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THE JUDICIAL POWER OF THE PURSE

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I. INTRODUCTION

The judiciary is the branch of government "least dangerous to the political rights of the Constitution," Alexander Hamilton argued in the 78th Federalist, "because it will be least in capacity to annoy or injure them. . . . The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever." [1] This classic conception of the role of the federal courts in American society no longer accurately describes the power they exercise. Lower federal courts are assuming an increasing influence over governmental spending, "the purse" in Hamilton's phrase; they now consequently direct, at least in part, the wealth of our society; and they exert their "active resolution," or affirmatively exercise their power, by means of mandatory injunctions.

The most dramatic examples of this exercise of judicial power have occurred in the fields of corrections and care of the mentally ill and mentally retarded, fields in which a substantial portion of current budgets are now mandated not by legislative choice but by orders of lower federal courts.[2] Finding that existing conditions violate constitutional standards, federal courts have ordered prisons throughout the nation to improve markedly their physical facilities and their level of services.[3] They have ordered such extensive

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[1] THE FEDERALIST No. 78 (A. Hamilton) at 490 (B. Wright ed. 1961).

[2] *See* text accompanying notes 83-85 *infra; see also* Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977).

[3] *See* cases cited notes 16-17 *infra.*

improvements in the level of care provided the mentally ill and mentally retarded that, in one case, the amount allegedly necessary to comply with the court's decree equalled sixty percent of the state budget, excluding school financing.[4] Public recognition of the significant effect these court orders have on the overall allocation of government funds is increasing; stories in the press point to them as examples of a shift of power to the federal judiciary at the expense of local democratic decisionmaking.[5]

The existence of lower federal court orders seeking to remedy constitutional violations by controlling, in part, the power of the purse does not, of course, mean that this exercise of power is legitimate. The Supreme Court has not yet reviewed any of the orders that significantly increase government expenditures for prisons or mental institutions. More importantly, the increasing activism of the lower federal courts in remedying institutional conditions has been paralleled by the Supreme Court's increasing emphasis on "the proper—and properly limited—role of the courts in a democratic society." [6] The Supreme Court has made clear that federalism limits federal interference in state activity,[7] and has required the judiciary to leave major policy questions to the democratic decisionmaking process.[8] The Court, however, has not yet applied these doctrines to invalidate a lower federal court order mandating action to remedy a constitutional violation. Rather, the focus of their application by the Supreme Court to date has been to restrict the kinds of cases deemed appropriate for the federal courts to decide. But a principal reason for the Court's refusal to decide certain kinds of cases is its fear of the impact that federal judicial remedies could have on the democratic process.[9] The Court has avoided deciding cases which would have required the very type of federal judicial intervention in, and supervision of, local decisionmaking involved in the prison and mental institution cases. Furthermore, one aspect of local decisionmaking that has been given special deference by the Supreme Court is the essential legislative function of raising and allocating government resources. The Court's reluctance to impose judicial

[4] Wyatt v. Aderholt, 503 F.2d 1305, 1317 (5th Cir. 1974); *see* cases cited note 15 *infra*.

[5] *See, e.g.*, Tolchin, *Intervention by Courts Arouses Deepening Disputes*, N.Y. Times, Apr. 24, 1977, at 1, col. 2; *Who Governs Alabama?*, 60 Minutes, Vol. IX, No. 29 (CBS Television Network, Apr. 17, 1977).

[6] Warth v. Seldin, 422 U.S. 490, 498 (1975).

[7] *See* National League of Cities v. Usery, 426 U.S. 833 (1976); Younger v. Harris, 401 U.S. 37 (1971).

[8] *See* text accompanying notes 134-35 *infra*.

[9] *See* text accompanying notes 118-23 *infra*.

standards in matters of the purse has led it to uphold government decisions seeking to allocate or conserve resources when those decisions were challenged on constitutional grounds.[10] The cumulative impact of the Court's attempt to limit the kinds of cases federal courts should decide and its willingness to defer to legislative discretion in spending decisions is inconsistent with the assertion of a wideranging federal judicial power to mandate governmental expenditures as a remedy for constitutional violations.

This is not to say that the Supreme Court itself has never affirmed a lower court order mandating increased government expenditures. It has done so in cases concerning school desegregation [11] and access to the courts.[12] But the orders that the Supreme Court has affirmed have been much more limited than those orders, as yet unreviewed, affecting prisons and mental institutions. Thus the reason that the Supreme Court has never set limits on federal equitable power to command the purse may be that no case yet decided required it to do so. The Court so far has been able to rely simply on such delphic propositions as "the nature of the violation determines the scope of the remedy" [13] and "breadth and flexibility are inherent in equitable remedies." [14] But when the Court reviews the increasing efforts of lower federal courts to remedy constitutional violations by requiring significant additional government expenditures, it will have to decide what limits there are, if any, to the judicial power of the purse.

This Article will explore the nature of those limits. Part II will describe the lower federal court decisions that have mandated increased government expenditures. Part III will examine the Supreme Court's emphasis on the value of limiting judicial intervention in the democratic decisionmaking process. Part IV will then describe how the Supreme Court, in light of its emphasis on judicial restraint, has dealt with lower court orders mandating increased government expenditures in the narrow range of cases in which the Court has authorized them and with the government's interest in controlling, and limiting, its own expenditures in other contexts. Finally, in Part V, I will outline my own suggestions as to how courts should approach the kinds of cases discussed in Part II given the restraints on federal courts detailed in Parts III and IV.

[10] *See* text accompanying notes 308-72 *infra.*

[11] *E.g.*, Milliken v. Bradley, 97 S. Ct. 2749 (1977).

[12] *E.g.*, Bounds v. Smith, 430 U.S. 817 (1977).

[13] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

[14] *Id.* 15.

II. MANDATING GOVERNMENT EXPENDITURES

A. *The Institution Cases*

Federal courts have ordered substantially increased government expenditures principally in three areas of government activity: institutions for the mentally ill or mentally retarded, prison systems, and juvenile detention systems. At present they have ordered at least eleven states to overhaul their facilities for the mentally ill or mentally retarded,[15] eleven states[16] and local governments in seven other states[17] to revamp their prison systems, and six states to im-

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[15] Alabama (Wyatt v. Stickney, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974)); Georgia (Burnham v. Department of Pub. Health, 503 F.2d 1319 (5th Cir. 1974), *cert. denied,* 422 U.S. 1057 (1975)); Louisiana (Gary W. v. Louisiana, 437 F. Supp. 1209 (E.D. La. 1977)); Massachusetts (Gauthier v. Benson (D. Mass. 1976), reported at 1 MENTAL DISABILITY L. REP. 122 (1976)); Minnesota (Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, vacated and remanded in part,* 550 F.2d 1122 (8th Cir. 1977)); Mississippi (Doe v. Hudspeth (S.D. Miss. 1977), reported at [1977] 11 CLEARINGHOUSE REV. 160); Nebraska (Horacek v. Exon, 357 F. Supp. 71 (D. Neb. 1973)); New York (New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975), 409 F. Supp. 606 (E.D.N.Y. 1976); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973)); Ohio (Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974)); Pennsylvania (Halderman v. Pennhurst State School & Hosp., No. 74-1345 (E.D. Pa., filed Nov. 30, 1977)); and Tennessee (Saville v. Treadway, 494 F. Supp. 430 (M.D. Tenn. 1974)).

[16] Alabama (Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part, remanded in part sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977)); Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part, decision reserved in part,* 503 F.2d 1320 (5th Cir. 1974), *cert. denied,* 421 U.S. 948 (1975)); Arkansas (Finney v. Hutto, 410 F. Supp. 251 (E.D. Ark. 1976); Holt v. Hutto, 363 F. Supp. 194 (E.D. Ark. 1973), *aff'd in part, rev'd in part sub nom.* Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969), 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971)); Delaware (Anderson v. Redman, 429 F. Supp. 1105 (D. Del. 1977)); Florida (Costello v. Wainright, 397 F. Supp. 20 (M.D. Fla. 1975), *vacated on other grounds,* 539 F.2d 547 (5th Cir. 1976) (en banc), *rev'd and remanded,* 430 U.S. 325 (1977)); Louisiana (Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977)); Massachusetts (Bel v. Hall, 392 F. Supp. 274 (D. Mass. 1975)); Mississippi (Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd,* 407 F. Supp. 1117 (N.D. Miss. 1975), 423 F. Supp. 732 (N.D. Miss. 1976), *aff'd,* 548 F.2d 1241 (5th Cir. 1977)); New Hampshire (Laaman v. Helgemoe, 437 F. Supp. 269 (D.N.H. 1977)); Nadeau v. Helgemoe, 423 F. Supp. 1250 (D.N.H. 1976)); New York (Todaro v. Ward, 431 F. Supp. 1129 (S.D.N.Y. 1977), *aff'd,* 565 F.2d 48 (2d Cir. 1977)); Ohio (Chapman v. Rhodes, 434 F. Supp. 1007 (S.D. Ohio 1977)); and Oklahoma (Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974), *aff'd,* 564 F.2d 388 (10th Cir. 1977)).

[17] California (Dillard v. Pitchess, 399 F. Supp. 1225 (C.D. Cal. 1975)); Brennemen v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972)); Georgia (Inmates of Henry County Jail v. Parham, 430 F. Supp. 304 (N.D. Ga. 1976)); Maryland (Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972)); Michigan (O'Bryan v. County of Saginaw, 437 F. Supp. 582 (E.D. Mich. 1977)); Missouri (Ahrens v. Thomas, 434 F. Supp. 873 (W.D. Mo. 1977)); Goldsby v. Carnes, 365 F. Supp.

prove their juvenile detention facilities.[18] Even some federal prison facilities are now being challenged in federal court.[19] It is important to specify at the outset the precise nature of the orders that will be considered in this Article. The decrees in these cases mandate massive changes in the operation of an institution and its programs, changes involving the physical condition of the facility, its staffing, the quality of its services, or a combination of these items. The nature and extent of change required by these cases, which I shall call "institution cases," will become apparent in the following discussion of several major institution cases. There are a vast number of other, more routine, cases, however, that involve the federal courts in ordering much more limited changes in the same kind of institution. These cases involve requiring certain procedures prior to depriving one detained in the institution of his liberty or property or ordering the closing of a small portion of a facility on the grounds that confinement there is cruel or unusual punishment or otherwise

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395 (W.D. Mo. 1973)); Nebraska (Moore v. Janing, 427 F. Supp. 567 (D. Neb. 1976)); and Texas (Smith v. Sullivan, 553 F.2d 373 (5th Cir. 1977)); Taylor v. Sterrett, 344 F. Supp. 411 (N.D. Tex. 1972), *aff'd in part*, 499 F.2d 367 (5th Cir. 1974), *cert. denied*, 420 U.S. 983 (1975)). In addition, local governments are under federal court order in at least seven of the eleven states listed in note 16 *supra:* Arkansas (Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971), 358 F. Supp. 338, 361 F. Supp. 1235 (E.D. Ark. 1973)); Florida (Mitchell v. Untreiner, 421 F. Supp. 886 (N.D. Fla. 1976); Miller v. Carson, 401 F. Supp. 835 (M.D. Fla. 1975), *aff'd in part, modified in part, and remanded*, 563 F.2d 741 (5th Cir. 1977)); Louisiana (Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972); Hamilton v. Shiro, 338 F. Supp. 1016 (E.D. La. 1970)); Massachusetts (Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974)); Mississippi (Obadde v. McAdory (S.D. Miss. 1973), reported at 2 PRISON L. REP. 413 (1973)); New York (Detainees of Brooklyn House of Detention v. Malcolm, 520 F.2d 392 (2d Cir. 1975); Rhem v. Malcolm, 371 F. Supp. 594, 377 F. Supp. 995 (S.D.N.Y. 1974), *aff'd*, 507 F.2d 333 (2d Cir. 1974), 389 F. Supp. 964 (S.D.N.Y. 1975), *aff'd*, 527 F.2d 1041 (2d Cir. 1975), 432 F. Supp. 769 (S.D.N.Y. 1977)); and Ohio (Jones v. Wittenberg, 323 F. Supp. 93, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972)).

[18] Indiana (Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir. 1974)); Kentucky (Baker v. Hamilton (W.D. Ky. 1972), reported at [1972] 6 CLEARINGHOUSE REV. 100)); Mississippi (Morgan v. Sproat, 432 F. Supp. 1130 (S.D. Miss. 1977); Patterson v. Hopkins, 350 F. Supp. 676 (N.D. Miss. 1972), *aff'd*, 481 F.2d 640 (5th Cir. 1973)); New York (Pena v. New York State Div. for Youth, 419 F. Supp. 203 (S.D.N.Y. 1976); Matarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972); Lollis v. New York State Dep't of Soc. Servs., 322 F. Supp. 473 (S.D.N.Y. 1970), 328 F. Supp. 1115 (S.D.N.Y. 1971)); Rhode Island (Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972)); and Texas (Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973), 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977)).

[19] *See, e.g.*, Jordan v. Arnold, 408 F. Supp. 869 (M.D. Pa. 1976); United States *ex rel.* Wolfish v. Levi, 406 F. Supp. 1243 (S.D.N.Y. 1976); N.Y. Times, Jan. 9, 1977, at 28, col. 1.

unconstitutional.[20] These other cases share with the institution cases the fact of federal judicial intervention in state or federal institutions and may occasionally raise some of the problems involved in the institution cases. But they differ so significantly in magnitude that they should be considered a different category of case altogether. Compliance with a judicial decree in the more limited cases is an administrative action that can be accomplished with relative ease. Compliance with the orders in the institution cases requires action by the legislature to raise or reallocate funds and, once that is accomplished, detailed judicial supervision of the executive's efforts to implement the changes mandated by the court decree. It is the judicial requirement of major legislative action and the detailed judicial supervision of executive implementation—consequences that derive from the scope of the changes involved—that characterize the institution cases considered in this Article.

Wyatt v. Stickney,[21] the most widely discussed of the institution cases,[22] involved two district court orders, one for state mental institutions and one for an institution for the mentally retarded. The conditions in those institutions presented classic examples of conditions that "would shock the conscience of any citizen who knew of them:" [23] dangerous physical facilities, severe overcrowding, inadequate staffing, denial of the basic necessities of life to residents, and even brutality in the treatment of those confined for care.[24] Faced with such a record, the district court held that patients involuntarily committed to the institutions would be denied their liberty without due process of law unless the state provided them a realistic opportunity to be cured or to improve their conditions, and that such an opportunity would require "(1) a humane psychological and physical environment, (2) qualified staff in numbers sufficient to administer adequate treatment and (3) individualized treatment plans." [25] To effectuate the constitutional rights found to be violated, the court "enjoined [state officials] from failing to implement fully and with

[20] *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969).

[21] 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

[22] *See, e.g.*, Barnett, *Treatment Rights of Mentally Ill Nursing Home Residents*, 126 U. PA. L. REV. 578 (1978); Comment, Wyatt v. Stickney *and the Right of Civilly Committed Mental Patients to Adequate Treatment*, 86 HARV. L. REV. 1282 (1973); Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975).

[23] Rhem v. Malcolm, 371 F. Supp. 594, 636 (S.D.N.Y. 1974).

[24] *See* Wyatt v. Aderholt, 503 F.2d 1305, 1310-12 (5th Cir. 1974).

[25] 344 F. Supp. at 375.

dispatch" [26] each of thirty-five specific requirements for the institutions housing the mentally ill and forty-nine specific requirements for the institution serving the mentally retarded. Compliance with the court's orders required massive budget increases for the institutions in question.[27] For example, to ensure a humane physical and psychological environment, the court ordered that no more than six persons be confined to one room, that each patient be provided specified clothing and furnishings, that toilets and showers of sufficient number and meeting detailed specifications be installed, that day room and dining facilities meet specific size and furniture requirements, and that heating and air conditioning adequate to maintain a specific range of temperatures be provided.[28] To ensure adequate staffing, the court established a minimum staffing ratio of two psychiatrists, twelve registered nurses, ninety-two nurse's aides, seven social workers, and fifteen food service workers, among others, for every 250 hospitalized mentally ill patients, and no fewer than one psychologist, one social worker, one vocational therapist and one registered nurse, among others, for every sixty mildly retarded individuals.[29] Finally, to ensure equalized treatment or habilitation plans, the court detailed the contents of such a plan, including specification of the kind of personnel that must periodically review these plans and the minimum number of such reviews annually.[30] The district court emphasized that "a failure by defendants to comply with this decree cannot be justified by a lack of operating funds," [31] but it did not decide what affirmative steps it would take if the funds were not made available.[32] The court did, however, appoint a seven-member Human Rights Committee for each institution to oversee compliance with the designated standards.[33] In affirming the district court order, the Court of Appeals for the Fifth Circuit noted that compliance with the order would require a substantial expenditure of state funds but stated that lack of resources was no excuse for noncompliance with the order.[34] Like the district court,

[26] *Id.* 378, 394.

[27] *See* Barnett, *supra* note 22, at 587-88 n.47.

[28] 344 F. Supp. at 380-82, 403-05.

[29] *Id.* 383-84, 406.

[30] *Id.* 384, 398.

[31] *Id.* 377.

[32] *Id.* 378.

[33] *Id.* 376, 386, 392, 407. Since *Wyatt*, the appointment by the federal judiciary of committees to supervise the implementation of decrees has been held an impermissible intrusion on local decisionmaking. Newman v. Alabama, 559 F.2d 283, 288-90 (5th Cir. 1977).

[34] 503 F.2d at 1315.

it declined to decide whether the court had authority to appoint a master to sell state land or to enjoin other nonessential expenditures in order to provide the necessary resources.[35]

The order in *Wyatt v. Stickney* set a model for other orders concerning institutions for the mentally ill or mentally retarded,[36] but it did not represent the outer limits of the exercise of judicial power over state expenditures in the mental health field. In *New York State Association for Retarded Children, Inc. v. Rockefeller*,[37] the district court issued an order concerning New York's Willowbrook State School for the Mentally Retarded. Although rejecting the *Wyatt* notion of a constitutional right to treatment, the district court found that Willowbrook residents did have a constitutional right to protection from harm. The court found that because the closing of the institution was not a realistic option,[38] basic protection for the residents depended upon increased staffing and improved physical conditions in the institution itself. The court recognized, however, that merely ordering an improved staffing ratio would not increase the personnel available, because, especially in the case of physical therapists, the state had been unable to recruit a sufficient staff at prevailing state wages. The court therefore ordered not only an increase in staff but a ten per cent increase in wages for physical therapists, deferring possible wage increases for other personnel until a compliance report was made.[39]

In *Welsch v. Likins*[40] the *Wyatt* model was extended even further. *Welsch* concerned a Minnesota institution for the mentally retarded which, unlike the institutions involved in *Wyatt*, the state claimed was as good or better than similar institutions elsewhere in that area of the country.[41] The district court nevertheless found that the physical plant and its staffing failed to meet constitutional conditions and ordered substantial improvements. The district court further held that the mentally retarded residents were constitutionally entitled not only to an improved facility but also to the least restrictive environment consistent with their needs,[42] thus requiring the creation of additional, less restrictive, facilities for their care. Compliance with such a decree necessitated a substantial

[35] *Id.* 1316-18.

[36] *E.g.*, Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974).

[37] 357 F. Supp. 752 (E.D.N.Y. 1973).

[38] 357 F. Supp. at 768.

[39] *Id.* 769.

[40] 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977).

[41] 550 F.2d at 1128.

[42] 373 F. Supp. at 502.

allocation of money, an allocation which the legislature had previously failed to provide.[43] The district court therefore ordered the state to comply with its decree as if adequate appropriations had been made, notwithstanding the legislature's failure in fact to make the appropriations, and enjoined compliance with all Minnesota constitutional and statutory provisions concerning the raising and allocating of funds inconsistent with its decree.[44] On appeal, the Eighth Circuit approved the district court order detailing the substantive improvements that Minnesota was required to make, but it vacated the order to spend money as if it had already been appropriated, noting that serious questions concerning the judicial power to issue such an order might be avoided by action in the forthcoming legislative session.[45] The Eighth Circuit made clear, however, that the district court order must be fully complied with, unless the state decided to close the institution or release substantial numbers of its residents.[46]

The cumulative financial impact of the lower federal court orders involving prisons is likely to exceed even that of the cases dealing with state institutions for the mentally ill or mentally retarded. Federal judicial review of prison conditions in dozens of cities and states has clearly demonstrated "[t]he sad and shameful history of penology in this country." [47] The same problems recur again and again: delapidated, unsanitary, and understaffed physical facilities, serious overcrowding, medical and psychiatric services insufficient to provide even minimally adequate care, food lacking in proper nutrition and prepared in unsanitary conditions, and the almost total absence of conditions that might serve to rehabilitate, or at least retard the dehabilitation of, prisoners, such as recreation, vocational training, or visits with friends and relatives.[48]

Judicial reaction to these conditions has been relatively uniform; courts have responded by ordering extensive corrective action, action necessitating dramatically increased expenditures for the prison systems. To deal with the physical condition of prisons, courts have ordered extensive structural improvements,[49] a mini-

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[43] *Id.* 497-98 n.7.

[44] 550 F.2d at 1129.

[45] *Id.* 1132-33.

[46] *Id.*

[47] Detainees of Brooklyn House of Detention v. Malcolm, 520 F.2d 392, 397 (2d Cir. 1975).

[48] *See* cases cited notes 16-17 *supra.*

[49] *See, e.g.*, Gates v. Collier, 501 F.2d 1291, 1303 (5th Cir. 1974); Moore v. Janing, 427 F. Supp. 567, 571-75 (D. Neb. 1976).

mum number of square feet to be assigned to each prisoner as living space,[50] an increase in custodial personnel,[51] the daily cleaning of the facility,[52] and, where such efforts would not be sufficient to meet constitutional standards, the closing of an institution and the shifting of prisoners to another facility.[53] To remedy overcrowding, courts have limited the number of people that can be confined to a facility,[54] or to the cells [55] or dormitories [56] of a facility. In fact, one court ordered the city of Boston to fund a bail appeal project that had lost its federal and state funds in order to ensure the release of inmates from an overcrowded jail.[57] To ensure minimum physical and mental health care to prisoners, courts have ordered the improvement of hospital facilities to meet stringent requirements [58] (in at least one case ordering the construction of a new hospital),[59] the hiring of physicians,[60] physchiatric personnel,[61] and other staff,[62] the provision of specific medical treatment, including periodic physical exams,[63] and the purchase of new equipment.[64] To improve food service, they have ordered the hiring of a nutritionist or similar

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[50] *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318, 334 (M.D. Ala. 1976), *aff'd and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977).

[51] *See, e.g., id.* 335.

[52] *See, e.g.*, Mitchell v. Untreiner, 421 F. Supp. 886, 897-98 (N.D. Fla. 1976); *see also* Alberti v. Sheriff of Harris County, 406 F. Supp. 649, 676 (S.D. Tex. 1975).

[53] *See, e.g.*, Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974), 527 F.2d 1041 (2d Cir. 1975).

[54] *See, e.g.*, Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977); Taylor v. Perini, 413 F. Supp. 189, 194 (N.D. Ohio 1976); Hamilton v. Love, 328 F. Supp. 1182, 1195 (E.D. Ark. 1971).

[55] *See, e.g.*, Newman v. Alabama, 559 F.2d 283, 288 (5th Cir. 1977); Detainees of Brooklyn House of Detention v. Malcolm, 520 F.2d 392, 398-99 (2d Cir. 1975); Chapman v. Rhodes, 434 F. Supp. 1007 (S.D. Ohio 1977).

[56] *See, e.g.*, Ambrose v. Malcolm, 414 F. Supp. 485 (S.D.N.Y. 1976).

[57] *See* Inmates of Suffolk County Jail v. Eisenstadt, 518 F.2d 1241 (1st Cir. 1975).

[58] *See, e.g.*, Newman v. Alabama, 503 F.2d 1320, 1330-33 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); Miller v. Carson, 401 F. Supp. 835, 876-79 (M.D. Fla. 1975), *aff'd in part, modified in part, and remanded*, 563 F.2d 741 (5th Cir. 1977).

[59] *See* Hamilton v. Landrieu, 351 F. Supp. 549, 550 (E.D. La. 1972).

[60] *See, e.g.*, Mitchell v. Untreiner, 421 F. Supp. 886, 899 (N.D. Fla. 1976).

[61] *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318, 333 (M.D. Ala. 1976), *aff'd and remanded sub nom.* Newman v. Alabama, 559 F.2d 280 (5th Cir. 1977).

[62] *See, e.g.*, Gates v. Collier, 349 F. Supp. 881, 901 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974).

[63] *See, e.g.*, Newman v. Alabama, 349 F. Supp. 278, 287 (M.D. Ala. 1972), *aff'd in part, decision reserved in part*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975).

[64] *See, e.g.*, Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 204 (8th Cir. 1974).

expert, the revision of food handling procedures and equipment to meet restaurant standards,[65] and the provision of minimal nutritional standards.[66] To ensure an improved environment, they have ordered specific amounts of recreation, reading material,[67] and opportunities for outside visitors [68] (including specifications concerning the physical condition of the visiting area),[69] and the provision of work assignments, educational opportunities, and vocational training.[70]

Not every court, of course, has ordered each of the items listed above; nor has every court addressed a challenge to all of the types of conditions described. Nevertheless, the lower federal courts are in almost uniform agreement concerning the need for wideranging changes in this country's prison system, changes which will have a major impact on budgets at every level of government. This budgetary impact will be marked because the courts have consistently rejected a defense based on the cost of compliance with their orders, responding that lack of resources is no excuse for failure to comply.[71] Many quote the language of the district court in

[65] *See, e.g.*, Mitchell v. Untreiner, 421 F. Supp. 886, 900 (N.D. Fla. 1976).

[66] *See, e.g.*, Jones v. Wittenberg, 330 F. Supp. 707, 716 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

[67] *See, e.g.*, Miller v. Carson, 563 F.2d 741, 748-9 (5th Cir. 1977).

[68] *See, e.g.*, Rhem v. Malcolm, 371 F. Supp. 594, 625-26 (S.D.N.Y. 1974).

[69] *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318, 334 (M.D. Ala. 1976), *aff'd and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977).

[70] *See, e.g.*, Nadeau v. Helgemoe, 423 F. Supp. 1250, 1269-71 (D.N.H. 1976). *But cf.* Newman v. Alabama, 559 F.2d 283, 291-92 (5th Cir. 1977) (denying existence of right of rehabilitation).

[71] "Lack of funds is not an acceptable excuse for unconstitutional conditions of incarceration." Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 201 (8th Cir. 1974). To the same effect are: Wyatt v. Aderholt, 503 F.2d 1305, 1315 (5th Cir. 1974) ("[T]he state may not fail to provide treatment [which the court found to be constitutionally required] for budgetary reasons alone."); Gates v. Collier, 501 F.2d 1291, 1320 (5th Cir. 1974) ("Shortage of funds is not a justification for continuing to deny citizens their constitutional rights."); Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968) (Blackmun, J.) ("Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations."); Hamilton v. Love, 328 F. Supp. 1182, 1184 (E.D. Ark. 1971) ("Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights."); Holt v. Sarver, 309 F. Supp. 362, 385 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) ("[T]he obligation of the Respondents [prison officials] to eliminate existing unconstitutionalities does not depend upon what the Legislature may do."). The Fifth Circuit most clearly enunciated these sentiments in Gates v. Collier, *supra*, 501 F.2d at 1319: "Where state institutions have been operating under unconstitutional conditions and practices, the defenses of fund shortage and the inability of the district court to order appropriations by the state legislature, have been rejected by the federal court." Indeed, Finney v. Arkansas Bd. of Correction, *supra*, reversed a district court judgment that had approved the corrective action taken by the state on the grounds that the government had been doing the best it could with the resources at its command. The Fifth Circuit held that inadequate. 505 F.2d at 202.

Holt v. Sarver: [72]

> Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.[73]

This reasoning reflects both judicial insistence on compliance forthwith notwithstanding the cost and reliance on the proposition (not generally advanced in the mental health cases but common in the prison context) that the courts are not really ordering the spending of money but rather are merely saying that the state must spend the money unless it exercises its option to close its prisons.[74]

Cases challenging juvenile detention systems tend to involve remedies that combine features both of the mental institution and prison cases. In *Morales v. Turman* [75] the district court issued an order affecting Texas juvenile correctional facilities hardly matched elsewhere for its sheer comprehensiveness.[76] To mention but a few items, the court, as in the mental institution cases, ordered the closing of two state facilities and the establishment of community based treatment alternatives,[77] the establishment in the remaining institutions of a staff-to-resident ratio of virtually one-to-one,[78] the implementation of detailed staffing plans,[79] and the creation of in-

[72] 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) *See, e.g.*, Mitchell v. Untreiner, 421 F. Supp. 886, 896 (N.D. Fla. 1976).

[73] 309 F. Supp. at 385.

[74] *Compare* New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 768 (E.D.N.Y. 1973) ("Nor can the court direct the closing of Willowbrook. . . . 'The State has no realistic option open to it to discontinue its mental hospitals and training schools forthwith.'" [citation omitted]) *with* Gates v. Collier, 501 F.2d 1291, 1320 (5th Cir. 1974) (*"But the district court did not require that the legislature appropriate monies for prison reform; it simply held, in keeping with a plethora of precedent on the fund shortage problem, that if the State chooses to run a prison it must do so without depriving inmates of the rights guaranteed to them by the federal constitution."*) (emphasis in original).

[75] 364 F. Supp. 166 (E.D. Tex. 1973), 383 F. Supp. 53 (E.D. Tex. 1974, *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977).

[76] *See* 535 F.2d at 868-69. In a later proceeding, the Fifth Circuit criticized the original district court order as "excessively detailed." Morales v. Turman, 562 F.2d 993, 999 (5th Cir. 1977).

[77] 383 F. Supp. at 125.

[78] *Id.* 126.

[79] *Id.* 102, 105.

dividualized treatment plans for each juvenile.[80] As in the prison cases, the court ordered "minimum standards in areas of medical treatment, social worker care, dietary requirements, educational and vocational programs, house parents, and correctional officers." [81] Other courts have also ordered wideranging, though less comprehensive, action to implement the right to treatment in juvenile detention facilities.[82]

Estimates of the cost of compliance with the federal court orders in the institution cases are rare, but the few hints available indicate that the sum will be substantial. Louisiana, for example, appropriated more than 106 million dollars for capital improvements following a court decree concerning the Angola state penitentiary, compared with approximately 1 million dollars annual total capital outlay previously made for all state correctional facilities. The state also added more than 18 million dollars of supplementary operating funds to the prison budget, an amount almost equal to the total operating budget of the entire state prison system at that time.[83] These additional expenditures did not purport to cover all the additional costs involved in complying with the court order concerning the Angola facility, let alone the costs required to meet other federal court decrees concerning other Louisiana prisons.[84] Compliance with one Alabama prison order has been estimated at more than 28 million dollars compared to the total state corrections budget of roughly 22 million dollars, and this estimate specifically does not include the costs of improving medical care in the Alabama prison system mandated by another federal court order.[85] Whether these figures are representative of the magnitude of increase in state expenditures necessary to comply with the orders in the institution cases cannot be accurately determined because of the lack of data

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80 535 F.2d at 869.

81 *Id.*

82 *See* cases cited note 18 *supra.*

83 *See* Williams v. Edwards, 547 F.2d 1206, 1218 (5th Cir. 1977); LAW ENFORCEMENT ASSISTANCE ADMINISTRATION AND BUREAU OF THE CENSUS, EXPENDITURES AND EMPLOYMENT DATA FOR THE CRIMINAL JUSTICE SYSTEM 1975, at 272, 276 (1977).

84 *See* Williams v. Edwards, 547 F.2d 1206, 1219 n.9 (5th Cir. 1977); Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972); Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970).

85 AMERICAN CIVIL LIBERTIES UNION FOUNDATION NATIONAL PRISON PROJECT, THE ALABAMA PRISON SYSTEM: AN ANALYSIS AND ESTIMATE OF THE COST AND ECONOMIC CONSIDERATIONS RESULTING FROM THE ORDERS IN THE UNITED STATES DISTRICT COURT IN *Pugh v. Locke* AND *James v. Wallace*, 406 F. Supp. 318 (M.D. Ala. 1976), at 6, 23 (1977); LAW ENFORCEMENT ASSISTANCE ADMINISTRATION AND BUREAU OF THE CENSUS, EXPENDITURES AND EMPLOYMENT DATA FOR THE CRIMINAL JUSTICE SYSTEM 1975, at 271 (1977).

available; however, even a cursory examination of the extensive changes involved, both in terms of capital construction and annual operating costs, suggests that a major reallocation of resources to the institutions for the mentally ill or mentally retarded, prisons and juvenile detention centers will be required.

The impact of the institution cases on state budgets is not likely to be eliminated by a Supreme Court decision that the cases are wrong as a matter of substantive constitutional law. Whatever the Supreme Court eventually decides about the existence of a constitutional right to treatment for the mentally ill, of habilitation for the mentally retarded, or of rehabilitation for prisoners,[86] the Court is likely to find that involuntary confinement in conditions which are so degrading and deplorable that they fail to meet certain minimum standards of decency constitutes a deprivation of liberty without due process of law. Given the records in a number of the institution cases, the requisite level of degradation, whatever it may be, exists in a number of state institutions. I therefore assume for purposes of this Article that at least some of the conditions condemned by lower federal courts will be found constitutionally deficient by the Supreme Court as well when it decides its first institution case.

The impact of the institution cases on the state treasuries is also not likely to be eliminated by the option suggested by some courts that the state can avoid spending money by closing the institutions involved. These institutions cannot be closed. Although specific, individual facilities might be closed and inmates transferred to other facilities as has occurred in some states,[87] no responsible government official could close all prisons and let all inmates go free. Nor could the government properly discharge all mentally ill patients, including those dangerous to themselves or to others. Moreover it would be tragic if the result of the institution cases would be to close state facilities and release individuals, such as the mentally retarded, who have no place to go and no other services available.[88] Thus, in practical terms, the states have no choice but to continue to operate

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[86] The existence of such rights is the subject of extensive academic discussion. *See, e.g.*, sources cited in Note, *supra* note 22, at 1339 n.5. Recent doubts about the existence of these rights have been expressed by the Fifth Circuit. Morales v. Turman, 562 F.2d 993, 998 (5th Cir. 1977); Newman v. Alabama, 559 F.2d 283, 291 (5th Cir. 1977).

[87] *See* Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974), 527 F.2d 1041 (2d Cir. 1975). *See also* N.Y. Times, Dec. 5, 1976, at 43, col. 1. In addition, Federal judges prohibited new admissions to Alabama state prisons for 15 months, with the result that city and county jails held those who otherwise would have been sent to state facilities. N.Y. Times, Dec. 5, 1976, at 43, col. 1.

[88] *See* N.Y. Times, Aug. 14, 1977, at 1, col. 5; *see also* Barnett, *supra* note 22.

prisons and facilities of some sort for the mentally ill and mentally retarded. Some courts recognized this reality [89] and simply framed their decrees as general orders to improve the institutional conditions. Although others (ironically, mostly in the prison cases) purport to give the state the option of closing the institution rather than complying,[90] surely even these courts must consider the option illusory. Thus, a court decree detailing what the government must do to continue running its prisons or mental institutions is the functional equivalent of a mandatory injunction that it do those things.[91]

Finally, the impact on the state treasury is not likely to be easily absorbed by using money allocated to lower priority items elsewhere in the budget. That some additional money is likely to be available is evidenced by the considerable shift of resources accomplished by some states as they have begun to comply with court orders.[92] But the money that can be made available in this way is limited. In virtually every case the government has complained of lack of resources in light of the magnitude of the ordered action.[93] Thus, although the courts insist on strict compliance with the decrees, there has in fact been only partial compliance.[94] The financial drain on the states is aggravated by the fact that the court decrees, envisioning minimum standards for staffing and operation of the facilities, necessitate providing a mandated amount of money to the institutions in every annual state budget on a permanent basis. Given the financial position of most

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[89] *See* note 74 *supra.*

[90] *Id.* "[T]here are more men and women in state and Federal prisons today than at any other time in the nation's history. . . . As of Jan. 1 [1976], there were 249,716 persons in prisons around the country, 10 percent more than a year earlier." N.Y. Times, Apr. 19, 1976, at 12, col. 4.

[91] The mandatory nature of an injunction is in itself nothing new. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 105 (1973). The difficulty arises because it is the state legislature and executive that are mandated to act.

[92] A number of cases note the existence of partial compliance by the states. *E.g.*, Williams v. Edwards, 547 F.2d 1206, 1218 (5th Cir. 1977); Miller v. Carson, 401 F. Supp. 835, 853, 889 (M.D. Fla. 1975), *aff'd in part, modified in part, and remanded*, 563 F.2d 741 (5th Cir. 1977). The National Institute of Law Enforcement and Criminal Justice, surveying implementation in a number of cases, concluded that, while states have not complied with some aspects of court orders, the worst abuses have been eliminated. NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANT ADMINISTRATION, U.S. DEP'T OF JUSTICE, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS 6, 27-29 (1977). *See also* Note, *supra* note 22, at 1379.

[93] *See, e.g.*, cases cited in note 71 *supra.*

[94] *See* note 92 *supra.*

state and local governments,[95] it is likely that a point short of full compliance will be reached—after the most outrageous conditions have been eliminated but with a substantial amount of money required for further compliance—after which the funds necessary for full compliance will become extremely difficult to find, if not simply unavailable. It is then that the confrontation between the federal judiciary and the states over control of the state treasuries is most likely to occur.

B. *Other Judicial Mandates of Expenditures*

Judicial impact on government expenditures has not been confined to the institution cases. Although it has not yet been widely used for this purpose, the equal protection clause has been interpreted by lower federal courts to mandate increased government expenditures. For example, in *Frederick L. v. Thomas*[96] a federal district court held that plaintiffs stated a cause of action under the equal protection clause when they challenged the denial by the School District of Philadelphia of free public education specially suited to children with specific learning disabilities. The plaintiffs contended that children with learning disabilities were effectively excluded from public education by the school district's failure to provide them anything more than access to the normal curriculum. If, as the district court suggested, the school district is constitutionally required to provide meaningful education to all children once it provides free education to normal children—and thus must provide special education for children not able to function in the normal curriculum—the result is either reallocation of existing funds, diminishing some services to allow reaching a greater number of indi-

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[95] In recent years a number of states and cities have been forced to reduce expenditures because of financial difficulties. New York City provides the most well-known example, *see* CONGRESSIONAL BUDGET OFFICE, NEW YORK CITY'S FISCAL PROBLEM, 94th Cong., 1st Sess. (1975), JOINT ECONOMIC COMM., NEW YORK CITY'S FINANCIAL CRISES, 94th Cong., 1st Sess. (1975); but it is by no means unusual. *See, e.g.*, Bradley v. Milliken, 540 F.2d 229, 247-51 (6th Cir. 1976), *aff'd*, 97 S. Ct. 2749 (1977) (Detroit school system). The fiscal situation varies from state to state and from city to city, *see* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, MEASURING THE FISCAL CAPACITY AND EFFORTS OF STATE AND LOCAL AREAS (1971), and in some areas, depending on the strength of the nation's economy, the fiscal situation may allow some room for expansion of services. H. OWEN & C. SCHULTZE, SETTING NATIONAL PRIORITIES: THE NEXT TEN YEARS 387-90, 405-09 (1976). The point at which it will become difficult to locate resources to meet increased costs will, therefore, depend on local circumstances, but that such a point exists in every jurisdiction, at some stage, seems beyond dispute.

[96] 408 F. Supp. 832 (E.D. Pa. 1976).

viduals, or, more likely, an increase in the school budget to finance additional programs.[97]

The likelihood of the equal protection clause becoming a vehicle for mandating increased government spending was diminished considerably, however, by the Supreme Court in *Maher v. Roe*.[98] The *Maher* Court rejected an attempt to invalidate, on equal protection and due process grounds, a state's refusal to fund therapeutic abortions in its Medicaid program, and a companion case rejected a similar challenge to a city's refusal to provide abortion services in its public hospitals.[99] The Court's conclusion in *Maher* was based on the proposition that the failure of the state to fund access to services does not unconstitutionally impinge on the right to receive those services, even if that right is so fundamental that its exercise cannot be prohibited by the government. Furthermore, the state is under no obligation to provide resources to the poor adequate to enable them to obtain services available privately, even if, realistically, only the rich are able to afford such services themselves.[100] Instead, the *Maher* Court said, "[o]ur cases uniformly have accorded the States a wider latitude in choosing among competing demands for limited public funds." [101]

Of course, *Maher* does not preclude a finding of an equal protection violation in the denial of public education to the poor or handicapped. An argument might be advanced that denial of adequate public education itself raises serious constitutional questions.[102] The point here is not to establish the reaches of the equal

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[97] The case was eventually decided on state statutory grounds. Frederick L. v. Thomas, 419 F. Supp. 960 (E.D. Pa. 1976), *aff'd*, 557 F.2d 373 (3d Cir. 1977). The School District of Philadelphia has in fact treated the requirements for new special education programs as a mandatory budget increase, amounting to 7.1 million dollars for the 1975-76 school year. SCHOOL DIST. OF PHILADELPHIA, SUMMARY OF THE PROPOSED OPERATING BUDGET FOR THE FISCAL YEAR BEGINNING JULY 1, 1975, at 1 (1975). *See also* Lebanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972).

[98] 97 S. Ct. 2376 (1977).

[99] Poelker v. Doe, 97 S. Ct. 2391 (1977).

[100] *See* 97 S. Ct. at 2383.

[101] *Id.* 2385 (footnotes omitted). For further discussion of the implications of *Maher*, see text accompanying notes 346-50 *infra*.

[102] Such an argument could be based on San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1972). While upholding the Texas school financing system in that case, the Court intimated that a stronger equal protection challenge might arise if a school system "fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process," *id.* 37, or if the state were to charge tuition for its public school system, thus absolutely precluding the poor from receiving an education, *id.* 25 n.60. The district court in *Frederick L.* relied on the first of these concepts in *Rodriguez* to support its equal protection theory, 408

protection clause in cases like *Frederick L. v. Thomas,* but simply to indicate that at present, in light of the Supreme Court decision in *Maher,* the equal protection cases are not likely to have a significant impact on the public treasury. If developments should prove otherwise, then the difficulties of formulating a judicial remedy in the institution cases would apply in this context as well.[103] Because the institution cases now raise the issue of mandated spending in its sharpest and least avoidable way, this Article will concentrate solely on those cases.

III. The Restraints on Judicial Power

Given the outrageous conditions in many of the prisons and mental hospitals now under court order, one's initial instinct is to applaud the intervention of the federal courts seeking to correct these conditions; the political branches of both federal and state governments have defaulted in their obligation to do so.[104] But

F. Supp. at 835, while a three judge district court in Virginia relied on the second to invalidate Virginia's system of reimbursing part of private tuition for handicapped children, a system which, the court said, unconstitutionally discriminated against the poor by precluding those too poor to pay the remainder of the private tuition from receiving the special education available to those who could afford to pay it. Kruse v. Campbell, 431 F. Supp. 180 (E.D. Va. 1977), *vacated and remanded,* 98 S. Ct. 38 (1977). The Supreme Court, however, has never held that the Constitution imposes an obligation on a school system to provide certain kinds of educational programs to any of its students, *cf.* Johnson v. New York State Educ. Dep't, 449 F.2d 871 (2d Cir. 1971), *vacated and remanded,* 409 U.S. 75 (1972) (upholding constitutionality of statute extending aid to school districts for purchase of books to be loaned free of charge to students in only certain grades), or that it requires funding of educational services that are privately available to the rich but which the poor cannot afford. It has held that the Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970), can properly be read as imposing an obligation to provide special programs for non-English speaking students. Lau v. Nichols, 414 U.S. 563 (1974).

[103] Similar difficulties might arise as well from judicial interpretations of conditions imposed on states and localities as a prerequisite to receiving federal grants-in-aid. For example, in Stanton v. Bond, 504 F.2d 1246 (7th Cir. 1974), *cert. denied,* 420 U.S. 984 (1975), the Seventh Circuit held that the proper judicial remedy for a state's failure to comply with a congressional requirement of early childhood health screening as a condition of its participation in the Medicaid program was to require the state to implement the program by a certain date. But each grant statute must be interpreted to see whether Congress intended that creation of the program, rather than merely the loss of federal funds, should be the remedy for noncompliance with the grant conditions, and, if it sought to require the creation of a state program, whether it could do so constitutionally. *See* Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 142-44 (1947). *Cf.* National League of Cities v. Usery, 426 U.S. 833 (1976) (holding unconstitutional extension of federal minimum wage legislation to states as employers). For a discussion of *Usery,* see text accompanying notes 151-59 *infra.*

[104] Judge Frank Johnson, who has issued a number of important orders in institution cases, *e.g.,* Wyatt v. Stickney, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974), has argued that the respon-

because it is the courts—federal courts—that are assuming the responsibility of reforming the way the states carry out some of their most essential functions, judicial intervention has an effect not only on the conditions in the institutions but also on the basic allocation of power in American government. It is this effect that raises the most serious questions about the orders in the institution cases. To some, it may seem odd—perhaps conservative is the word—to suggest that the limits on federal judicial power have any relevance when the courts are seeking to fashion protection for individual liberties. But if the courts were to have plenary power to define constitutional values, command sufficient appropriations to support those values, and then control by equitable decree the spending of the money appropriated, they would be exercising all power of government—judicial, legislative and executive. Such a concentration of power was never contemplated by the Constitution. "The concentrating these in the same hands," said Madison in the Federalist papers, quoting Jefferson, "is precisely the definition of despotic government." [105] The Court may, as it claims, be supreme "in the exposition of the law of the Constitution," [106] but there must be some limit to federal judicial power to commandeer affirmative legislative and executive power even to enforce its decisions defining constitutional rights. It is not enough to say that it is the legislature, not the courts, that formally appropriates the money, and that it is the executive, not the courts, that formally directs its spending, if they have no choice but to do so in response to a court order. Some amount of decisionmaking power must be retained by the other branches of government before they can be compelled to exercise their affirmative powers. It is therefore necessary to analyze whether the judiciary in the institution cases has, to any extent, improperly invaded legislative and executive powers in ordering action to correct the constitutional violations found to exist.

Our inquiry must begin with the reasons for limiting judicial power because only if those reasons are applicable would judicial restraint be required. The Supreme Court has referred to three interests to be protected by limiting the power of the federal courts: the democratic process, the federal system, and the proper allocation

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sibility in those cases "passed by default to the judiciary." Johnson, *Observation: The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903, 915 (1976).

[105] THE FEDERALIST No. 48 (J. Madison) at 345 (B. Wright ed. 1961).

[106] Cooper v. Aaron, 358 U.S. 1, 18 (1958). *But see* P. BREST, PROCESS OF CONSTITUTIONAL DECISIONMAKING, CASES AND MATERIALS 67 (1975); G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 33 (9th ed. 1975).

of power within the federal government itself.[107] The effect on the democratic process in the institution cases stems from the fact that it is the judiciary, and not the politically accountable branches, that is directing the allocation of government funds. Thus the orders would be no less intrusive into the normal prerogatives of the legislature in a democratic society if it were state rather than federal courts issuing the orders as, indeed, is sometimes the case.[108] The effect on the federal system, on the other hand, occurs because a branch of the federal government is directing the allocation of state funds. Thus a conflict with principles of federalism would exist even if it were Congress, and not the federal courts, issuing the directions to state officials.[109] Finally, the effect on the allocation of power within the federal government occurs, as such, only in those cases in which the federal courts have ordered action by another branch of the federal government.[110] Because these interests differ, they must be examined separately to determine the extent to which they are affected by lower federal court orders in the institution cases. An examination of the eleventh amendment will then follow because, at least until last term,[111] that amendment seemed to determine the balance between the power of federal courts and the power of the states to control the allocation of money from the public treasury.

A. *The Democratic Process*

The anti-democratic nature of any judicial order invalidating legislative or executive action is well known, the result being that "the one non-elective and non-removable element in the government rejects the conclusions as to constitutionality arrived at by the two elective and removable branches." [112] Yet despite continued academic debate concerning the justification for this judicial power,[113] it has surely become a lasting part of the American constitutional system. I do not seek to question it here. Two aspects of the

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[107] *See* text accompanying notes 112-94 *infra*.

[108] *See, e.g.*, Wayne County Jail Inmates v. Lucas, 391 Mich. 359, 216 N.W.2d 910 (1974); Jackson v. Hendrick, 457 Pa. 405, 321 A.2d 603 (1974). *But see* State v. McCray, 267 Md. 111, 297 A.2d 265 (1972).

[109] *See* National League of Cities v. Usery, 426 U.S. 833 (1976).

[110] *See* Elrod v. Burns, 427 U.S. 347, 351-53 (1976); Baker v. Carr, 369 U.S. 186, 210 (1962).

[111] *See* Milliken v. Bradley, 97 S. Ct. 2749, 2761-62 (1977).

[112] Commager, *Judicial Review and Democracy*, in JUDICIAL REVIEW AND THE SUPREME COURT 64 (L. Levy ed. 1967).

[113] For a summary of this debate, see W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 7-30 (4th ed. 1975).

orders in the institution cases, however, suggest that they are a greater intrusion into democratic decisionmaking than the normal invalidation of a law on constitutional grounds. Rather than preventing the government from acting in an unconstitutional way, these orders mandate affirmative action by the legislative and executive branches to correct a constitutional violation. Moreover, the court orders involve a subject matter that is the very foundation of the discretion lodged in the other branches: the raising, allocation, and spending of government funds.

"Throughout most of our history, the form of the Supreme Court's contributions to public policy . . . [has been] negative" [114] because a judicial declaration that a statute is unconstitutional simply prevents the exercise of governmental power.[115] Affirmative judicial decrees mandating the expenditure of funds in the institution cases, however, require legislative action either in the form of reallocation of money from the legislature's priorities to the area of the courts' concern or the enactment of new taxes. The executive must also act affirmatively to implement the decree once the money is made available by the legislature, and that implementation is subject to continuing judicial supervision. The decrees in the institution cases, by establishing priorities for funding and by detailing how expenditures should be made, thus have the effect of legislation.[116] The affirmative nature of the order invades the democratic process not just by invalidating a legislative decision but by replacing that decision with a judicially designed substitute, a substitute created without "the legitimacy which flows from the process of democratic self-government." [117]

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[114] A. Cox, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 76 (1976).

[115] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), which launched judicial power to declare acts of Congress unconstitutional, denied power to the Court as well as to Congress. By declaring a congressional enactment unconstitutional, it withdrew from the Court a case that Congress wanted it to hear.

[116] *See generally* A. Cox, *supra* note 114, at 76-98; Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1296-98 (1976).

[117] A. Cox, *supra* note 114, at 88. In a recent Article Professor Chayes labelled litigation such as in the institution cases "public law litigation," Chayes, *supra* note 116, at 1284, and sought to defend its legitimacy, *id.* 1313-16. Such a label creates the impression that this kind of litigation is a normal function of the federal courts, but the examples Professor Chayes gives are principally of institution cases, desegregation cases, and reapportionment cases. As this Article seeks to show, the authority of the federal courts to issue affirmative orders as framed in the institution cases is by no means clear, and the authority exercised by the Supreme Court in desegregation and reapportionment cases is narrower than Professor Chayes acknowledges. *See* text accompanying notes 250-96 *infra*. Furthermore, the Supreme Court has attempted to limit such a role for federal courts in other areas. *See* text accompanying notes 120-48, 220-49 *infra*. Therefore, although Professor Chayes

Of course, requiring affirmative action by the political branches to correct constitutional violations is not unprecedented; the Supreme Court most notably required such action to desegregate the schools after *Brown v. Board of Education*.[118] But, as will be discussed,[119] no desegregation order approved by the Supreme Court has been as intrusive into local democratic decisionmaking as the orders in the institution cases. Moreover, the Supreme Court has made clear that although courts have the power to mandate affirmative action by the political branches, that judicial role is not the norm in constitutional litigation. Indeed, recent Supreme Court history has demonstrated the Court's intent to avoid, wherever possible, such a judicial role. A comparison of *United States v. Richardson*[120] with *Flast v. Cohen*,[121] and *Warth v. Seldin*[122] with *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[123] indicates the Supreme Court's reluctance to mandate action by the political branches that would entail continuing judicial supervision.

In *United States v. Richardson* the Court rejected a federal taxpayer's challenge to the constitutionality of the secrecy of the Central Intelligence Agency budget, holding that the taxpayer had not met the strict requirements enumerated in *Flast v. Cohen* for bringing a taxpayer suit. The *Flast* Court had permitted a taxpayer to challenge a federal statute on the grounds that it provided funds to religious schools in violation of the establishment clause of the first amendment. As Justice Powell noted in concurrence in *Richardson*, the attempt to distinguish the cases on the technical

sought to take Justice Holmes' advice to focus attention on "'what the courts will do in fact,'" 89 HARV. L. REV. at 1281-82 (quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897)), in fact public law litigation is a good deal less a normal function of the federal courts than Professor Chayes suggests. Moreover, in seeking to defend the expanded role of the courts he denigrates the ability of Congress to represent the interests of divergent groups in solving basic problems ("And to retreat to the notion that the legislature itself—Congress!—is in some mystical way adequately representative of all the interests at stake . . . is to impose democratic theory by brute force . . . ." *Id.* 1311), but it is not on an idealized conception of the legislature's representative character that the legitimacy of legislative action rests. Rather, that legitimacy derives from the Constitution, which gives the legislature, and no other branch, the power to make the basic policy decisions governing the nation's future. *See* text accompanying notes 137-48 *infra*; A. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962).

[118] 347 U.S. 483 (1954); 349 U.S. 294 (1955).

[119] *See* text accompanying notes 250-78 *infra*.

[120] 418 U.S. 166 (1974).

[121] 392 U.S. 83 (1968).

[122] 422 U.S. 490 (1975).

[123] 429 U.S. 252 (1977).

test of taxpayer standing was unconvincing,[124] but there was another, more important, distinction between them. Allowing a taxpayer suit in *Richardson* would have involved an intrusion in the democratic process that was not present in *Flast.* Invalidation of statutes—albeit state statutes—on establishment clause grounds had become a familiar role for the Court by the time of *Flast.*[125] Extending the Court's jurisdiction to the federal statute involved in *Flast* did not significantly extend the Court's power, nor did it require continuing judicial supervision of executive or legislative actions or the interpretation of an unexplored constitutional provision. A decision on the merits in *Richardson,* however, would have required the Court to interpret for the first time the constitutional obligation to publish from time to time "a regular Statement and Account of the Receipts and Expenditures of all public Money." [126] Because the Constitution does not specify who is obligated to publish such a statement, how much detail it requires, nor how often it must be issued, allowing a taxpayer to sue in *Richardson* would mean that virtually anyone could obtain a judicial decree mandating the performance, under judicial standards, of the affirmative obligation of government to disclose its expenditures. This possibility of numerous judicial orders mandating government disclosure, Justice Powell argued, would shift power away from a democratic form of government by substituting judicial pressure for the leverage that citizens should apply on their elected representatives.[127] The majority in *Richardson,* while relying on a technical interpretation of standing, also recognized this implication of the *Richardson* suit:

> [T]he absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. . . . Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens con-

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[124] 418 U.S. at 180-85 (Powell, J., concurring).

[125] *See, e.g.,* Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

[126] U.S. CONST. art. I, § 9, cl. 7.

[127] 418 U.S. at 188 (Powell, J., concurring).

> vince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.[128]

The Supreme Court similarly refused to permit judicial supervision of the solution of an intricate political problem in *Warth v. Seldin*.[129] In *Warth* the Court held that an attack on the exclusionary zoning practices of a Rochester, New York suburb could not be brought by individuals residing in the Rochester metropolitan area who desired to live there or by an organization of builders who desired to build there, because they lacked standing to sue. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[130] however, the Court found that a developer and its potential customers did have standing to challenge a suburb's refusal to rezone property the developers had contracted to improve. Although the *Arlington Heights* Court sought to distinguish *Warth* on the grounds that the *Arlington Heights* plaintiffs had shown more of a stake in the outcome of the litigation than those in *Warth*,[131] a more convincing distinction lies in the scope of the judicial role envisioned in the two cases. In *Warth* the plaintiffs sought an injunction against the suburb's exclusionary zoning practices as a whole. To grant such relief, the Court would be required to detail what kinds of zoning practices are constitutionally impermissible. Then, once it had defined the extent of impermissible exclusion, future cases would necessitate judicial supervision of the implementation of even a seemingly permissible zoning statute to ensure that the unconstitutional exclusion did not occur in its administra-

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128 *Id.* 179.

129 422 U.S. 490 (1975).

130 429 U.S. 252 (1977).

131 *Id.* 261-62. Unlike the plaintiffs in *Warth*, the Court asserted, the builder in *Arlington Heights* has shown an injury "'likely to be redressed by a favorable decision.'" *Id.* 262. But the *Arlington Heights* builder could not show, any more than could the *Warth* plaintiffs, that the inability to build or reside in the suburb was "the consequence of" the suburb's illegal acts. 422 U.S. at 506. The *Arlington Heights* builder had no assurance of the federal financing needed for his project, 429 U.S. at 261, and the *Warth* plaintiffs had no assurance that the economics of the housing market could enable them to move to the suburb. 422 U.S. at 506. In both cases, a change in the zoning decision might—or might not—result in plaintiffs having housing in the suburb; the result would depend on resolving financing problems. In both cases, the adverse zoning decision was but one of many hurdles that had to be overcome. The *Arlington Heights* Court found, however, that its facts, unlike those of *Warth*, required no "undue speculation." 429 U.S. at 261. In doing so, it relied principally on the fact that the *Arlington Heights* litigation was tied to a specific project, *id.*; but this specificity seems less important to the detection of a stake in the outcome of the litigation, *see* 422 U.S. at 527-28 (Brennan, J., dissenting), than to the limiting and narrowing of the type of judicial decision required on the merits.

tion. Such a decision thus involves judicial supervision of legislative and executive actions on a massive scale, as the state courts in New Jersey, where such suits are allowed, have found.[132] In *Arlington Heights,* on the other hand, the litigation simply sought zoning approval of a single project. If the alleged racial discrimination in the city's refusal to permit the project had been proven, the remedy would simply have been to require the zoning authorities to justify the rezoning on nonracial grounds or allow the project to be built.[133] No federal court supervision of the nation's zoning would be necessary; indeed, no judicial supervision of Arlington Heights's zoning would be required. Such a suit therefore required only narrowly circumscribed judicial intervention, allowing the plaintiff a remedy with little cost in terms of judicial resources.

The essential difference then between *Richardson* and *Flast* and between *Warth* and *Arlington Heights,* as the Court itself implied,[134] lies in the impact on the democratic process that would result from judicial intervention into the merits in these cases. Perhaps the Court should not inject such a consideration into the technical requirements of standing to avoid judicial intervention,[135] but the important point here is that it did so. Such a consideration is considerably more justifiable when the Court is fashioning the kind of order an equity court should direct toward the political branches of government. *Richardson* and *Warth* are important because they demonstrate the importance the Court places on avoiding affirmative orders that interfere with democratic decisionmaking. The judicial role currently exercised in the institution cases is surely no less intrusive into the democratic process than that which would have resulted from a decision on the merits in *Richardson* or *Warth,* not only because of the extent of judicial supervision involved, but, perhaps more significantly, because the institution cases involve the courts in the allocation of government resources.

The exercise of discretion in matters of taxation and budget allocation is the quintessential legislative responsibility. Indeed,

> representative institutions were brought into existence . . . by the ability of nobles, clergy, and townsfolk to re-

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132 *Compare* Oakwood at Madison, Inc. v. Township of Southern Madison, 72 N.J. 481, 371 A.2d 1192 (1977) *with* Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed,* 423 U.S. 808 (1975).

133 429 U.S. at 271 n.21.

134 *See* Warth v. Seldin, 422 U.S. 490, 498 (1975); United States v. Richardson, 418 U.S. 166, 179 (1974).

135 *See generally* Davis, *Standing: Taxpayers and Others,* 35 U. CHI. L. REV. 601 (1968).

> sist the royal tax collectors, to assert their right of being asked for their consent to new or exceptional levies. . . . This celebrated "power of the purse" has remained one of the cherished activities of parliamentary bodies . . . Closely related to this power is the power to determine the expenditures of the government. In the beginning the two were joined; Parliament granted specific levies for specific tasks. Today, the expenditures of the government are, under a representative scheme, fixed through an annual budget.[136]

The Constitution recognizes the critical importance of controlling the power of raising and allocating money in the most democratic fashion possible. It requires that "[a]ll Bills for raising Revenue shall originate in the House of Representatives," [137] the most popular branch of government, and that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." [138] The reason for vesting in Congress the power both to raise and allocate money derives from the fact that, even with the imperfections of Congress, no other body has the institutional capability of making such decisions. Indeed, the principal protection for taxpayers from excessive taxation and for recipients of aid from disproportionately allocated government resources rests on the accountability of the legislature to the public, on its "broad-based diversity," and on its inability to act without majority support.[139] For this reason, the courts generally do not question legislative decisions on the distribution of tax burdens or the allocation of revenues among competing needs.[140] In fact, the Court has found the institutional protection for the decision to raise taxes so essential that it has hinted that any delegation of such a decision even to the executive branch would raise constitutional problems.[141]

The orders in the institution cases, of course, do not deal directly with either the raising or the allocation of money. They simply require a specified level of services, leaving to the legislature the necessary revenue raising and allocation decisions that result from the order. But although the court does not specify the source

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136 C. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY 281 (1968).

137 U.S. CONST. art. I, § 7, cl. 1.

138 *Id.* art. I, § 9, cl. 7.

139 Freedman, *Review: Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 325-26 (1976).

140 *Id.; see* text accompanying notes 332-40 *infra*.

141 National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974); *see* Freedman, *supra* note 139, at 318-29.

of the money needed to comply with its order, it still is engaging in budget allocation. The selection of each ingredient in the court's definition of the requirements of due process necessitates either the elimination of some element in another part of the government's budget or the raising of additional resources. Because government resources are limited and because some commitments of those resources cannot be reduced due to contract or other obligations,[142] the impact of a court's decision falls on a relatively few budget items. The court is in fact allocating the budget away from those items, probably without even knowing what they are. The court's allocation decision is simply that every element of the court decree take precedence over every other competing element in the budget, whatever they may be. The legislature retains no say at all about the comparative value of the item lost to the item required by the court. Thus the value of legislative decisionmaking on budget allocation is undermined, to a greater or lesser degree, depending on the size of the court's demands and the amount of money available.

Some have argued that such judicial intervention in the budget process in favor of prisoners and the mentally ill can be justified because those groups are left out of the normal political decisionmaking processes.[143] Indeed they often are. But the scarce resources allocated by government are largely allocated to people indistinguishable from those affected by the court orders. The mentally ill involuntarily committed to an institution may receive additional services under court order at the expense of those voluntarily committed to the same institution, or those not committed but using outpatient facilities at public hospitals or mental health centers. Prisoners may receive better medical care at the expense of the parolee who seeks it at a public hospital, or they may receive training or addiction services at the expense of the public at large who need identical services. Many beneficiaries of court orders are not entitled to vote, but neither are the children whose access to education, libraries, or welfare benefits might be curtailed to pay for the court order. The allocation of scarce resources by court order is not

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142 Most government expenditures—almost 75% of the federal budget, for example—are "uncontrollable" in the sense that they are mandated by existing law or by a preexisting contractual obligation. B. BLECHMAN, E. GRAMLICH, & R. HARTMAN, SETTING NATIONAL PRIORITIES: THE 1976 BUDGET 192-93 (1975). Even the use of the remainder can be changed in the short run only to a limited extent. *Id.* 197-207. The difficulties in modifying government contractual obligations were recently reemphasized by the Supreme Court. United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

143 Chayes, *supra* note 116, at 1315.

likely to be from the fortunate to the powerless; it is already the powerless to whom the state largely directs its resources.

The justification for judicial intervention in favor of the institutionalized, therefore, is not that they are less politically powerful but that they are being held involuntarily by the state. The state cannot constitutionally hold people, the argument runs, without meeting certain standards because to do so would deny them liberty without due process of law.[144] It need not meet those standards when providing services to those who voluntarily use them. Indeed, it can deny those services entirely. Such a division of government budgets between voluntary and involuntary recipients provides the basis for constitutional analysis, but, if applied strictly in this era of limited resources, it would seriously reduce the legislature's ability to allocate government resources. If the distinction between voluntary and involuntary should become the basis of resource allocation, the pivotal issue in budget formulation would become the judicial definition of involuntary commitment. Do children, who go to school under the threat of truancy laws, attend "voluntarily?" Are the physically ill, or chronically ill, who are in public hospitals because no one else will take them, "voluntary" patients?[145] Unless the answer to these questions is no, then the budgets of these institutions, together with those of clearly voluntary services, such as libraries and higher education, would be subject to reallocation in favor of those found to be held involuntarily.

By reordering spending priorities in favor of the involuntarily committed, the orders in the institution cases thus have invaded the critical legislative responsibility of revenue raising and budget allocation and, because of their detail, the executive responsibility of managing institutions as well. This shift of power away from elected officials to individuals appointed for life weakens the democratic accountability of government and "[i]t is no light thing to do that."[146] "[C]oherent, stable—and *morally supportable*—government is possible only on the basis of consent, and . . . the secret of consent is the sense of common venture fostered by institutions that

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[144] *See, e.g.*, Rhem v. Malcolm, 507 F.2d 333, 337 (2d Cir. 1974); Donaldson v. O'Connor, 493 F.2d 507, 520 (5th Cir. 1974), *aff'd*, 422 U.S. 563 (1975).

[145] A proposed congressional bill dealing with the institution cases, *see* text accompanying notes 386-89 *infra*, includes in its definition of institutions subject to suit on constitutional grounds state facilities for the chronically physically ill or handicapped and nursing homes. H.R. 2439, 95th Cong., 1st Sess. § 1(5) & (6) (1977). *See also* Barnett, *supra* note 22, at 611-17.

[146] J. THAYER, JOHN MARSHALL 107 (1901).

reflect and represent us and that we can call to account." [147] Some may be willing to allow, even encourage, federal judges to improve society regardless of the cost to democracy itself, but the Supreme Court has made clear that substitution of a judicial decree for the political process will be tolerated, if at all, only if the judicial intrusion into politics is limited to the maximum extent possible.[148] The orders in the institution cases must therefore be framed to comply with such a limit.

B. *Federalism*

Orders of federal courts mandating state expenditures in the institution cases clearly affect the balance of power between the federal and state governments. Although some amount of federal power over state activities is envisoned by the Constitution,[149] the Supreme Court has held that the concept of federalism protects state sovereignty to some degree from federal control.[150] The question in the institution cases is whether the federal courts have exceeded the limits of permissible federal power and invaded the area of protected sovereignty.

In *National League of Cities v. Usery* [151] the Court relied on the principle of federalism to declare unconstitutional the congressional extension of the Fair Labor Standards Act [152] to state and local government employees, holding the extension beyond the power of Congress under the commerce clause because it displaced "the States' freedom to structure integral operations in areas of traditional governmental functions." [153] The Court emphasized specifically the impact of the congressional statute on the ability of the states to allocate and control their own financial resources. The Court noted that an extension of the Fair Labor Standards Act would entail significant mandatory increases in state and local government budgets, resulting in "forced relinquishment of important governmental activities" [154] to meet the federal statute's requirements and displace-

147 A. BICKEL, THE LEAST DANGEROUS BRANCH 20 (1962) (emphasis in original). *See generally id.* 16-23; A. BICKEL, THE MORALITY OF CONSENT 3-30 (1975). For a similar comment on the Boston school desegregation cases, discussed in note 277 *infra*, see Lewis, *The Boston Schools II*, N.Y. Times, May 24, 1976, at 29, col. 5.

148 *See* text accompanying notes 134-35 *supra* & 220-307 *infra*.

149 *See* U.S. CONST. art. VI, cl. 2.

150 *See* National League of Cities v. Usery, 426 U.S. 833 (1976); Younger v. Harris, 401 U.S. 37 (1971).

151 426 U.S. 833 (1976).

152 29 U.S.C. §§ 201-19 (1970 & Supp. V 1974).

153 426 U.S. at 852.

154 *Id.* 847.

ment of "state policies regarding the manner in which they will structure delivery of those government services which their citizens require." [155] These combined effects "impair[ed] the States' 'ability to function effectively within a federal system' " [156] and therefore exceeded congressional power. *Usery* thus demonstrates that the concept of federalism shields the allocation and management of state resources even from indirect congressional control, at least when Congress is acting under the commerce clause, although the extent of that protection is by no means elucidated in the Court's opinion. Many congressional actions have significant state budgetary implications, yet *Usery* does not question all such actions.[157] But *Usery* at least indicates that state management of its financial resources is an interest subject to some kind of protection by the notion of federalism, the extent of protection depending on the federal interest involved.[158] *Usery* specifically did not decide the extent of congressional power under the fourteenth amendment to redirect allocation of state expenditures.[159]

Although the Court in *Usery* sought to delineate some substantive areas of state activity protected from congressional control by the notion of federalism, most of the Supreme Court's applications of the federalism doctrine limiting federal judicial power have focused on the form of intervention; these decisions are characterized by a reluctance to allow federal court interruption or supervision of local decisionmaking. The principal application of this policy is the doctrine known as *Younger* abstention. This doctrine, based on

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[155] *Id.* The Court distinguished Fry v. United States, 421 U.S. 542 (1975), because the application of the Economic Stabilization Act of 1970 to the states, upheld in *Fry*, did not involve an increase in local budgets or a restriction of state choices concerning the structure of government operations. 426 U.S. at 853.

[156] 426 U.S. at 852.

[157] *See id.* 852-55, distinguishing the federal regulations in question in Fry v. United States, 421 U.S. 542 (1975), and United States v. California, 297 U.S. 175 (1936).

[158] This was Justice Blackmun's reading of the opinion, *id.* 856 (concurring opinion), and his vote was necessary to enable the Court's opinion to command a majority. *See* Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1222-50 (1977). For another reading of the case, see Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977). Professors Michelman and Tribe suggest that *Usery* supports a theory of individual rights against the government for essential services, 86 YALE L.J. at 1181-91, 90 HARV. L. REV. at 1090; if true, the theory would entail massive federal judicial involvement in matters of the purse. *But see* Maher v. Roe, 97 S. Ct. 2376 (1977); text accompanying notes 346-50 *infra*.

[159] 426 U.S. at 852 n.17.

Younger v. Harris[160] and related cases,[161] denies the federal courts the power to enjoin ongoing state criminal proceedings, and at least some ongoing civil proceedings,[162] except in the most exceptional cases. This policy of federal restraint is based in part on the view that the state judicial proceeding provides an adequate alternative forum to resolve the issues sought to be litigated in the federal court.[163] The *Younger* Court underscored, however,

> an even more vital consideration, the notion of "comity," that is, 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. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." [164]

These two reasons for *Younger* abstention may both be applicable to a particular case, such as a federal injunction of a state criminal proceeding. Because such an injunction would interrupt a state court proceeding itself likely to be able to resolve the federal issues, federal intrusion into state government operations is unnecessary and unwarranted.[165] But the Court in *O'Shea v. Littleton*[166] and *Rizzo*

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[160] 401 U.S. 37 (1971).

[161] For a discussion of the cases explicating *Younger* abstention, see *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1274-1330 (1977). *Younger* abstention should not be confused with so-called *Pullman* abstention, based on Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), which requires federal courts not to decide a case when there is an unclear issue of state law the resolution of which might avoid federal constitutional questions. Although considerations of federalism play a role in *Pullman* abstention, its primary emphasis seems to be on avoiding unnecessary federal judicial resolution of constitutional issues. Thus *Pullman* abstention does not, unlike *Younger* abstention, prevent federal judicial resolution of an issue, but merely postpones it to determine if the litigation can be decided on narrower grounds. *See generally* Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590 (1977); Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974); *Developments in the Law, supra*, at 1250-64.

[162] *See* Juidice v. Vail, 430 U.S. 327 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

[163] Younger v. Harris, 401 U.S. 37, 43-44 (1971); P. BATOR, D. SHAPIRO, P. MISHKIN & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 183 (2d ed. 1977 Supp.).

[164] 401 U.S. at 44.

[165] *See Developments in the Law, supra* note 161, at 1282-84.

[166] 414 U.S. 488 (1974).

v. Goode [167] indicated that the *Younger* emphasis on federalism has a viability independent of the existence of a state judicial forum to decide the federal issues alleged.

In *O'Shea v. Littleton* citizens of Cairo, Illinois alleged a pattern and practice of racial discrimination in the city's administration of criminal justice, resulting in higher bond requirements and harsher penalties being set for black activists and their allies. The Court dismissed the complaint because it did not allege a ripe "case or controversy" as required for federal court jurisdiction by article III.[168] The Court found no real or immediate threat of injury to the plaintiffs because none of them would be subject to the alleged discrimination unless they subjected themselves to the criminal justice system by violating an unchallenged law. Such an eventuality was considered too speculative to justify federal judicial intervention. The *O'Shea* Court, however, did not rest simply on finding the complaint too speculative. As an additional reason for rejecting the complaint, the Court cited the notions of equity, comity, and federalism espoused in *Younger*.[169] The Court stated that a remedy for the pattern and practice of abuses in the local criminal justice system would require "an ongoing federal audit of state criminal proceedings," [170] a continuous monitoring of the operation of the state system by the federal courts that would result in intrusion into the system's daily operations whenever abuses were alleged. The Court refused to permit such a federal judicial role in the management of the state criminal justice system. This result in *O'Shea* might be interpreted simply to reflect the Court's concern expressed in *Younger* that federal courts should not intervene in ongoing state judicial proceedings. A remedy for the violations alleged in *O'Shea* would require such an intervention in the future, even though there was no ongoing state proceeding at the time of the *O'Shea* litigation. Unlike the plaintiffs in *Younger*, however, the *O'Shea* plaintiffs would surely have lacked an adequate remedy at the state level if their allegations about the local criminal justice system were true. Thus *O'Shea* extended *Younger* by prohibiting judicial interference with state court proceedings even where those proceedings could not be expected to resolve the issues sought to be litigated in the federal courts.[171]

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[167] 423 U.S. 362 (1976).

[168] 414 U.S. at 493-99.

[169] *Id.* 499.

[170] *Id.* 500.

[171] *See id.* 510-11 (Douglas, J., dissenting); *Developments in the Law*, *supra* note 161, at 1300.

Rizzo v. Goode [172] made clear that the Court's federalism concerns expressed in *O'Shea* protected more than state judicial proceedings. In *Rizzo* plaintiffs, who included a class of all black residents of Philadelphia, sought to remedy what they alleged was a pattern of police misconduct in that city. The district court, finding such a pattern and practice, issued an injunction requiring the creation of new methods of dealing with citizen complaints of police misbehavior, including the adjudication of complaints by "an impartial individual or body, insulated so far as practicable from chain of command pressures." [173] The Supreme Court reversed, citing *O'Shea* in expressing doubts whether plaintiffs had adequately alleged that they were subject, at the hands of unknown and unnamed policemen, to a "real and immediate" injury.[174] But, as in *O'Shea,* the Court did not simply find the allegations too speculative. The Court went on to discuss the limits on federal equitable power attributable to principles of federalism, limiting the district court's power over executive decisionmaking even though no ongoing state proceeding could hear the federal claims. The Court rejected the district judge's notion that federal courts had the power to supervise the functioning of local police departments.[175] Stressing the government's extremely wide latitude in the conduct of its own internal affairs, the Court observed:

> Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as respondents here.[176]

O'Shea and *Rizzo* thus interpret the principles of federalism to provide protection for local decisionmaking from federal judicial supervision, a position similar to the preference for democratic

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[172] 423 U.S. 362 (1976).

[173] COPPAR v. Rizzo, 357 F. Supp. 1289, 1321 (E.D. Pa. 1973), *aff'd sub nom.* Goode v. Rizzo, 506 F.2d 542 (3d Cir. 1974), *rev'd,* 423 U.S. 362 (1976).

[174] 423 U.S. at 371-73.

[175] *Id.* 380.

[176] *Id.*

resolution of issues expressed in *Warth* and *Richardson*.[177] Indeed, *O'Shea* and *Rizzo* provide that protection in its strictest form, suggesting that federalism is an absolute bar to a federal judicial remedy for the alleged violations.[178] But such a bar to federal judicial power must be strictly interpreted in light of the established federal judicial power to provide a remedy for proven state violations of individual rights.[179] Essential to the results in *O'Shea* and *Rizzo* is the fact that the Court was not forced to confront established fourteenth amendment violations; this was so because the Court found no justiciable controversy in either case. The fourteenth amendment itself, however, increases federal power over state activities;[180] therefore, cases like *Usery*, which limit federal power under the commerce clause, and *O'Shea* and *Rizzo*, which involve no justiciable fourteenth amendment violations, should not preclude a federal judicial remedy in cases, such as the institution cases, in which fourteenth amendment violations are established.

The mere existence of a fourteenth amendment violation does not mean, however, that all restraints on the federal government in its relations with the states are eliminated. Even in cases of proven fourteenth amendment violations the Court has made clear that the form of the remedy, at least, is affected by federalism constraints.[181] If, as *Usery* suggests,[182] budget allocation is vital to the continued independent existence of the states, and if, as *O'Shea* and *Rizzo* suggest,[183] continual federal judicial supervision of state performance of its obligations improperly invades state responsibilities, these concerns do not simply disappear in a fourteenth amendment context. The principles of federalism are still applicable in cases of fourteenth amendment violations to ensure that the federal courts minimize their incursions into the area of state sovereignty. In

177 *See* text accompanying notes 120-35 *supra*.

178 423 U.S. at 380; 414 U.S. at 499; *see* Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 320 (1976).

179 *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Reynolds v. Sims, 377 U.S. 533 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954).

180 *See* cases cited note 379 *infra*.

181 *See, e.g.*, White v. Weiser, 412 U.S. 783 (1973); Sixty-seventh Minnesota State Senate v. Beens, 406 U.S. 187 (1972).

182 426 U.S. at 845.

183 In *O'Shea* the Court found that a continual federal judicial monitoring of the performance of the local criminal justice system would be required, and that that would be "unworkable." 414 U.S. at 500. If a police review board had been established in *Rizzo*, not only would the department's organization have been modified by court order, but also the review board's power to enforce any of its findings would have had to stem from the power that created it—intervention of the federal district judge. Thus a continual federal judicial supervision of police conduct and discipline would be required. *See* 423 U.S. at 380.

that sense, the principles of federalism must be considered in formulating the remedy in the institution cases.

C. *The Allocation of Power Within the Federal Government*

The constitutional provision for the separation of powers, strictly applicable only to the allocation of power among the three branches of the federal government,[184] has been interpreted to restrict federal judicial power in a way comparable to the restrictions, discussed earlier, established in the federal-state context. In *Gilligan v. Morgan*[185] the Court construed the political question doctrine—a doctrine that limits judicial power in light of the separation of powers[186]—as a restraint on federal equitable power to oversee the operations of the political branches of the federal government. In *Gilligan* students at Kent State University, in the aftermath of the 1970 confrontation, sought a declaratory judgment and an injunction against the Ohio National Guard to ensure that its training and direction did not promote excessive use of force. Although the Court could readily have dismissed the case on other grounds,[187] it turned instead to the assertion that the complaint raised a political question. Any relief, the Court stated, would necessitate "continuing surveillance by a federal court over the training, weaponry, and orders of the [National] Guard, [and] would therefore embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government."[188] Judicial evaluation of alternative procedures and policies to correct the alleged abuses would be beyond judicial competence because such complex and subtle decisions are matters of discretion, "appropriately vested in branches of the government which are periodically subject to electoral accountability."[189] While leaving open to judicial resolution allegations of specific unlawful misconduct by military personnel, allegations which would narrow and focus the judicial role in any pending controversy, the Court held that the suit in its present form raised a nonjusticiable political question.[190]

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184 *See* Elrod v. Burns, 427 U.S. 347, 351 (1976); Baker v. Carr, 369 U.S. 186, 210 (1962).

185 413 U.S. 1 (1973).

186 Baker v. Carr, 369 U.S. 186, 210 (1962).

187 Four Justices considered the case moot, 413 U.S. at 12; the suit might also have been dismissed as "speculative" under the doctrine of ripeness as espoused in O'Shea v. Littleton, 414 U.S. 488 (1974), and Rizzo v. Goode, 423 U.S. 362 (1976).

188 413 U.S. at 7.

189 *Id.* 10.

190 *Id.* 11-12.

To date only a few institution cases involve federal judicial mandates of improvements in federal facilities,[191] but any extensive judicial attempt to mandate executive or legislative action to improve federal operations would, like *Gilligan,* involve the courts in supervision of matters vested in the discretion of the political branches of government and thus would raise questions about the limits on judicial power inherent in the separation of powers. Indeed, the limits on the role of the judiciary are perhaps most clearly understood in the federal context; judicial power to require that Congress exercise its power to draw money from the Treasury [192] or that the President "take Care that the Laws be faithfully executed" [193] in a manner prescribed by a court order seems clearly circumscribed by the independent discretion given the other branches of government in the exercise of their constitutional powers. Thus, arguments for expansion of federal judicial power usually stop short of supporting judicial incursion into the power of the coordinate branches of the federal government.[194]

D. *The Eleventh Amendment*

The eleventh amendment,[195] hurriedly passed to overturn the Supreme Court's decision in *Chisholm v. Georgia* [196] that a state could be held liable for its debt in federal court, reaffirmed that the immunity of states from private suits, absent the states' consent, applied to suits against the states in federal court.[197] This doctrine of sovereign immunity has been invoked principally to restrict federal judicial power in the *Chisholm* context—the assertion of private

191 *See* cases cited note 19 *supra.*

192 U.S. CONST. art. I, § 9, cl. 7.

193 *Id.* art. II, § 3.

194 For example, the federal government is excluded from the proposed legislation dealing with the institution cases. *See* note 386 *infra* & accompanying text.

195 "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST., amend. XI.

196 2 U.S. (2 Dall.) 419 (1793).

197 The eleventh amendment has been interpreted as a clarification of the intent of article III of the Constitution, *see* Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism,* 89 HARV. L. REV. 682, 684-85 (1976). Accordingly, notwithstanding the fact that the eleventh amendment itself is restricted to suits against a state by citizens of other or foreign states, the Court has held that the doctrine of sovereign immunity protects a state against suits in federal court by its own citizens as well. Hans v. Louisiana, 134 U.S. 1 (1890). The doctrine also serves to protect the federal government against unconsented suits in federal court. *See generally* P. BATOR, D. SHAPIRO, P. MISHKIN & W. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1339-51 (2d ed. 1973).

claims against the public treasury.[198] It might, therefore, seem relevant to determination of the extent of federal judicial power to mandate state expenses in institution cases brought by private individuals. Last term, however, the Supreme Court in *Milliken v. Bradley*[199] rejected a state's eleventh amendment defense to a direct federal court order to appropriate money for a specified purpose.

An understanding of the decision in *Milliken* requires an understanding of eleventh amendment precedent. Because the eleventh amendment denies all federal judicial power to redress private claims against the states, the Court recognized early that a broad reading of the amendment would severely restrict federal judicial power to protect individual rights against government wrongdoing. It therefore adopted the fiction that an action against a government official is not an action against the state and therefore is not barred by sovereign immunity.[200] Accordingly, the Court reasoned in *Ex parte Young*[201] that an attempt to restrain an individual government officer from acting pursuant to an unconstitutional statute was a restraint only on the officer, and not the state, and thus not prohibited by the eleventh amendment. But as the Court had earlier recognized,[202] if any suit were allowed as long as the named defendant was a government official rather than the state, the doctrine of sovereign immunity would be destroyed altogether. The Court therefore has attempted to delineate when a suit nominally against a government official is really against the state and thus barred by the eleventh amendment, and when it is, both nominally and in fact, against the official only and thus allowable.

This delineation has not been easy. On the one hand, the Court has held that a private action for damages, when the money judgment would be in fact paid by the state, remains barred by sovereign immunity even if nominally brought against a government official.[203] Similarly, the leading case of *Edelman v. Jordan*[204] held that the eleventh amendment barred a suit in equity seeking to recover retroactively social security benefits that the state wrongfully withheld from the plaintiffs because the payments would in fact

198 *See* Tribe, *supra* note 197, at 686-88.

199 97 S. Ct. 2749, 2761-62 (1977).

200 *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 857 (1824). *See generally* C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 99-105 (1972).

201 209 U.S. 123 (1908).

202 Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828); *see* C. JACOBS, *supra* note 200, at 102-03.

203 Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945).

204 415 U.S. 651 (1974).

come from the state's general resources. On the other hand, the *Edelman* Court recognized that not every suit with an impact on the public treasury would be barred by the eleventh amendment:

> As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night. The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*. . . . But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra*.[205]

Milliken v. Bradley [206] required interpretation of this quotation from *Edelman*. In *Milliken* a federal district court ordered Michigan to appropriate money to support specified programs for remedial education to remedy its unconstitutional segregation of the Detroit public schools. Critical to the eleventh amendment issue in *Milliken* was whether the *Edelman* Court had meant to suggest that "ancillary," "inevitable" effects on the public treasury would not be barred by the eleventh amendment while a direct order against the treasury would be barred, or, alternatively, that a prospective order would not be barred, no matter what the effect on the public treasury, but a retroactive order, like that in *Edelman*, would violate the eleventh amendment. The Court in *Milliken* unanimously adopted the latter, prospective-retroactive, reading of *Edelman*, thus upholding the district court order to pay for remedial education because it was prospective in nature, despite its "direct and substantial impact on the state treasury." [207] Because they too

[205] *Id.* 667-68.

[206] 97 S. Ct. 2749 (1977).

[207] *Id.* 2762.

are prospective, the orders in the institution cases would therefore also not be barred by the eleventh amendment under *Milliken.*

If the Court in *Milliken* had accepted instead the direct-ancillary distinction of *Edelman,* it would have invalidated the federal court order in that case on eleventh amendment grounds; presumably the orders in the institution cases would be equally invalid. In fact, the *Milliken* Court's reliance on the distinction between prospective and retroactive orders is largely unreasoned,[208] and it is considerably less plausible than reliance on the distinction between "ancillary" and "direct" orders against the public treasury. If the essential issue under the eleventh amendment is whether the suit is "really" against a government official or against the state, it is hard to see why the prospective or retroactive effect on the public treasury is relevant. If the affirmative decree requires not the defendant official but the state itself, including the legislature, to appropriate money, it appears to be a suit against the state whether the money is to be paid for future or past claims. It is, of course, tenuous to suggest that even a negative order against a government official does not restrain the state itself, but the fiction that the suit is against the official alone loses all credibility if affirmative action by the state itself is required to comply with the court order. On the other hand, if only the official is restrained and no affirmative action by the state is mandated, an "ancillary," incidental impact on the state treasury might not turn the suit into one against the state itself. The very concept of an "ancillary" effect implies that the state is not directly involved in the suit. Indeed, unlike the Court's reliance on the prospective-retroactive distinction, an eleventh amendment distinction based on whether there is an affirmative mandate on the public treasury, rather than merely an incidental monetary effect, is supported both by prior eleventh amendment

208 Although the Court emphasizes the prospective nature of the relief sought, *id.* 2762, nn.21 & 22, it does not say why that prospectivity matters. It does say that the *Milliken* relief, unlike that of *Edelman,* could not "wipe the slate clean by one bold stroke," *id.* 2762, and did not involve a raid by individual citizens for an accrued monetary liability. *Id.* 2762 n.22. These explanations may be no more than reformulations of the distinction between prospective and retroactive relief, but they could provide a rationale for that distinction as well. A retroactive judgment might be seen as requiring immediate payment from limited funds—in "one bold stroke"—while prospective relief might allow compliance over time depending on fiscal constraints. ("[T]he injunction entered here could not instantaneously restore the victims of unlawful conduct to their rightful condition." *Id.* 2762 n.21.) A similar implication could be drawn from *Edelman* itself. 415 U.S. at 666 n.11. Alternatively, the Court could be emphasizing that no private payments to individuals would result from a *Milliken* decree, although the relevance of whether the recipient of the money is an individual or local institution is by no means clear. In both *Milliken* and *Edelman* the state treasury is forced to disburse money because of a private suit.

precedent[209] and by the reasons for the adoption of the eleventh amendment itself.[210]

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[209] The impermissibility of affirmative decrees was originally enunciated in Louisiana v. Jumel, 107 U.S. 711 (1883). Louisiana had passed a statute in 1874 issuing bonds and promising their payment in the most extravagant terms, including an assurance of the imposition of a special tax without further legislative authorization if necessary for payment, as well as a declaration that diversion by a state official of those tax revenues to a purpose other than payment to the bonds was a felony. *Id.* 713. Although this obligation could not be impaired by the state without violating the contract clause of the Constitution, *id.* 719-20, in 1879, Louisiana sought to stop further levy of the promised tax. The bondholders then sued to declare the 1879 statute a violation of the contract clause, but the *Jumel* Court held the action barred by the eleventh amendment. Although the relief was phrased as an injunction against enforcement of the 1879 statute, the *Jumel* Court reasoned that its real nature was an affirmative order on the state:

> The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared that it shall not be done.

Id. 721.

The remedy sought thus implied power in the federal courts to control the payment of money not by the normal damage action but by "assuming the control of the administration of the fiscal affairs of the State to the extent that may be necessary to accomplish the end in view." *Id.* 722. Such a replacement of judicial for political control of state finances was held barred by the eleventh amendment. *Jumel* was followed by several cases that similarly barred affirmative relief against the state, *see* C. JACOBS, *supra* note 200, at 122-30, culminating in a proposed eleventh amendment test enunciated in Pennoyer v. McConnaughy, 140 U.S. 1 (1891):

> The dividing line between the cases to which we have referred [allowing the suit as one against an individual officer] and the class of cases in which it has been held that the State is a party defendant, and, therefore, not suable, by virtue of the inhibition contained in the Eleventh Amendment to the Constitution, was adverted to in *Cunningham v. Macon & Brunswick Railroad,* where it was said, referring to the case of *Davis v. Gray, supra: "Nor was there in that case any affirmative relief* granted by ordering the governor and land commissioner *to perform any act towards perfecting the title of the company."* 109 U.S. 453, 454. Thus holding, by implication, at least, that affirmative relief would not be granted against a State officer, by ordering him to do and perform acts forbidden by the law of his State, even though such law might be unconstitutional.

Id. 16 (emphasis in original).

These cases have not been overruled, and have moreover been followed in cases dealing with federal sovereign immunity, *see, e.g.,* Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 691 n.11, 703-04 (1949), unless, of course, *Milliken* itself overrules them.

[210] Anti-Federalists, of course, supported the amendment as a protection for the states from unwarranted federal interference. C. JACOBS, *supra* note 200, at 71. But the Federalists supported it too, because they recognized the impracticality of relying on judicial remedies as a means of strengthening national control of the states. Even Alexander Hamilton had stated prior to the adoption of the Constitution itself that the states could not be sued without their consent, arguing:

> To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it

Despite the weakness of the *Milliken* decision in its eleventh amendment analysis, the result of the case makes a good deal of sense, not only for that case but for the institution cases as well. The difficulty with relying on the eleventh amendment to bar direct federal court mandates on the state treasury is that eleventh amendment prohibitions are absolute, denying federal power to provide the remedy under any circumstances. Such rigidity is a hindrance to adjusting the balance of federal-state power in constitutional cases. In *Milliken,* for example, the intrusion into state sovereignty by the direct orders was minor because only a trivial amount of money was involved,[211] while the need for that intrusion to protect federal rights was substantial.[212] Because the state had, in fact, already agreed to fund desegregation projects costing considerably more than the ones being litigated,[213] to deny any federal judicial flexibility to provide the necessary additional remedy would have protected state sovereignty solely as a matter of principle, without any compelling need to do so. Moreover, because the distinction between direct and ancillary effects is by no means self-defining, and because the financial impact of the two kinds of orders may often be equivalent, a flat prohibition of direct orders requiring the states to spend money would simply engender judicial ingenuity to accomplish the desired result in an indirect way. Indeed, many existing court orders framed in negative terms in reality have an affirmative impact on the public treasury, yet are not barred by the eleventh amendment because they are not mandatory in form.[214] It would be

> could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a preëxisting right of the State Governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

THE FEDERALIST No. 81 at 511-12 (B. Wright ed. 1961). These difficulties of enforcement exist only if a federal court orders the state itself to act in a certain way. It is the direct order, followed by state resistance, that has "the makings of a constitutional crisis." Jaffe, *Suits Against Governments and Officers: Sovereign Immunity,* 77 HARV. L. REV. 1, 26 (1963).

211 The cost, 5.8 million dollars, 97 S. Ct. at 2764, was 0.25% of Michigan's expenditures for education in 1974. *See* COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 260-61 (1976-77).

212 As the Court of Appeals for the Sixth Circuit noted, the effects of the Supreme Court's first decision in the case, Milliken v. Bradley, 418 U.S. 717 (1974), foreclosing an interdistrict remedy to desegregate the Detroit school system, made elimination of unconstitutional segregation "extremely difficult (if not impossible)." Bradley v. Milliken, 540 F.2d 229, 236 (6th Cir. 1976). If the Supreme Court had disapproved the remedial education decree in its second decision, there would have been no apparent remedy for the unconstitutional segregation.

213 97 S. Ct. at 2755 n.11, 2765.

214 *See, e.g.,* Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969). *But see* Edelman v. Jordan, 415 U.S. 651, 671 (1974) (disapproving retroactive payments made in *Shapiro, supra*).

more sensible to distinguish permissible orders by the extent of their financial burden or their otherwise intrusive nature rather than on the basis of their form, but eleventh amendment analysis does not permit the courts to do so. Finally, deciding the permissibility of federal court mandates of government expenditures on eleventh amendment grounds would require the acceptance in that context of all of eleventh amendment law, with quite undesirable consequences. For example, the Court decided as early as 1890 that eleventh amendment protection does not extend to political subdivisions of the state, such as cities and counties.[215] Thus, strictly as as eleventh amendment matter, federal courts could order any type of affirmative relief against the major cities of this country, even if such relief against the states themselves were barred. Yet in *Milliken* the financial impact of the court order on Detroit was considerably more serious than the impact on the state.[216] Although one might be tempted to argue against the continued viability of this extraordinary anomaly of eleventh amendment law,[217] the rule was unanimously reaffirmed only last term.[218]

Although the retroactive-prospective test affirmed in *Milliken* allows the orders in the institution cases to withstand eleventh amendment attack, it does not, by itself, render those orders permissible without further analysis. The eleventh amendment is only one bar to a federal court mandate of state expenditures. As discussed above, any such mandate will affect several important interests—federalism, the democratic process, and, in some cases, the allocation of power within the federal system. In its own decisions affecting the public treasury, the Supreme Court has recognized the

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215 *See* Lincoln County v. Luning, 133 U.S. 529 (1890).

216 Bradley v. Milliken, 540 F.2d 229, 247-50 (6th Cir. 1976). Apparently the city decided to absorb its portion of the increase to receive state aid. 97 S. Ct. at 2766 n.3.

217 State involvement in local government finances was virtually nonexistent in 1890, whereas today the nationwide total of revenue raised by local governments is augmented 62% by state aid. 2 ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM 1976-77, at 58 (1977). Thus any fiscal impact on local treasuries inevitably has a corresponding impact on state treasuries. Moreover, federalism's protections apply to cities as well as states, as the Court made clear in *National League of Cities v. Usery:*

> As the denomination "political subdivision" implies, the local governmental units which Congress sought to bring within the Act derive their authority and power from their respective States. Interference with integral governmental services provided by such subordinate arms of a state government is therefore beyond the reach of congressional power under the Commerce Clause just as if such services were provided by the State itself.

426 U.S. 833, 855-56 n.20 (1976).

218 Mt. Healthy School Dist. Bd. of Educ. v. Doyle, 97 S. Ct. 568, 572 (1977).

need for carefully tailoring federal judicial orders in light of these interests.[219] It is the Supreme Court's emphasis on judicial restraint in fashioning equitable remedies to which this Article now turns.

IV. Supreme Court Precedent and the Institution Cases

The Supreme Court has upheld federal judicial power to place additional financial burdens on government, particularly in cases dealing with the rights of criminal defendants and in those ordering desegregation of public schools. It has also upheld other significant federal court orders requiring, or making unavoidable, affirmative legislative or executive action, most notably in the school cases and in the reapportionment cases. In doing so, however, the Court has been much more solicitous of the interests identified in Part III than have the lower federal courts in the institution cases. As a result, no federal court order approved by the Supreme Court has been as intrusive in local democratic decisionmaking as the orders in those cases. Part A of this section is designed to substantiate these assertions by comparing the Supreme Court cases, including its two institution cases, with the lower court orders in the institution cases. Part B will then document the Court's increasing recognition of the legitimacy of the state interest in avoiding increases in its expenditures even when attacked on constitutional grounds. These two sections will provide the basis for the proposed modifications of the lower court orders in the institution cases presented in Part V.

A. *Government Action Mandated by the Supreme Court*

1. Access to the Courts

The Supreme Court's first expansion of judicial power to include mandating increases in government expenditures occurred in 1956 in *Griffin v. Illinois*.[220] Indigent criminal defendants asserted in *Griffin* that Illinois' failure to provide them with transcripts of their trial, which were necessary for an effective appeal of conviction, violated the due process and equal protection clauses of the fourteenth amendment. The Supreme Court agreed, holding that "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." [221]

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[219] For a discussion of these factors in *Milliken*, see text accompanying notes 272-76 *infra*.

[220] 351 U.S. 12 (1956).

[221] *Id.* 19.

No legislative enactment was struck down in *Griffin*. No statute provided transcripts for the rich but not the poor; the rich paid for the transcripts themselves. The crux of the constitutional violation was not illegitimate state action but state inaction. Because it was the absence of an adequate government subsidy for transcripts that was declared unconstitutional,[222] the only possible remedy for the constitutional violation was the creation by the state of a program making such transcripts available to indigents. This the state did, at an annual cost of $250,000.[223]

That this affirmative duty on the state arose for the first time in the Supreme Court's landmark case concerning constitutional protection for the poor is not surprising. To the extent that the constitutional protection of the poor is based on a notion that the state has a duty to protect the poor against certain hazards in an unequal society,[224] such as the hazard of not being able effectively to prosecute an appeal, the state can protect the poor only by spending money. Thus when the Court in 1963, in *Douglas v. California*,[225] extended its protection of the poor to require the furnishing of counsel on appeal, the effect of the Court's ruling was again to mandate an increase in government budgets across the country for indigent defense.

Most cases concerning wealth discrimination, however, do not mandate increased government expenditures for the protection of the poor.[226] Instead, the most common constitutional protection for indigents is the invalidation of governmental charges for certain of its functions, such as poll taxes [227] or filing fees.[228] Such a restriction

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222 Illinois provided free transcripts only in capital cases and in cases raising constitutional questions. The Court in *Griffin* held that they were required in other cases as well. *Id.* 14-15.

223 Allen, Griffin v. Illinois: *Antecedents and Aftermath*, 25 U. CHI. L. REV. 151, 161 n.38 (1957).

224 *See* Michelman, The Supreme Court 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 HARV. L. REV. 7, 9 (1969); Tribe, *supra* note 158.

225 372 U.S. 353 (1963); *cf.* Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment requires provision of counsel at trial).

226 For example, Tate v. Short, 401 U.S. 395 (1971), held unconstitutional a Texas provision limiting punishment of certain offenses to a payment of a fine for those able to pay it, but converting the fine to imprisonment for those unable to pay. The Court held that the scheme unconstitutionally discriminated against the poor, but it did not increase the state's financial obligations. Indeed, imprisonment of an indigent for nonpayment of fines "saddles the State with the cost of feeding and housing him for the period of his imprisonment." *Id.* 399.

227 *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

228 *See* Boddie v. Connecticut, 401 U.S. 371 (1971) (divorce action); Smith v. Bennett, 365 U.S. 708 (1961) (post-conviction criminal proceedings); Burns v. Ohio, 360 U.S. 252 (1959) (criminal appeals).

on the government's choice of methods of funding its programs, which also occurs, for example, whenever a state tax is invalidated as a burden on interstate commerce,[229] has a significantly less extensive impact on legislative and executive discretion than requiring an increase in specific items in the government budget. The government may have to reallocate the burden of paying for its programs, but there is no judicial mandate of legislative or executive action. An invalidation of a method of raising revenue is simply a traditional judicial declaration of invalidity, involving only a negative restraint on otherwise unchecked legislative discretion.[230] Of all the cases involving protection of the indigent, only two lines of cases impose an affirmative requirement of legislative action: those following *Griffin* requiring subsidization of transcripts or their equivalent[231] and those following *Douglas* requiring provision of counsel or its equivalent.[232] In light of their affirmative impact, the Supreme Court has carefully limited the intervention in local decisionmaking permitted in these two kinds of cases.

Griffin and *Douglas* were unusual in requiring additional funds for specific aspects of providing an adequate criminal defense, but they involved only a moderate step beyond the general concept that the states are obligated to provide a fair trial, whatever the cost, or face reversal by the Supreme Court.[233] Indeed, *Griffin* and *Douglas* did not sanction a mandatory federal injunction requiring state action, but simply reversed state court decisions interpreting constitutional requirements for criminal appeals. Like other reversals of state judgments that may cause increased local expenditures, such as routine reversals of criminal convictions, they involved no direct order of legislative or executive action. The Court in *Griffin* recognized the implied mandatory impact of its order, but merely stated that "[w]e are confident that the State will provide corrective rules

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229 *See generally* P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 479-602 (1977); *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953 (1962).

230 *See* text accompanying notes 114-17 *supra*.

231 *E.g.*, Mayer v. City of Chicago, 404 U.S. 189 (1971); Roberts v. LaVallee, 389 U.S. 40 (1967); Draper v. Washington, 372 U.S. 487 (1963). *But see* United States v. MacCollom, 426 U.S. 317 (1976) (free transcripts not required in federal habeas corpus proceedings); Britt v. North Carolina, 404 U.S. 226 (1971) (state provided transcript substitute adequate).

232 *E.g.*, Bounds v. Smith, 97 S. Ct. 1491 (1977) (law library for prison inmates). *But see* Ross v. Moffit, 417 U.S. 600 (1974) (counsel not required on discretionary appeals).

233 *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961).

. . . .[234] The lack of confrontation with state authorities was underscored by the Court's emphasis on the considerable legislative flexibility in formulating the necessary corrective action. The Court specifically did not require transcripts to be purchased in every case involving an indigent defendant; it allowed the states to find other means of providing adequate and effective appellate review.[235]

The Court's emphasis on local flexibility was detailed further in *Draper v. Washington*.[236] Methods of helping indigents prepare an appeal other than providing a transcript would be acceptable, the Court indicated,

> if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript. Moreover, part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances. . . . [T]he fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcript does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review.[237]

Similarly, although *Douglas* required counsel on appeal, it did not prevent the states from limiting expenses by relying, to the extent possible, on volunteer attorneys.[238] The Court has further limited the impact of its requirements of counsel and transcripts by narrowing the kinds of proceedings in which they must be provided. The Court has thus refused to extend its requirements of counsel to state discretionary appeals or to applications for certiorari to the Supreme

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[234] 351 U.S. at 20.

[235] *Id.*

[236] 372 U.S. 487 (1963).

[237] *Id.* 495-96.

[238] *Douglas*, like *Griffin*, provided no constraints on state flexibility in complying with its mandate as long as counsel was provided. The dissent in *Douglas* argued, however, that requiring counsel was itself too restrictive of state flexibility, since, unlike the transcript cases, no adequate substitutes for counsel exist. 372 U.S. at 364 (Harlan, J., dissenting). The Court has in fact sought ways to encourage substitutes for paid counsel, at least for habeas corpus proceedings. *See* Bounds v. Smith, 97 S. Ct. 1491 (1977); Johnson v. Avery, 393 U.S. 483 (1969).

Court [239] and has limited the situations that require transcripts by holding that they need not be furnished in federal habeas corpus proceedings.[240]

In *Bounds v. Smith* [241] the Supreme Court recently extended the transcript and counsel cases by affirming a district court order requiring North Carolina to provide a law library to state prisoners in order to ensure protection of the prisoners' "constitutional right of access to the courts." [242] *Bounds* was an unusual indigent defense case in that it concerned a review not of a state court interpretation of the Constitution but of a federal district court order mandating state action.[243] But the Court emphasized, as in *Griffin,* that states should have wide latitude to evaluate the methods used to provide the constitutionally required access, and even encouraged "local experimentation." [244] In fact, the library system proposed in *Bounds* was suggested by the state itself, and it was considerably less extensive—and expensive—than the one plaintiffs had sought.[245] The Court in *Bounds* recognized that economic feasibility was an appropriate factor to consider in choosing among possible alternatives,[246] and suggested a wide array of alternatives available to other states in fulfilling their constitutional obligation, some of which—such as volunteer attorneys or law students—require no state expenditures at all.[247] *Bounds* therefore did not significantly expand the demands on the state treasury or limit the flexibility of the state to meet those demands.

Griffin, Douglas, and *Bounds* thus involve a considerably more limited intrusion into local democratic decisionmaking than the orders in the institution cases. The Court did not design a detailed list of requirements that a state must provide, regardless of cost, in order to meet the constitutional standards, as is commonly done in the institution cases,[248] but emphasized flexibility and local experimentation. The Court did not establish standards of quality that

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239 Ross v. Moffit, 417 U.S. 600 (1974).

240 United States v. MacCollom, 426 U.S. 317 (1976).

241 97 S. Ct. 1491 (1977).

242 *Id.* 1494.

243 The Court did not take note of this distinction.

244 *Id.* 1500.

245 *See id.* 1493-94.

246 *Id.* 1496.

247 *Id.* 1499-1500. Recently a federal district court refused to require the state creation of a law library, finding state supported legal assistance to prisoners adequate to meet the requirements of *Bounds v. Smith.* Hall v. Maryland, 433 F. Supp. 756 (D. Md. 1977).

248 *See, e.g.,* cases cited notes 21 & 49-70 *supra.*

necessitate continuing judicial supervision of their achievement: it required no minimum kind of transcript, no minimum counsel-client ratio, no minimum quality library—indeed, no library at all. The Court simply articulated in general terms the constitutional standard the localities must meet and allowed them to design their compliance to fit both local circumstances and local budgets. Such an approach avoids the necessity of judicial control of local government functions to ensure achievement of judicial standards. In short, because unavoidable mandated costs are relatively small,[249] these cases are likely to cause little impact on the democratic management of government, and because the federal judicial intrusion is limited, little unwarranted federal control of state decisionmaking is required.

2. The Desegregation Cases

The implementation of the Supreme Court's decision in *Brown v. Board of Education*,[250] declaring unconstitutional the *de jure* segregation of public schools, produced the most dramatic confrontation between federal judicial power and state and local authority in modern times. But a careful reading of Supreme Court decisions in this area demonstrates the Court's efforts to minimize judicial interference in the operation of local school systems. The basis of the Court's approach to enforcing its decision in *Brown* was announced the following year in *Brown II*:[251]

> Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. . . .
>
> In fashioning and effectuating [their] decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. . . .[252]

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249 *See* text accompanying note 223 *supra*.

250 347 U.S. 483 (1954).

251 349 U.S. 294 (1955).

252 *Id.* 299-300 (footnotes omitted).

The Court's preference for local responsibility for designing the desegregation of school systems, if done in good faith, its insistence on "practical flexibility" [253] by the courts, and its requirement of "all deliberate speed" [254] rather than immediate execution of its mandate, reflect its willingness to allow conscientious local boards to determine the nature and timing of the remedy for the constitutional violation in light of the practical difficulties involved.

For more than a decade, however, the Court reviewed cases concerning not attempted good faith complaince but massive defiance of "the minimal requirement of *Brown:* that segregation cease being enforced by law." [255] The Court left no doubt of its unwillingness to allow its reliance on local decisionmaking to permit rejection of desegregation.[256] In *Griffin v. Prince Edwards County School Board,*[257] for example, the county had attempted to avoid desegregation by closing its public schools while funding private schools for white children. In order to remedy such defiance, the Court said that,

> the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia.[258]

Nothing in the Court's opinion suggests that exercise of such an affirmative intervention in local affairs would be appropriate, let alone routine, in a case in which resistance to the Court's decision was less absolute. Rather, the *Griffin* Court, frustrated by every kind of obstruction of the constitutional mandate,[259] simply sought to make clear that localities were required to exercise their power to achieve desegregation.

In 1968 the Court considered the appropriate judicial power over a locality that had adopted a plan purporting to comply with the requirements of *Brown.* In *Green v. County School Board* [260]

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253 *Id.* 300.

254 *Id.* 301.

255 A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 126 (1970).

256 *See* Cooper v. Aaron, 358 U.S. 1 (1958).

257 377 U.S. 218 (1964).

258 *Id.* 233. This sentence engendered the Court's first dissent in a desegregation case. *See id.* 234.

259 *See id.* 226, 229.

260 391 U.S. 430 (1968).

the Court rejected as inadequate the county's opening of its school system to all students on a freedom-of-choice basis, holding that abolishing a segregated school system required more than merely ending legal segregation. "School boards such as the respondent then operating state-compelled dual systems" the Court said, "were . . . clearly charged [by *Brown II*] with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." [261] But while the *Green* Court made clear that desegregation must include affirmative steps to dismantle the segregated school system, it did not seek to alter the comparative role of the federal courts and the local school board, as enunciated in *Brown II,* in designing and effectuating that desegregation. The issue remained whether the school board acted in good faith to provide relief "at the earliest 'practicable' date;" if so, the federal court would accept the plan as effective.[262] Indeed, because an integrated school system could be achieved in New Kent County, the subject of the litigation in *Green,* simply by rezoning the school attendance patterns,[263] no major judicial displacement of local power would be likely once the legal standard was clarified.

Three years later, in *Swann v. Charlotte-Mecklenburg Board of Education,*[264] the Court sought to clarify further the appropriate federal judicial role in desegregation cases. While the Court attempted to ensure broad federal judicial power to fashion a remedy for desegregation upon "default" [265] by the school authorities, it recognized that "there are limits" [266] to that judicial power. It therefore analyzed the district court's order under review to determine if it was "reasonable, feasible and workable." [267] In doing so, the *Swann* Court upheld the power of the district court to override the judgment of the recalcitrant school board in the determination of what was necessary for dismantling the dual system, but it did not require immediate compliance regardless of the practical problems involved. As a result, the Court approved the district court's order of more busing of students than desired by the local board, but only after finding that the decree was "well within the capacity

261 *Id.* 437-38.

262 *Id.* 439.

263 *See* G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 725 (1975).

264 402 U.S. 1 (1971).

265 *Id.* 16.

266 *Id.* 28.

267 *Id.* 31.

of the school authority" [268] and that the additional buses needed "could easily be obtained." [269] In matters of school construction, the Court emphasized the importance of construction decisions to racial segregation, but noted at the same time the complexity of factors that a school board must consider before making such a decision.[270] It therefore required only that the courts and the school boards ensure that the construction policy not be used to perpetuate or establish a dual system, a requirement that falls far short of authorizing a district court itself to order new school construction when it feels it necessary to achieve desegregation.[271] In fact, because of the particular facts of the case, the *Swann* Court's review of appropriate federal judicial power in school desegregation cases was quite limited. It did not deal either with a district court order opposed by a local board on feasibility rather than policy grounds, or one concerning a school board attempt to comply with the desegregation requirement "in good faith."

Most recently in *Milliken v. Bradley* [272] the Court upheld a district court's order that Michigan provide funds for remedial education, not only on the eleventh amendment grounds discusssed earlier [273] but also as a proper exercise of equitable discretion. In doing so the Court emphasized the limited nature of judicial intervention in local decisionmaking. The state, which had agreed to fund projects considerably more expensive than those it opposed in court, could hardly oppose the relatively minor fiscal burden imposed by the district court order on the grounds of impracticality or infeasibility.[274] Moreover, the Detroit Board of Education had proposed the requirement of the items involved in the litigation itself; it had even encouraged the district court to issue its order, presumably as a means of obtaining state revenue for the financially starved city schools.[275] Thus *Milliken* did not present a case of excessive, or even unwelcome, intrusion into the operation of the local school system. In upholding the district court's order, the Court seemed to go out of its way to distinguish the facts of *Milliken* from a case that more seriously invaded local authority:

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[268] *Id.* 30.

[269] *Id.* 30 n.12.

[270] *Id.* 20-21.

[271] *But cf.* Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972) (court ordered construction of new prison hospital).

[272] 97 S. Ct. 2749 (1977).

[273] *See* text accompanying notes 199-207 *supra.*

[274] *See* 97 S. Ct. at 2755, 2765; note 211 *supra.*

[275] *See* 97 S. Ct. at 2764.

> Nor do we find any other reason to believe that the broad and flexible equity powers of the court were abused in this case. The established role of local school authorities was maintained inviolate, and the remedy is indeed remedial . . . .
>
> . . . .
>
> Nor are principles of federalism abrogated by the decree. The District Court has neither attempted to restructure local governmental entities nor to mandate a particular method or structure of state or local financing. . . . The District Court has, rather, properly enforced the guarantees of the Fourteenth Amendment consistent with our prior holdings, and in a manner that does not jeopardize the integrity of the structure or functions of state and local government.[276]

The cumulative impact of the desegregation cases thus falls far short of authorizing unlimited federal judicial interference in local decisionmaking to ensure compliance with a constitutional mandate. Indeed, twenty-four years after *Brown,* the cases seem instead to demonstrate an extraordinarily patient recognition of the need for local responsibility and of the practical restraints the localities face in achieving compliance with the constitutional mandate. The Court's reliance on notions of "practical flexibility," "deliberate speed," "feasibility," and "workability" are in sharp contrast to the orders issued in the institution cases. No Supreme Court order in the school desegregation cases has threatened to close a state's schools unless it forthwith meets constitutional standards regardless of cost. Instead, the Court has consistently sought to place primary responsibility for the designing and timing of compliance in the hands of local authorities as long as they were acting in "good faith." Even when local authorities are in default, the Court has tried to limit the judicial role. Although the federal courts have overturned important school policies to ensure enforcement of the Constitution, only a small part of educational policy has been superseded by court order. In no desegregation order approved by the Court have the federal courts invaded the established role of local authorities in virtually every major aspect of school policy, the quasi-executive role often assumed by the lower federal courts in the institution cases.[277] Finally, however intrusive a desegregation order may be,

[276] *Id.* 2761, 2763.

[277] This is not to say that lower federal courts have not exercised powers comparable to that exercised in institution cases in desegregation cases not reviewed by

there is an end to the federal judicial role in school policy. Once the school district has desegregated, the Court has held that the district court has "fully performed its function" and no further proceedings are necessary.[278] In contrast, if the institutions must maintain a constitutionally prescribed minimum of services, that minimum, enforced by the federal courts, will last in perpetuity. Each future budget—indeed every major administrative decision concerning maintenance, staffing, or treatment in the institutions—can engender judicial supervision to determine whether the institution is maintaining the amount and kind of services constitutionally required. In terms of the extent and duration of federal court involvement in the management of local government, the institution cases—particularly in view of their insistence on compliance notwithstanding the cost—exceed the judicial role approved by the Supreme Court in the desegregation cases.

3. The Reapportionment Cases

Although the reapportionment cases do not involve the allocation of government resources, they are relevant here because they involve the federal courts in a dramatic intervention in local democratic decisionmaking. But in *Reynolds v. Sims*,[279] having declared the state legislative apportionments under review unconstitutional, the Court emphasized that "legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely

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the Supreme Court. A receivership of South Boston High School has been enforced to implement a desegregation order, Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 97 S. Ct. 743 (1977), the court relying principally on the institution cases as authority for such a remedy. *Id.* 533. Even that very extensive order, however, is distinguishable from those imposed in the institution cases. It was issued only because of massive resistance to desegregation, *id.* 533-34, and was a temporary expedient simply to bring the school in compliance with the desegregation plan, *id.* 535. The receiver was the Boston Superintendent of Schools, and the capital improvements made were only those he recommended. Morgan v. McDonough, 548 F.2d 28, 29 (1st Cir. 1977). Even the most extraordinary remedy—appointing new school officials for a fixed term, albeit officials nominated by the School Superintendent, *id.* 30-32—was justified as a means to end the receivership as quickly as possible. *Id.* 33. Yet the remedy in the Boston case was extraordinary indeed, as the court acknowledged, *id.* 30, and it is by no means clear that even it can be defended as a legitimate exercise of federal equitable power. *See* Roberts, *The Extent of Federal Justicial Equitable Power: Receivership of South Boston High School*, 12 N. ENG. L. REV. 55 (1976). *But see* Comment, *Equitable Remedies: An Analysis of Judicial Utilization of Neoreceiverships to Implement Large Scale Institutional Change*, 1976 WIS. L. REV. 1161.

[278] Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424, 437 (1976).

[279] 377 U.S. 533 (1964).

fashion after having had an adequate opportunity to do so." [280] More significantly, the Court did not authorize federal courts to mandate affirmative legislative action to enact a new apportionment plan if the legislature fails to act. Instead it suggested the proper relief by approving the district court's decision in that case to issue a temporary plan pending legislative action, a plan "admittedly provisional in purpose so as not to usurp the primary responsibility for reapportionment which rests with the legislature." [281] The Court in fact has held that a district court's order mandating legislative enactment of a particular apportionment plan impermissibly limited the state's "freedom of choice to devise substitutes for an apportionment plan found unconstitutional." [282]

The standard remedy for legislative failure to reapportion has therefore become issuance by a federal court of a provisional reapportionment plan.[283] This is, of course, an extraordinary remedy, but it is considerably more restrained than ordering the legislature to act itself or forcing legislative action by presenting an option—such as prison closing in the institution cases [284]—that is not in fact viable. By adopting its own plan, the court avoids direct confrontation with legislative power and even allows the legislature to delay indefinitely enactment of its plan. However undesirable it is to the legislators to have to run in court-designed districts, this option may seem preferable to devising a solution themselves. Even today some legislatures have not yet passed a constitutional reapportionment plan.[285] The Court was able to adopt the device of having federal

[280] *Id.* 586; *see* Maryland Comm'n for Fair Representation v. Tawes, 377 U.S. 656, 676 (1964).

[281] 377 U.S. at 586.

[282] Burns v. Richardson, 384 U.S. 73, 85 (1966).

[283] No Supreme Court case has authorized a federal court injunction requiring legislative action, although, at the same time, the Court has never indicated that such an action would be erroneous. Justice Frankfurter said in Colegrove v. Green, 328 U.S. 549, 555 (1946), that it "never occured to anyone that this Court could issue mandamus to compel Congress to perform its mandatory duty to apportion;" it might, however, occur to someone now.

[284] *See* text accompanying notes 87-91 *supra.*

[285] For example, legislative apportionment in Mississippi was invalidated in 1962, Connor v. Johnson, 256 F. Supp. 962 (S.D. Miss. 1966), *aff'd*, 386 U.S. 483 (1967), and, after no legislative reapportionment occured, the district court adopted its own plan for the 1967 elections, Connor v. Johnson, 265 F. Supp. 492 (S.D. Miss. 1967). A subsequent legislative attempt to reapportion was held unconstitutional, Connor v. Johnson, 330 F. Supp. 506 (S.D. Miss. 1971), so that the district court again formulated a plan for the 1971 elections. That plan was the basis of the 1971 elections due to time constraints, despite a Supreme Court decision that it violated constitutional standards, Connor v. Johnson, 402 U.S. 690 (1971), 404 U.S. 549 (1972). Notwithstanding that decision, the legislature adopted with minor modification the district court's 1971 plan as its permanent plan, a decision approved by the district court, Connor v. Waller, 396 F. Supp. 1308 (S.D. Miss.

courts, rather than legislatures, issue and implement reapportionment plans because they could do so without appearing to enact legislation. Unlike the effects of legislation, the public is not regulated by the adoption of a reapportionment plan because the public has no legal interest in the precise lines that describe voting districts as long as the suffrage itself is not impaired; [286] only the legislators are the object of the judicial action. In fact, rather than undermining the democratic nature of legislation, such judicial action is designed to promote popular control of government.[287] The courts can further insulate themselves from acting like legislatures by issuing their plans without even confronting the types of political pressures and other considerations that legislatures would have to consider; courts simply rely on mathematical criteria.[288] Thus the courts have been able to ensure relatively speedy legislative reapportionment in a way as unintrusive to legislative or democratic interests as possible.

To further curtail the federal judicial intervention involved in reapportionment, the Supreme Court has limited the power of district courts even in the adoption of their own plans by requiring avoidance of excessive interference with state responsibilities. In *Minnesota State Senate v. Beens*,[289] for example, the Court vacated the order of a district court that sought, as part of a temporary reapportionment plan, to reduce substantially the number of state senators and representatives, stating that such a reduction nullified a valid state policy concerning the size of the legislature. Similarly, in *White v. Weiser* [290] the Court rejected the district court's action ordering elections under one plan when another, more acceptable to the state, also met constitutional requirements. The Court noted

1975), but overturned by the Supreme Court, Connor v. Waller, 421 U.S. 656 (1975). The district court then formulated another temporary plan for the 1975 elections and, under yet another Supreme Court order, Connor v. Coleman, 425 U.S. 675 (1976), the district court adopted a plan for the 1979 elections. Last term, in Connor v. Finch, 97 S. Ct. 1828 (1977), the Supreme Court held the 1979 plan unconstitutional. In its most recent decision, the Court urged the district court—not the legislature—to draw up a constitutionally acceptable plan expeditiously. *Id.* 1839.

286 *See* United Jewish Organizations of Williamsburg v. Carey, 97 S. Ct. 996 (1977).

287 Reynolds v. Sims, 377 U.S. 533, 566 (1964).

288 Last term the Court emphasized that the courts, unlike the legislature, have no authority to reconcile the conflicting state policies regarding apportionment, so that they must exercise their power "circumspectly." Connor v. Finch, 97 S. Ct. 1828, 1833-34 (1977). That circumspection is made possible by reliance on mathematical criteria. *See* Mahan v. Howell, 410 U.S. 315, *rehearing denied*, 411 U.S. 922 (1973).

289 406 U.S. 187 (1972).

290 412 U.S. 783 (1973).

that the "district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.' " [291]

The institution cases permit no method comparable to the reapportionment device of fashioning judicially created remedies rather than mandating legislatively created ones. Money can be raised only by the legislature. A judicial attempt to impose a tax itself, although once suggested as a remedy,[292] has never been implemented; such an action seems farfetched as an exercise of judicial power. Imposing a tax–like reallocation of the budget [293]–would involve the judicial enactment of legislation and would require judicial consideration of all the complexities that are normally the legislature's responsibility. Seizing and selling state property [294] appears no more plausible, particularly because the use of capital assets to fund permanently mandated operating costs is an inadequate, even irresponsible, method of government financing. Despite the attempts of one district court,[295] legislative action to find the money necessary to pay for the court decrees cannot be avoided. Furthermore, implementation of the orders, once the money is found, can be carried out only by the executive. Appointing a master not just to supervise compliance but to exercise executive power to effectuate it, even if a permissible exercise of judicial power, could only be a temporary expedient.[296] Operations of the

[291] *Id.* 795.

[292] In Virginia v. West Virginia, 246 U.S. 565 (1918), Virginia obtained a $12 million judgment against West Virginia and sought a writ of mandamus in the Supreme Court to compel the West Virginia legislature to levy the necessary taxes to pay the judgment. The Court on its own raised the issue whether it might direct and supervise the levy of a tax itself, without relying on action by West Virginia, but left the question unresolved. It decided instead not to dispose of the case finally but to give the legislature time to consider taxation and to give Congress, which also had power to act, time to consider appropriate legislation. *Id.* 604-05. West Virginia then paid the judgment voluntarily. *See* Comment, *Enforcement of Judicial Financing Orders: Constitutional Rights in Search of a Remedy*, 59 GEO. L.J. 393, 395-99 (1970). Many courts in fact deny that they possess power to levy taxes. *See, e.g.*, Jones v. Wittenberg, 330 F. Supp. 707, 712-13 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

[293] The court suggested in Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) that a possible remedy might be to enjoin "state officials from authorizing expenditures for nonessential state functions, and thereby alter the state budget." *Id.* 1317.

[294] This, too, was a suggestion in Wyatt v. Aderholt. *Id.*

[295] Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, vacated in part*, 550 F.2d 1122 (8th Cir. 1977); *see* text accompanying notes 40-46 *supra.*

[296] The Court of Appeals for the Fifth Circuit recently held that the proper role for a master would be "to *observe*, and to report his *observations* to the Court, with no authority to intervene in daily prison operations." Newman v. Alabama, 559 F.2d 283, 290 (5th Cir. 1977) (emphasis in original). Masters appointed in institution cases in fact have not generally been involved in implementation of the orders themselves but simply in supervising that implementation for the court. *See, e.g.*, New York State Ass'n for Retarded Children, Inc. v. Carey, 409 F. Supp. 606,

prisons and mental institutions cannot be removed from the executive branch of government. If the constitutional mandate in the institution cases is to be implemented, therefore, the courts must decide how properly to assure the affirmative exercise of legislative and executive power to do so.

4. The Institution Cases in the Supreme Court

The Supreme Court to date has decided only two cases that raise the issues involved in the institution cases, and these two decisions are important not for what they decide but rather for the fact they decide so little. In *O'Connor v. Donaldson*[297] the plaintiff, who had been involuntarily committed in a Florida state mental hospital for almost fifteen years, alleged that officials in that institution had unconstitutionally denied him his liberty by denying him the right to treatment. The Fifth Circuit Court of Appeals, foreshadowing its landmark decision the same year in *Wyatt v. Aderholt*,[298] held that the plaintiff had "a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition."[299] If such a right to treatment existed, massive changes in the institutions would be required, as *Wyatt* demonstrates,[300] although the Fifth Circuit in *Donaldson* did not require such changes because the plaintiff, who had been released from the institution, merely sought damages from institution officials. The Supreme Court decision, however, avoided the critical question of whether there was a right to treatment. The Court instead emphasized that no effort had been made to cure Donaldson's illness and that he was neither dangerous nor incapable of surviving in freedom. There was, in short, no adequate reason for depriving him of his liberty at all. He therefore stated a cause of action for violation of his constitutional rights simply because he was denied his liberty without justification. Because, in the Court's view, Donaldson could have and should have been released, no question of a right to treatment arose. Affirmative obligations on the institution are necessary only for those who cannot be released.

608 (E.D.N.Y. 1976); Davis v. Watkins, 384 F. Supp. 1196, 1212 (N.D. Ohio 1974); Wyatt v. Stickney, 344 F. Supp. 373, 377 (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). *But cf.* note 277 *supra* (receiver appointed to implement desegregation order). *See generally* Note, *supra* note 22.

297 422 U.S. 563 (1975).

298 503 F.2d 1305 (5th Cir. 1974).

299 493 F.2d 507, 520 (5th Cir. 1974), *aff'd in part, vacated and remanded in part*, 422 U.S. 563 (1975).

300 *See* text accompanying notes 21-33 *supra*.

Thus the Supreme Court in *Donaldson* avoided any hint of financial responsibility on the part of the state and even avoided promulgating a constitutional doctrine that would mandate increased government expenditures on mental institutions. Indeed, as if to underscore the narrowness of its holding, the Court seemed to go out of its way to negate the effect of the court of appeal's decision.[301]

In *Estelle v. Gamble* [302] the Supreme Court decided a case concerning prison conditions as narrowly as it had decided the rights of mental patients in *Donaldson*. Estelle, an inmate of a Texas prison, alleged that certain prison officials failed to give him proper medical treatment for injuries he suffered while in prison and sued the officials for damages. The inadequate treatment given to Estelle might well have been due to the fact that the Texas prison system has had, at various times, only one to three doctors to care for 17,000 prisoners,[303] but the Court did not suggest any minimum medical care that needed to be given to prisoners as a matter of constitutional law. Instead, the Court held that inadequate medical treatment would constitute unconstitutional cruel and unusual punishment only if there had been "deliberate indifference to serious medical needs of prisoners." [304] Despite serious shortcomings in the treatment of Estelle, the Court held that, although the treatment might constitute medical malpractice under state tort law, such neglectful treatment did not constitute a constitutional violation. Thus, like *Donaldson, Estelle* articulated a constitutional standard that created no obligation on the state to improve its facilities. The responsibility of state officials, as a matter of constitutional law, was simply not to cause injury deliberately, and that responsibility was met even though the prison was understaffed.[305] Only Justice Stevens, dissenting alone, argued that such a constitutional standard was inappropriate and that a minimum standard of medical care should be required.[306]

The Supreme Court's refusal to date to adopt the broad grounds of the lower federal courts in dealing with inadequacies in the level of care provided in institutions may be explained by the fact that

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301 "Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case." 422 U.S. at 577 n.12.

302 429 U.S. 97 (1976).

303 *Id.* 110 n.2 (Stevens, J., dissenting).

304 *Id.* 104.

305 On remand the complaint was dismissed. Gamble v. Estelle, 554 F.2d 653 (5th Cir. 1977).

306 429 U.S. at 116 n.13 (Stevens, J., dissenting).

the cases as presented did not require it to do so.[307] But the Court might have also avoided those grounds because of its reluctance to adopt the kind of affirmative remedies the lower court cases envision.

B. *The Relevance of Cost in Constitutional Decisionmaking*

Although the Supreme Court has limited the affirmative impact of its remedies to avoid excessive federal judicial interference in local decisionmaking,[308] it has never specifically addressed the importance of limiting judicial impact on the public purse in the delineation of appropriate judicial remedies for constitutional violations. In the cases defining the extent of the constitutional protection provided by procedural due process and by the equal protection clause, however, the Court has dealt directly with protecting the governmental interest in economy, albeit with some inconsistency. Taken as a whole, however, cases in these areas demonstrate that the Court is willing to recognize the government's interest in avoiding increased expenditures even in its formulation of constitutional standards.

1. The Procedural Due Process Cases

Goldberg v. Kelly,[309] which prescribed the procedures required before welfare payments could be terminated, provided the first opportunity for a Supreme Court statement on the relevance of cost in constitutional decisionmaking. That statement was ambiguous. One year after *Goldberg*, the Court in *Bell v. Burson*[310] read *Goldberg* as largely denying the significance of an impact on the public treasury.[311] But the *Goldberg* Court, before defining the procedures required by due process, sought to demonstrate that "the State is not without weapons to minimize . . . [the] increased costs."[312] The Court argued that much of the drain on fiscal and administrative resources mandated by the Court's requirement of procedures could

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307 *Estelle*, for example, did not require the Court to decide what would constitute "deliberate indifference" by the state itself in failing adequately to fund institutions or, indeed, if that would be the appropriate standard in institution cases. If some sort of intent must be shown before a state could be responsible for institutional conditions, many of the institution cases would be unable to meet that constitutional standard. *Compare* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) *and* Washington v. Davis, 426 U.S. 229 (1976) *with* text accompanying note 91 *supra*.

308 *See* text accompanying notes 220-307 *supra*.

309 397 U.S. 254 (1970).

310 402 U.S. 535 (1971).

311 *Id.* 540-41.

312 397 U.S. at 266.

be reduced by carefully devised hearings and the skillful use of personnel. Thus, only after conceding the interest in economy, did the Court, influenced perhaps by what it thought was the modest extent of the economic impact it was requiring, find that the interests sought to be protected "clearly" outweighed the state's concern to prevent an increase in expenses.[313] Little notice has since been taken of this attempt at cost-analysis in *Goldberg*. Instead, *Goldberg* has been read broadly, as did Chief Justice Burger in dissent, who warned that "new layers of procedural protection may become an intolerable drain on the very funds earmarked for food, clothing, and other living essentials." [314]

In the years following *Goldberg*, however, the Court continued a dual approach to the fiscal burden issue. While citing *Goldberg* to denigrate the issue's significance in *Bell v. Burson*, the Court almost simultaneously recognized it, without mentioning *Goldberg*, in *Richardson v. Perales*,[315] a case limiting the need for physicians to testify at disability hearings. In *Richardson* the Court stated that the cost of such a requirement, "although not controlling," was a pragmatic factor that deserved mention.[316] In subsequent cases, when costs were to be deemed insignificant, the Court simply cited *Goldberg* and *Bell v. Burson* for the proposition that "these rather ordinary costs cannot outweigh the constitutional right." [317] When costs were significant, however, as in the question of whether counsel was required in probation hearings, the Court would be pragmatic and omit reference to *Goldberg:*

> Certainly, the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial.
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> In some cases, these modifications in the nature of the revocation hearing must be endured and the costs borne . . . . But due process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed.[318]

In recent years the Court's recognition of the significance of costs has increased, and, rather than attempting to read *Goldberg*

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313 *Id.*

314 *Id.* 284 (Burger, C.J., dissenting).

315 402 U.S. 389 (1971).

316 *Id.* 406.

317 Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972).

318 Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973) (footnote omitted).

narrowly, the Court has virtually eliminated citation to *Goldberg* altogether.[319] Chief Justice Burger's emphasis in his *Goldberg* dissent of the tradeoff between program costs and administrative costs has instead become accepted. Even in cases expanding procedural due process protection, such as *Goss v. Lopez*,[320] the Court has limited procedural requirements because it recognized that stricter requirements might, "by diverting resources, cost more than it would save in [program] effectiveness." [321] The Court's increasing recognition of the impact of its procedural due process decisions on the legislative allocation of resources between administrative costs and program costs can best be seen in the two most important recent procedural due process cases, *Mathews v. Eldridge* [322] and *Ingraham v. Wright*.[323]

In *Mathews* the Court decided the extent of constitutionally mandated procedural requirements before Social Security disability benefits could be terminated, an issue related to the *Goldberg* issue of the procedural requirements required before welfare benefits could be terminated. Distinguishing *Goldberg*, the Court held that a prior evidentiary hearing was not required for disability recipients, in part because the hardship of termination on the recipient and the need for additional safeguards to ensure fairness and reliability in the termination were less for the disability recipient than the welfare recipient.[324] The Court then considered a final factor, which it labeled the "public interest," [325] in determining the proper due process safeguards. In doing so the Court provided the most extensive statement to date of the relevance of increased cost to constitutional standards:

> The most visible burden [of a prior evidentiary hearing] would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision. No one can predict the extent of the increase . . . . The parties submit widely varying estimates of the probable additional financial cost. We only need say that experience with the constitutionalizing of government procedures suggests that the

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319 A recent exception occurred last term in Carey v. Population Servs. Int'l, 97 S. Ct. 2010, 2020 (1977).

320 419 U.S. 565 (1975).

321 *Id.* 583.

322 424 U.S. 319 (1976).

323 430 U.S. 651 (1977).

324 424 U.S. at 335-47.

325 *Id.* 347.

> ultimate additional cost in terms of money and administrative burden would not be insubstantial.
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> Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources, is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited.[326]

The Court seemed to imply more in *Mathews v. Eldridge* when it required costs to be "weighed" than it did in *Goldberg* when it found that cost-saving was "outweighed" by other interests. Costs now seem to weigh more, but the Court has not attempted to define how one tells how much they weigh or how that weight can be compared with that of competing interests. But the fact that the importance of cost-saving considerations has increased was demonstrated in *Ingraham v. Wright*.[327]

In *Ingraham* the Court, having decided that protection against corporal punishment in schools was a constitutionally protected liberty interest, held that the availability of state remedies for excessive punishment provided a constitutionally adequate protection for that interest. In a dramatic departure from previous cases,[328] the Court refused to require any federal procedure because it found that any incremental gain from such a procedure would not justify its cost. Citing the language from *Mathews* quoted above that "at some point" the need for safeguards would be outweighed by the cost, the *Ingraham* Court stated that "that point has been reached in this case." [329] The risk of error, in light of existing safeguards, was minimal, the Court said, but the imposition of procedural safeguards "would also entail a significant intrusion into an area of

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[326] *Id.* 347-48.

[327] 430 U.S. 651 (1977).

[328] *See id.* 696-97 (White, J., dissenting).

[329] *Id.* 682.

primary educational responsibility." [330] Even the dissent agreed that a balance had to be struck, although it found the risk of error greater and the intrusion into the disciplinary process "exaggerated." [331] Thus the majority and dissent in *Ingraham* seemed to disagree not about the importance of the cost of procedures in the definition of constitutional requirements but about what that cost would in fact be. If, then, "at some point" costs are such that they affect the definition of due process requirements, one might expect as well that "at some point" they would also affect the nature of the appropriate remedy for due process violations. The reason for the relevance of cost in either case is the same: mandating increased costs on government affects the government's allocation of its finite resources.

2. The Equal Protection Cases

The Supreme Court has also considered the potential impact on governmental costs relevant to its equal protection cases. The Court is generally reluctant to overturn on equal protection grounds any legislative judgment concerning the allocation of government resources.[332] Referring to the distribution of welfare funds in *Dandridge v. Williams*,[333] the Court observed:

> [T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. . . . [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.[334]

As part of this deference to legislative discretion in budget allocation, the Court has recognized that the government's desire to avoid an increase in its expenditures may explain its decision to exclude some people from government spending programs. The legitimacy of that interest was, in part, the basis for the Court's upholding of Maryland's maximum welfare grant provision in *Dandridge*, al-

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330 *Id.*

331 *Id.* 700 (White, J., dissenting).

332 The Court recently reemphasized the peculiar deference given to legislative judgments in budget allocation. *See* Matthews v. De Castro, 429 U.S. 181, 185 (1976).

333 397 U.S. 471 (1970).

334 *Id.* 487.

though it found other plausible reasons for the state statute.[335] More significantly, in *Geduldig v. Aiello*[336] the Court upheld against an equal protection attack the exclusion of pregnancy benefits from a government disability program, an exclusion based solely on the government's desire to minimize the cost of the program. The government had created a self-supporting disability program in *Geduldig,* and its desire not to initiate a government subsidy, to raise the cost of the program to its subscribers, or to lower other benefits in order to include pregnancy benefits was enough in itself, according to the Court, to justify the exclusion of those benefits.[337] Similarly, in *Weinberger v. Salfi*[338] the Court upheld Congress' adoption of a duration-of-relationship requirement as a prerequisite to receiving Social Security survivor's benefits, finding the legislative decision to be a valid "substantive policy determination that limited resources would not be well spent in making individual determinations."[339] Citing *Geduldig,* the *Salfi* Court upheld that determination to save money without requiring a justification for choosing that particular method of saving money over any other.[340]

Although the government's interest in limiting its expenditures is significant in cases requiring only "rational" government decisionmaking,[341] that interest has less weight when efforts at economy affect fundamental interests or result in the allocation of funds on

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[335] *See id.* 486-87.

[336] 417 U.S. 484 (1974).

[337] *Id.* 496. The Court rejected the contention that a higher level of scrutiny was required on the grounds that the exclusion discriminated against women on the basis of sex. *Id.* 496 n.20.

[338] 422 U.S. 749 (1975).

[339] *Id.* 784.

[340] *Id.* 785.

[341] The Court has not yet held, to be sure, that the government can protect its purse by excluding any benefit or beneficiary it chooses, even in cases in which the government's decision is subject only to judicial review to determine its rationality. But last term, in Ohio Bureau of Employment Services v. Hodory, 97 S. Ct. 1898 (1977), the Court, recognizing the government's interest in its fiscal integrity as a reason for denying unemployment benefits to strikers, suggested surprisingly that that question was still open:

> It is clear that protection of the fiscal integrity of the [unemployment benefits] fund is a legitimate concern of the State. We need not consider whether it would be "rational" for the State to protect the fund through a random means, such as elimination from coverage of all persons with an odd number of letters in their surnames. Here, the limitation of liability tracks the reasons found rational above, and the need for such limitation unquestionably provides the legitimate state interest required by the equal protection equation.

Id. 1910.

"suspect" grounds, thus engendering greater judicial scrutiny. In *Shapiro v. Thompson*,[342] for example, the Court invalidated a one-year residency requirement for receiving welfare benefits as an unconstitutional infringement on the right to travel. The Court noted that the residency requirement was designed to inhibit those who needed relief from entering the state, an objective designed at least in part to limit the impact of welfare costs on the public treasury. The Court stated:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.[343]

Similarly, in *Memorial Hospital v. Maricopa County*[344] the Court invalidated a one-year residency requirement as a condition to nonemergency hospitalization, a requirement designed in part to protect the public treasury, although here the Court attempted to show that the "claimed fiscal savings may well be illusory."[345]

Shapiro and *Maricopa County* thus indicate that in cases requiring heightened judicial scrutiny, the Court, although recognizing the government's interest in limiting its expenditures as a legitimate concern, will not allow that interest to be controlling. The impact of these cases has been limited, however, by two subsequent developments. First, *Maher v. Roe*,[346] in upholding the constitutionality of the government's denial of Medicaid funds for abortions, narrowed the category of cases which require heightened scrutiny of a governmental decision to limit its spending. The *Maher* Court applied only a rationality test to the refusal to pay for

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342 394 U.S. 618 (1969).

343 *Id.* 633 (footnote omitted).

344 415 U.S. 250 (1974).

345 *Id.* 265. The dissent commented: "However valuable a qualified cost analysis might be . . . this sort of judgment has traditionally been confided to legislatures . . . ." *Id.* 287 (Rehnquist, J., dissenting).

346 97 S. Ct. 2376 (1977). For a further discussion of *Maher*, see text accompanying notes 98-101 *supra*.

the exercise of the constitutional right to an abortion, reasoning that a refusal of the state to pay for services privately available does not "penalize" the right to obtain those services.[347] The Court distinguished *Shapiro* and *Maricopa County,* saying that the government in those cases denied all welfare funds to those exercising constitutional rights, rather than merely refusing to pay for the exercise of the right itself. Just as the government could refuse to pay bus fares in the right-to-travel cases, the Court said, it could refuse to pay for abortions.[348] It is prohibited only from denying all welfare benefits to those who get an abortion; that prohibition would penalize the exercise of the right.[349] The *Maher* Court went on to find the government exclusion of abortion services rational and, although it did not rely on government economy as a justification, it was clearly less willing to scrutinize a spending decision than a regulatory one.[350] The result in *Maher* thus significantly limits the obligation of government to provide funding necessary for the exercise of constitutionally protected rights.

The second, even more significant, limitation of the scope of heightened judicial scrutiny in budget allocation decisions has come in those cases dealing with allocations made on constitutionally "suspect" grounds. The cases dealing with the government's power to categorize beneficiaries of public funds on the basis of sex and illegitimacy suggest that the government's interest in economy may have significantly greater weight than recognized in *Shapiro*; if the government does not seek to exclude a group from the receipt of certain public funds altogether, as in the right-to-travel cases, but simply differentiates on economy grounds between the treatment it gives to the affected group and that it gives to others, the distinction may well be upheld.

The complete denial of funds to one sex—like the complete denial to those who have exercised their right to travel—violates the equal protection clause, at least if it is based on "archaic and overbroad" generalizations about the differences between the sexes.[351] Thus in *Weinberger v. Wiesenfeld,*[352] the Court held unconstitutional the denial of Social Security benefits to a beneficiary's surviv-

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347 97 S. Ct. at 2382-83, 2385.

348 *Id.* 2383 n.8.

349 *Id.*

350 *Compare id. with* Carey v. Population Servs. Int'l, 97 S. Ct. 2010 (1977) (Court applied a compelling state interest test in finding a New York statute which regulated distribution and advertisement of contraceptives unconstitutional).

351 Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).

352 420 U.S. 636 (1975).

ing husband that were provided to a surviving wife.[353] Arguments about the government's need to limit costs were not even advanced to justify the exclusion of surviving husbands. Such arguments, however, have been advanced in attempts to justify the requirement that a woman must prove her husband's dependency in order to qualify for a program's benefits although a man need not prove his wife's dependency. In *Frontiero v. Richardson*[354] the Court invalidated such a sex-based differentiation as grounded on a stereotyped distinction between the sexes. The plurality, however, even though treating sex as a suspect classification for equal protection purposes, suggested that the economic argument advanced by the government might have changed the result had sufficient evidence been produced:

> The Government offers no concrete evidence, however, tending to support its view that such differential treatment in fact saves the Government any money. In order to satisfy the demands of strict judicial scrutiny, the Government must demonstrate, for example, that it is actually cheaper to grant increased benefits with respect to *all* male members, than it is to determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependency requirement. Here, however, there is substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits. And in light of the fact that the dependency determination with respect to the husbands of female members is presently made solely on the basis of affidavits, rather than through the more costly hearing process, the Government's explanation of the statutory scheme is, to say the least, questionable.[355]

This novel proposition that the government's actual saving of money might validate a suspect classification was qualified by the additional statement that, in any case, administrative convenience alone could not justify the sex-based classification.[356] But in *Califano v. Goldfarb*[357] the *Frontiero* dictum recognizing the government's interest

[353] *Compare id. with* Califano v. Webster, 430 U.S. 313 (1977) (upholding exclusion of men from favorable economic benefits on grounds that the exclusion was designated to compensate women as a group for past economic discrimination).

[354] 411 U.S. 677 (1973).

[355] *Id.* 689-90 (footnotes omitted).

[356] *Id.* 690-91.

[357] 430 U.S. 199 (1977).

in economy was reaffirmed by five members of the Court. *Goldfarb,* like *Frontiero,* invalidated on equal protection grounds a sex-based differentiation requiring a man, but not a woman, to prove actual dependency on his spouse. The plurality of four stated that the "only conceivable justification" for such a classification was that it would save the government time, money, and effort; as in *Frontiero,* they said, such an administrative convenience claim had not been verified by the government and, in any event, would not justify the discrimination involved.[358] The four dissenters disagreed, stating that administrative convenience would justify a sex-based classification in the allocation of social insurance funds as long as one sex was not completely denied funds and the government's interest in economy was in fact served by the classification.[359] Justice Stevens, casting the deciding vote, agreed with the dissenters that the administrative convenience rationale could justify the distinction at issue, but he agreed with the plurality that the government's interest in economy was not in fact served by the differentiation in *Goldfarb.*[360] Thus a majority of the Court in *Goldfarb* seems to have accepted the *Frontiero* proposition that an actual economic saving can justify at least some sex-based classifications affecting the dispersal of public funds.

The position of Justice Stevens and the four dissenters in *Goldfarb* is consistent with the Court's position on classifications based on illegitimacy, as they themselves recognized.[361] Although the Court has declared unconstitutional the flat exclusion of a class of illegitmates from workmen's compensation benefits[362] or Social Security benefits,[363] the Court in *Mathews v. Lucas*[364] upheld a provision that exempted all but a specific group of illegitimate children from proof of actual dependency. Stating that saving of the expense of individualized determinations for some cases justified the classification, the Court relied on the *Frontiero* notion of the weight to be given to such an economic argument:

> In cases of strictest scrutiny, such approximations must be supported at least by a showing that the Government's dollar "lost" to overincluded benefit recipients is returned by a dollar "saved" in administrative expense avoided.

358 *Id.* 217.

359 *Id.* 234-38 & n.7 (Rehnquist, J., dissenting).

360 *Id.* 219-22 (Stevens, J., concurring).

361 *Id.* 226-27 (Stevens, J., concurring), 236-38 (Rehnquist, J., dissenting).

362 *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

363 *See* Jimenez v. Weinberger, 417 U.S. 628 (1974).

364 427 U.S. 495 (1976).

> *Frontiero v. Richardson,* 411 U.S. at 689 (plurality opinion). Under the standard of review appropriate here, however, the materiality of the relation between the statutory classifications and the likelihood of dependency they assertedly reflect need not be " 'scientifically substantiated.' " Nor, in any case, do we believe that Congress is required in this realm of less than strictest scrutiny to weigh the burdens of administrative inquiry solely in terms of dollars ultimately "spent," ignoring the relative amounts devoted to administrative rather than welfare uses.[365]

The *Frontiero-Goldfarb-Lucas* equal protection analysis presumably does not mean that any classification on suspect grounds, short of total denial of funds, can be defended if it in fact saves the government money. Some classifications are more suspect than others; any racial classification, for example, may well be invalid no matter what the economic justifications are.[366] But the fact that the Court gives the interest in economy weight even in cases dealing with classifications based on sex and illegitimacy—and even more weight when mere rationality is the standard of review [367]—demonstrates that the Court in its equal protection analysis, as in its procedural due process analysis, considers the scarcity of government funds as a factor affecting the definition of constitutional rights. Such a position undermines the proposition so often relied on in the institution cases that inadequate resources are irrelevant to the enforcement of constitutional rights.[368] If cost figures into the definition of constitutional rights, the relevance of cost should not disappear once those rights are found to exist. Indeed it is less restrictive of personal freedom to take cost into account when determining the appropriate method of enforcing protected rights than to deny their existence altogether because it is too costly to recognize them. It is possible that the Court recognized the importance of cost when remedying the constitutional violation found in *Califano v. Goldfarb.*[369] The estimated annual cost of paying Social Security benefits to all male dependents without proof of dependency, as was done for all female dependents, was 411 million dollars; the cost of

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365 *Id.* 509-10 (citations omitted).

366 One might doubt, for example, whether a classification of beneficiaries on racial grounds to determine life expectancy for pension purposes would be constitutional. *See* Comment, *Gender Classifications in the Insurance Industry,* 75 COLUM. L. REV. 1381, 1393-95 (1975).

367 *See* text accompanying notes 336-40 *supra.*

368 *See* note 71 *supra.*

369 430 U.S. 199 (1977).

establishing procedures so that all beneficiaries, both male and female, would have to establish dependency was estimated at 1 billion dollars.[370] The *Goldfarb* Court was careful to order neither alternative, although the normal remedy for underinclusiveness would be either to extend the benefit to those excluded or to deny it to all concerned.[371] The Court, by specifying no remedy, gave the maximum possible freedom to Congress to match the constitutional requirements with available resources.[372] This kind of flexibility is what the institution cases require.

V. The Extent of the Judicial Power of the Purse in the Institution Cases

A. *When Congress Acts*

The current lower federal court orders mandating increased government expenditures in the institution cases lack explicit congressional authorization. If such congressional authorization were obtained, the power of the federal courts in these cases would be strengthened. Congress cannot, of course, extend judicial power beyond that conferred by article III,[373] but it could authorize judicial action that would otherwise present "troublesome questions about the suitability of the issues tendered for decision by the judiciary." [374] Most complaints about unwarranted judicial interference with democratic decisionmaking would not survive an explicit congressional decision to authorize the judicial action in question.[375] Concerns about judicial invasion of the responsibility of the other branches of the federal government are eased by the direct invitation to the courts by those branches to assume the responsibility.[376] Similarly, concerns about judicial restrictions on

370 Jablon v. Secretary of HEW, 399 F. Supp. 118, 132 (D. Md. 1975), *aff'd*, 430 U.S. 924 (1977).

371 Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring).

372 *See, e.g.*, H.R. 6857, 95th Cong., 1st Sess. (1977) (proposing, *inter alia*, that special dependency requirements for entitlement to insurance benefits for husbands and widowers be eliminated).

373 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

374 Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 Harv. L. Rev. 645, 684 (1973).

375 Only an actual congressional decision, not inaction, will give the court adequate popular support for its assertion of power, *see* Tribe, *supra* note 197, at 696 n.73; accordingly, the Court is less reluctant to grant standing to sue once Congress has authorized judicial review. Scott, *supra* note 374, at 686-87.

376 Of course, mere unanimous consent by the three branches of government cannot rearrange the constitutional allocation of power. *See* Buckley v. Valeo, 424 U.S. 1, 120-43 (1976). But that consent can provide a source of power when the responsibility is not explicitly allocated by the Constitution itself. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

democratic decisionmaking are diminished if the judicial action is requested by the politically accountable branches of government. Indeed, after congressional enactment of a statute, the only remaining reason for restraint would be the limitations enforced by the doctrine of federalism—limitations applicable against both Congress and the judiciary. Even that concern, however, would be lessened by congressional authorization of the federal judicial action. For although federalism is a constitutional limit on congressional power, it presents less of a barrier to congressional than judicial action because "the states, and their interests as such, are represented in the Congress but not in the federal courts." [377] This ability of the states to be heard in the congressional resolution of national policy does not legitimate all congressional action regulating the states,[378] but it is particularly relevant when Congress is attempting to define the extent of judicial power to enforce the fourteenth amendment. Since that amendment is specifically designed as a federally enforced limit on state authority,[379] only a branch of the federal government can determine the extent of its restriction of the states' authority. That decision is best made by Congress, influenced by the representatives of the states, but exercising federal constitutional power. Indeed, the Constitution explicitly gives Congress the power to enforce the fourteenth amendment.[380] A judicial determination of the reach of judicial power to enforce the fourteenth amendment would not only be unrestrained by participation of the states but would be inappropriately self-serving; in fact such a self-definition of power would conflict with the constitutional norm since the Constitution generally gives Congress the power to define the jurisdiction of the federal courts.[381] Thus Congress, with power over both the states and the courts, is the most appropriate forum for resolving a conflict between federal judicial power to enforce the fourteenth amendment and the interests of the states in the federal system.[382]

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377 Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1685 (1974) (footnote omitted); *see* Tribe, *supra* note 197, at 695 n.71.

378 *See* National League of Cities v. Usery, 426 U.S. 833 (1976); text accompanying notes 151-59 *supra*.

379 Fitzpatrick v. Bitzer, 427 U.S. 445, 455-56 (1976); Ex Parte Virginia, 100 U.S. 339, 346-48 (1879).

380 U.S. CONST. amend. XIV, § 5.

381 *Id.* art. III, § 2; Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869); Sheldon v. Sill, 49 U.S. (8 How.) 440 (1850).

382 Congress' role in resolving questions of enforcement of the fourteenth amendment is greater than its role in interpreting the scope of the amendment. A judicial interpretation of the Constitution is not subject to congressional control; indeed, congressional interpretation is subject to judicial scrutiny. *Compare* Katzen-

The Supreme Court has recognized that congressional power under the fourteenth amendment gives Congress authority to override restraints imposed on the federal judiciary to protect state sovereignty. In *Fitzpatrick v. Bitzer* [383] the Court held that Congress had power under the fourteenth amendment to authorize damage actions against the states, actions that, absent a congressional enactment, would be barred by the eleventh amendment. Congress could override the eleventh amendment limitation and authorize judicial impact on state treasuries, the Court said, because the fourteenth amendment sanctioned congressional intrusion into "spheres of autonomy previously reserved to the States." [384] Although the limits on the federal courts in the institution cases are attributable not to the eleventh amendment but to judicial restraint,[385] the power of Congress to authorize judicial action in the institution cases would seem to be no less than its power to override the eleventh amendment.

A bill authorizing actions in federal court against the states in institution cases is now pending before Congress.[386] Its focus, however, seems more to authorize the Attorney General to initiate or intervene in such suits—a federal court having held that he currently lacked such power [387]—than to address the appropriate judicial remedies for constitutional violations. In fact, although the bill authorizes injunctions "or other order for preventive relief" [388] in private suits brought against the states, it prohibits the Attorney General from initiating a suit unless he certifies that state officials

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bach v. Morgan, 384 U.S. 641 (1966) *with* Oregon v. Mitchell, 400 U.S. 112 (1970). But Congress can deny judicial power to issue injunctions in specific cases, Lauf v. E. G. Shinner & Co., 303 U.S. 323 (1938) (labor disputes), unless, perhaps, the remedy is interpreted as part of the constitutional mandate itself. *See generally* Note, *The Nixon Busing Bills and Congressional Power*, 81 YALE L.J. 1542 (1972).

[383] 427 U.S. 445 (1976).

[384] *Id.* 455.

[385] *See* text accompanying notes 220-307 *supra*.

[386] *See* H.R. 2439, 95th Cong., 1st Sess. (1977). The bill has engendered considerable controversy. *Compare States Attack Carter Plan to Let Federal Officials Sue for Inmates*, N.Y. Times, May 2, 1977, at 20, col. 1 (indicating strong opposition to bill by National Association of Attorneys General) *with A Federal Law Urged to Aid State Inmates*, N.Y. Times, May 15, 1977 at 18, col. 1 (reporting that the American Bar Association urged enactment). See *States' Rights v. Victims' Rights*, N.Y. Times, May 8, 1977, § 4 at 18, col. 1 (editorial).

[387] United States v. Solomon, 419 F. Supp. 358 (D. Md. 1976), *aff'd*, 563 F.2d 1121 (4th Cir. 1977). *But see* In re Estelle, 516 F.2d 480 (5th Cir. 1975), *cert. denied*, 426 U.S. 925 (1976) (interlocutory appeal for writ of mandamus dismissing United States as intervenor denied).

[388] H.R. 2439, 95th Cong., 1st Sess. § 3 (1977).

"have had a reasonable time to correct" the violations.[389] Presumably the courts in a private cause of action could allow the states no less. But it is the definition of a "reasonable time" for compliance that is the cause of difficulty in the institution cases. The amount of time reasonable to correct the violations depends on the amount of money available to do so. Until Congress determines the extent to which it wants the courts to determine the amount of money the states must spend on compliance, it is unlikely to strengthen the courts' authority to deal with the institution cases.

B. *In the Absence of Congressional Action*

In the absence of congressional action, the exercise of federal judicial power to remedy constitutionally inadequate conditions in government institutions should be tailored to allow the flexibility encouraged by the Supreme Court in *Griffin* and *Douglas* and cases following them,[390] in light of the problems of "practicality," "feasibility," and "workability" recognized by the Supreme Court in the desegregation cases.[391] This should be done, as the Fifth Circuit in its recent decisions in institution cases has begun to recognize,[392] to avoid excessive federal judicial invasion of local democratic decision-making involved in the orders as now framed.[393] Such a policy of judicial restraint is characteristic of equity jurisdiction.[394] As the Court said in the context of desegregation:

> [I]n constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown v. Board of Education*
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> . . . .
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> In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests,

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389 *Id.* § 4.

390 *See* text accompanying notes 233-49 *supra.*

391 *See* text accompanying notes 250-78 *supra.*

392 *See* Miller v. Carson, 563 F.2d 741 (5th Cir. 1977); Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977); Morales v. Turman, 562 F.2d 993 (5th Cir. 1977). None of these decisions, however, requires the degree of judicial restraint advocated here.

393 *See* text accompanying notes 112-48 *supra.*

394 *See, e.g.*, A. BICKEL, *supra* note 117, at 249-51; D. DOBBS, *supra* note 91, at 62-64 (1973).

notwithstanding that those interests have constitutional roots.[395]

The principal practical reality that the courts must accept in shaping their remedies in the institution cases is that money is a constraint. They cannot continue their insistence on strict compliance regardless of the amount of money available,[396] because the limits on government resources are no less applicable in the courtroom than outside of it. The Supreme Court recognizes this reality, as its procedural due process and equal protection cases demonstrate.[397] A recognition that government resources are finite does not allow the government to refuse to enforce constitutional rights because it is too expensive to do so.[398] The issue in the institution cases is not whether there will be compliance with the Constitution—of that there should be no doubt—but rather the timing of achieving that compliance. Because of myriad demands for limited government resources, only a certain amount of money can be allocated in any particular year for a new expenditure, no matter how intense the need for it.[399] A judicial decision that institutional conditions are unconstitutional requires that money be found to correct them, but the amount of money to be applied each year is a legislative decision; this decision must be accepted by the courts if, in the words of the desegregation cases, it is made "in good faith."[400] A court cannot weigh the competing demands for government resources to determine how much can be raised for the institutions, nor should it try to force the legislature to raise the necessary money regardless of competing considerations. The judicial impact on the purse is acceptable only if the legislature retains its discretion to raise and

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[395] Lemon v. Kurtzman, 411 U.S. 192, 200-01 (1973) (footnote omitted). *See also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 374-76 (1977).

[396] The Fifth Circuit seems to acknowledge the reality of limited resources. "[W]e recognize that it is simpler to order prison reform than to pay for it." Pugh v. Rainwater, 557 F.2d 1189, 1192 n.9 (5th Cir. 1977).

[397] *See* text accompanying notes 308-72 *supra.*

[398] In Watson v. City of Memphis, 373 U.S. 526 (1963), a case concerning desegregation of municipal recreational facilities, the Court stated that "it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny them than to afford them." *Id.* 537. The budgetary argument in *Watson* was so unsupported by factual data that it seemed frivolous. *See id.*

[399] *See* note 142 *supra.*

[400] Green v. County School Bd., 391 U.S. 430, 439 (1968); Brown v. Board of Educ., 349 U.S. 294, 299 (1955).

allocate money,[401] a discretion limited by the need to meet the judicial order but not eliminated by it. Judicial requirements of expenditures must, in short, meet the test of feasibility, and feasibility is in the first instance a legislative judgment, subject to the requirement that the legislature's attempt to meet the constitutional standard is in good faith. If the courts allow the legislature this time to comply, interference with democratic decisionmaking will be minimized to the point that judicial confrontations with legislative power will become unlikely.

Courts must also recognize that detailed orders containing hundreds of specifications that the executive must implement are unworkable. The courts cannot effectively decide how many registered nurses or square feet per patient are constitutionally required.[402] Moreover, this level of detail necessitates continual federal judicial supervision of the state's day-to-day management of its institutions; the court must intervene to ensure that its plan is being carried out. But state institutions are too complex to be administered under court order; there are too many variables for a court to consider and comprehend.[403] It is no answer for the court to appoint a master to make these decisions.[404] Basic administration must be left in the hands of executive officials, mandated to comply with the Constitution, but allowed the flexibility to do so as long as they proceed in good faith. A federal court's insistence on literal compliance with its own scheme ought to be recognized as having the potential to undermine, as well as to enhance, the executive's ability to improve conditions for institutionalized patients. Decisions mandating improved mental hospital facilities can divert money needed to deinstitutionalize patients and provide them with outpatient care. A new prison mandated by court order might be an undesirable substitute for small, community-based facilities. The Supreme Court has recognized these complexities in prison administration in words that could largely be applied to the management of all institutions:

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401 *But see* Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHN'S L. REV. 406, 409-10 (1972) (arguing that, given finite resources, courts must make what are, in effect, political decisions that impact on state spending).

402 *See* Morales v. Turman, 562 F.2d 993, 999 (5th Cir. 1977). For development of the view that courts possess the constitutional authority and practical capacity to determine such issues, see Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367 (1977); Note, *supra* note 2; Comment, *supra* note 22, at 1297.

403 *See* Note, *supra* note 22.

404 See note 296 *supra*.

> Traditionally, federal courts have adopted a broad hands-off attitude towards problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. . . . Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.[405]

This "healthy sense of realism" suggests that the courts should abandon their attempt to supervise executive implementation of constitutional standards by defining those standards in great detail. Instead, the courts should adopt their requirements in the form of generally stated constitutional standards and should allow sufficient executive flexibility to enable the states to design their implementation.

It might be argued that such a "good faith" standard would be meaningless and ineffectual and that only a detailed order and timetable, implemented under judicial supervision and requiring strict compliance regardless of the financial impact, would achieve the desired results. This need not be so, however. If, for example, a court were to decide that the Constitution requires "provision of basic medical care to all patients in the institution," it could then require the state to draft a plan indicating (1) what the state will do, in the setting of the institution in question, to meet such a standard and (2) how, and over what period of time, the state will implement its plan. The court would retain the power to review and criticize the state's particularization of the constitutional standard, but agreement is likely due to widespread acceptance of what constitutes minimally adequate care.[406] In fact, the court can avoid deciding whether the precise ingredients of the plan amount to constitution-

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[405] Procunier v. Martinez, 416 U.S. 396, 404 (1974) (footnotes omitted); *accord*, Jones v. North Carolina Prisoners' Labor Union, Inc., 97 S. Ct. 2532, 2538 (1977).

[406] *See* Note, *supra* note 22, at 1367.

ally adequate care by treating the state's plan as provisional only. If the plan makes major improvements in presently indefensible conditions, the court need not bless that plan as constitutional. The major issue is not what has to be done to complete the job—that is a long way off—but how the job can be begun. After the first steps are taken, the plan can, and no doubt will, be altered as problems arise in its implementation and as changes of judgment occur as to the type of care needed. It is the direction and rate of change that is important, not the details of timing, staffing, and planning for capital construction. These details should not become the business of the courts.

It is a mistake to assume that judicial power to ensure that the states are implementing necessary changes as fast as they can derives from the details of court orders or the extent of intervention in the local democratic process. The fact that general cooperation with the thrust of the court orders in the institution cases has occurred to date [407] stems instead from the use of the courts' principal enforcement tool: their power publicly to make illegitimate the maintenance of intolerable conditions in the institutions. The power to declare conditions unconstitutional is a potent weapon, as demonstrated not only by the institution cases but also by those involving Presidents [408] and Congress [409] as well. Indifference to the institutional conditions is made impossible by the judicial order, publicly stated, that the outrageous conditions must be ended; its order that action be taken arms the reform movement to achieve the desired political result.[410] Indeed, it is this kind of voluntary compliance that the court seeks, not a confrontation with legislative or executive power. But if the power of the courts rests principally on their declaration that current conditions are illegitimate, they must take care not to issue orders that make noncompliance excusable, and thus legitimate. The likelihood of compliance is undermined, not enhanced, by detailed orders that fail to recognize the constraints on the political process. If the courts order the legislators and executives to do more than is possible, they invite understandable resistance rather than compliance; that resistance invites further

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407 *See* note 92 *supra.*

408 United States v. Nixon, 418 U.S. 683 (1974); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

409 Powell v. McCormack, 395 U.S. 486 (1969).

410 *See* Lucas, *Of Ducks and Drakes: Judicial Relief in Reapportionment Cases,* 38 NOTRE DAME LAW. 401, 413-14 (1963).

orders, and the ensuing confrontation will lead not to better institutions but to political crisis.[411]

If the courts invite confrontation, they will face a practical impediment to effectuating their orders more important than any yet mentioned. These judicial orders are unenforceable. Only the legislature can provide the necessary money, and only the executive can administer the spending of that money.[412] The courts cannot imprison the legislature for contempt unless it raises or reallocates the necessary money, nor jail an executive official to ensure implementation of a government program. Courts ultimately lack the power to force state governments to act. Unless the courts are willing to do what no responsible government official would do—close the institutions, and let the prisoners and the mentally ill, dangerous or otherwise, go free—if the courts are unwilling to play a game of "chicken" with state officials, as they should be, they should face the fact that these orders will be complied with, if at all, voluntarily, absent federal executive action to enforce them. Recognition of this practical limit on judicial power does not render the courts powerless to enforce the Constitution. It merely restricts them to their real, and not their imagined, power. "The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction." [413]

An objection might be raised that the process I suggest will take years, with the result that, in the meantime, constitutional rights will continue to be violated by the states with impunity. Compliance will indeed take time. But, as the Court recognized in the desegregation cases, although insistence on enforcement of constitutional rights cannot be compromised, once the direction is set un-

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411 One way courts avoid such confrontations is by issuing declaratory judgments rather than injunctions against state officials. This approach has been encouraged in the name of federalism by the Supreme Court, *see* Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975); Note, *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 211 nn.48-49 (1974); but the crux of the institution cases is not the coercive nature of the relief but the intrusiveness involved in requiring legislative and executive action. A requirement in the form of a declaratory judgment, rather than an injunction, would only modestly lower the degree of confrontation.

412 *See* text accompanying notes 292-96 *supra*. Judicial attempts to appoint an ombudsman or committee to manage the implementation of the judicial decrees have been rejected by the Fifth Circuit as impermissible. Miller v. Carson, 563 F.2d 741, 752-54 (5th Cir. 1977); Newman v. Alabama, 559 F.2d 283, 288-90 (5th Cir. 1977).

413 Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting). "Such feeling must be nourished," he added, "by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements." *Id.* (Frankfurter, J., dissenting).

alterably, the achievement of that compliance may be slow.[414] Such a compromise between the requirements of principle and the expediency which governs the political branches' efforts to achieve it is not new; Alexander Bickel articulated it best when he described what he called the "Lincolnian tension." [415] Lincoln, Bickel noted, was opposed to slavery as a matter of principle but recognized the limits a democratic society imposed on immediate achievement of its abolition. The teaching of Lincoln's life, Bickel wrote,

> is that principled government by the consent of the governed often means the definition of principled goals, and the practice of the art of the possible in striving to attain them. The hard fact of an existing evil institution such as slavery and the hard practical difficulties that stood in the way of its sudden abolition justified myriad compromises short of abandoning the goal. The goal itself—the principle—made sense only as an absolute, and as such it was to be maintained. As such it had its vast educational value, as such it exerted its crucial influence on the tendency of prudential policy. But expedient compromises remained necessary also, chiefly because a radically principled solution would collide with widespread prejudices, which no government resting on consent could disregard, any more than it could sacrifice its goals to them.[416]

That the immediate achievement of a constitutional goal is not possible "is nothing to be proud of. It is a disagreeable fact, and it cannot be wished away. It is no service to any worthy objective simply to close one's eyes to it." [417] Thus the Court in the desegregation cases, like Lincoln on the issue of slavery, recognized the practical difficulty of overturning resistance to the desired principle. It therefore ordered not immediate compliance, but "all deliberate speed."

Refraining from setting a judicially-imposed timetable, together with a detailed minimum standard of facilities and care, will not be easy. The conditions are unacceptable, the government process slow, and the constitutional standards an urgent necessity. A quick solution to the problem is almost irresistable. There is a human inclination, to which judges are as susceptible as the rest of us, to try to bypass the difficulties involved in the governmental process

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414 *See* text accompanying notes 253-54 *supra.*

415 A. BICKEL, *supra* note 117, at 65.

416 *Id.* 68.

417 *Id.* 69.

and demand immediate action. But, as a dissenting judge in an institution case said, "[a] Federal judge rearranging a State's penal or educational system is like a man feeding candy to his grandchild. He derives a great deal of personal satisfaction from it and has no responsibility for the results." [418] Responsibility for government action in a democracy can reside only in the political branches of government.

But what if a state does nothing? What if it presents an inadequate plan or claims that present conditions are satisfactory? What if the state claims that it would like to do more but has no money to do so? If these questions suggest a lack of good faith compliance—if the state is not trying to meet constitutional standards—the court is in no worse a position than if it had detailed mandatory requirements that the state defied. The courts alone cannot force state action; the federal legislative and executive branches must do so. If Congress and the President must ever resolve a conflict between federal judicial authority and the states, the courts will be in a stronger position if their orders are moderate, practical, and workable than if the states can claim that the courts order more than is possible to do. Even if the courts do not understand that money is a constraint, the Congress and the President know that it is. Because Congress has the power to limit judicial authority as well as the power to enforce the fourteenth amendment,[419] it is in the interest of the courts—and those who seek improvements in institutional conditions—to ensure that any congressional decision defining judicial power is made with the courts in their most defensible position. Because any confrontation between federal judicial power and state authority can be resolved only by Congress, the judicial power of the purse will, in the final analysis, extend no further than a democratic decision permits.

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[418] McRedmond v. Wilson, 533 F.2d 757, 766 (2d Cir. 1976) (Van Graafeiland, J., dissenting).

[419] *See* text accompanying notes 377-82 *supra*.