vital national tradition,"[72] which the lower federal courts must properly respect. It can be argued that no court has the power to issue orders beyond the controversy presented to it, and thus the Court has injected an unnecessary element into the equation by raising federalism concerns. But the more recent decisions of the Supreme Court consistently grant those concerns an increasingly important role, both in school cases specifically, and constitutional jurisprudence in general.[73]

C. The District Courts — Life in the Fast Lane

The express purpose of the Chief Justice in detailing the analysis in *Swann* was to assist school authorities and courts in shaping remedies where a segregated school system was found to exist. The lower courts have continued to "grapple with the flinty, intractable realities of the day-to-day implementation"[74] of the commands of *Brown I* and *Brown II*. In doing so, the remedies formed have been limited only by the imagination of the courts, the school boards, the plaintiffs, and the special masters which the courts invariably appoint to aid in their determinations.

In Boston, the district court placed the South Boston High School into a receivership because of the strenuous objections which parents had voiced to forced busing of students, and the violence which had erupted in that particular school.[75] While this form of relief is not without precedent,[76] the First Circuit, in affirming the order, said that

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Unlike *Columbus*, in which the decision of the trial court was given great weight by the Supreme Court, *see* note 70 *supra*, *Dayton II* upheld the court of appeals, which had overruled some of the trial court's finding of fact as clearly erroneous and imposed the affirmative duty to desegregate after *Brown I* on the Dayton board. 583 F.2d at 247. The failure to meet this duty, and the continued maintenance of a dual system was a violation which could properly be met with a systemwide remedy. 99 S. Ct. at 2980-81.

72. 433 U.S. at 410.

73. The Burger Court has shown an increasing concern for federal/state relationships in the areas of criminal procedure, and in areas where federal judicial power interacts with state or local government. *See* notes 99-110 and accompanying text *infra*.

74. Swann v. Charlott-Mecklenberg Bd. of Educ., 402 U.S. 1, 6 (1971).

75. Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977). *See* Roberts, *The Extent of Federal Judicial Power: Receivership of South Boston High School*, 12 NEW ENGLAND L. REV. 55 (1976).

76. At the turn of the century, judges used receiverships to reorganize the railroad companies. *See* Note, *Reorganization of Railroad Corporations Under Section 77 of the Bankruptcy Act*, 33 COLUM. L. REV. 571 (1933); Note, *Receivership as a Remedy in Civil Rights Cases*, 24 RUTGERS L. REV. 115 (1969).

only the extraordianry circumstances present in Boston warranted the substitution of a court appointed official for an official holding office through normal elective procedures.[77] The court also noted that the receiver was an assistant superintendant of the school system, a factor which the appeals court felt would help minimize the intrusion into local school powers.[78]

A court also interfered with traditionally local powers in Cleveland. The school system in that city, while operating under a federal court order to desegregate,[79] found that it would be unable to pay certain debenture bonds which would come due at the end of 1977 if it continued to pay normal operating costs. Because of the statutory provisions controlling Ohio school financing, the Cleveland schools would have been forced to close rather than default on the bonds.[80]

Because closing the schools would prevent implementation of the ordered desegregation plan, the district court ordered that the schools stay open, joined the creditor banks and county auditor as defendants in the case, and enjoined the banks from seeking payment of the debt.[81] In a memorandum suppporting the order, the court cited 28 U.S.C. section 2283 as specific authority for a federal court to issue an injunction to maintain its jurisdiction and supervise its orders. On appeal,[82] the order was vacated and the case was remanded for a full

77. 540 F.2d at 535. Beyond the considerations of parent objections and violence, the school committee in Boston had shown purposeful intransigence in implementing court ordered desegregation, causing District Judge McGarrity to comment, "On the basis of the history of these proceedings, the court can expect no assistance from the school committee as presently constituted." Morgan v. Kerrigan, No. 72-911, slip op. at 23 (D.C. Mass., Dec. 9, 1975).

78. 540 F.2d at 527.

79. Reed v. Rhodes, 422 F. Supp. 708 (N.D. Ohio 1976).

80. Under section 3313.483 of the Ohio Revised Code, OHIO REV. CODE ANN. § 3313.483 (Page Supp. 1978), a school system which is faced with a year-end deficit must request an audit by the state, which will certify if the system has exhausted its operating funds and is required to close. This is done to insure payment of debts, since Ohio requires that government bonds be paid at maturity, OHIO REV. CODE ANN. § 5705.03 (Page Supp. 1978), and the Ohio Constitution requires governmental subdivisions to reserve funds for the payment of debts prior to paying current operating expenses, OHIO CONST. art. XII, § 11. Failure to pay the debt at its date of maturity precludes collection by the creditor. National City Bank v. Board of Educ., 52 Ohio St. 2d 81, 86, 369 N.E.2d 1200, 1203 (1977).

81. Reed v. Rhodes, No. 76-1300 (N.D. Ohio, Nov. 8, 1977).

82. Initially, the order had been stayed by the court of appeals pending outcome of a mandamus action filed by the banks to force the county auditor to pay the bonds. The court reasoned that if the mandamus did not issue, there would be no need to reach the federal question involved. *Cf.* Railroad Comm'r v. Pullman Co., 312 U.S. 496 (1941). The Ohio Supreme Court subsequently issued the mandamus, clearing the way for federal action. National City Bank v. Board of Educ., 52 Ohio St. 2d 81, 369 N.E.2d 1200 (1977).

hearing below because the order had been issued without notice to all parties.[83] In dicta, however, the appeals court characterized school financing as a local activity with which a federal court should not tamper, when the financing decisions have been made without an unconstitutional purpose. Because the requirement that school systems operate out of debt could not be shown to have been intended to further school segregation, and because there was no similar intent with respect to the possible closing of schools,[84] the federal court was required to follow state law regarding school financing.[85]

Beyond school financing, the district court in Cleveland ordered a reorganization of the school administration, a power traditionally reserved to the local board. The order to restructure came at the recommendation of the special master in the case with the purpose of easing implementation of the desegregation order.[86] Once again, the court of appeals found that the order had been given without notice to the parties and remanded to the district court for a full hearing.[87] The court re-emphasized the need for local authorities to retain control over the schools unless extraordinary circumstances existed, stating that such circumstances did not exist on the record before it.[88]

The purpose of the Supreme Court in *Swann* was to define guidelines for the lower courts. In both Boston and Cleveland, however, the trial courts did not reflect the concern of the Supreme Court for local powers. It may be that the guidelines, and the quanitative analysis they call for, are not useful for a court which is primarily concerned with implementation of a desegregation plan in a complex case. Moreover, the Cleveland case points out that the *Swann* analysis may merely overlap with traditional notions of abstention and federalism, and may be unnecessary to prevent a federal court from interfering in a state court's proceeding.[89]

The appellate courts in these cases did reflect the Supreme Court's concern for local powers, however, and may have even gone beyond the holding of the Supreme Court in *Swann*. In both cases the district court had made a finding that systemwide *de jure* segregation had been caused by the official acts of school officials.[90] Under a *Swann*

83. National City Bank v. Battisti, 581 F.2d 565 (6th Cir. 1977).
84. *Cf.* Griffin v. County School Bd., 377 U.S. 218 (1964).
85. 581 F.2d at 569.
86. Reed v. Rhodes, 455 F. Supp. 569 (N.D. Ohio 1978).
87. Reed v. Cleveland Bd. of Educ., 581 F.2d 570 (6th Cir. 1978).
88. *Id.* at 575.
89. *See* note 82 *supra*.
90. Reed v. Rhodes, 455 F. Supp. 569 (N.D. Ohio 1978); Morgan v. Kerrigan, 379 F. Supp. 410 (D. Mass. 1974), *aff'd sub nom.* Morgan v. Hennigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). The Cleveland case was taken up on ap-

analysis, the scope of the remedy would also be systemwide. Yet the two appeals courts, using identical language to arrive at different results, said that only extraordinary circumstances would allow a district court to use its equitable powers to perform traditional local powers, even where a systemwide constitutional violation was found to exist.

The purpose of requiring extraordinary circumstances may be an acknowledgement of the Supreme Court's concern for federal/state relationships, a misreading of the Court's cases,[91] or a legitimate concern by those circuit courts for federal/state comity. The rationale, however, may further limit the powers of the district court to fashion a remedy when a constitutional wrong is discovered.

III. STATE POWERS AS A LIMIT TO JUDICIAL DECREES

A. Plenary State Powers v. The Need for a Remedy

The Cleveland and Boston cases provide a vehicle for examining the impact of the *Swann* rationale in lower court cases. But that examination does not reach a major concern raised by *Swann*: the propriety of limiting the federal judicial power in school desegregation cases based on deference to local powers.

Traditionally, injunctive relief was a one time proposition. The court would issue its order after discovering the evil. After that, the parties were expected to comply, and the chancellor would be required to interfere only if a party requested.[92]

But in *Brown II*, the Court specifically stated that the lower court was to retain jurisdiction, allowing the judge to monitor school board compliance with the order.[93] Nonetheless, many of the original desegregation orders were proscriptive in nature, instead of prescriptive.[94] This put the burden for desegregation on local authorities rather than requiring the court to construct and implement a plan. It was only

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peal and the implementation of the order to desegregate stayed until the Supreme Court decided *Columbus* and *Dayton II*. Shortly after those plans were upheld, the Sixth Circuit affirmed the Cleveland case. The Cleveland School Board subsequently announced it would petition for certiorari in the Supreme Court. *See* 48 U.S.L.W. 3457 (petition for certiorari filed Nov. 21, 1979).

91. The "extraordinary circumstances" requirement was used in both Younger v. Harris, 401 U.S. 37 (1971), and Rizzo v. Goode, 423 U.S. 362 (1976), to preclude federal injunctive relief in other factual settings. In both cases, however, some other form of relief was available to the plaintiffs. *See* notes 110-113 *infra*.

92. *See* Milliken v. Bradley, 418 U.S. 717, 744 (1974); Chayes, *supra* note 3.

93. 349 U.S. at 299. *See* Chayes, *supra* note 3.

94. *See, e.g.*, Reed v. Rhodes, 422 F. Supp. 708 (N.D. Ohio 1976). The original order here enjoined the school board from operating a dual school system, rather than prescribing affirmative relief.

when school authorities failed in this duty that the court could use its extraordinary equitable powers to fashion the needed relief.[95]

The Supreme Court's more recent approach, however, places a limitation on that broad power by forcing the lower court to defer to local and state authorities, even where those authorities have failed to provide an acceptable desegregation plan, in areas where local powers have traditionally controlled.

The power of school authorities to make policy decisions concerning the wellbeing of the school has consistently been an area in which judicial tampering has been kept to a minimum. Two reasons are generally advanced for restraint. First, the courts are reluctant to intrude on the academic freedom of an institution or instructor. In *Regents of the University of California v. Bakke*,[96] the need for academic freedom and respect for a local determination of the need for a pluralistic student body were determined to be sufficient grounds for establishing a racial classification.

Secondly, and more pertinent to the desegregation cases, is the argument that the local control of schools is necessary to insure direct control by the people over decisions which vitally affect the education of their children. This argument has been utilized to support a local school tax scheme which was attacked as denying equal protection to the children in poorer districts,[97] and to deny a constitutional challenge to corporal punishment in schools.[98]

On the other hand, schools and school officials are not the only

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95. *See* Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 16 (1971); Green v. County School Bd., 391 U.S. 430, 439 (1968).

96. 438 U.S. 265 (1978). In Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978), the Court held that adequate due process had been given to a medical student prior to her academic dismissal from the school. The Court distinguished academic suspension from disciplinary suspension, stating that, because of the subjective nature and highly specialized nature of the standards used, that such decisions were best left to the schools themselves.

97. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). The *Rodriguez* Court upheld a school taxing scheme based on property values, which forced the districts with lower property values to offer an inferior education or to seek funds elsewhere. The Court refused to recognize a certain quantum of education as a fundamental right, and held that so long as some education was provided, the state had met its obligation to provide *some* educational opportunity to its children. Ohio's scheme for school funding has recently survived a similar attack, with the Ohio Supreme Court relying on similar reasoning. Board of Educ. v. Walter, 58 Ohio St. 2d 368, ____ N.E.2d ____ (1979).

98. In Ingraham v. Wright, 430 U.S. 651 (1977), the Court explicitly deferred to the normal processes of community debate and legislative action to decide if corporal punishment should be used, rather than decide under the fourteenth amendment what it considered to be a policy question. In doing so, the Court stressed that school discipline was normally committed to the discretion of local authorities. *Id.* at 681-82.

local and state concerns which have received deferential treatment from the Supreme Court in recent years. In *Younger v. Harris*,[99] a decision which set the tone for many of the Supreme Court's later rulings, it was held that federal courts should not hear suits seeking to enjoin a pending state criminal prosecution on first amendment grounds unless there exist extraordinary circumstances which create a great and immediate danger of irreparable loss to the criminal defendant. As in *Swann*,[100] the Court tied a traditional equity requirement — the requirement of irreparable injury — to a concern for federalism, stating that the notion of "comity"[101] was even a more vital consideration in restraining federal courts.[102]

Additionally, state executive functions have been brought under this hybrid notion of equity jurisprudence and federalism. In *Rizzo v. Goode*,[103] citizens of Philadelphia brought a class action against that city's mayor and certain police officials, under 42 U.S.C. section 1983, alleging a pattern of illegal and unconstitutional police mistreatment of minority citizens. The district court held that such abuses had occurred as a regular, systematic pattern and found for the plaintiffs.[104] Under court supervision, a plan to monitor police behavior, which was satisfactory to both parties, was formulated.[105] The Supreme Court reversed, holding that the judgment was an unnecessary intrusion into the discretion of the police department and city in conducting local affairs.[106] The Court stressed the lack of causal relationship between the "isolated" action of a few police officers who were not named as parties to the action and the damages sought by the plaintiffs, and found

99. 401 U.S. 37 (1971). The action was based on first amendment rights and asked that the statute be found void as unconstitutionally vague and overbroad.

100. *See* notes 72-73 and accompanying text *supra*.

101. Justice Black, writing for the Court, defined comity as a "proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." 401 U.S. at 44.

102. The *Younger* doctrine has now been extended to civil cases which are quasi-criminal in nature, such as a civil action to abate the showing of an allegedly obscene movie, Huffman v. Pursue, Ltd. 420 U.S. 592 (1975), civil contempt proceedings, Juidice v. Vail, 430 U.S. 327 (1977), or a civil attachment proceeding to which the state is a party, Trainor v. Hernandez, 431 U.S. 434 (1977). Most recently, the Court has extended the doctrine even farther by applying *Younger* to a state child custody proceeding. Moore v. Sims, 99 S. Ct. 2371 (1979). *Moore* can be read as suggesting a requirement that a party exhaust available state remedies prior to bringing an action against the state in federal court.

103. 423 U.S. 362 (1976).

104. COPPAR v. Rizzo, 357 F. Supp. 1289 (E.D. Pa. 1973), *rev'd sub nom.* Rizzo v. Goode, 423 U.S. 362 (1976).

105. 357 F. Supp. at 1321.

106. 423 U.S. at 379.

that liability had not been proven.[107] Turning to the court order, Justice Rehnquist, writing for the Court, determined that in the absence of a constitutional violation, the district court had improperly invoked its equitable powers.[108] Further, the Court rejected a claim that plaintiffs were entitled to a prophylactic order to protect them from unconstitutional abuses of police power.[109] The Court reasoned that the exercise of federal equitable power must be restrained by the relationship between federal and state powers, as well as the need for equity powers to be used only in extraordinary circumstances.[110] Essentially, the same concerns that had been used in *Swann* and *Younger* were extended to protect a state executive branch.

These cases demonstrate that the Supreme Court's concern for federal/state comity goes beyond the school desegregation cases. But an important distinction must be made between the school cases, and cases in which other local activities were involved. In *Younger* and *Rizzo* the Court emphasized that an alternative remedy was available in law should injunctive relief not be granted.[111] Because of the nature of the wrong outlined in *Brown I*, however, no equivalent remedy at law exists for the plaintiff to pursue in segregation cases.

The mandate of *Brown I* was not simply to provide compensation for past desegregation;[112] rather, it called for admission of black and other minority students to the public schools on a racially nondiscriminatory basis.[113] While, ideally, this could best be accomplished

107. *Id.* at 370-77.

108. *Id.* at 377-80.

109. *Id.* In reaching its conclusion the Court relied heavily on its decision two years earlier in O'Shea v. Littleton, 414 U.S. 488 (1974). *O'Shea* involved a § 1983 action against a magistrate and a circuit court judge for allegedly engaging in a continuing pattern of illegal bond-setting, sentencing, and jury fee practices in criminal cases. The Supreme Court, with Justice White writing, held that the claim failed to state a case or controversy as required by Article III of the Constitution, because none of the plaintiffs alleged any real injury to himself and no statute was challenged as unconstitutional on its face. Additionally, the Court stated in dicta that even if a case or controversy had been stated, the injunctive relief sought would not be granted because it would constitute a major restraint on the daily conduct of the courts in direct contradiction of *Younger*.

110. 423 U.S. at 379.

111. For example, a major thrust of the *Younger* doctrine is where the right asserted cannot be vindicated through the defense of a criminal action which is pending, both in the state court and through discretionary review by the United States Supreme Court. In the *Rizzo* situation, an action may be brought for injunctive relief or compensatory and punitive damages under 42 U.S.C. § 1983, *Cf. Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (establishing a federal right of action for money damages under § 1983), or a tort action could possibly be brought against the individual or the political subdivision which employs him. This would also be the case in the school discipline cases.

112. It can be argued that the determination of quantum would be impossible.

113. Brown I, 347 U.S. 483 (1954).

by the good faith compliance of local authorities, the Court made it clear that reluctance on the part of those authorities was insufficient grounds to prevent enforcement of the constitutional principles.[114] Absent an ability to fashion broad equitable relief, the district court can offer no remedy for the wrong if the school officials choose to hedge or compromise their compliance. A local school board which has not offered a constitutionally acceptable plan should not expect the same plenary powers it has abused to provide a debilitating limit on the remedy which the court may shape. The requirement for direct action to implement the decision in *Brown I*, as mandated by *Brown II* and *Green*, requires the court to exercise functions traditionally reserved to local bodies.[115] This is done to secure the constitutional rights of the individual against abuse by those bodies.[116]

B. The Judicial Trinity — Legislature, Executive, and Judge

To allow a judge to make decisions which are legislative in nature, and administer to the degree necessary the governmental unit affected by the court order, may stretch both his effectiveness and his credibility.[117] As previously mentioned,[118] desegregation suits are not suits in the traditional private model, involving a dispute between two parties.[119] Rather, they involve a large number of plaintiffs and defendants, and incredibly complex fact situations.[120] Instead of

114. Brown II, 349 U.S. 294, 300 (1955).

115. *Id.* The Court in *Dayton II* referred to an affirmative duty to desegregate the schools after the decision in *Brown I*. The reappearance of an affirmative duty theory, after several years of focus on limitations, may mark a return to the judicial activism of the Warren Court. The difference is that the duty is discussed in the context of determining liability, and is based on the Court's holding in *Brown I*, rather than a duty created by a specific court order to desegregate in a specific case. *See* discussion and cases cited in note 71 *supra*.

116. *See* Cox, *supra* note 4, at 814. Professor Cox points out that the "necessary components of any program of integrated education in a large city appear to commit the courts to constant executive or administrative supervision of the organization, employment practices, curriculum, and extracurricular acitivites of entire school systems." He further states that the requisite affirmative action can only be accomplished "through voluntary cooperation of the political branches or else by the courts themselves embarking upon programs having typically administrative, executive, and even legislative characteristics heretofore thought to make such programs unsuited to judicial undertaking." *Id.*

117. Chayes, *supra* note 3, at 1307. The author argues that to gain the substantive goals advanced by the Court in *Brown I* and other civil rights cases, there must be created a cultural commitment to judicial oversight which restricts the latitude normally allowed state and local decision makers.

118. *See* note 3 and accompanying text *supra*.

119. *See* Chayes, *supra* note 3.

120. *Id.* Professor Chayes attributes the number of parties to the growth of liberal joinder and the class action rules under the new federal civil rules. *See* FED. R. CIV. P. 19, 23.

standing aloof as a decisionmaker, the judge becomes involved in determining the shape and scope of the case; likewise the remedy is not imposed on a party, but is often negotiated by the parties and the judge.[121]

Moreover, by making forward looking, policy oriented relief once a constitutional violation is discovered, the court may be creating problems of a different nature. By granting such relief, the court may leave the citizens in that district with the sense that they have lost control over the political process.[122] Further, the long term effects of the decision may not readily appear to a judge immersed in historical, sociological, and demographic evidence. In *Milliken*,[123] for example, the Supreme Court emphasized that by consolidating the existing school districts, a new array of problems would arise, including the status and authority of the present school boards, the need for the boards to represent a defined local constituency, problems in levying taxes and establishing equality in those taxes, as well as other financial problems.[124] The Ohio Supreme Court, in ordering the Cleveland school board to pay its bonds, and thereby in effect ordering the system to close in defiance of a federal court order, emphasized that to allow default would destroy the system's credit rating, and thereby call into question the rating of all Ohio school bonds.[125] The ability to borrow money was characterized as vital to the continued operations of the schools because of the uneven, staggered flow of revenue from tax collection.[126] It can be argued, therefore, that by attempting to keep the schools open in the short term, the federal court had jeopardized the long term operation of the schools in an entire state.

It must be emphasized, however, that while the problems enunciated above are cause for the federal judge to tread more cautiously when dealing in areas of plenary state power, it is fundamental law that the Constitution and the rights enumerated therein must supersede competing state interests.[127] Thus, while these concerns may encourage a judge to consider broader input before making a decision, they

121. Chayes, *supra* note 3.

122. In Cleveland, after a tax levy had been defeated, a principal in the Cleveland school system said, "There was also the busing issue, a feeling of getting back at the judge, and also the frustration of having no part in making judgments that affect our lives. It is just a gut feeling, that people need to have a say in their lives." Turpin v. Mailet, 579 F.2d 152 (2d Cir. 1978) (Van Graafeiland, J., dissenting), *citing* New York Times, Apr. 16, 1978 at 24, col. 2.

123. *See* notes 45-58 and accompanying text *supra*.

124. 418 U.S. at 743.

125. National City Bank v. Board of Educ., 52 Ohio St. 2d 81, 88, 369 N.E. 2d 1200, 1204 (1977).

126. *Id.*

127. U.S. CONST. art. VI.

should not prevent a court from enforcing the constitutional rights of the plaintiffs.

A second concern that arises about the judge in these cases is that his abilities may be taxed beyond their limit as the court becomes more involved with the day to day operations of the school in order to implement its order.[128] The Supreme Court has said that federal judges are poor candidates for the position of organizing military training[129] or for the redesignation of school districts.[130] Nevertheless, there are several reasons why the technical competency of the judge should not be a central concern in the school desegregation cases.

First, the court is required to examine complex issues in suits at law in order to find liability and determine damages.[131] In an adversary system, it becomes the job of the advocates to educate the court in the limited subject area embraced by the suit.[132] Thus, the system operates on the presumption that the judge is sufficiently competent to grasp the issues over which that court has jurisdiction. Chief Justice Warren once offered, after his retirement, that there was "no such thing as an expert" on the Supreme Court. Rather, the Justices are all generalists.[133]

Moreover, the court is able to draw upon outside experts as masters in the case before it,[134] or avail itself of other outside sources of information. These may consist of citizen committees, made up of lay persons and experts, which take control of the institution under order of the court,[135] or the appointment of a sole individual to a posi-

128. *See* Cox, *supra* note 4, at 819; Goldstein, *supra* note 34, at 43-52; Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977).

129. Gilligan v. Morgan, 413 U.S. 1 (1972).

130. Milliken v. Bradley, 418 U.S. 717 (1974).

131. *See* Goldstein, *supra* note 34, at 44. For example, in deciding border dispute cases between states under its original jurisdiction, the Court is called on to decide complicated questions of surveying and geology in determining borders between two states. *See, e.g.*, Mississippi v. Arkansas, 415 U.S. 289 (1974).

132. Professor Cleary has characterized a trial as "not an inquest or investigation but a demonstration conducted by the parties." Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 7 (1959).

133. R. KRUGER, *supra* note 2, at 666.

134. FED. R. CIV. P. 53. The rule, in pertinent part, provides that:

> [T]he court in which any action is pending may appoint a special master therein . . . . The master shall prepare a report upon the matters submitted to him . . . and, if required to make findings of fact and conclusions of law, he shall set them forth in the report . . . . In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous . . . . Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

135. *See* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *cert. denied*, 438 U.S. 915 (1978) (naming a "human rights committee" to monitor prison conditions).

tion of authority to aid in implementing the plan.[136]

Finally, the court can rely on the lawyers, in their role as advocates and the expertise of the attorneys' clients to assist it in drawing up proposed remedial plans. Some courts have had success in allowing the parties to negotiate a plan, within the confines of the court's order.[137] Although this allows the parties to control, to some degree, the outcome of the litigation, it mitigates the impact that any lack of judicial expertise might otherwise have on the case. If the plans of the parties are determined to be insufficient by the court, it may revert to a special master to construct a plan.[138]

Thus, while concerns exist about the competency of federal judges to decide hard cases which involve what have been traditionally seen as legislative or policy questions, and to administer their orders once formed, the nature of the judicial process itself prevents these concerns from controlling. A judge cannot pick which cases he will hear based on his or someone else's evaluation of that judge's ability to understand the case; rather, he must hear the case and draw on the sources of information and expertise which are available to him and which ensure he can make an informed decision.[139]

It would be a mistake, however, to focus on these concerns, and to allow them to control the determination of a plaintiff's constitutional rights. The concern should not be with the judge's competency to decide "political" questions, but rather with the "board of education's competence in enduring the civil rights of the school children."[140]

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136. Reed v. Rhodes, No. 76-1300 (N.D. Ohio, Mar. 7, 1978) (naming a Deputy Superintendant for Desegregation Implementation); Morgan v. Kerrigan, 409 F. Supp. 1141 (D. Mass. 1975), *aff'd sub nom.* Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977) (naming a receiver for South Boston High School).

137. Professor Chayes suggests that a negotiated remedy mitigates the danger of intruding on organic powers and organic interparty relationships. Chayes, *supra* note 3, at 1298-99. The plan which the Supreme Court invalidated in *Rizzo* had been implemented after both sides had found it agreeable. 423 U.S. at 365. The city's subsequent appeal, after acquiescing in the remedy, could be construed to mean that the agreement was designed to gain a final, appealable order rather than to show accession to demands.

138. *See, e.g.*, Reed v. Rhodes, 455 F. Supp. 569 (N.D. Ohio 1978). In *Reed*, the court rejected the plans offered by the defendant school board as not meeting the duty created by the violation. Instead, the court ordered that the special master's plan, which involved the transportation of large numbers of students, be implemented.

139. *See* Cox, *supra* note 4, at 794.

140. *Id.* Professor Cox maintains that where constitutional principles are involved, the federal courts must not defer to other powers, or shrink from their duty to decide the case.

C. *Alternative Models*

The school desegregation cases, and public law litigation in general, involve extensive involvement by the courts in policy matters. While the Supreme Court has taken the *Swann* approach to limit the federal court's activism in these areas by tying traditional equity limitations to federalism concerns, other proposals have surfaced which would also limit the power available to federal courts when dealing with what are viewed as local powers.

Because the courts deal with political and administrative questions in deciding these cases, a separation of powers analysis has been suggested to prevent the court from interfering.[141] In varying degrees, the proposals urge the court to weigh the state powers which are legislative or executive in nature and defer to those powers in creating and enforcing its order.[142] This would allow local authorities an oppor-

141. The Supreme Court itself alluded to a separation of powers analysis in dealing with the case of Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974), placing particular concern on the undemocratic nature of the federal courts. The Court, however, subsequently ruled that a separation of powers analysis was not appropriate when dealing with different levels of government in Elrod v. Burns, 427 U.S. 347 (1976). In *Elrod* a plurality of the Court held that a "vertical" separation of powers analysis "has no applicability to the federal judiciary's relationship to the States." *Id.* at 352. (plurality opinion of Brennan, J.).

A more detailed proposal has been offered in Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978). Professor Nagel notes that current uses of equitable relief "raise the question whether the judiciary has begun to tolerate in itself a blending of functions that would never be tolerated in another branch of government," and offers that the courts should engage in an "abstract functional differentiation" of the powers involved in a given case prior to making a decision in that case. After the Court determines the detail in which the decree will be given, and the range of the decree, i.e., the duration and impact, a duty would be placed on the court to address the scope of its intrusion into the classically defined function of the other branch and demonstrate "that it could not redress the adjudicated violation by involving fewer third-party consequences." *Id.* at 712. *See also*, Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977) (urging that federal action which is beyond conventional federal authority and therefore violates "states' rights" be treated as non-justiciable and resolution of the question left to the political branches); Chayes, *supra* note 3, at 1310 (concluding that a vertical separation of powers analysis is inconsistent with the supremacy clause of the Constitution).

142. *See, e.g.*, Nagel, *supra* note 141, at 707-23. Professor Nagel suggests five areas where deference should specifically be called for:

(1) Postponement of the remedy to give local authorities an opportunity to act.
(2) By engaging in an ad hoc review of the proper degree of deference to show lack of interference with the functions of other branches.
(3) Wording the decree carefully to avoid an improper intrusion into the power of another branch.
(4) Allowing executive authorities to appoint executive officers.
(5) Seeking cooperation of other federal branches before direct intrusions into local power by means of a declaratory judgment.

Id. at 718-23.

tunity to take proper measures without intrusion by the court, and would leave the policy decisions in the hands of elected decision makers. Unlike the "affirmative duty" approach in *Brown II*, however, courts would not be permitted to intrude where a political remedy was available.

On initial examination, the separation of powers analysis appears more consistent with democratic principles, and would therefore be desirable over extensive judicial (and inherently undemocratic) intrusion. But individual rights fare poorly as a rule in a majoritarian system. Deference to state powers would leave these policy matters up to the same political entity which has been found liable of violating the plaintiff's constitutional rights. In the school cases, the restoration of the rights would be left to the school board, whose inability to create a satisfactory desegregation plan initially forces the court to invoke its broad equity powers.[143] Additionally, several other flaws exist with a separation of powers analysis which make it less than acceptable for constitutional adjudication. Under the supremacy clause of the Constitution, state law must yield to federal law when they are in conflict. Thus the analysis rests on the faulty premise that the federal courts can be treated as equals with the branches of state governments.[144]

A second alternative to limit federal intrusion into state powers is available via legislation, both on the federal and state level.[145] Under the Constitution, Congress may regulate the jurisdiction and powers of the federal courts, and there has been much activity regarding the federal courts' ability to issue remedial orders in the school cases, particularly orders which involve forced transportation of students.[146]

Beyond providing clear limits, executive and legislative action can also remove the onus of desegregation from the courts. Legislatures can enact reforms which make judicial intrusions unlikely by eliminating

143. *See* discussion and cases cited in notes 111-16 *supra*.

144. U.S. CONST. art. VI; Elrod v. Burns, 427 U.S. 347 (1976) (plurality opinion of Mr. Justice Brennan); *see* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

145. This approach would be consistent with the Choper proposal that political questions be deferred to political bodies for resolution rather than have the court decide them. Choper, *supra* note 141.

146. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW, 119-20 (9th ed. Supp. 1979). The Congress has had before it no less than five proposals to limit busing. Of these, only a rider to the Appropriations Act for the Departments of Labor and HEW has been passed into Law. *See* Pub. L. No. 94-439, §§ 206-08, 90 Stat. 1434 (1976). Its language did not address court jurisdiction, however, and only limited the funds which could be spent for transportation of students from their neighborhoods. Thus, its impact was on enforcement of the 1964 Civil Rights Act by HEW rather than by the courts. In July 1979, the House defeated a proposed constitutional amendment, which would have made busing unconstitutional, by a vote of 216 to 209. GUNTHER, *supra* at 119-20.

the wrong before the suit is brought.[147] This is particularly appropriate in the cases where institutional conditions are attacked, such as in the prison and mental health facility cases,[148] where direct control over the improvement of conditions can be exercised.

Finally, as an alternative to the *Swann* approach, the Supreme Court has begun elaborating alternative measures of relief which it feels are consistent with the nature of the remedy. After the Court remanded the Detroit case,[149] the district court formulated a remedy which did not involve extensive transportation, or metropolitan desegregation, but focused on improving the educational skills of minority children in the schools, and bringing those skills in parity with the white children in the schools.[150] The Supreme Court upheld the plan[151] as necessary to place the victims of unlawful discrimination in the position they would have occupied had such illegal conduct not been engaged in by local officials.[152] The Court said the remedy would not exceed the violation where the remedy is tailored to cure the condition that offends the Constitution, and that matters in addition to student reassignment were an appropriate area in which federal courts might act.[153] The Court also explained its decision in *Edelman v. Jordan*,[154] stating that prospective relief for a past wrong was

147. In discussing the tension between judicial action and legislative policy choices, James Bradley Thayer wrote:

> [I]t should be remembered that the exercise of [the power of judicial review], even when unavoidable, is always attended with a serious evil, namely that the correction of legislative mistakes comes from the outside, and the people thus lost the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors.

J. THAYER, JOHN MARSHALL 106-07 (1974). Professor Cox points out, however, that the actions of the courts may be a part of this educational process, particularly where political rights are supressed, or the "habits [are] so ingrained that their vice could be conveniently ignored so long as the Court was silent." Cox, *supra* note 4, at 828-29.

148. *See* cases cited in note 5 *supra*.

149. *See* notes 46-59 and accompanying text *supra*.

150. Milliken v. Bradley, 402 F. Supp. 1096 (E.D. Mich. 1975), *aff'd*, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977). The criteria established by the court included improvement of reading skills, in-service training for teachers, testing programs, and counselling and career guidance for minority children. The court also ordered minimal transportation to eliminate racially identifiable schools. *Id.* at 1034.

151. Milliken v. Bradley, 433 U.S. 267 (1977) (Milliken II).

152. *Id.* at 281-83.

153. *Id.* at 287-88. In holding such remedies were acceptable, the Court relied heavily on the prior use of similar relief by lower federal courts in school cases.

154. 415 U.S. 651 (1974). The Court in *Edelman* had held that the eleventh amendment barred suit against a state to pay past disability benefits to an applicant even where federal guidelines had not been followed. In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), however, the Court allowed retrospective monetary relief as a remedy where the action was brought to enforce legislation enacted under § 5 of the fourteenth amendment.

distinguishable from payment of an accrued monetary liability. Prospective relief was a necessary step to insure future constitutional compliance and to "wipe out continuing conditions of inequality produced by the inherently unequal dual school system long maintained by Detroit."[155]

In approving alternative remedies for courts hearing desegregation cases, the Supreme Court has taken advantage of the breadth of the equitable powers available to the federal courts. On the other hand, it can be argued that the remedies announced in *Milliken II* are as intrusive on state and local powers as are transportation orders. The remedies impact directly on the availability of funds for such programs, and may still involve the court in administering the programs or appointing masters to perform that task.

Moreover, the Court in *Milliken II* shifted the emphasis on integrated education, on which the *Brown I* Court had based its decision, to one of attempting to improve the quality of the education which the minority students received.[156] While this may be necessary because of practical considerations,[157] it may also mark the beginning of a trend of disregarding the mandate of *Brown I* that separate is inherently unequal.

IV. CONCLUSION

In *Swann*, the announced purpose of the Supreme Court was to provide guidelines for the lower courts in fashioning desegregation remedies. It did this by stating a limitation on the equitable powers of those courts, based on the plenary nature of school powers, and the need for the federal courts to consider federal/state comity in formulating their desegregation orders. *Milliken II*, however, allowed a remedy to stand which intruded on basic local powers to control school curriculum and testing, and in doing so ignored one of the basic mandates from *Brown I*. The apparent inconsistency points to the wide latitude which the Supreme Court has in reviewing lower court orders when it applies the standard from *Swann*. In determining the scope of the remedy based on the nature of the violation, the district court is left with a seemingly impossible quantitative analysis, which leads to a

155. 433 U.S. at 290.

156. In *Brown I* the Court had stressed that even where "tangible" factors are equal, "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, [deprives] the children of the minority group of equal education opportunities . . . ." 347 U.S. at 493.

157. *E.g.* In Detroit the school system is 80% black or minority students. In *Milliken I* the Court effectively precluded fully integrated schools by excluding suburban districts from the court's order. 418 U.S. 717 (1974).

series of ad hoc reviews by the Supreme Court of both the violation and the remedy in school cases. *Columbus* and *Dayton II* may remedy this, with their renewed emphasis on the trial court's findings. Until such time as the Court reaffirms the decision in those cases, however, the lower courts seem to be left with a confusing doctrinal maze from which to pick the remedies for the cases before them. As the Boston and Cleveland cases show, their decisions may, for the most part, be unaffected by the Supreme Court's uncertainty.

Conversely, it can be argued that the effort to defer to state plenary powers wherever possible is a proper role for the federal courts, in order to prevent a loss of credibility with the state and local officials. It may be that, by limiting the lower federal courts extensive intrustions into local government powers, the Supreme Court will create a better atmosphere for the development by local officials of alternative means to enforce individual liberties.

That is not to say that courts should shy away from protecting individual rights merely because protecting those rights would involve the court in policy questions or require the court to intrude on local powers to effect a remedy. De Tocqueville said: "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[158] While federalism may dictate restraint on the part of the judiciary when dealing with powers traditionally viewed as plenary in local authorities, the courts must be able to effectively remedy violations of constitutional guarantees or these guarantees will exist only on paper. It would be ironic indeed, if the same powers which state officials had abused in violation of the Constitution would serve as a shield against an effective remedy of those violations.

G. Michael Kirkman

158. A. DETOCQUEVILLE, DEMOCRACY IN AMERICA 280 (P. Bradley ed. 1945).