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*Stephen L. Fluckiger***

Summary of Contents

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"Judicial activism," a recurrent theme in America's political history, is again the subject of intense public debate. The debate focuses on judicial involvement in making policy and administering public institutions and programs. Some claim this involvement "adds up to a radical transformation of the role and function of the judiciary in American life."[1] This article presents an overview of recent commentary on judicial encroachment[2] upon the executive or administrative branch of government, highlighting the trend toward increasing judicial encroachment upon matters traditionally left to the executive branch.[3]

Part I reviews court action during the last several decades with respect to governing public institutions and overseeing ad-

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1. *See, e.g.*, Chayes, *The New Judiciary*, HARV. L. SCH. BUL., Fall 1976, at 23, 23.

2. Professor Dimock suggested the term "encroachment" as a term more precisely denoting the recent tendency of courts to undertake tasks traditionally carried out by other governmental departments.

3. Much of the recent commentary in this area tends to be critical of the direction the courts appear to be headed, *see, e.g.*, SUPREME COURT ACTIVISM AND RESTRAINT 1 (S. Halpern & C. Lamb eds. 1982), a point of view the author generally shares. Professor Raoul Berger has noted, however, that such views probably represent "those of a negligible minority" of the academic legal community. A CONFERENCE ON JUDICIAL REFORM: THE PROCEEDINGS 128 (P. McGuigan & C. Keiper eds. 1982) (remarks of Raoul Berger). Nonetheless, even advocates of recent court encroachment acknowledge that it represents a fundamental departure from past court activity. *See infra* text accompanying notes 160-66.

ministrative processes, comparing recent court actions with past actions. Of course, views vary widely as to whether and in what ways recent judicial activity differs significantly from past judicial activity. Part I first sets forth a broad sampling of cases involving encroachment in education, police and fire protection, state and local government, health care, corrections, science policy,[4] and welfare services. Part I then uses these cases as a context for definitions and descriptions of judicial encroachment.

Part II synthesizes various views on reasons for the change in the judiciary's role and the consequences, principally negative, that might be expected if such encroachment continues. Part III summarizes some suggestions for reform that have been offered by scholars concerned with the ramifications of the trend toward imbalance between the judicial and executive branches. Finally, Part IV argues that government officials and the public generally must be educated concerning the dangers of a trend toward imbalance and that support is needed for measures that will ensure survival of concepts of federalism and separation of powers.

I. Extent and Nature of Judicial Oversight of Public Administrators

To what extent do judges' decisions affect the day-to-day activities of local, state, and federal government administrators? Is significant judicial oversight of public administrators limited to widely publicized fields—such as public school desegregation, conditions of confinement, and right to treatment cases—or is it more widespread? A complete answer would require inquiry into not only the effects on public administrators of federal and state court orders entered against them, but also the effects of orders entered against other public administrators.[5] In addition, one

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4. "Science policy" is science-oriented regulation, examples of which are set forth *infra* notes 121-22 and accompanying text.

5. For an example of such an inquiry, see D. Horowitz, The Courts and Social Policy 16 (1977) (order requiring San Francisco public school administrators to provide remedial English instruction to Chinese-American students prompted Texas legislators to enact law making bilingual education mandatory in schools with 20 or more students of limited English speaking ability); *see also id.* at 287 (school prayer decisions impact on numerous school districts); N. Glazer, Overseeing Education and Social Services 14-15 (unpublished paper presented on Dec. 13, 1978 at a conference on "The Role of the Judiciary in America," sponsored by the American Enterprise Institute for Public Policy Research (AEI)) (stating that "from the point of view of state administrators, a decision in one district has substantial consequences" in other districts).

must consider the impact of threatened and pending lawsuits on public administrators.[6]

While it would be difficult to empirically measure the impact of court actions on public administrators,[7] the scope of such impact may be inferred from the breadth of subject matter covered in the illustrative survey of cases in Part A below. Part A highlights the effect court decisions have on administrators at every level of government and in widely disparate areas of public administration. Part B then summarizes the views of administrators, judges, scholars, and others on whether and in what ways the judicial activity described in Part A differs from past judicial encroachment.

A. Extent of Judicial Oversight[8]

In ascertaining whether any trends exist in the judiciary's relationship to governmental policy-making and administrative processes, the judiciary's constitutional role should be placed in perspective. The courts, particularly federal courts, indisputably have played a continuous role in "lawmaking" or "policy making." There are a number of reasons for this role.

First, in our system of constitutional federalism, the courts must interpret the "constitutional bargain" between the federal government and the states. " 'Constitutional bargain' litigation," as Donald I. Baker describes it, necessarily involves the courts in choosing between the interests of different constituencies.[9] Mr. Baker notes that the idea of individual rights, embodied in our Bill of Rights,

> necessarily involves courts setting aside the political decisions of some current legislative majority or political executive on the ground that they have failed to pay heed to some overriding value of due process, non-discrimination or the like. Not infrequently, such litigation involves protection of rights of

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6. Kalodner, *Introduction*, in LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION 4-6 (H. Kalodner & J. Fishman eds. 1978); *see* N. Glazer, *supra* note 5, at 15; McCoy, *The Impact of Section 1983 Litigation on Policymaking in Corrections*, FED. PROBATION, Dec. 1981, at 17, 22.

7. *See infra* notes 239-40 and accompanying text.

8. The cases discussed throughout this paper are intended only as representative examples of judicial oversight, not as a current or comprehensive statement of the law in any particular area.

9. Memorandum from Donald I. Baker to Stephen L. Fluckiger 2-3 (Mar. 31, 1983). I gratefully acknowledge Donald I. Baker's helpful suggestions, many of which are contained in the following discussion.

> people (e.g., prisoners or aliens) who are denied a voice in the political process and hence are unlikely to be protected by it.[10]

Other factors have thrust the United States judicial system into an "activist" role, at least when compared to judicial systems in other countries. According to Mr. Baker, these factors include a litigious American society; a generally weak political system; a general distrust of popular legislative majorities and public administrators; "an uncommonly formal and legalized administrative process . . . with judicial review as an essential feature"; a tradition of natural rights; and the common law, which in part antedates the period of parliamentary supremacy in England.[11] These factors all contribute to a system, as described by Professor Donald L. Horowitz, in which "no courts anywhere have greater responsibility for making public policy than the courts of the United States."[12]

Given this judicial role, court action in the following representative cases is arguably consistent with past judicial activity. Courts simply decide between different political interests. However, commentators generally agree that during the last two or three decades the judiciary's role in public governance has expanded significantly.[13] In a 1976 address to the National Conference of the American Society for Public Administration, Judge David L. Bazelon described the transformation of the judiciary's role as follows:

> Forty years ago, if anyone asked what the impact of the judicial system was on public administration, many lawyers probably would have been a little puzzled, but soon would have responded that at least they were not aware of any real impact. Until ten or fifteen years ago, about the only public administrators regularly troubled with court review were regulatory agencies functioning in a structured system of advocacy considering primarily economic matters such as rate making.[14]

In contrast to the limited degree to which public administrators have been affected by the judicial system, as noted by Judge Bazelon, the following survey illustrates the extent to which public administrators at all levels of government and in varying

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10. *Id.* at 3.

11. *Id.* at 3-5.

12. D. HOROWITZ, *supra* note 5, at 3.

13. *See infra* notes 158-59 and accompanying text.

14. Bazelon, *The Impact of the Courts on Public Administration*, 52 IND. L.J. 101, 101 (1976).

fields of public administration have been "troubled" by recent court action.

1. Educators

While public school[15] officials have long been objects of judicial scrutiny,[16] courts rarely became involved in matters of school administration or educational policy.[17] In recent years, however, courts bave increasingly become involved in overseeing all facets of public school administration, from broad policies governing entire school systems to narrow regulation governing student conduct.[18]

Courts have determined where school boundaries should be located[19] and when schools should open and close.[20] They have called and cancelled elections for school boards,[21] imposed tax

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15. As used herein, "school" includes publicly funded colleges and universities.

16. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (school officials may not require students to salute flag); Meyer v. Nebraska, 262 U.S. 390 (1923) (state may not forbid teaching of German); *cf.* Farrington v. Tokushige, 273 U.S. 284 (1927) (state may not regulate in detail the curriculum and choice of texts of private school).

17. *See, e.g.*, Minersville School Dist. v. Gobitis, 310 U.S. 586, 598 (1940) ("[T]he courtroom is not the arena for debating issues of educational policy.").

18. For an in-depth examination of the effects of various desegregation orders on school administration, see, *e.g.*, D. HOROWITZ, *supra* note 5, at 106-70; LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION (H. Kalodner & J. Fishman eds. 1978) [hereinafter cited as LIMITS OF JUSTICE]; M. REBELL & A. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS (1982); E. WOLF, TRIAL AND ERROR: THE DETROIT SCHOOL SEGREGATION CASE (1981); Leedes & O'Fallon, *School Desegregation in Richmond: A Case History*, 10 U. RICH. L. REV. 1 (1975); Roberts, *The Extent of Federal Judicial Equitable Power: Receivership of South Boston High School*, 12 NEW ENG. L. REV. 55 (1976); Wilkinson, *The Supreme Court and Southern School Desegregation, 1955-1970: A History and Analysis*, 64 VA. L. REV. 485, 542-46 (1978). As of March 24, 1983, at least 357 school districts were operating under court desegregation orders. Letter from United States Department of Education to Mary Voegtle (Mar. 24, 1983).

19. *E.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); *see also* United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972).

20. *E.g.*, Liddell v. Board of Educ., 491 F. Supp. 351 (E.D. Mo. 1980), *aff'd*, 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1081 (1981). *See generally* A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 77-90 (1976).

21. United States v. Missouri, 388 F. Supp. 1058, 1060-61 (E.D. Mo.), *aff'd in part, rev'd in part*, 515 F.2d 1365, *later appeal*, 523 F.2d 885 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975). *See generally* Oster & Doane, *The Power of Our Judges—Are They Going Too Far?*, U.S. NEWS & WORLD REP., Jan. 19, 1976, at 29, 31.

levies,[22] ordered busing,[23] and ordered various capital and operating expenditures within particular schools.[24]

In one widely publicized case, Judge W. Arthur Garrity ordered that South Boston High School be placed in temporary receivership.[25] In the course of the litigation, Judge Garrity ordered the high school's headmaster and football coach transferred to jobs outside the school; ordered the school board to pay moving costs for a court-hired headmaster; ordered the library at Trade High School moved to a larger room; ordered the purchasing of a piano at another school; and, according to one news reporter, "pondered the purchase of tennis balls."[26]

Other courts have assessed the constitutionality of admission[27] and graduation policies,[28] evaluated faculty hiring and tenure procedures,[29] determined what may[30] and may not be

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22. United States v. Missouri, 388 F. Supp. 1058, 1060 (E.D. Mo.), *aff'd in part, rev'd in part*, 515 F.2d 1365, *later appeal*, 523 F.2d 885 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975).

23. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

24. *See, e.g.*, Oster & Doane, *supra* note 21, at 30 (Boston school district required to spend $125,000 to renovate high school and buy equipment and $25,000 to pave a turnaround for buses at an elementary school); *see infra* notes 25-26 and accompanying text.

25. Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977). *See generally* Roberts, *supra* note 18; Smith, *Two Centuries and Twenty-Four Months: A Chronicle of the Struggle to Desegregate the Boston Public Schools*, in LIMITS OF JUSTICE, *supra* note 18, at 25.

26. Footlick, *Too Much Law?*, NEWSWEEK, Jan. 10, 1977, at 42, 42.

27. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (admission policies established by medical school administrators).

28. *See, e.g.*, Footlick, *supra* note 26, at 44 (due process prevented teacher from holding child back in kindergarten); Brimelow & Markman, *Supreme Irony*, HARPER'S MAG., Oct. 1981, at 16, 18 (Florida court struck down school board's attempt to make functional literacy test a prerequisite for high school grade advancement and graduation).

29. *See, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) (affirmative action in hiring teachers); Ollman v. Toll, 518 F. Supp. 1196 (D. Md. 1981) (school officials may not refuse to promote teacher because of political beliefs) *aff'd*, 704 F.2d 139 (4th Cir. 1983); Potemra v. Ping, 462 F. Supp. 328 (S.D. Ohio 1978) (must meet due process requirements to dismiss teacher for incompetence); G. ROCHE, THE BALANCING ACT: QUOTA HIRING IN HIGHER EDUCATION (1974); Note, *Title III on Campus: Judicial Review of University Decisions*, 82 COLUM. L. REV. 1206 (1982); Note, *Free Speech Rights of Homosexual Teachers*, 80 COLUM. L. REV. 1513 (1980). *Compare* Keyeshian v. Board of Regents, 385 U.S. 589 (1967) (school board may not refuse to hire teacher for belonging to certain organizations) *with* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (school board may require the payment of dues to certain organizations as a condition of teaching). One court fined and imprisoned a professor for refusing to disclose how he voted on a tanure decision at a faculty committee meeting. Blaubergs v. Board of Regents, 661 F.2d 426 (5th Cir. 1980), *cert. denied*, 457 U.S. 1106 (1982). In another case

> [a] high school teacher in Massachusetts obtained an injunction from a federal court against a meeting of a school committee which was considering

taught,[31] evaluated grading decisions,[32] and reviewed decisions to exclude certain books from school libraries.[33] "[F]ederal courts have become preoccupied with school regulations to an unbelievable extent," observes one scholar who notes court decisions involving school clubs, armband wearing, and leaflet distri-

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the advisability of the teacher's discharge for use in class of "a vulgar term for an incestuous son," a term which the teacher told the school committee he could not "in good conscience" consent not to use again in the classroom. The court's opinion suggested that such interference with the teacher's academic freedom amounted to a violation of the First Amendment and of the federal civil rights law.

M. FLEMING, THE PRICE OF PERFECT JUSTICE 132 (1974) (footnote omitted).

30. *See, e.g.*, Lau v. Nicholas, 414 U.S. 563 (1974) (school district must teach English to Chinese students); Pickering v. Board of Educ., 391 U.S. 563 (1968) (school board cannot limit what teacher says about current events); Martin Luther King, Jr. Elementary School Children v. Ann Arbor School Dist. Bd., 473 F. Supp. 1371 (E.D. Mich. 1979) ("black English" is a language barrier which results in the deprivation of equal opportunity unless special compensatory classes are offered to overcome the barrier). *But see* Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975) (teaching of sex education class raises no federal question), *appeal dismissed*, 425 U.S. 908 (1976).

One federal district court held that a public school teacher's "academic freedom" under the First Amendment had been violated when her employers sought to dismiss her because she had assigned a short story by a best-selling author to an eleventh grade English Class over the specific objections of her employers. The court reviewed the story, found it not legally obscene under existing Supreme Court standards, compared it with other literature offered to eleventh graders, and decreed it was an appropriate story for the teacher to assign to her class.

M. FLEMING, *supra* note 29, at 132 (footnote omitted).

31. *See, e.g.*, Brimslow & Markman, *supra* note 28, at 18 (Mississippi administrators ordered to supply high schools with a textbook previously rejected because of its controversial stress on black history).

32. A federal court in Vermont agreed to review a student's claim that school authorities acted arbitrarily, capriciously, and in bad faith in the matter of grades and dismissals. In the California state courts a medical student sought reinstatement in the university, claiming his dismissal was arbitrary and therefore a violation of due process of law. The school's answer pleaded that petitioner had spent four years attempting to complete the first three years of medical school, that he remained at the bottom of a class of 122 students, and that he had been found scholastically deficient to practice medicine. The trial court's judgment of dismissal was reversed on appeal, and a hearing was ordered.

M. FLEMING, *supra* note 29, at 133 (footnote omitted). *But see "See You In Court,"* U.S. NEWS & WORLD REP., Dec. 20, 1982, at 58, 59 (California judge dismissed case of university student who sued her professor and the school to gain grade change from B-plus to A-minus).

33. *See, e.g.*, Pico v. Board of Educ., 638 F.2d 404 (2d Cir. 1980) (trial court ordered to determine motive of school board in removing books from libraries), *aff'd*, 457 U.S. 853 (1982); Note, *Schoolbooks, School Boards, and the Constitution*, 80 COLUM L. REV. 1092 (1980).

bution on school property.[34] In one instance, students in a Virginia high school obtained a federal court order permitting them, over school board objections, to publish in the school newspaper results of a student survey on birth control.[35] The dress code cases, including decisions on permissible hair length, further evidence the courts' involvement in details of school administration.[36]

2. *Police officials*

Judicial oversight of law enforcement activities has been one of the most controversial areas of court activity in recent years. The controversy has focused mainly on criminal rights. For example, in interpreting the fourth amendment, courts have laid

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34. M. FLEMING, *supra* note 29, at 130-31; *see also* Goss v. Lopez, 419 U.S. 565 (1975) (notice and hearing required before student could be suspended); Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.) (witness needed before corporal punishment may be administered), *aff'd*, 423 U.S. 907 (1975); Brimelow & Markman, *supra* note 28, at 18 (school administrators forced to allow homosexual student to take male date to senior prom); Glazer, *Campus Rights and Responsibilities: A Role for Lawyers?*, 39 AM. SCHOLAR 445 (1970).

35. Kidney, *Are Judges Getting Too Powerful?*, U.S. NEWS & WORLD REP., Jan. 16, 1978, at 8, 39, 41.

36. [F]or boys, a federal court issued a preliminary injunction prohibiting school officials from denying admission to a male student whose hair reached his shoulders, and another court ruled that regulation of length of hair of male high school students was unconstitutional in that the right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the Constitution. Courts look after girls, too: a federal court enjoined school officials from enforcing a rule requiring that a girl's hair "be kept one finger width above the eyebrows, clear across the forehead," a rule the court found unconstitutional.

Hair need not grow on top of the head to be of concern to the federal district courts. One court, on behalf of a high school student, enjoined school officials from enforcing a regulation setting a maximum length for sideburns. Another court upheld the validity of a high school dress code prohibiting mustaches, but it ordered the suspended student reinstated anyway, because it concluded the dress code did not apply to plaintiff's mustache, which was barely perceptible, of natural growth, and not artificially cultivated. Another court held that in the absence of a showing of a relationship to health, welfare, morals, or discipline of the students, a rule prohibiting students in a junior college from wearing beards violated the equal protaction clause of the Fourteenth Amendment.

Pants are another popular area of concern. A federal court held unconstitutional a school dress code prohibiting boys in grammar school from wearing dungarees to school in the absence of any showing that dungarees inhibited the educational process. The right to wear clothes of one's choice, said the court, is a constitutional right protected by the Fourteenth Amendment.

M. FLEMING, *supra* note 29, at 131 (footnotes omitted).

down detailed requirements for police searches.[37] They have held in certain circumstances that use of ultraviolet light is a "search,"[38] but that use of a flashlight is not.[39] Use of an x-ray machine has been held a search,[40] but use of a dog to detect scents undetectable by humans has not.[41]

Juxtaposing these superficially incongruous decisions is not intended to belittle court holdings or impugn court analysis of fourth amendment demands; rather, it is intended to illustrate the detail with which courts have nationalized the operating procedures of police officers.[42] Similarly detailed procedures have been mandated, for example, with respect to arrests[43] and interrogations.[44] But even more far reaching, say some, than the broad interpretation of various constitutional amendments is the courts' application of those amendments to the states.[45]

Courts have employed various means to restrain overzealous law enforcement officers. For example, evidence acquired in violation of a suspect's constitutional rights is excluded from court.[46] Similarly, a confession obtained in violation of a suspect's rights is inadmissible.[47] In addition, courts have, by finding an implied cause of action under the Constitution for the violation of certain rights,[48] permitted individuals aggrieved by police practices to sue for damages under section 1983.[49]

Judicial oversight of public safety extends beyond the treatment of suspects into such administrative matters as who is hired, promoted, and fired. For example, courts not only rou-

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37. *See generally* 1 W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS (1984).

38. *See, e.g.*, United States v. Kenaan, 496 F.2d 181 (1st Cir. 1974).

39. *See, e.g.*, Marshall v. United States, 422 F.2d 185 (5th Cir. 1970).

40. *See, e.g.*, United States v. Albarado, 495 F.2d 799 (2d Cir. 1974).

41. *See, e.g.*, United States v. Fulero, 498 F.2d 748 (D.C. Cir. 1974).

42. *See generally* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

43. *See generally* W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965).

44. *See generally* Kamisar, Brewer v. Williams, Massiah, *and* Miranda: *What is an Interrogation? When Does it Matter?*, 67 GEO. L.J. 1 (1978).

45. *See generally* Friendly, *supra* note 42.

46. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961). *See generally* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974).

47. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

48. *E.g.*, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

49. 42 U.S.C. § 1983 (1982); *see, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961) (overruled on other grounds in Monell v. Department of Social Servs., 436 U.S. 658 (1978)). *See generally* Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781 (1979).

tinely order administrators to devise new hiring standards,[50] but frequently mandate specific hiring quotas by race and sex. For example, one court ordered administrators in a police department to include in each group of 200 recruits 100 black or Hispanic men, 33 women, and 67 white men. The court also ordered that female officers be referred to as "police officers" rather than "police women" or "police matrons."[51] Administrators have also been ordered to develop new systems for selecting officers for promotion.[52] Furthermore, courts have ordered the promotion of specific officers who did not do well on discriminatory written examinations.[53]

Courts have also forced police departments to revise their procedures when a pattern of misconduct has been found to exist.[54] One department was ordered to prepare "a comprehensive program for dealing adequately with civilian complaints," including the revision of public manuals and rules "spelling out in some detail, in simple language, the 'do's and don'ts' of permissible conduct in dealing with civilians."[55] Police officers were also prohibited from making derogatory remarks or using offensive language.[56]

3. Other state and local government officials

Federal and state courts have encroached on many areas of state government once thought to be purely matters of local discretion. Although of concern more to legislators than administrators, the Supreme Court's sweeping reapportionment decisions warrant mention in any discussion of judicial encroachment.[57] In other voting cases, courts have voided property ownership,[58] poll tax,[59] and residency requirements, for

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50. *See, e.g.*, Vanguard Justice Soc'y, Inc. v. Hughes, 471 F. Supp. 670, 717 (D. Md. 1979) (height and weight requirements set by department officials held invalid).

51. Oster & Doane, *supra* note 21, at 33.

52. *See, e.g.*, Allen v. City of Mobile, 464 F. Supp. 433 (S.D. Ala. 1978).

53. *Id.*

54. *See, e.g.*, Allee v. Medrano, 416 U.S. 802 (1974); Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966).

55. Council of Orgs. on Philadelphia Police Accountability and Responsibility v. Rizzo, 357 F. Supp. 1289, 1321 (E.D. Pa. 1973), *aff'd in relevant part sub nom.* Rizzo v. Goode, 506 F.2d 542 (3d Cir. 1974), *rev'd*, 423 U.S. 362 (1976).

56. *Id.*

57. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962). *See generally* W. ELLIOTT, THE RISE OF GUARDIAN DEMOCRACY (1974).

58. *See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

59. *See, e.g.*, Harper v. Virginia Bd. of Educ., 383 U.S. 663 (1966).

both voters[60] and office seekers.[61] In one case, a federal district court held unconstitutional Mobile, Alabama's one-hundred-year-old system of electing school board commissioners.[62]

State courts have increasingly become involved in the finances of local government institutions.[63] Several state courts have invalidated financing of education based upon property taxes, holding that inequality in tax bases discriminates against children from poorer communities.[64] Other state courts have acted to "correct" property tax assessment practices that varied within the community.[65]

Federal courts generally act in the property tax area only if they find an intentional violation of the equal protection clause, although they might apply a stricter standard when variations in taxing policies are racially discriminatory.[66] The Supreme Court has limited federal courts in this area by upholding the constitutionality of property taxes to finance schools and finding that wealth is not a suspect class under the equal protection clause.[67]

Federal courts have sought to ensure the equal allocation of such local governmental services[68] as the maintenance of streets,[69] parks,[70] and public housing.[71] But when the quality of the service is hard to quantify, as with educational services,[72]

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60. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972).

61. *See, e.g.*, Rinaldi v. Preller, No. 79-183 (D. Md. Feb. 15, 1979).

62. Bolden v. City of Mobile, 542 F. Supp. 1050 (S.D. Ala. 1982).

63. *See generally* Inman & Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662 (1979).

64. *See* Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 432 U.S. 907 (1977); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977); A. COX, *supra* note 20, at 92-96.

65. *See, e.g.*, Town of Sudbury v. Commissioner of Corps. and Taxation, 366 Mass. 558, 321 N.E.2d 641 (1974); Switz v. Township of Middleton, 23 N.J. 580, 130 A.2d 15 (1957).

66. *See, e.g.*, Lehnhausen v. Lake Shore Auto Parts, 410 U.S. 356 (1973). *See generally* Comment, *The Road to Uniformity in Real Estate Taxation: Valuation and Appeal*, 124 U. PA. L. REV. 1418 (1976).

67. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). *See generally*, Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

68. *See generally* Lineberry, *Mandatory Urban Equality: The Distribution of Municipal Public Services*, 53 TEX. L. REV. 26 (1975).

69. *See, e.g.*, Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *aff'd on reh'g*, 461 F.2d 1171 (5th Cir. 1972) (en banc).

70. *See, e.g.*, Beal v. Lindsey, 468 F.2d 287 (2d Cir. 1972).

71. *See, e.g.*, Hills v. Gautreaux, 425 U.S. 284 (1976).

72. *See, e.g.*, McInnis v. Shapiro, 293 F. upp. 327 (N.D. Ill. 1958), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969). *But see* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc).

and police and fire protection,[73] federal courts generally will not order the reallocation of resources.[74]

With regard to zoning and land use planning, federal courts, which invalidate zoning regulations only when racial discrimination has been shown or can be inferred, have not been as activist as state courts.[75] Several state courts have required that each community provide its "fair share" of housing for the poor.[76] Recently the New Jersey Supreme Court went further and "impos[ed] on many suburbs the affirmative obligation to use government subsidies and innovative zoning techniques to assure that lower-income housing is actually built."[77]

Courts have also limited the regulatory powers of local governments in several first amendment contexts. For example, one federal court temporarily enjoined the enforcement of a local ordinance prohibiting topless dancing in bars, stating that "nude dancing which cannot be characterized as obscene is a form of expression entitled to some protection under the first amendment."[78] Another court found that a city's ownership and display of a Christian nativity scene as part of a city-sponsored outdoor Christmas display violated the Constitution.[79] In contrast to former practice when obscenity was viewed as not involving first amendment interests and as being not any different from "traffic in beef or buttons,"[80] federal courts are now extensively involved in determining to what extent local officials may protect community standards by restricting the distribution of obscene materials.[81] Courts have protected the use of profane language at school board meetings[82] and its display on the back of jackets worn in public places.[83] In addition, courts have found

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73. *See, e.g.*, Burner v. Washington, 399 F. Supp. 44 (D.D.C. 1975).

74. *See generally* Inman & Rubinfeld, *supra* note 63, at 1698-1700 & n.89.

75. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). *See generally* Inman & Rubinfeld, *supra* note 63, at 1710.

76. *See, e.g.*, Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975).

77. *See* Zax & Kayden, *A Landmark in Land Use*, NAT'L L.J., Mar. 14, 1983, at 11, 11.

78. Hughes v. Cristofane, 486 F. Supp. 541, 544 (D. Md. 1980).

79. *See, e.g.*, Donnelly v. Lynch, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1984). *Contra* Citizens Concerned for Separation of Church and Stata v. City of Denver, 526 F. Supp. 1310 (D. Colo. 1981); *see also* Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973) (prohibiting federal government participation in Christmas pageant).

80. L. LUSKY, BY WHAT RIGHT? 320 (1975).

81. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973).

82. *See, e.g.*, Rosenfeld v. New Jersey, 408 U.S. 901 (1972).

83. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971).

a right of privacy that protects the right of individuals to have abortions[84] and to obtain contraceptives.[85]

Another area of considerable concern to city and other local government administrators is the possibility of personal and municipal liability for violation of constitutional or statutory rights. The former Mayor of Greenville, Mississippi quit after twelve years of public service, explaining that he was "not going to run and subject [himself]" to the possibility of personal liability under section 1983.[86] Similarly, when officials in a small Kansas town discovered that the town could be liable under section 1983, they sought insurance coverage. When the officials "found that the premium would exceed the total town budget," they decided to disband the town.[87]

Although commentators differ on the impact of recent Supreme Court decisions subjecting local government entities to liability under federal civil rights statutes,[88] the Constitution,[89] and antitrust laws,[90] most agree that local public administrators have greater cause to be concerned today than in the recent past.[91] According to one commentator, because of the relative ease of proving damages and the provision for liberal attorney fees under the Civil Rights Attorney's Award Act of 1976, the Supreme Court's recent expansion of section 1983 to include nonconstitutional claims "may well end up being much more costly to governmental entities and officials than are traditional

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84. *See* Roe v. Wade, 410 U.S. 113 (1973).

85. Griswold v. Connecticut, 381 U.S. 479 (1965).

86. Jaron, *The Threat of Personal Liability Under the Federal Civil Rights Act: Does It Interfere with the Performance of State and Local Government?*, 13 URB. L. 1, 2 (1981).

87. *Id.* at 1.

88. *See, e.g.*, Maine v. Thiboutot, 448 U.S. 1 (1980) (section 1983 provides remedy for nonconstitutional claims); Owen v. City of Independence, 445 U.S. 622 (1980) (city liable for failure to hold a hearing amid public accusations in connection with firing of police chief).

89. *See* Hundt, *Suing Municipalities Directly Under the Fourteenth Amendment*, 70 NW. U.L. REV. 770 (1975).

90. *See, e.g.*, Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982).

91. *See, e.g.*, Eisenberg, *Section 1983: Doctrinal Foundations and Empirical Study*, 67 CORNELL L. REV. 482 (1982); Goode, *The Changing Nature of Local Governmental Liability Under Section 1983*, 22 URB. L. ANN. 71 (1981); Jaron, *supra* note 86; Kushner, *The Impact of Section 1983 after* Monell *on Municipal Policy Formation and Implementation*, 12 URB. L. 466 (1980). During 1982, 13,534 civil rights suits seeking billions of dollars in damages were filed against local governments, up from 270 suits two decades earlier. *"See You In Court," supra* note 32, at 59.

Section 1983 actions."[92] Not only affirmative governmental acts, but informal administrative policies and customs as well, can give rise to liability.[93] Consequently, municipalities are finding it increasingly difficult, if not impossible, to purchase comprehensive insurance to protect their employees and elected officials against personal loss.[94]

4. Mental health care administrators

Only in the last two decades have courts begun to challenge the discretion of experts charged with the care and treatment of the mentally ill.[95] In some observers' opinions, judges have, by imposing pervasive orders,[96] effectively substituted their judgment in matters in which the health care provider is presumably expert. For example, courts have reviewed administrators' decisions regarding the confinement and treatment of dangerous and nondangerous patients.[97] With respect to the manner of treatment, courts have required that it be "adequate and effective"[98] and administered in the least restrictive manner possible.[99] Courts have also claimed the right to determine for themselves the adequacy of treatment.[100] Further, courts have limited the

92. Goode, *supra* note 91, at 86-87. Under the Civil Rights Attorney's Award Act of 1976, a municipality may be subject to substantial fees even when the case is settled, a consent judgment awarded, or the municipality attempts to redress the plaintiff's grievance as a result of the commencement of litigation. *Id.* at 87 n.105. As a result, Professor Goode observes that plaintiffs' lawyers "will undoubtedly plead statutory claims under Section 1983 routinely, thereby exposing the governmental defendant to liability for attorney's fees." *Id.* at 88.

93. Kushner, *supra* note 91, at 472.

94. Jaron, *supra* note 86, at 20.

95. *See generally* R. MARTIN, LEGAL CHALLENGES TO BEHAVIOR MODIFICATION (1975).

96. *See, e.g.*, Williams v. Robinson, 432 F.2d 637 (D.C. Cir. 1970).

97. *See, e.g.*, Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *vacated on other grounds*, 422 U.S. 563 (1975). As to confinement, see Pennsylvania Ass'n For Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) (due process requires periodic notice and hearings to assign school children to special classes for mentally retarded).

98. *See, e.g.*, Wyatt v. Stickney, 344 F. Supp. 387, 390 (M.D. Ala. 1972) (quoting Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971)), *aff'd in part, remanded in part, reversed in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

99. *See, e.g.*, Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966).

100. *See, e.g.*, Donaldson v. O'Connor, 493 F.2d 507, 526 & n.47 (5th Cir. 1974), *vacated on other grounds*, 422 U.S. 563 (1975); *cf.* Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973) (administering of drug which induced vomiting unacceptable as constituting cruel and unusual punishment).

use of experimental therapy or methods of treatment by strictly defining what constitutes informed and voluntary consent.[101]

Mental health experts are often faced with conflicting requirements, on one hand to protect the common good and on the other to preserve individual rights. For example, at the same time psychiatrists have been ordered to place patients in the least restrictive environment, they have also become subject to the threat of liability for acts of patients whose release threatens public safety.[102]

With regard to nontherapeutic treatment, courts have, among other things, prescribed a variety of minimum standards dealing with physical facilities, the number and training of support staff,[103] and patient discipline,[104] privileges,[105] and responsibilities.[106] *Wyatt v. Stickney*[107] involved orders to reform state institutions for the mentally ill and retarded. Confronted with shocking conditions and inadequate treatment, the district court ordered state officials to satisfy thirty-five specific requirements for mental health institutions and forty-nine requirements for an institution for the mentally retarded. One commentator summarized these requirements as follows:

> Compliance with the court's orders required massive budget increases for the institutions in question. 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

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101. *See, e.g.*, Wyatt v. Stickney, 344 F. Supp. 373, 380 (M.D. Ala. 1972), *aff'd in part, remanded in part, reversed in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

102. *See, e.g.*, Press, *When Can a Shrink Be Sued*, NEWSWEEK, Mar. 7, 1983, at 77.

103. *See infra* notes 107-09 and accompanying text; *see also* Oster & Doane, *supra* note 21, at 33 (hospital ordered to immediately fill 100 staff vacancies). As of 1978, courts had ordered at least eleven states to overhaul their facilities for the mentally ill or mentally retarded. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 718 (1978).

104. *See, e.g.*, Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd*, 535 F.2d 864 (5th Cir. 1976), *rev'd* 430 U.S. 322 (1977).

105. *See, e.g.*, Brown v. Schubert, 389 F. Supp. 281 (E.D. Wis. 1975) (hospital could not discourage inmates from sending letters to newspapers).

106. *See, e.g.*, Souder v. Brennan, 367 F. Supp. 808 (D.D.C. 1973) ("work therapy" program centered around "institutional housekeeping functions" is work, not therapy, and minimum wages must be paid).

107. 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, reversed in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

> facilities meet specific size and furniture requirements, and that heating and air conditioning adequate to maintain a specific range of temperatures be provided. To ensure adequate staffing, the court established a minimum staffing ratio of two psychiatrists, twelve registered nurses, ninety-two nurse's aids, 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. 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. The district court emphasized that "a failure by defendants to comply with this decree cannot be justified by a lack of operating funds," but it did not decide what affirmative steps it would take if the funds were not made available. The court did, however, appoint a seven-member Human Rights Committee for each institution to oversee compliance with the designated standards.[108]

In another case involving a state mental health facility, the state had heen unable to hire sufficient staff at prevailing wages. Accordingly, in connection with an order to increase the staff at the facility, the court ordered a ten percent increase in wages for certain employees, deferring a decision on possible wage increases for other employees until a compliance report was issued.[109]

While most courts have stopped short of ordering measures to raise money to fund specific reform measures, one district court ordered a state "to comply with its decree as if adequate appropriations had been made, notwithstanding the legislature's [previous refusal] to make the appropriations, and enjoined compliance with all [the state's] constitutional and statutory provisions concerning the raising and allocating of funds inconsistent with its decree." The order was reversed on appeal.[110]

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108. Frug, *supra* note 103, at 721 (footnotes omitted).

109. *Id.* at 722; *see* New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 769 (E.D.N.Y. 1973).

110. Frug, *supra* note 103, at 723 (footnote omitted); *see* Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), *aff'd* 525 F.2d 987 (8th Cir. 1975). *See generally* Hirschhorn, *Where The Money Is: Remedies to Finance Compliance with Strict Structural Injunctions*, 82 MICH. L. REV. 1815 (1984); Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40 (1974).

5. Corrections administrators

In sharp contrast to the view that it "is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries,"[111] courts recently have initiated reforms touching every aspect of corrections administration, including the physical condition of prisons, overcrowding, physical and mental health treatment, food service, recreation, and prison discipline.[112] As summarized by one commentator,

> courts have ordered extensive structural improvements, a minimum number of square feet to be assigned to each prisoner as living space, an increase in custodial personnel, the daily cleaning of the facility, 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. To remedy overcrowding, courts have limited the number of people that can be confined to a facility, or to the cells or dormitories of a facility. . . . To ensure minimum physical and mental health care to prisoners, courts have ordered the improvement of hospital facilities . . . the hiring of physicians, psychiatric personnel, and other staff, the provision of specific medical treatment, including periodic physical exams, and the purchase of new equipment. To improve food service, they have ordered the hiring of a nutritionist or similar expert, the revision of food handling procedures and equipment to meet restaurant standards, and the provision of minimal nutritional standards. To ensure an improved environment, they have ordered specific amounts of recreation, reading material, and opportunities for outside visitors (including specifications concerning the physical condition of the visiting area), and the provision of work assignments, educational opportunities, and vocational training.[113]

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111. Stroud v. Swope, 187 F.2d 850, 851-52 (9th Cir.), *cert. denied*, 342 U.S. 829 (1951). *See generally* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

112. For an in-depth study of the implementation of several comprehensive prison orders, see M. HARRIS & D. SPILLER, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS (1977); S. KRANTZ, LAW OF CORRECTIONS AND PRISONERS' RIGHTS IN A NUTSHELL (1983); NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, IMPLEMENTATION OF REMEDIES IN PRISON CONDITION SUITS (1980); Project, *Judicial Intervention in Corrections: The California Experience—An Empirical Study*, 20 UCLA L. REV. 452 (1973); Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981). In 1982, 39 states were under court orders to remedy prison crowding. W. Burger, Annual Report on the State of the Judiciary 7 (Feb. 6, 1983).

113. Frug, *supra* note 103, at 723-25 (footnotes omitted); *see also* Fletcher, *The Dis-*

Courts have opined on the fairness of disciplinary[114] and parole[115] procedures and, arguably, even hinted at the existence of certain fourth amendment protections for inmates from unreasonable searches and seizures.[116] The warden of one prison in Ohio reportedly keeps a thick looseleaf book filled with judicial prison regulations and spends twenty percent of his time dealing with prisoners' lawsuits.[117] In connection with prisoners' rights to represent themselves in court, federal judges "have reviewed and weighed such matters as the adequacy of typewriter facilities for a prisoner, the quantity of writing paper allowed prisoners each day, the length of writing pencils furnished prisoners, and the wattage of the light bulbs in their cells."[118]

> A federal district court in New York held that it was a denial of [a prisoner's] right to the equal protection of the laws under the Fourteenth Amendment for New York authorities to keep her in a state jail separate from other inmates pending her extradition on state charges to California. A federal district court in Connecticut ruled that the wearing of a goatee by a prisoner in a state jail awaiting trial in a state court was a federally protected right under the Fourteenth Amendment to the Constitution. A federal district court in California ruled, apparently under the Fourteenth Amendment's application to the states of freedom of speech and religion, that a state prisoner must be allowed to subscribe to *Muhammad Speaks;* that each California prison library must make available a copy of *The Holy Qu-ran* by Elsef Ali; and that the state prison system must employ a Muslim minister, when available, at an hourly rate comparable to that paid to chaplains of the Catholic, Jewish, and Protestant faiths.[119]

Another court ordered prison authorities to allow convicts to observe the rites of their "religion," rites that included the serving of sirloin steak and Harvey's Bristol Cream Sherry. Prison offi-

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cretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 YALE L.J. 635, 639 (1982).

114. *See, e.g.,* Wolff v. McDonnell, 418 U.S. 539 (1974). *See generally* Milleman, *Prison Disciplinary Hearings and Procedural Due Process: The Requirement of a Full Administrative Hearing,* 31 MD. L. REV. 27 (1971).

115. *See, e.g.,* Greenholtz v. Inmates of Penal and Correctional Complex, 442 U.S. 1 (1979); *cf.* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (parole revocation).

116. *See, e.g.,* Lanza v. New York, 370 U.S. 139, 142-44 (1962). *But cf.* Bell v. Wolfish, 441 U.S. 520 (1979) (body-cavity searches did not violate fourth amendment).

117. N.Y. Times, June 1, 1980, at A1, col. 1.

118. M. FLEMING, *supra* note 29, at 133 (footnote omitted).

119. *Id.* (footnotes omitted).

cials were held in contempt for refusing to honor the rights until an appellate court lifted the order.[120]

6. *Science policy administrators*

The deluge of science-oriented legislation[121] passed during the last decade has increased the opportunity for judicial oversight of federal agencies—both "old agencies," such as the Food and Drug Administration, and "new agencies," such as the Environmental Protection Agency, Occupational Safety and Health Administration, and Consumer Product Safety Commission.[122] In recent years, courts have been active not only in elaborating

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120. Hager, *Activist Judges Expand Power of the Bench*, L.A. Times, Dec. 22, 1976, at 10, col. 1. Courts also have become extensively involved in reforming juvenile detention systems. *See, e.g.*, Morales v. Turman, 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). In *Morales*, for example, the district court ordered the closing of two state facilities and the establishment of community-based treatment alternatives, the esteblishment in the remaining institutions of a staff-to-resident ratio of virtually one-to-one, the implementation of detailed staffing plans, and the creation of individualized treatment plans for each juvenile. 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." Frug, *supra* note 103, at 727 (footnotes omitted).

121. *See, e.g.*, Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1982); National Weather Modification Policy Act, 15 U.S.C. §§ 330-330E (1982); Consumer Product Safety Act, 15 U.S.C. §§ 2051-2081 (1982); Federal Fire Prevention and Control Act, 15 U.S.C. §§ 2215-2223 (1982); Marine Protection Research and Sanctuaries Act of 1972, 32 U.S.C. §§ 1401-1444 (1982); Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1982); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1542 (1982); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1982); Clean Water Act of 1977, 16 U.S.C. §§ 1431-1434 (1982), 33 U.S.C. §§ 1251-1376 (1982); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 894 (codified as amended in scattered sections of 33 U.S.C. (1982)); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1982); Energy Conservation and Production Act, 42 U.S.C. § 6833 (1982); Earthquake Hazard Reduction Act of 1977, 42 U.S.C. §§ 7701-7706 (1982); Emergency Energy Conservation Act of 1979, Pub. L. No. 96-102, 93 Stat. 749 (codified as amended in scattered sections of 42 U.S.C. (1982)); Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C. (1982)); Energy Securities Act of 1980, Pub. L. No. 96-264, 94 Stat. 611 (codified as amended in scattered sections of 7, 10, 12, 15, 16, 30, 42 and 50 U.S.C. (1982)).

122. Cabinet, independent, and other agencies charged with implementing science policy legislation include the Commerce Department (which supervises such agencies as the National Bureau of Standards and the National Oceanic and Atmospheric Administration), the Office of the Chief of Engineers (popularly known as the Army Corps of Engineers) within the Department of Defense, the Department of Energy, the Environmental Protection Agency, the Federal Energy Regulatory Commission, the Food and Drug Administration, the Nuclear Regulatory Commission, and the Occupational Safety and Health Administration.

procedural requirements governing agency action, but in overturning agency determinations on substantive grounds.[123]

In the area of procedural elaboration, then-professor Scalia noted that the judiciary had intervened primarily in the area of informal rulemaking. "[F]or example," noted Scalia, courts have

> converted the simple requirement for "publication of notice" of a proposed rule [contained in the Administrative Procedure Act] into a requirement that the agency disclose in advance the factual data it proposes to rely upon; and the "statement of basis and purpose" provision into a requirement that major arguments against a prposed [sic] rule be answered.[124]

Scalia noted that Congress encouraged judicial intervention by mandating certain "hybrid rulemaking" provisions in connection with new grants of rulemaking power.

> These "hybrid rulemaking" provisions provided additional vehicles for the discernment of "implicit" procedural demands. Thus, a provision for "public hearing" in rulemaking was held to import a requirement of cross-examination; and a provision for judicial review on the basis of "substantial evidence" (ordinarily applicable only to formal adjudication and formal rulemaking) was held to mandate "adversary, adjudicative-type procedures" before the agency.[125]

In addition, Scalia observed, the courts broadly construed the judicial review provisions of the Administrative Procedure Act. As a result, the proposition that Congress had given the courts "carte blanche to impose extra-statutory procedural requirements" on the agencies became widely accepted in judicial and academic circles.[126]

The courts' intervention in agency decision making on substantive grounds is more difficult to document, noted Scalia. For one thing, "[i]t is very easy for the courts to achieve substantive

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123. *See* A. Scalia, Overseeing the Administrative Process 11-16 (unpublished paper presented Dec. 13-14, 1978, at AEI Conference on "The Role of the Judiciary in America"); *see also* R. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983); Fiorino, *Judicial-Administrative Interaction in Regulatory Policy Making: The Case of the Federal Power Commission*, 28 AD. L. REV. 41 (1976); Oakes, *Substantive Judicial Review in Environmental Law*, 7 ENVTL. L. REP. (ENVTL. L. INST.) 50029, 50030-31 (1977); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); Note, *Judicial Review of Agency Rulemaking*, 14 GA. L. REV. 300, 308 (1980).

124. A. Scalia, *supra* note 123, at 9 (footnotes omitted).

125. *Id.* at 10 (footnotes omitted).

126. *Id.*

ends through procedural means. A case may be sent back to the agency for asserted procedural reasons because of the judge's underlying dissatisfaction with the substantive result produced. Many believe this happens with some frequency."[127] For example, a court may determine that an agency decision is "arbitrary" because the decision lacks adequate rational support in the administrative record[128] or because the agency failed to adequately consider each factor in the decision making process.[129] In addition, a court may reject the substance of a decision as not being supported by "substantial evidence."[130]

In reviewing the substance of agency actions, courts have immersed themselves in a myriad of scientific questions. Courts have, for example, examined the health risk of lead as a gasoline additive,[131] the safety of exposure to various levels of benzene,[132] the toxicity of pesticides,[133] the hazards associated with nuclear power plants,[134] and the practicability of emission reduction systems.[135]

Until recently the most prominent examples of substantive review of agency action occurred under the National Environmental Policy Act.[136] Under this act, courts sought to determine whether an agency had sufficiently considered the environmental effect of its actions.[137] Generally review was procedural in nature, resulting merely in a delay while the agency considered cer-

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127. *Id.* at 11. Judge J. Skelly Wright observes that "in all but name" courts often "exercise a policy veto over the acts of the bureaucracy." Wright, *Judicial Review and the Equal Protection Clause*, 15 HARV. C.R.-C.L. L. REV. 1, 6 (1980).

128. *See, e.g.*, National Resources Defense Council v. EPA, 478 F.2d 875 (1st Cir. 1973); Environmental Defense Fund, Inc. v. EPA, 465 F.2d 528 (D.C. Cir. 1972).

129. *See, e.g.*, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

130. *See, e.g.*, American Petroleum Inst. v. OSHA, 581 F.2d 493, 497 (5th Cir. 1978), *aff'd sub nom.* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980).

131. *See* Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976).

132. *See* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 807 (1980).

133. *See* Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978).

134. *See* Yellin, *High Technology and the Courts: Nuclear Power and the Need for Institutional Reform*, 94 HARV. L. REV. 489, 492 (1981).

135. *See* Bethlehem Steel Corp. v. EPA, 651 F.2d 861 (8th Cir. 1981). For a summary of numerous other decisions involving the Clean Air Act, see R. MELNICK, *supra* note 123, at 20-21.

136. 42 U.S.C. §§ 4321-4347 (1982); *see, e.g.*, Oakes, *supra* note 123, at 50029.

137. Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 515-29 (1974).

tain new factors suggested by the court.[138] According to some commentators, however, the review was often implicitly substantive, involving rejection of agency action solely because proper weight was not given to environmental factors.[139]

Increased oversight of substance as well as form of administrative action signals a fundamental alteration of the relationship between the judicial and executive branches. Scalia observes that liberalized standing procedures now generally permit public interest groups and others not directly affected by agency action to challenge a rule "immediately upon its promulgation, without awaiting invocation against a particular individual."[140] Congress has aided in transforming the judicial role "by distributing rights to review with ever increasing liberality."[141] Scalia also warns that

> as the concept of "rights of individuals" expands to include (ultimately) the "right" of every citizen to have the officials of his government behave in a fair, efficient and lawful fashion, the duty to "take Care that the Laws be faithfully executed" becomes converted from a Presidential to a judicial responsibility.[142]

7. *Welfare program administrators*

While the science policy cases exemplify judicial assumption of executive power, Professor Abram Chayes observes that cases involving oversight of federal health and welfare agencies[143] il-

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138. *See, e.g.*, Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

139. *See, e.g.*, Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); 2 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 9.03[1] (1985). Two Supreme Court cases have severely limited the procedural and substantive review of agency actions under NEPA. Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

140. A. Scalia, *supra* note 123, at 19 (footnote omitted).

141. *Id.* at 25.

142. *Id.* at 22 (footnote omitted); *see also* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 34 n.108 (1973).

143. Agencies charged with implementing social welfare legislation include, among others, the Food and Nutrition Service of the Agriculture Department (administers food stamp, school lunch, and supplementary food programs); the Economic Development Administration (provides aid to areas suffering from severe unemployment and low family income caused by competition to local industry from imports) and Minority Business Development Agency of the Commerce Department; the Health and Human Services Department, including the Office for Civil Rights, Social Security Administration, and Office of Human Development Services (which consists of four agencies operating grant programs and coordinating government-wide services for children, youth, families, devel-

lustrate the judicial assumption of legislative power.[144] In construing antidiscrimination statutes, courts have reconciled diverse regulations promulgated by agencies that could not agree upon legislative policy.[145] Courts have also undertaken to determine whether discrimination can be shown by statistical evidence alone[146] and whether affirmative action is permissible, or even required, as a remedy.[147]

Further examples of the courts' legislative role can be found in cases challenging the location of public housing. Such determinations require courts to obtain input, in legislative fashion, from the affected groups, including neighborhood groups, local housing authorities, city councils, and the federal Department of Housing and Urban Development.[148] In remedying constitutional defects in the provision of housing services, housing administrators have been instructed in detail with respect to, among other things, design and location of units.[149] In one case, a federal court ordered city officials to set up a new housing program for low income persons.[150]

While decrees as to the operation of welfare departments and the administration of social services generally have not been as detailed as in other institutional cases, according to Professor Nathan Glazer, they do "involve a direct hand in administration."[151] For example, Professor Glazer cites one case in which

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opmentally disabled, the aged, and native Americans); Housing and Urban Development Department; the Bureau of Indian Affairs of the Interior Department; and the Employment and Training Administration of the Labor Department.

144. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976).

145. Bryner, *Congress, Courts, and Agencies: Equal Employment and the Limits of Policy Implementation*, 96 POL. SCI. Q. 411 (1981); Comment, *The Supreme Court's Interpretation of the Civil Rights Act of 1964: Liberty, Equality, and the Limitation of Judicial Power*, 1980 B.Y.U. L. REV. 295, 316-22.

146. *See, e.g.*, Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); Dothard v. Rawlinson, 433 U.S. 321 (1977); Washington v. Davis, 426 U.S. 229 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Comment, *supra* note 145, at 316-22.

147. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

148. *See, e.g.*, Mahaley v. Cuyahoga Metro. Hous. Auth., 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 419 U.S. 1108 (1975); Gautreaux v. Chicago Hous. Auth., 296 F. Supp. 907 (N.D. Ill. 1969).

149. *See generally* Note, *The Limits of Litigation: Public Housing Site Selection and the Failure of Injunctive Relief*, 122 U. PA. L. REV. 1330 (1974).

150. *See* Gest, *Drive to Halt "Tyranny of Judges,"* U.S. NEWS & WORLD REP., Feb. 15, 1982, at 33.

151. Glazer, *The Judiciary and Social Policy*, in THE JUDICIARY IN A DEMOCRATIC

"the state was required by a judge to hire a specified number of additional new social workers."[152] In New York City, a judge forced officials to provide nightly lodging for thousands of homeless persons, at an estimated cost to the city of up to $20 million a year.[153] In a case that involved extensive continuing oversight of a federal agency, the Department of Labor (DOL) was ordered to undertake specified actions to provide farm workers with employment services on a nondiscriminatory basis. The court implemented its liability finding through a special review committee composed of three high-ranking DOL administrators, three farmworker representatives, and a nonpartisan chairman chosen by the six other members.[154] In another action, a federal court permitted individuals to sue county officials for denying Comprehensive Employment and Training Act applications.[155] And finally, in a landmark case, the Supreme Court imposed formal hearing requirements on the juvenile justice system.[156]

B. Nature of Judicial Oversight

1. Comparison of past and recent encroachment

Many commentators perceive that periods of increased judicial oversight of the executive and legislative branches occur in cycles, with periods of relative quietude following times of controversial activity.[157] However, most commentators agree that

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SOCIETY 67 (L. Theberge ed. 1979).

152. *Id.* at 67-68.

153. *See* Gest, *supra* note 150, at 33.

154. NAACP v. Brennan, 360 F. Supp. 1006 (D.D.C. 1973). *See generally* Altman, *Implementing a Civil Rights Injunction: A Case Study of* NAACP v. Brennan, 78 COLUM. L. REV. 739 (1978).

155. Hudson Valley Freedom Theatre, Inc. v. Heimbach, 671 F.2d 702 (2d Cir.), *cert. denied*, 459 U.S. 857 (1982).

156. *In re* Gault, 387 U.S. 1 (1967). *See generally* D. HOROWITZ, *supra* note 5, at 171-219.

157. *See, e.g.*, Agresto, *The Limits of Judicial Supremacy: A Proposal for "Checked Activism,"* 14 GA. L. REV. 471 (1980); Caldeira & McCrone, *Of Time and Judicial Activism: A Study of the U.S. Supreme Court, 1800-1973*, in SUPREME COURT ACTIVISM AND RESTRAINT 103 (S. Halpern & C. Lamb eds. 1982); Glazer, *Towards an imperial judiciary?*, 41 PUB. INTEREST, Fall 1975, at 104, 110-12; G. McDowell, Curbing the Courts: Response to Judicial Activism 1857-1981 (paper presented Oct. 1-2, 1981, at AEI Conference on "Judicial Power in the United States: What are the Appropriate Restraints?"). The problems of the legitimacy and limits of federal judicial power have existed since the founding of the republic, and have proved to be fertile subjects of debate since that time. *See, e.g.*, D. ALFANGE, THE SUPREME COURT AND THE NATIONAL WILL (1937 & reprint 1964); C. BEARD, THE SUPREME COURT AND THE CONSTITUTION (1912 & reprint 1952); R. BERGER, CONGRESS AND THE SUPREME COURT (1969); R. BERGER, GOV-

the current surge of encroachment, dating generally from the 1954 decision of *Brown v. Board of Education*,[158] differs fundamentally from periods of judicial "activism" in the past.[159]

Some claim judicial oversight of the executive or legislative branches in the past was characterized by negative mandates that prohibited the legislature or executive official from taking certain action.[160] Contemporary encroachment, on the other hand, is characterized by positive commands. Professor Horowitz has noted that while courts have always had wide dis-

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ERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) [hereinafter cited as R. BERGER, GOVERNMENT BY JUDICIARY]; A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1978); C. BLACK, THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960); L. BOUDIN, GOVERNMENT BY JUDICIARY (1932); R. CARR, THE SUPREME COURT AND JUDICIAL REVIEW (1942); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); E. CORWIN, COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT (1938); A. COX, *supra* note 20; B. COXE, AN ESSAY ON JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION (1970); C. CURTIS, LAW AS LARGE AS LIFE: A NATURAL LAW FOR TODAY AND THE SUPREME COURT AS ITS PROPHET (1959); D. DEWEY, MARSHALL VERSUS JEFFERSON: THE POLITICAL BACKGROUND OF MARBURY VERSUS MADISON (1970); R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC (1971); J. ELY, DEMOCRACY AND DISTRUST (1980); S. GABIN, JUDICIAL REVIEW AND THE REASONABLE DOUBT TEST (1980); J. GROSSMAN & R. WELLS, CONSTITUTIONAL LAW AND JUDICIAL POLICY MAKING (1972); C. HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY (1914); R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1979); P. KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT (1970); L. LEVY, AGAINST THE LAW (1974); L. LEVY, JUDICIAL REVIEW AND THE SUPREME COURT: SELECTED ESSAYS (1967); L. LUSKY, *supra* note 80; R. MCCLOSKEY, THE AMERICAN SUPREME COURT (1963); A. MASON, THE SUPREME COURT: PALLADIUM OF FREEDOM (1962); W. MEIGS, THE RELATION OF THE JUDICIARY TO THE CONSTITUTION (1971); R. VON MOSCHZISKER, JUDICIAL REVIEW OF LEGISLATION (1971); B. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW (1942 & reprint 1967).

158. 347 U.S. 483 (1954).

159. *See, e.g.*, D. HOROWITZ, *supra* note 5, at 4-9; Chayes, *supra* note 144; Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791 (1976); Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978); Horowitz, *The Judiciary: Umpire or Empire?*, 6 LAW & HUMAN BEHAV. 129 (1982); Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); C. Fried, Connecting the Problems of Judicial Power with Larger Issues 1-5 (paper delivered Dec. 13-14, 1978 at AEI Conference on "The Role of the Judiciary in America"). *But see* Mendelson, *The Politics of Judicial Activism*, 24 EMORY L.J. 43 (1975).

160. N. Glazer, *supra* note 5, at 12-14. *But see* Dan-Cohen, *Bureaucratic Organizations and the Theory of Adjudication*, 85 COLUM. L. REV. 1, 4 & n.15 (1985) (summarizing Professor Fiss' view that even nineteenth century litigation was ultimately concerned with implementing public values rather than resolving individual disputes); *see also* Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 36 (1979).

cretion to fashion affirmative relief, the exercise of that discretion has traditionally been restricted to well-defined and rather matter-of-fact ministerial duties.[161] In recent times, however, courts increasingly have been involved in formulating policy, administering services, and overseeing day-to-day functioning of certain public institutions.[162]

Commentators point to the relative ineffectiveness of attempts in the 1960's and 1970's to curb judicial encroachment, as compared to such attempts in the past, as further evidence of the unique nature of recent encroachment.[163] Thus, note several critics, notwithstanding the fact that seven of the nine justices on the current Supreme Court were appointed by Republican presidents in an effort to curb judicial encroachment and restore strict constructionism, "on issues where the [Supreme] Court has a free vote, where there is no constitutional compulsion, the Court rather regularly produces results more liberal than those you would get after a full debate in a national referendum."[164]

In recent years public reaction to court encroachment appears to be characterized as frequently by acquiescence as by alarm. This indicates, some argue, that judicial encroachment has become commonplace.[165] These developments, among

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161. D. HOROWITZ, *supra* note 5, at 6-7.

162. *See supra* notes 18, 103 & 112; *see also* A. COX, *supra* note 20, at 91; D. HOROWITZ, *supra* note 5; Chayes, *supra* note 1; Diver, *The Judge as Political Power Broker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Fiss, *supra* note 160; Frug, *supra* note 103; Lottman, *Enforcement of Judicial Decrees: Now Comes the Hard Part*, 1 MENTAL DISABILITY L. REP. 69 (1976); Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978); Resnick, *supra* note 159; Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978); Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977); Note, *Civil Rights Suits Against State and Local Government Entities and Officials: Rights of Action, Immunities, and Federalism*, 53 S. CAL. L. REV. 945 (1980); Note, *Federal Courts and State Prison Reform: A Formula for Large Scale Federal Intervention Into State Affairs*, 14 SUFFOLK U.L. REV. 545 (1980); Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975); N. Glazer, *supra* note 5, at 18-20. *See generally* O. FISS, THE CIVIL RIGHTS INJUNCTION (1978).

163. *See, e.g.*, Glazer, *supra* note 157, at 106-07, 110-14.

164. Address by Judge Bork, The Consequences of Judicial Imperialism 12 (unpublished and undated draft in possession of author) [hereinafter cited as Bork]; *see also* Agresto, *supra* note 157, at 477 n.34; Baker, *Why the States Need Better Lawyers*, Wash. Post, Mar. 1, 1981 at C2, col. 1 (Burger Court decided over 160 cases holding state laws unconstitutional in eight-year period in contrast to 120 such cases decided by Warren Court during same period).

165. *See, e.g.*, Glazer, *supra* note 157, at 110-11 (comparing the outhurst over school prayer in 1962 and 1963 with the "relative quietude" of the 1973 abortion decisions);

others, tend to corroborate the assessment that the judiciary's expanded role represents a fundamental change in the judiciary's relationship to the other branches of government.[166]

2. *General characteristics of judicial encroachment*

No simple definition of judicial encroachment can adequately encompass all the concerns underlying recent commentary on the subject. However, commentators have identified three broad characteristics that distinguish contemporary encroachment from judicial "activism" in the past. These characteristics include (a) the proliferation of rights, (b) social policy making and administration of public institutions, and (c) noninterpretivist constitutional and statutory construction.

a. Proliferation of rights. While courts have construed new rights in past periods of activism,[167] contemporary encroachment has been characterized by a proliferation of rights, from the right of privacy[168] and the right to know,[169] to rights to travel,[170] treatment,[171] and training.[172] The fourteenth amendment is the principal source of many of these new rights.[173] Rights of action are also implied under the fourth,[174] fifth,[175] and eighth amendments.[176] In addition, many new rights derive from legislation adopted during the past fifteen years, Congress expressly granting some rights,[177] and the courts implying others.[178]

Bork, *supra* note 164, at 12.

166. *See, e.g.*, Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 CALIF. L. REV. 983 (1979); Greanias & Windsor, *Is Judicial Restraint Possible in an Administrative Society?*, 64 JUDICATURE 400 (1981); Moynihan, *Imperial Government*, COMMENTARY, June 1978, at 25; N. Glazer, *supra* note 5, at 16-20; Glazer, *supra* note 157, at 106, 108-09, 117-19.

167. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

168. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

169. *See, e.g.*, GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375 (1980).

170. New York v. 11 Cornwell Co., 695 F.2d 34 (2d Cir. 1982), *order vacated*, 718 F.2d 22 (2d Cir. 1983).

171. *See, e.g.*, Diver, *supra* note 162, at 50.

172. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307 (1982) (constitutional right to minimally adequate training for mentally retarded). For a general discussion of the recent proliferation of rights, see Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982) (summarizing judicially recognized rights against public agencies).

173. *See* H. FRIENDLY, *supra* note 142, at 18.

174. *See, e.g.*, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

175. *See, e.g.*, Davis v. Passman, 442 U.S. 228 (1979).

176. *See, e.g.*, Carlson v. Green, 446 U.S. 14 (1980).

177. *See, e.g.*, H. FRIENDLY, *supra* note 142, at 22-25.

178. *Compare* J.I. Case Co. v. Borak, 377 U.S. 426 (1964) *with* California v. Sierra

Not only have courts—and in some instances Congress—created many new rights, but according to Professor Paul J. Mishkin, courts have defined such rights "in terms which imply an institutional remedy."[179]

> Thus, in *Wyatt*, the court's acceptance of a constitutional "right to treatment," rather than simply to humane conditions of commitment, even in general terms would appear to require systemic change in state mental hospitals. In fact, the court went beyond that to define the content of the entitled "treatment" to include details of building structure and operation, environmental conditions, and hospital procedures. From such a definition, the institutional decree follows inexorably. In *Rizzo*, the district court explicitly did not recognize a constitutional right of the citizenry to specific modes of police administration, such as a civilian complaint review procedure. But its holding effectively found a constitutional right of citizens in general to be free of "too many" violations by the police or at least to have substantial affirmative efforts by the police administration seeking to minimize them. . . . From that definition of a right, the institutional remedy automatically follows.[180]

b. Social policy making and institutional administration. Broad institutional remedies, or structural injunctions, are the centerpiece of many encroachment cases.[181] Lawsuits involving such remedies have been variously described as "public law,"[182] "structural reform,"[183] "new model,"[184] or "monitoring model" litigation.[185] In these cases, judges actively supervise broad remedies designed to upgrade public facilities and restructure programs and procedures. Public administrators are told, in specific detail, "just how they are to operate." Such decisions "almost

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Club, 451 U.S. 287 (1981).

179. Mishkin, *supra* note 162, at 955.

180. *Id.* at 955-56. *But see* Glazer, *supra* note 151, at 67 (differentiates between "a decision, no matter how far reaching, which establisbes a right from a decision which directly involved the administration of social services"); A. Chayes, The New Judiciary: Why the Role Has Changed 14 (unpublished paper presented Dec. 13, 1978 at AEI Conference) ("What is novel about contemporary judicial activity. . . . [is] not judicial activism of the Supreme Court in creating new rights, but judicial ingenuity of trial courts in creating new remedies for accepted constitutional or statutory rights.").

181. *See, e.g.*, Oster & Doane, *supra* note 21, at 30-31.

182. Chayes, *supra* note 144, at 1284.

183. Fiss, *supra* note 160, at 2.

184. Coffin, *supra* note 166, at 984; *see also* Chayes, *supra* note 144, at 1282.

185. McCoy, *supra* note 6, at 19.

inevitably involve some provisions for continued oversight for an indeterminate period of time and some mechanism whereby special agents of the court assist it in this oversight."[186]

Institutional administration not only is qualitatively different from past judicial encroachment, but differs from traditional litigation as well. Observers perceive the following characteristics of this new type of litigation: (1) the party structure is "amorphous and sprawling" rather than bilateral; (2) the fact finding is "predicative and legislative" rather than "historical and adjudicative"; (3) relief is "forward looking" and "flexible" rather than simply providing compensation for wrongs in a manner logically derived from the liability; (4) the remedy is negotiated as much as imposed; (5) the remedy frequently requires the on-going participation of the court rather than being a one-time judgment; (6) the judge's role is active and even legislative in evaluating the facts and framing the decree; (7) the case is often a grievance about public policy affecting many people rather than a dispute about private rights between private individuals; (8) the remedy, rather than the underlying rights, is the focal point of the suit; (9) the litigation is frequently used to bypass majoritarian political controls; and (10) the remedy often requires that government resources be allocated or reallocated.[187]

Judicial administration of public institutions and programs has been facilitated by a burgeoning judicial bureaucracy. Courts may he aided hy receivers, masters, special masters, master hearing officers, monitors, human rights committees, ombudsmen, administrators, advisory committees, implementation committees, audit and review committees, master's committees, biracial committees, or various other committees, depending on the jurisdiction and nature of the case.[188] These special agents gather data, make findings of fact and conclusions of law, formulate and recommend implementation plans, report on compliance efforts, negotiate and mediate differences among parties, render final decisions in disputes, and in general "super-

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186. Glazer, *supra* note 151, at 67.

187. *See* Chayes, *supra* note 144, at 1302; Coffin, *supra* note 166, at 989; Glazer, *supra* note 151, at 68-69; Mishkin, *supra* note 162, at 955-59; Resnick, *supra* note 159, at 390-91, 403-13.

188. Starr, *Accommodation and Accountability: A Strategy for Judicial Enforcement of Institutional Reform Decrees*, 32 ALA. L. REV. 399, 407-14 (1981); Special Project, *supra* note 162, at 826. Charles Fried notes that judicial activity, which is intended to protect against governmental intrusion, if not restrained, can become another form of governmental intrusion. C. Fried, *supra* note 159, at 6.

vise, coordinate, approve, or even command action of the defendant to implement the remedy."[189] Often these functions are carried out with the aid of a staff.[190] In a few instances, institutions have been placed in receivership.[191]

Judge Frank M. Coffin argues that "new model" suits have been limited mainly to "school systems, jails, mental institutions, public universities, police departments . . . and housing projects."[192] Professor Chayes sees institutional litigation as part of a broader group of cases, including electoral reapportionment, environmental, employment discrimination, and other "policy-making" cases, the appearance of which signals a fundamental restructuring of government. In the new alignment that has emerged, the judiciary has acquired both legislative and executive branch powers.[193]

c. Non-interpretivism. A recurrent theme in the "judicial imperialism" literature is the degree to which courts, in constitutional litigation, have departed from the Framers' intent and, in cases involving statutory interpretation, from legislative intent. In so doing, critics argue, the courts have imposed values not found in, or reached results contrary to, the language, history, or structure of the document being interpreted.[194]

In the constitutional context, Judge Robert H. Bork has observed that "[h]ardly anyone denies" that courts in many instances have rewritten the Constitution. "Instead the scholarly debate swirls, or perhaps stagnates, around the issue of whether judicial rewriting of the Constitution is justified. In fact, the de-

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189. Special Project, *supra* note 162, at 834. *See generally id.* at 826-35.

190. *Id.* at 833.

191. *Id.* at 835-37; *see also* Note, *Receivership as a Remedy in Civil Rights Cases*, 24 RUTGERS L. REV. 115 (1969).

192. Coffin, *supra* note 166, at 988.

193. *See generally* Chayes, *supra* note 144. Chayes notes that the "new remedies" involve the courts in the management of the environment, restructuring of economic markets, corporate and union governance, the policing of credit and employment practices, and other major sectors of our economic and institutional life. [Although there are] some histerical analogies [to contemporary activism] . . . to be fair, we must say that nothing in the historical record (at least since the demise of mercantilism) matches the scope of the current involvement of the courts in the management of social and economic institutions.

A. Chayes, *supra* note 180, at 14-15.

194. Bork, *supra* note 164, at 3. *See generally supra* note 157. For a thoughtful discussion of the recent exchange between Justices Stevens and Brennan and Attorney General Edwin Meese concerning the relevance of the Framers' intent in constitutional litigation, see Talyor, *Meese v. Brennan: Who's Right About the Constitution?*, NEW REPUBLIC, Jan. 6 & 13, 1986, at 17.

bate is less about that than the question of which justification for rewriting the Constitution is better."[195]

Judge Bork characterizes the debate as a "new struggle for intellectual dominance in constitutional theory." The "contending schools of thought" are "interpretivism," or strict construction, and "noninterpretivism," or "what we loosely refer to as activism or imperialism."[196] Professor John Hart Ely, Judge Bork continues, describes these concepts as follows:

> Interpretivism is the tenet "that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or are clearly implicit in the written Constitution . . . . What distinguishes interpretivism"—or, if you will, strict construction—"from its opposite is its insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution." Noninterpretivism—or activism, if you will—advances "the contrary view, that courts should go beyond that set of references and enforce norms that cannot he discovered within the four corners of the document."[197]

Court critics note that noninterpretivism has also had an impact in the statutory context. For example, Professor Horowitz charges that

> [m]uch judicial activity has occurred quite independent of

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195. Bork, *supra* note 164, at 3.

196. *Id;* Bork, *The Struggle Over the Role of the Court,* NAT'L REV., Sept. 17, 1982, at 1137. Judge Bork asserts that the

> struggle for intellectual dominance in constitutional theory . . . is about the duty of judges with respect to the Constitution. It is taking place out of public sight, in a sense, because it is carried on almost entirely in the law schools and in the law reviews. But that doesn't mean it won't affect our entire polity in the years ahead. The ideas that win hegemony there will govern the profession, including judges, for at least a generation and perhaps more.

Id.

197. Bork, *supra* note 196, at 1137. Judge Bork notes that noninterpretivists are usually careful to say that a judge should not simply enforce his own values. And they variously prescribe as tha source of this new law, which is to control the judge, such things as natural law, conventional morality, the understanding of an ideal democracy, or what have you.

> There is a curious consistency about these theories. No matter from which base they start, the professors always end up at the same place, prescribing a constitutional law which is considerably more egalitarian and socially permissive than either tbe written Constitution or the state of legislative opinion in the American public today. That may be the point of the exercise.

Id. at 1137.

> Congress and the bureaucracy, and sometimes quite contrary to their announced policies. The very idea is sometimes to handle a problem unsatisfactorily resolved by another branch of government. In areas far from traditional development by case law, indeed in areas often covered densely by statutes and regulations, the courts have now seized the initiative in lawmaking.[198]

Noninterpretivism, many argue, has facilitated a degree of judicial oversight of administrative agency action that in effect "replaces agency discretion with judicial discretion."[199]

II. Causes and Consequences of Encroachment

A. *Causes*

Commentators have suggested a variety of causes that have contributed to the recent trend of increased judicial encroachment, ranging from very narrow to societal and world-wide phenomena. These causes are, for the most part, interrelated. Consequently, segregating such causes for analytical purposes is likely to produce arbitrary classifications. Nevertheless, for convenience of discussion, observations concerning causes of contemporary activism can be divided into those relating to (1) the nature of the judicial process and (2) changes in the role of law and government.

1. *Nature of the judicial process*

Judicial encroachment can become "a self-repeating phenomenon" because of the nature of the judicial process.[200] Because courts rely on precedent, they may be perceived as activist for some time as they attempt to articulate the bounds of new substantive rights. Furthermore, courts may become more ac-

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198. D. Horowitz, *supra* note 5, at 5-6; *see also id.* at 12-17. Professor Horowitz explains that in the statutory area,

> the conventional formulation of the judicial role has it that courts are to "legislata" only interstitially. With the important exception of judicial decisions holding legislative or executive action unconstitutional, this conventional formulation of what used to be the judicial role is probably not far from what judges did in fact do. It is no longer an adequate formulation.

Id. at 6. *See generally* Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 Geo. Wash. L. Rev. 1 (1981).

199. Bork, *supra* note 164, at 3.

200. The phrase is taken from Griswold, *Cutting the Cloak to Fit the Cloth: An Approach to Problems in the Federal Courts*, 32 Cath. U.L. Rev. 800, 800 (1983).

tivist as a result of liberalized standing rules which permit increasing numbers of litigants to seek court resolution of social and economic problems.[201]

The tendency of the law towards constant "growth" affects judges at all levels of the judicial system. Professor Horowitz observes, for example, that "Supreme Court Justices, appointed because a President thinks they will construe the Bill of Rights more narrowly then their predecessors, have a way of becoming entangled in institutional tradition."[202] "Our country is so big and litigation is so extensive," Professor Erwin N. Griswold notes, "that it is not possible to take every expansive decision of lower courts to the Supreme Court for review, and thus the law changes quickly and extensively whenever the Supreme Court points the way."[203]

2. Role of law and government

One of the fundamental causes of contemporary activism is the radical change in attitudes and beliefs toward the role of law, and concomitantly of government, in society. As described by Professors Randall Bridwell and Ralph U. Whitten in a study of the role of the federal judiciary in the private law area, "the foundation of our philosophy of judicial power and the sources of law" was a set of "suppositions about the role of positive, rational human action in relationship to the ordering of society. At the heart of this philosophy," later identified as classical liberalism, were beliefs about the "limitations . . . of human reason and piecemeal institutional planning to solve societal problems."[204]

As a result, the development of the law relied upon the "spontaneous order" of society—the process of unregulated experiment and autonomous behavior of parties pursuing their own purposes—rather than "organization" efforts by the legislature to regulate society according to some encompassing theory

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201. *See, e.g.*, Glazer, *supra* note 157, at 112-19. Judge Clifford Wallace observee that "[j]udicial restraint only rarely permits one to overturn the law made by activist judges" and thus "gives such judges a certain advantage, because judges who deplore their innovations will nonetheless retain, though rarely extend, them." Wallace, *supra* note 198, at 15.

202. D. HOROWITZ, *supra* note 5, at 13.

203. E. Griswold, The Judicial Process 21 (The Benjamin N. Cardozo Lecture Delivered Nov. 21, 1979 at the Association of the Bar of the City of New York).

204. R. BRIDWELL & R. WHITTEN, THE CONSTITUTION AND THE COMMON LAW 139 (1977).

or plan, which has characterized the role of law in society in recent times. Such organization efforts are premised on the positivist or rationalist school of legal and political thought, which places more confidence in man's reason than does the classical liberal theory.[205] These different perceptions concerning human nature account for the fundamental divergence between the positivist and liberal approaches to the role of law in society—the positivist approach, on the one hand, tending to elevate ends or substance, and the liberal approach, on the other hand, tending to elevate means or procedure. These changes in attitude toward law have not only brought about greater legislative activity, but also have influenced the roles of lawyers and judges in society.

a. Legislative ordering of society. The rising influence of positivism has motivated government, particularly the federal government, to regulate areas of private behavior previously regulated only by custom, tradition, or societal mores. This phenomenon is described as the growth of the modern "administrative" or "welfare" state.[206] Growth of the public sector has brought with it increasing regulation,[207] which in turn has brought increasing judicial intervention in the interpretation of such regulation.[208] As government has become involved in allocating an increasing array of burdens and benefits, courts have been subjected to an increasing demand to settle disputes between agencies and individuals, and between agencies and agencies.[209] Many commentators believe that judicial encroachment will continue as long as pervasive government regulation exists.[210]

b. Increased influence of lawyers. A principal feature of the

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205. *Id.*

206. *See, e.g.*, Greanias & Windsor, *supra* note 166, at 413; *see also* A. Chayes, *supra* note 180, at 15 ("regulatory" state).

207. *See, e.g.*, Greanias & Windsor, *supra* note 166, at 402-03 (noting that while the federal register totaled more than 60,000 pages in 1975 compared to 2,619 pages in 1936, the number of pages of public bills enacted by Congress has not increased appreciably since 1946-48).

208. Chief Justice Burger has noted that ambiguous statutes contribute to judicial intervention, which " 'frequently puts courts in the appearance' of serving as the cutting edge of social, political and economic reform." Oster & Doane, *supra* note 21, at 30; *see also* Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681 (1979). *See generally* J. ELY, *supra* note 157, at 130-34.

209. *See* H. FRIENDLY, *supra* note 142, at 21-22; Greanias & Windsor, *supra* note 166, at 402-07.

210. *See, e.g.*, Glazer, *supra* note 157, at 116-19; Greanias & Windsor, *supra* note 166, at 413; J. Daly, A. Chayes, I. Glasser, A. Scalia & L. Silberman, An Imperial Judiciary: Fact or Myth? 8, 31-34 (AEI Forum Dec. 28, 1979).

welfare state is the creation of government "entitlements," the distribution of which creates expectations concerning the role of government. Reinforced by the view that "law is policy,"[211] adjudication has become an accepted and desirable means to implement these expectations. As a result, "powerful and permanent interests" have arisen to engage "in constitutional litigation to expand the scope and power of government."[212] According to Professor Glazer,

> Law—for the purpose of the correction of presumed evils, for changing government practices, for overruling legislatures, executives, and administrators, for the purpose indeed of replacing democratic procedures with the authoritarian decisions of judges—became enormously popular. The number of law students rose rapidly, in response to new opportunities for litigation, and also serving as insurance of expanded litigation, owing to the increasing number of lawyers.[213]

"Lawyers strive for objectives," Professor Glazer concludes, "in the service of ideologies that cannot be realized through the legislative and executive functions of government but which may be through the agency of authoritarian courts."[214] When courts

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211. C. Fried, *supra* note 159, at 7-8.

212. Glazer, *supra* note 157, at 120. Beginning with the NAACP Legal Defense Fund and the ACLU in the 1950's, scores of public law centers, receiving government or foundation aid, have been established in nearly all areas of social policy. These law centers, it is argued, are constantly urging courts to find new rights or expand the bounds of old ones. *See, e.g., id.* at 126. *See generally* A. Cox, *supra* note 20, at 103-18; H. FRIENDLY, *supra* note 142, at 19-23; Baker, *supra* note 164. A similar but broad view of this phenomenon is the perception that a trend exists among all groups to demand a " 'justice dominated' distribution of resources in short supply." Coffin, *supra* note 166, at 992.

213. Glazer, *supra* note 157, at 120.

> There are now more than 574,000 lawyers in America, twice as many as there were just twenty years ago. Law school enrollments have gone up 187 percent in the same period. We have one lawyer for every 400 people (compared to one doctor for every 500 or three times as many lawyers per capita as England and twenty times as many as Japan).

Howard, *A Litigation Society?*, WILSON Q., Summer 1981, at 98. Laurence Silberman argues that the rate at which controversies become legal disputes is related to the rate of increase in the number of new lawyers. Silberman, *Will Lawyering Strangle Democratic Capitalism?*, REGULATION, Mar.-Apr. 1978, at 15, 16 n.2.

214. Glazer, *supra* note 157, at 120; *see also* Berns, *The Least Dangerous Branch, But Only If . . .*, in THE JUDICIARY IN A DEMOCRATIC SOCIETY 1, 14-16 (L. Theberge ed. 1979); Silberman, *supra* note 213, at 19, 44; Broder, *New Right Sounds Attack on Courts*, Wash. Post, Nov. 22, 1981, at A3. This attitude is illustrated by the following response of a public interest lawyer to President Reagan's election and the appointment of Ruth Bader Ginsburg, Abner Mikva, and Patricia Wald to the Court of Appeals for the District of Columbia Circuit: "The courts now loom as the most congenial branch of

respond to attempts to achieve social reform through litigation, a self-repeating cycle results. Legislatures, it has been noted, observe the courts' willingness to handle politically sensitive issues and forego action in hopes that the courts will resolve the issue.[215]

c. Role of judges. Some argue that judges, like lawyers, have been influenced by what Judge Ruggero J. Aldisert describes as "sociological jurisprudence,"[216] which teaches that the "final aim" of law is "society's welfare."[217] Within this positivist framework, contemporary courts are resorting more and more to the

> method of sociology as a primary decisional tool. They are considering the pragmatic effects of alternative courses of decision. They are attempting to vindicate social needs of all who would be affected by their decisions, irrespective of whether those affected were the litigants before them. They are looking to the general state of contemporary legislative policy and the felt needs of the society—insofar as they can discern those needs in an increasingly pluralistic society. They are considering economic forces, scientific developments, and identifiable expressions of public opinion.[218]

An outgrowth of viewing law as a means to promote "soci-

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the federal government. We may have to return to litigation to take advantage of this asset." Brimelow & Markman, *supra* note 28, at 16; *see also* D. HOROWITZ, *supra* note 5, at 10; Howard, *supra* note 213, at 101 (there are at least 125 public interest law firms and their impact "is far greater than their numbers would indicate"); Hunt, *The Lawyers' War Against Democracy*, COMMENTARY, Oct. 1979, at 45; E. Griswold, *supra* note 203, at 23. *Contra* J. Fleishman, The Criticism of Public Interest Law: Some Rebuttals (unpublished paper presented Oct. 1, 1980 at AEI Conference) (asserting that public interest firms today are more likely to pursue legislative reform than to litigate).

215. Silberman, *supra* note 213, at 21.

216. Aldisert, *The Role of the Courts in Contemporary Society*, 38 U. PITT. L. REV. 437, 445 (1977); *see also* Bork, *supra* note 196, at 1137 (Warren Court was influenced by legal realism movement, which was spearheaded at Yale Law School); C. Fried, *supra* note 159, at 8.

217. Aldisert, *supra* note 216, at 447; *see also* Mishkin, *supra* note 162, at 961-62 (principal cause of judicial encroachment is that "judge desires to right a wrong").

218. Aldisert, *supra* note 216, at 445. The wisdom of justifying decisions on the basis of social science data is a topic of current controversy. *Compare* Sperlich, *And then there were six: the decline of the American jury*, 63 JUDICATURE 262, 274-75 (1980) (arguing that the question whether juries should be reduced from 12 to 6 persons is an empirical question the Court should answer by deferring to the best empirical evidence), *with* O'Brien, *The seduction of the judiciary: social science and the courts*, 64 JUDICATURE 8 (1980) (because it is largely reflective of human behavior, social science is ever-changing, as are expert opinions concerning the wisdom of various social policies; hence, the opportunity for judicial intervention is never ending).

ety's welfare" is "the increasing subordination of the individual case in judicial policy making."[219] This has been achieved through the erosion of traditional jurisprudential doctrines such as standing, mootness, ripeness, political question, and exhaustion of administrative remedies.[220] Likewise, prerequisites for maintaining class actions have been loosened. These procedural expansions have been accompanied by an expansion of substantive rights, many of which, according to Judge Henry J. Friendly, are attributable to the Supreme Court's selective incorporation of the Bill of Rights into the due process clause of the fourteenth amendment and the revitalization of the fourteenth amendment.[221] These constitutional developments have been accompanied by equally significant statutory interpretations, including revitalization of the reconstruction civil rights statutes.[222]

An oft-repeated justification for judicial encroachment is the failure of elective hranches to satisfy pressing social needs, particularly in the case of disadvantaged portions of the population.[223] For example, Judge Frank M. Johnson has explained that

> in an ideal society, all of these judgments and decisions should he made, in the first instance, by those to whom we have entrusted these responsibilities. It must be emphasized, however, that when governmental institutions fail to make these judgments and decisions in a manner which comports with the

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219. D. HOROWITZ, *supra* note 5, at 9; *see also* Aldisert, *supra* note 216, at 445.

220. *See, e.g.*, H. FRIENDLY, *supra* note 142, at 20-21; McDowell, *A modest remedy for judicial activism*, PUB. INTEREST, Spring 1982, at 3, 6-10; E. Griswold, *supra* note 203, at 21-22.

221. H. FRIENDLY, *supra* note 142, at 18.

222. 42 U.S.C. §§ 1982, 1983, 1985(3) (1982); *see* Monroe v. Pape, 365 U.S. 167 (1961) (partially overruled in Monnel v. Department of Social Servs., 436 U.S. 658 (1978)). *See generally* Aldisert, *supra* note 216, at 464; Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977); *supra* notes 86-94 and accompanying text. Another significant development that has contributed to judicial encroachment is legislation and decisions providing for the payment under certain conditions of plaintiffs' attorney fees. *See* D. HOROWITZ, *supra* note 5, at 262 & nn.33-35. Horowitz notes one case, Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974), in which attorney's fees were awarded even though plaintiff's lawyer had agreed to represent the plaintiff without charge.

223. *See, e.g.*, H. GRAHAM, THE CONSCIENCE OF THE COURTS 283-84 (1975); Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963); Mendelson, *supra* note 159, at 43; Satter, *Changing Roles of Courts and Legislatures*, CASE & COMMENT, July-Aug. 1980, at 18.

> Constitution, the federal courts have a duty to remedy the violation.[224]

Judge Ralph K. Winter's observations concerning the "underlying judicial attitudes which have served at least as a fertile breeding ground for judicial activism"[225] coincide with the widespread view that courts are permitted, even required, to correct a problem that, in Professor Horowitz's words, is "unsatisfactorily resolved by another branch of government."[226] Judge Winter identifies these attitudes, which are associated with the upper middle class intellectual community: hostility toward a pluralist, party-dominated political process, demand for rationality in public policy, and skepticism about the morality of capitalism.[227]

d. Role of society. Commentators have also attributed judicial encroachment to the decline of such traditional stabilizing institutions as the presidency, Congress, political parties, family, church, and unions.[228] With traditional institutions waning and society becoming increasingly conflict ridden, courts act as a means "of conflict resolution and social control."[229] In addition, the last few decades have witnessed an increasing sensitivity to human rights throughout the world.[230] In particular, some feel

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224. Johnson, *Judicial Activism is a Duty—Not an Intrusion*, JUDGES' J., Fall 1977, at 4, 5-7; *see also* Johnson, *The Alabama Punting Syndrome*, JUDGES' J., Spring 1979, at 4. *But see* Glazer, *supra* note 157, at 118, arguing that if legislatures don't do what courts are doing, "[i]t is because no one knows how to, or there is not enough money to cover everything, or because the people simply don't want it. These strike me as valid considerations in a democracy, but they are not considered valid considerations when issues of social policy come up as court cases for judgment."

225. R. Winter, The Activist Judicial Mind 4 (unpublished paper presented Dec. 13, 1978 at AEI Conference).

226. D. HOROWITZ, *supra* note 5, at 6.

227. R. Winter, *supra* note 225, at 2-3. Professor Winter noted that critics attribute the consistently liberal policy results of judicial encroachment to the

> isolation of the Supreme Court in liberal Washington, the influence of, and dependence on, liberal law clerks, and an understandable desire for good reviews from a left-leaning media. Admirers [of judicial encroachment] attribute it to an enlightenment which has shaped judicial views of the good society in a fashion so similar to their own best judgment.

Id.

228. *See, e.g.*, A. Chayes, *supra* note 180, at 19.

229. Address by R. Cramton, Judicial Lawmaking in the Leviathan Stete 3 (remarks prepared for dinner in honor of Kenneth Culp Davis, May 27, 1976) [hereinafter cited as R. Cramton].

230. Wyzanski, *Judicial Review in America: Some Reflections—Opening Statement*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 485 (R. Collins ed. 1980); A. Chayes, *supra* note 180, at 19.

that egalitarianism has become a predominant policy-shaping value, particularly for the judiciary.[231]

B. Consequences

The positive effects of judicial encroachment are generally described in terms of the results achieved. In particular, using the judicial process to formulate and implement social policy and administer public institutions is defended as being "more sensitive and responsive to the politically weak than the legislative process."[232] Many praise judges for interpreting the Constitution in ways that enable it "to grow and meet the challenges of modern times."[233]

Professor Arthur S. Miller, in defending "judicial activism," argues that because our pluralistic society has reached no consensus about values, such values must be "externally and explicitly articulated."[234] Professor Miller asserts that since the political process "has either broken down or is rapidly breaking down," it cannot define values. Accordingly, the "Supreme Court, because of the consequent vacuum, is a leader in a vital national seminar that leads to the formulation of values for the American people."[235] In short, Professor Miller argues that courts can achieve results for society through judicial activism that would not be achieved through "the workings of the political system."[236]

Other more immediate benefits of judicial encroachment have also been touted. For example, in prison reform litigation,

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231. *See, e.g.*, M. FLEMING, *supra* note 29, at 99-113; Browne, *Liberty vs. Equality: Congressional Enforcement Power Under the Fourteenth Amendment*, 59 DEN. L.J. 3 (1982).

232. *See, e.g.*, A. HOLCOMBE, SECURING THE BLESSINGS OF LIBERTY (1941); *see also* Hirschhorn, *supra* note 110, at 1819; *cf.* C. HYNEMAN, THE SUPREME COURT ON TRIAL 261 (1963) (recommending that courts rescue the nation from the major failures of the elected branches).

233. Kidney, *supra* note 35, at 39 (quoting Judge Charles B. Renfrew).

234. Miller, *In Defense of Judicial Activism*, in SUPREME COURT ACTIVISM AND RESTRAINT 135, 177 (S. Halpern & C. Lamb eds. 1982).

235. *Id.* Professor Miller argues that, "[l]eaders" who can provide "a central symbol of authority and wisdom" are "necessary, if for no other reason than that stated by the Grand Inquisitor: people require miracle, mystery, and authority—precisely what they get from the justices . . . ." *Id.* Of course, the Grand Inquisitor's goal was to convince men to "[resign] their freedom" and their "loaves," *i.e.*, their possessions, to the rulers so that they could redistribute them in order to bring about "universal happiness" and "peace to all." F. DOSTOYEVSKY, THE BROTHERS KARAMAZOV 288 (Penguin Classics ed. 1975).

236. Miller, *supra* note 234, at 177.

Richard Singer attributes the following improvements to court intervention:

> (1) prison reform has become the concern of several professional groups;
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> (2) grievance mechanisms have been instituted in most prisons;
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> (3) prison concerns are now more visible to the public;
>
> (4) strip cells are now rare; and
>
> (5) prison policies and administration have become standardized.[237]

More significantly, court intervention in some cases has involved substantial reallocation of resources, permitting administrators to upgrade facilities and services.[238]

In recent years an increasing number of attempts have been made to measure the impact of various Supreme Court decisions.[239] Attempts have also been made to measure the impact of lower court decisions on the individuals and institutions affected thereby.[240] As complex institutional litigation has become widespread and as debate over the legitimacy and effectiveness of such litigation has intensified, actual and potential effects of judicial encroachment have been extensively examined. Part 1 below reviews the commentary regarding the impact of judicial encroachment on state and federal governments, including executive branch agencies, courts, and legislatures. Part 2 summarizes the literature with respect to the consequences for society in general.

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237. Singer, *Prisoners' Rights Litigation: A Look at the Past Decade, and a Look at the Coming Decade*, FED. PROBATION, Dec. 1980, at 3, 5; *see also* Kidney, *supra* note 35, at 39 (quoting Robert Plotkin, attorney with Mental Health Law Project).

238. *See* Hirschhorn, *supra* note 110, at 1822-24.

239. *E.g.*, THE IMPACT OF SUPREME COURT DECISIONS (T. Becker & M. Feeley eds. 1973); R. JOHNSON, THE DYNAMICS OF COMPLIANCE (1967); S. KRISLOV, COMPLIANCE AND THE LAW (1972); A. MILNER, THE COURT AND LOCAL LAW ENFORCEMENT (1971); W. MUIR, PRAYER IN THE PUBLIC SCHOOLS: LAW AND ATTITUDE CHANGE (1967); S. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT (1970).

240. *E.g.*, M. HARRIS & D. SPILLER, *supra* note 112; LIMITS OF JUSTICE, *supra* note 18; Altman, *supra* note 154, at 739. Even if the impact in each applicable case could be measured, there is reason to believe that the aggregate impact of such decisions would be greater than the sum of the impact in each individual case. Donald Horowitz observes that, "[e]ach [case] is assumed to have its own impact, apart from [other cases]," although the impact of a court decision often extends far beyond the parties to the case, and thus cannot be measured in terms of compliance alone. D. HOROWITZ, *supra* note 5, at 287; *see supra* notes 5, 6 and accompanying text.

1. Consequences for government

a. Executive agencies and administrators. One oft-noted effect of court supervision of public institutions is the cost of compliance. Judge Johnson's decision in *Wyatt v. Stickney*,[241] for example, resulted in an increase in Alabama's annual expenditure on mental institutions from $14 million before suit was filed to $58 million the year after the decree was rendered.[242] In the mental health care field nationwide it has been estimated that imposing minimum staffing standards alone would require an increase of 5.3% to 6.5% in public mental health budgets.[243] One scholar noted that Louisiana

> 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.[244]

Similar expenditures were required to comply with a federal court order involving an Alabama prison.[245]

Professor Horowitz notes that "decisions expanding welfare eligibility or ordering special education for disturbed, retarded, or hyperactive pupils have had similar budgetary effects."[246] An estimated 10,000 individuals became eligible for welfare benefits as a result of federal court decisions striking down state restrictions on welfare payments.[247]

In addition to the appropriation of new funds, judicial encroachment frequently requires that money be reallocated from one program to another. For example, one commentator predicted that *Goldberg v. Kelly*,[248] which mandated standards for welfare benefit terminations, would result in a diversion of funds

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241. 344 F. Supp. 387, 390 (M.D. Ala. 1972), *aff'd in part, remanded in part, reversed in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

242. D. Horowitz, *supra* note 5, at 6.

243. *Id.* at 95-105 (also notes that court-imposed deinstitutionalization could result in savings dwarfing any increase resulting from meeting minimum constitutional standards of care).

244. Frug, *supra* note 103, at 727.

245. *Id.*

246. D. Horowitz, *supra* note 5, at 6.

247. *Id.*

248. 397 U.S. 254 (1970).

from substantive programs to compliance procedures, including hearings and continued aid to ineligible recipients.[249]

In addition to the obvious impact of judicial encroachment on the budgetary process, commentators are beginning to inquire into the broad effects judicial intervention has upon formulation of policy and performance of social policy institutions. Professor Glazer sets forth the following five hypotheses concerning "the larger impact of judicial administrative decision making on social policy."[250]

(1) Reduces administrator's power. According to Professor Glazer, placing "greater emphasis on the rights of the student, welfare recipient, prisoner, mental patient, or other receiver of social services or presumed beneficiaries of social policy . . . must . . . reduce the powers of administrators of social services." It must also "reduce the power of those working directly with clients, beneficiaries, patients, etc.[,] because the orders of a court are directed to those ultimately responsible, and they must carry out the court's orders hy means of regulations limiting discretion below." Expanding the power of subjects and diminishing the power of administrators reduces the administrators' responsibility and ability to act on first-hand knowledge. Administrators faced with "strict procedures and requirements may either get around them or give up."[251]

Judicial intervention may increase staff morale if new personnel are added as a result of a court order. On the other hand,

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249. Funston, *Judicialization of the Administrative Process*, 2 AM. POL. Q. 38, 44 (1974). Professor Funston noted that one federal court, relying on *Goldberg*, held that a state convict had a constitutional right to an adversary hearing, complete with a written notice of charges and representation hy counsel, before being placed in solitary confinement for prison misbehavior. Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *aff'd in part, rev'd in part*, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972). Another federal court found that *Goldberg* mandated a hearing for public housing residents suhject to eviction. Escalera v. New York City Hous. Auth., 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970). A third federal court found that an applicant for public housing has a constitutional claim to a prior hearing on the matter of his eligibility before the application is denied. Davis v. Toledo Metropolitan Hous. Auth., 311 F. Supp. 795 (N.D. Ohio 1970). Funston concluded that

> *Goldberg* raised issues and implications for the administrative process far beyond the confines of welfare terminations and parole revocations, implications for virtually any action effecting a change in the status of a government beneficiary. Hirings, firings, reductions, rejections, non-renewals, dismissals, discharges, denials, diminishments, and so forth appear ripe for the application of the requirements of rudimentary administrative due process.

Funston, *supra*, at 62.

250. Glazer, *supra* note 151, at 77.

251. *Id.* at 77-78.

the "new workers may threaten the old guard or offend them, and lead them to reduce their efforts." Nevertheless,

> one undoubted influence of an increase in rights is a reduction of the power and discretion of working administrators and a simultaneous shifting of power and discretion from below to further up the chain of command. Organizational theorists on the whole believe that this will not enhance the effectiveness of an organization.[252]

(2) Undermines administrator's authority. Professor Glazer further observes that "emphasis on rights means an emphasis on procedures," which "are intended to make the administrator and service provider more equal to the subject. This inevitably reduces the authority of the administrator and service provider." Undermined authority results in diminished capacity to serve, since performance is affected by expectations. "The effect of procedural requirements based on suspicion of the service provider is undoubtedly to spread the conviction among the recipients of service that the service provider cannot achieve well and should be kept within strict bounds—with the expected results on the effectiveness of the service provider."[253]

(3) Places theorist over practitioner. Litigation gives "great weight to theoretical as opposed to practical or clinical knowledge," observes Professor Glazer. "Testimony comes from experts from distant universities" who generally have "never taught, guarded prisoners, been engaged in the custodial care of the retarded, or attended to welfare patients." The effect of relying on "professors of education rather than teachers and principals," on "psychiatrists and penologists rather than guards and wardens," on "teachers of psychiatry rather than working therapists" will be "to exaggerate theoretical considerations and reduce practical considerations." This is so "because practical and clinical considerations very often cannot" adequately be expressed in court. The effect again is "to reduce the responsibility and authority of the worker at the face of social policy" and to

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252. *Id.; see also* McCoy, *supra* note 6, at 17. Virtually all public interest law cases diminish the power of the executive branch and correspondingly increase the power of the judiciary. "Even in those cases which never get to court, the public interest law firms' involvement in administrative proceedings substantially narrows the discretion of the executive officials." J. Fleishman, *supra* note 214, at 13.

253. Glazer, *supra* note 151, at 78. *See generally* Rufus & Knapp, *Due Process as a Management Tool in Schools and Prisons*, 28 CLEV. ST. L. REV. 373 (1979).

reduce input that workers with first-hand knowledge "can provide in the formulation of policy."[254]

(4) Reduces adaptability. Social science knowledge, Professor Glazer suggests, is "tentative." It consists of "educated guesses," and "is subject to rapid change. Thus it is possible for social policy to be turned in a direction on the basis of presumed scientific knowledge that is ineffective and counterproductive." An administrator who acts on such knowledge "can reverse himself" without recourse to legal process and "may be better able to temper . . . theoretical knowledge with practical experience."[255]

(5) Increases power of lawyers and theoretical professions. Finally, Professor Glazer asserts that

> the emphasis on rights and procedures strengthens some elements in the provision of service among others. To begin with, it enhances the role of lawyers on all sides. The advice of lawyers becomes more important for practicing administrators, since they must take it into account as opposed to whatever judgment their own experience suggests. This emphasis on rights and procedures enhances the role of the more theoretical professions in the provision of service. . . . [I]f one has faith that these professions carry the answer to the problems of these services, one will applaud such a shift of power. If one is more skeptical, one will not applaud and will not expect any great change in results.[256]

b. Courts and judges. Once judicial authority is asserted in a public policy area, all acts of governmental officials in that area become vulnerable to challenge in court. Increased vulnerability, some have noted, not only affects the behavior of governmental officials, but opens the door to detailed lower court intervention into a wide range of governmental activities.[257] Much of this intervention is in practice unreviewable because of appellate court caseloads, the trial court's fact-finding powers and discretion, and the nature of appellate review.[258] Furthermore, certain

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254. Glazer, *supra* note 151, at 78-79.

255. *Id.* at 79-80.

256. *Id.* at 80. Judge Bork has commented that an activist judiciary increases the "already disproportionate influence of intellectuals upon our politics." Since judges generally are members of the intellectual class, "they tend to respond to its values." Bork, *supra* note 164, at 12-13.

257. *See* R. BERGER, GOVERNMENT BY JUDICIARY, *supra* note 157, at 410; Glazer, *Should Judges Administer Social Services?*, 25 PUB. INTEREST, Winter 1972, at 71.

258. R. Winter, The Sources and Growth of Judicial Power 2 (unpublished paper

groups will begin to expect the courts always to be involved in making and implementing policy. Consequently, Professor Glazer suggests, the courts "will not be allowed to withdraw from broadened positions they have seized, or have been forced to move into, because of the creation of new and powerful interests."[259]

As demands on courts increase, many commentators have asked whether the courts, as they are presently structured, have the capacity to administer social policy. Professor Horowitz observes that if courts are to function effectively in a policy making and administrative role, then their capacity must be increased.[260] According to Mr. Moynihan, organizations in need of administrative capabilities generally find ways to acquire them. Thus, as courts shape ever broader remedies, they will tend to create ever larger bureaucracies to ensure that their remedies are enforced.[261] Recently, however, increasing numbers of commentators and judges have begun to question the court's ability to deal with the number and increased complexity of cases that, in part at least, are occasioned by the courts' expanded role.[262] The danger, some warn, is that as federal courts become larger and more bureaucratized, "the individual judge no longer bears the responsibility for deciding cases and writing opinions."[263]

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presented Dec. 13, 1978 at AEI Conference).

259. Glazer, *supra* note 157, at 119.

260. D. HOROWITZ, *supra* note 5, at 255-98.

261. Moynihan, *supra* note 166, at 28.

262. *See, e.g.*, Edwards, *A Judge's View on Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 259 (1981); Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME LAW. 648 (1980); Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248 (1981).

263. Powell, *Are the Federal Courts Becoming Bureaucracies?*, 68 A.B.A. J., Nov. 1982, at 1370, 1370. Justice Powell states that he is convinced that the bureaucratizing of the courts has not yet extended to the judging process; however, he notes the need for fundamental changes "if we are to preserve our federal system of courts by the Constitution." *Id.* at 1372.

Professor Daniel Meador has calculated that from 1960 to 1980 federal district judgeships increased by 128% and court of appeals judgeships by 94%; law clerks increased by 164%, from 264 to 697. Bankruptcy referees increased from 174 to 236 in the same period.

> Prior to 1968 there were no federal magistrates. By 1979 there were 196 full-time . . . and 292 part-time magistrates serving in the district courts . . . . From no staff attorneys in the appellate courts in 1960, we now have 136. From no circuit executives we now have 10. Overall, in the 1960s, there were 5,562 persons employed in the judicial branch of the federal government; in 1979 there were 12,563, an increase of 126%.

D. Meador, The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of

Judith Resnick, in a study of "managerial judges," warns that "[t]ransforming the judge from adjudicator to manager substantially expands the opportunities for judges to use—or abuse—their power."[264] The new managerial role of judges "tends to undermine traditional constraints on the use of that power." Moreover, "no explicit norms or standards" exist to guide judges in the use of their new managerial powers. Thus, they "are forced to draw upon their own experience," which may often be insufficient to enable them to make sound judgments. Other pitfalls Professor Resnick identifies include the threat to impartiality posed by the judges' casual contact with counsel and personal interest in the outcome, particularly in pressing for settlement.[265] "The danger inherent in these developments," Professor Horowitz concludes in his study, "is that in developing a capacity to improve on the work of other institutions, [courts] may become altogether too much like them."[266]

Even if the judiciary could be restructured "to function more systematically in terms of general categories that transcend individual cases," as do most social policy institutions, Professor Horowitz suggests that "there is a limit to the changes of this kind courts can absorb and still remain courts. Heightened attention to recurrent patterns of behavior risks inattention to individual cases."[267] Professor Philip B. Kurland warns that as courts become overloaded, individual disputes will be "relegated to people's courts" and "compulsory arbitration" without the protection of due process.[268] Justice Lewis F. Powell offers a similar warning:

> The principal victims of bureaucratization of the federal judicial system would not be the judges or staffs. Rather, as [a] study chaired by then Solicitor General Bork concluded, those most likely to suffer would be the litigants [with substantial claims] who seek justice. Indeed, the rule of law, reduced to wholesale justice, could be the ultimate victim.[269]

Action 4 (unpublished paper dated Sept. 24, 1980); *see also* Resnick, *supra* note 159, at 437 & n.242.

264. Resnick, *supra* note 159, at 425-26.

265. *Id.* at 425-31.

266. D. Horowitz, *supra* note 5, at 298; *see also* Horowitz, *supra* note 159, at 140.

267. D. Horowitz, *supra* note 5, at 298.

268. P. Kurland, Daniel in the Lion's Den 19 (unpublished paper presented Apr. 26, 1978, at Fifth Circuit Judicial Conference).

269. Powell, *supra* note 263, at 1372; *cf.* O'Brien, *supra* note 218, at 19-21 (use of social science data may have adverse implications for preservation of civil liberties).

One of the commentators' most frequently expressed apprehensions is the impact of judicial encroachment on the rule of law. For example, Professor Roger C. Cramton asserts that public acceptance of judicial pronouncements depends upon a perception that judges are different from other policy makers.[270] Judge Bork had argued that when judges free themselves from any meaning to be found in the Constitution by traditional methods of legal interpretation, "they can only decide politically." But, he notes, unlike legislatures, "courts are inaccessible and unresponsive" because "interest groups have no access to the [judicial lawmaking] process and no power to censure those responsible for the outcome."[271] As the courts become more involved in political decisions, Professor Griswold adds, they " 'invite and indeed require political reaction.' "[272]

Professor Ralph R. Smith, describing the reaction of various community groups involved in the Boston school desegregation case, notes that school officials, who felt they were not responsi-

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270. R. Cramton, *supra* note 229, at 12; *see also* Browne, *supra* note 231, at 448-51; Greanias & Windsor, *supra* note 166, at 400, 409 (the exercise of legislative and executive policymaking "could well lead to a time of 'severe stress' that would dissipate much of the greatest source of judicial power, which is its social acceptance"). Robert Bork argues that in order to preserve their power, courts are often guilty of "a degree of disingenuousness." While promoting a public perception "that it is really the Constitution and not the politics of a majority of nine lawyers that requires democratic choices to be overturned," courts often justify results that are contrary to the Framers' intent by arguing that the Constitution " 'is not shackled to the political theory of a particular era.' " Bork, *supra* note 164, at 10 (quoting Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966)).

271. Bork, *supra* note 164, at 6. Judge Bork also has argued that judicial activism tends to trivialize the Constitution. "Once legal interpretation is abandoned in order to produce good results, it is almost impossible to find a stopping point." *Id.* at 7. As Arlin Adams expressed it, "Too frequent invocation of the Constitution tends to debase it." Adams, *Judicial Restraint, the Best Medicine*, 60 JUDICATURE 4, 193 (1976).

272. E. Griswold, *supra* note 203, at 23 (quoting R. MCCLOSKEY, THE MODERN SUPREME COURT 343 (1960)); *see also* A. BERLE, THE THREE FACES OF POWER: THE SUPREME COURT'S NEW REVOLUTION 77 (1967); M. FLEMING, *supra* note 29, at 169-71; Adams, *supra* note 271, at 193; Agresto, *supra* note 157, at 491; Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 640-41 (1982); Goldwin, *Comments to Chapter 1*, in THE JUDICIARY IN A DEMOCRATIC SOCIETY 18 (L. Theberge ed. 1979); Kurland, *Comments to Chapter 1*, in THE JUDICIARY IN A DEMOCRATIC SOCIETY 21 (L. Theberge ed. 1979); Kurland, *Government By Judiciary*, 20 MOD. AGE 358, 363-64 (1976); O'Brien, *Judicial Review and Constitutional Politics: Theory and Practice*, 48 U. CHI. L. REV. 1052, 1052-53 (1981); W. Berns, The Constitution and the Adversarial Society 36-37 (unpublished paper presented Dec. 14, 1978, at AEI conference). Law produced by judicial activists will be intellectually incoherent, Bork argues, "because individual judges will have different hierarchies of political values. . . . [Such law fails] to give fair warning and educates us to see law as essentially manipulative and cynical." Bork, *supra* note 164, at 6-7.

ble for the unconstitutional conditions found by the court, deeply resented the court's intrusion. They felt that "a remedy without a violation is similar to taxation without representation." The court's actions, according to Professor Smith, resulted in a heightened sense of the anti-majoritarian quality of the judiciary.

> This awareness turned to frustration as the community realized that the court is not subject to the political process of recall or rejection by ballot. And the frustration turns to bitterness when it is a branch of the Federal government (a presumptive outsider) which engenders the dislocation and frustrated expectations.[273]

c. Legislative process. Professor Glazer notes that judicial supremacy

> weakens democracy because it removes from the people and their representatives the ability to shape policy. It weakens it further by creating and fostering a cynicism about how things get done—whatever the judgment of the representatives of the electorate. . . . Finally, it weakens democracy because it encourages [a] refusal to deal with great issues . . . [which] many argue are the cause and justification of judicial intervention.[274]

Perhaps as important, Professor Kurland observes, is the effect judicial encroachment has on the governed. "Excessive reliance upon courts instead of self government may deaden a people's sense of moral and political responsibility for their future, especially in matters of liberty, and may stunt the growth of political capacity that results from the exercise of the ultimate power of decision."[275]

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273. Smith, *supra* note 25, at 25.

274. N. Glazer, *supra* note 5, at 29; *see also* Greanias & Windsor, *supra* note 166, at 407 (judicial encroachment has divisive effect on society when major court decisions are not "forced through the sieve of trade-offs that take place in the legislative arena or even the President's office"); A. Scalia, *supra* note 123, at 36. Judge Bork asserts that the argument that non-interpretivism always expands freedom and "never subtracts from it" is "wrong," because "[e]very time a court creates a new constitutional right against government or expands, without warrant, an old one, the constitutional freedom of citizens to control their lives is diminished. Freedom cannot be created by this method; it is merely shifted from a large group to a smaller group." Bork, *supra* note 196, at 1138-39.

275. P. Kurland, *supra* note 268, at 16; *see also* Ayer, *Do Lawyers Do More Harm Than Good?*, 65 A.B.A. J. 1053, 1057 (1979); Diver, *supra* note 162, at 89; Howard, *supra* note 213, at 106-07; Kidney, *supra* note 35, at 40.

2. Impact on society

Judge Bork has observed that judicial encroachment inflicts inefficiency and increased costs upon social and economic processes. Inefficiency results from expansive readings, for example, of antitrust and regulatory statutes and from requiring hearings in contexts in which they are not appropriate, such as school discipline.[276]

Increased costs result from judicially mandated expansions of governmental services. The litigation process focuses on rights; consequently, courts are ill equipped to conduct cost-benefit analyses or evaluate trade-offs. Such trade-offs, notes Judge Winter, include reducing classroom resources in order to pay for transportation, or freeing criminals in order to reduce prison crowding.[277]

In addition to its direct costs, judicial encroachment, according to Judge Bork, damages a "community's morale and self-confidence in its moral standards. . . . Constitutional law as enunciated hy the Supreme Court is an enormously powerful moral teacher." Too often the Court's teachings are a rebuke to traditional moral standards of the community, whose attempts to fight pornography or to discipline students in school, for example, are constantly rebuffed. "[S]light episodes of racial segregation, often well in the past," he adds, are used to justify massive desegregation orders. The courts' seeming unwillingness to "punish criminals" is a further cause of public frustration. Such judicial behavior not only frustrates society, he argues, but "make[s] it doubtful of its own healthiest moral standards and weaken[s] its morale."[278]

Another consequence of judicial encroachment Judge Bork and others identify is "the rationalization of moral values as state legislative choices are steadily displaced by federal judicial choices." In addition, Judge Bork has decried the "gentrification of the Constitution"—the process by which the moral values of judges and those intimately associated with them are imposed

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276. Bork, *supra* note 164, at 8.

277. R. Winter, *supra* note 258, at 16; *see also* Silberman, *supra* note 213, at 15 (unbridled growth of legal process has become a cancer that threatens vitality of capitalism and democracy); D. Stanley, Cutback Management and Mandates 9-10 (unpublished paper presented Apr. 14, 1981, to National Conference of the American Society for Public Administrators).

278. Bork, *supra* note 164, at 8-10.

upon the Constitution.[279] Several commentators have observed a disparity between the values of leaders in the legal community and the values of the general public on a number of religious, family, and moral issues.[280] This disparity, when reflected in court decisions, disturbs those who disagree with the courts' point of view, not only because of the results reached, but because of the courts'—particularly the Supreme Court's—"educative power."[281] Judges tend "to respond to intellectual class values" which, Judge Bork observes, "tend to be left of center on the American political spectrum, and more egalitarian and morally relativistic as well." Thus, the judiciary's influence "is rather steadily pressing our views and our politics to the liberal side of the spectrum."[282]

III. Recommendations for Reform

Recent public interest in judicial encroachment has prompted some who do not necessarily agree that the courts have overstepped their bounds to join in discussions as to the appropriate remedies in the event the judiciary engages in a systematic abuse of its powers.[283] This section describes possible remedies and briefly summarizes their bases and, with respect to certain proposals, the objections to them. The recommendations have been organized according to the principal audiences or individuals to whom they have been addressed.

A. Judges

Self-restraint is the suggestion most often urged upon judges. The importance of this principle has been recognized by academics,[284] practitioners,[285] and judges[286] alike. Most judges

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279. Bork, *supra* note 196, at 1138.

280. *See, e.g.*, McGuigan & Rader, *Judicial Oligarchy: Have the People Ceased to be Their Own Rulers?*, in A Blueprint for Judicial Reform 362 (P. McGuigan & R. Rader eds. 1981).

281. Bork, *supra* note 164, at 12.

282. *Id.*; *see also* McGuigan & Rader, *supra* note 280.

283. *See* AEI Conference, "Judicial Power in the United States: What are the Appropriate Constraints?" 115-16 (Oct. 1-2, 1981) [hereinafter cited as AEI conference] (remarks of Ralph Winter).

284. *See generally supra* note 157. *But see* R. Berger, Government by Judiciary, *supra* note 157, at 414 (argument that courts were not intended to have absolute power); Agresto, *supra* note 157, at 477 ("Vigorous demands for self restraint in scholarly literature, in court opinions and in careful judicial selections . . . have had minimal effect.").

285. *See, e.g.*, Griswold, *supra* note 200, at 803.

generally acknowledge Justice Stone's assessment that "the only check upon our own exercise of power is our own sense of self-restraint."[287] Various means have been suggested to motivate judges to exercise greater restraint. Foremost is that judges educate themselves concerning the dangers of excessive use of judicial power.[288] Professor Mishkin suggests that

> [t]he momentum toward proliferation and regularization of broad institutional relief can be slowed or stopped only by heightened judicial sensitivity to its implications and concomitant judicial restraint in all three dimensions: the formulation of new constitutional rights in affirmative duty terms which imply institutional relief; the dismissal of more traditional or limited remedies as ineffective without a clear demonstration that this is the fact; and the drafting of institutional decrees in terms where the relief exceeds the scope of the violation.[289]

Professor Griswold has offered a number of steps judges can take to cut down the flow of cases to the courts of appeals, and ultimately the Supreme Court. He first suggested that judges remember the role that practicing lawyers play in administering the law and do everything they can within the framework of their responsibilities to make the legal system "more intelligible." In the tax law area, for example, he argues that a clear rule of law, rather than a rule that varied according to individual circumstances, would have provided guidance to the Internal Revenue Service, practitioners, and clients alike, and avoided much litigation.[290]

Professor Griswold next stressed the importance of "correcting errors which are made in the lower court. . . . [A]s the Supreme Court is able to correct errors," he observes, "the volume of litigation in the lower courts will be reduced."[291] Correcting errors, others have noted, may be a further method of encouraging lower courts to exercise restraint.[292]

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286. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 119 (1958) (Frankfurter, J., dissenting); Turpin v. Mailet, 579 F.2d 152, 173 (2d Cir.) (Van Graafeiland, J., dissenting), *vacated sub nom.* West Haven v. Turpin, 439 U.S. 974 (1978).

287. United States v. Butler, 297 U.S. 1, 79 (1936) (Stone, J., dissenting).

288. Markey, *On the Cause and Treatment of Judicial Activism*, 40 FED. B. NEWS J. 296, 298 (1981).

289. Mishkin, *supra* note 162, at 973; *see also* Kay, *Limiting 'Federal Court Jurisdiction: The Unforeseen Impact on Courts and Congress*, 65 JUDICATURE 185 (1981).

290. Griswold, *supra* note 200, at 796-803.

291. *Id.* at 799.

292. *See, e.g.*, Fletcher, *supra* note 113, at 660-61.

Professor Griswold, as well as others, have encouraged judges to write shorter opinions.[293] Others have called for greater honesty in opinion writing. As expressed by Professor Paul A. Freund, if courts are going to make law, they "should not play a shell game," but "tell us what [they are] doing."[294] It has been suggested that such honesty in judging will not only forestall unnecessary judicial lawmaking, but may cause reforms that could eliminate the need to make law in future cases.[295]

In connection with the exercise of self-restraint, judges have been urged to more frequently use such jurisprudential doctrines as standing, ripeness, mootness, political question, abstention, and exhaustion of administrative remedies.[296] Such doctrines not only ease the burdens of the federal judiciary, but leave to the legislative and executive branches matters that, proponents argue, would better be decided by such branches.

Other proposals include suggestions that appellate judges strictly construe the "clearly erroneous" provision of Rule 52 of the Federal Rules of Civil Procedure, thus limiting their review of findings of fact;[297] Supreme Court justices sit as trial court judges one month out of each year;[298] and judges more diligently enforce the rule requiring attorneys filing a lawsuit to have a good faith basis for filing an action.[299] Judge J. Skelly Wright has suggested that "the time may be ripe to revive the doctrine

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293. Griswold, *supra* note 200, at 799.

294. Oster & Doane, *supra* note 21, at 29 (quoting Paul Freund); *see also* R. BERGER, GOVERNMENT BY JUDICIARY, *supra* note 157, at 414, 417-18; Berns, *supra* note 214, at 5; Bork, *supra* note 196, at 1139; Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A. J. 1212 (1977); Markey, *supra* note 288, at 298; O'Brien, *supra* note 272, at 1094. *But see* Graglia, *In Defense of Judicial Restraint*, in SUPREME COURT ACTIVISM AND RESTRAINT 150 (S. Halpern and C. Lamb eds. 1982) (arguing that judges are not restrained by requirement of written opinions if they are willing to ignore and misrepresent facts or assert the illogical or impossible). *See generally* H. BALL, JUDICIAL CRAFTSMANSHIP OR FIAT (1978).

295. Markey, *supra* note 288, at 298. Similarly, notes David O'Brien, judges should differentiate between utilizing social science data to arrive at a conclusion and using it to justify a rule of law. Social science may help in fact finding and clarifying the social implications of legal issues, but it remains inappropriate for "the process of justification." O'Brien, *supra* note 218, at 16-17.

296. *See, e.g.*, M. DIMOCK, LAW AND DYNAMIC ADMINISTRATION 145 (1980) (exhaustion of administrative remedies); Hudson Institute, Report of the Committee on the Next Agenda 31-32 (Jan. 15, 1985) (standing, ripeness, mootness) [hereinafter cited as Next Agenda].

297. Griswold, *supra* note 200, at 802.

298. M. FLEMING, *supra* note 29, at 149.

299. Howard, *supra* note 213, at 108 (proposal made by then Attorney General Griffin Bell).

that condemns excessive delegation of legislative power."[300] Supporters of this doctrine argue that its revival would help ensure that Congress make important policy choices, provide the recipient of delegated authority an intelligible standard, and provide ascertainable standards for court review.[301]

B. Legislators

Article III of the Constitution grants Congress certain authority with respect to the exercise of the judicial power of the United States.[302] Congress also has powers under the necessary and proper clause[303] and the fourteenth amendment[304] to enact legislation affecting the work of federal courts. In addition, the Senate exercises veto power over Supreme Court nominees.[305] Recommendations that members of Congress exercise such powers to limit the exercise of the federal judicial power can be divided into several categories: (1) regulation of the power of judicial review, (2) enactment of remedial legislation under the fourteenth amendment, (3) review of Supreme Court nominees, (4) oversight of administrative agencies, (5) restriction of public interest litigation funding, and (6) limitation of venue shopping.

1. Regulation of the power of judicial review

a. Limitations on jurisdiction. Many proposals have been made that would limit or modify the ability of both trial and appellate courts to decide certain matters. For example, the pro-

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300. Wright, *supra* note 127, at 6-7.

301. *See, e.g.*, Greanias & Windsor, *supra* note 166, at 412-13.

302. Article III of the Constitution provides in relevant part as follows:

> Section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish . . . .
>
> Section 2. . . . In all cases affecting Ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.
>
> The trial of all crimes . . . when not committed within any State . . . shall be at such place or places as the Congress may by law have directed.

U.S. CONST. art. III, §§ 1, 2, cls. 2, 3.

303. Congress shall have power to "make all laws which should be necessary and proper for carrying into execution the foregoing powers," including the power to "constitute Tribunals inferior to the Supreme Court." U.S. CONST. art. I, § 8, cls. 9, 18.

304. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

305. U.S. CONST. art. II, § 2, cl. 2.

posed Judicial Reform Act of 1982 contained provisions repealing general federal question jurisdiction,[306] reversing all implied causes of action and establishing a rule of construction for all federal statutes,[307] and requiring as prerequisites to federal habeas corpus relief that state prisoners exhaust state administrative remedies and raise substantial constitutional questions.[308] The act also would have amended section 1983 to preclude relief for violations of federal statutes except those granting equal rights; restored immunity to local and municipal governments and other political subdivisions; made the anti-injunction statute again apply to section 1983 actions, thus precluding federal courts in such cases from staying state court proceedings; and required exhaustion of state remedies as a condition precedent to bringing a section 1983 suit.[309] Finally, the act sought to restore the earlier rule that class actions can be brought only on behalf of persons sharing a community of interest, who all raise the same claim against the same party to whom they all bear the same relationship.[310]

Professor Gary L. McDowell also proposed a reform of class actions, and in addition suggested that Congress, under the necessary and proper clause, set stricter standing requirements. Professor McDowell further proposed that Congress restrict the application of the Declaratory Judgments Act, which has greatly facilitated the administration of social services by federal courts.[311]

Various proposals have been made to create courts of special or limited jurisdiction to, for example, review Supreme Court decisions invalidating state legislation,[312] or to decide issues related to substantive areas of law such as taxation, antitrust, and so forth.[313] Professor Macklin Fleming suggested that district courts be "restored to their position as courts of limited jurisdiction" over matters such as bankruptcy, copyright, pat-

306. S. 3018, 97th Cong., 2d Sess. § 161 (1982).

307. *Id.* § 171.

308. *Id.* § 131.

309. *Id.* § 141.

310. *Id.* § 191.

311. McDowell, *supra* note 220, at 10-13.

312. C. HYNEMAN, *supra* note 232, at 51.

313. L. Ratner, Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction 9 (unpublished paper presented Oct. 12, 1981, at AEI Conference); *cf.* W. Burger, *supra* note 112, at 6-7 (comparing the American legal system with European systems).

ents, admiralty, antitrust, and federal taxation. He suggested that "federal law and federal rights arising out of the state courts could be enforced in the state courts, as they are in Canada and Australia."[314] Professor Leonard G. Ratner proposed that Congress specify detailed procedures to govern the Supreme Court's appellate jurisdiction. Congress could eliminate review of diversity cases, circumscribe review of factual issues, and set a minimum limit on the value of the matter in dispute to exclude review of less consequential cases.[315]

Recent debate has focused on proposals to restrict the Supreme Court's appellate jurisdiction under article III, section 2 of the Constitution.[316] Much of the debate concerning Congress's power to limit the Supreme Court's jurisdiction relates to bills that have been introduced in recent Congresses.[317] Similar efforts have been mounted in the past in response to unpopular court decisions.[318]

Some commentators have argued that, if Congress were to prevent the Supreme Court from hearing appeals in certain matters, lower federal courts should also be precluded from deciding such cases. Otherwise, inconsistencies could result between lower

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314. M. FLEMING, *supra* note 29, at 153.

315. L. Ratner, *supra* note 313, at 9, 18.

316. *See supra* note 302.

317. As of February 15, 1983, the following bills restricting federal appellate court jurisdiction had been introduced in the 98th Congress: H.R.J. Res. 28, 98th Cong., 1st Sess. (1983) (busing; proposing constitutional amendment); H.R. 798, 98th Cong., 1st Sess. (1983) (busing); H.R. 525, 98th Cong., 1st Sess. (1983) (voluntary school prayer); H.R. 523, 98th Cong., 1st Sess. (certain cases); H.R. 521, 98th Cong., 1st Sess. (1983) (certain cases); H.R. 520, 98th Cong., 1st Sess. (1983) (voluntary school prayer); H.R. 253, 98th Cong., 1st Sess. (1983); H.R. 183, 98th Cong., 1st Sess. (1983) (voluntary school prayer); H.R. 158, 98th Cong., 1st Sess. (1983) (busing); H.R. 46, 98th Cong., 1st Sess. (1983) (state cases).

During the 97th Congress, at least thirty-five bills were introduced that would in some way restrict federal court jurisdiction, dealing with abortion, busing, voluntary school prayer, drafting women, and review of state court decisions. Letter from William J. Howard to Stephen L. Fluckiger (Jan. 7, 1983). Hearings were conducted by the Senate Judiciary Committee on bills involving court ordered school busing, *Hearings on S. 528, S. 1005, S. 1147, S. 1646, S. 1743, and S. 1760 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1982), and the proposed human life amendment, *Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1982).

318. The literature discussing the legality of Congress's power to restrict federal appellate court jurisdiction under the Constitution is extensive. *See generally Constitutional Restraints Upon the Judiciary: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981); AEI Conference, *supra* note 283.

federal courts and state courts.[319] Alternatively, it has been proposed that with respect to some causes of action, a litigant be required to obtain a judgment in state court prior to being permitted to sue in federal court.[320]

b. Limitations on remedial powers. Several commentators have proposed that Congress limit the remedial powers of federal courts, particularly to issue orders requiring the appropriation of funds.[321] Representative Dornan, for example, introduced a bill that would have prohibited a federal court from taking action requiring expenditure of state or federal funds without prior legislative approval.[322] Senator East has proposed that all federal injunctions directed against a state or a state agency be ordered by three-judge courts.[323] In addition, the recommendation has been made that a court that prescribes a remedy requiring expenditure of public funds should be required to hear evidence on the remedy's cost.[324]

Professor McDowell proposed that Congress adopt one or more of the following measures to limit the virtually unlimited discretion courts have to issue equitable decrees: separate legal from equitable procedures; refuse to grant equitable powers in connection with new legislation; set a jurisdictional amount ($10,000, for example) for damages before the court could exercise equity jurisdiction; limit the amount of funds that could be spent in implementing an equitable decree; or exempt certain cases from equitable relief (as it did with labor disputes under the Norris-La Guardia Act).[325] It has also been suggested that Congress limit federal courts' ability to decide cases on evidence outside the record.[326]

c. Constitutional amendment. Another frequently suggested means for controlling the improper use of judicial power is amendment of the Constitution.[327] While some argue that the

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319. AEI Conference, *supra* note 283, at 171 (remarks of Hans Linde).

320. *Id.* at 155-58 (remarks of Paul Bator).

321. N. Glazar, *supra* note 5, at 20-21; McDowell, *supra* note 220, at 13-16; AEI Conference, *supra* note 283, at 144-45 (remarks of Laurence H. Silberman).

322. H.R. 4200, 96th Cong., 1st Sess. (1979).

323. S. 3018, 97th Cong., 2d Sess., 128 CONG. REC. 13,297 (1982).

324. AEI Conference, *supra* note 283, at 148 (remarks of Dorothy Beasley).

325. McDowell, *supra* note 220, at 13-16.

326. AEI Conference, *supra* note 283, at 148 (remarks of Dorothy Beasley).

327. *But see* Graglia, *supra* note 294, at 150-52 (constitutional amendment has not proven to be an effective means of restraining the judiciary).

amendment process should be made easier,[328] others adhere to the view that requiring an extraordinary rather than simple majority to amend the Constitution preserves the rule of law and precludes majoritarian tyranny.[329] Some believe that a federal constitutional convention should be convened periodically as a means of continually updating the Constitution.[330]

d. Regulation of voting requirements. Another recurring proposal for restricting the judiciary is the suggestion that an extraordinary majority or unanimous vote of the Supreme Court he required to declare a statute unconstitutional. This requirement would result in increased judicial deference toward legislative enactments.[331]

e. Creation of study commission. Chief Justice Warren E. Burger, among many others, has recommended that Congress create a commission to study the structure of the judicial system in the United States, including the interrelationship of state and federal court systems.[332] One purpose of such a commission could he to aid in reeducating judges, academics, and journalists on the proper role of the judiciary.

f. Elimination of judicial review. Some have even recommended that judicial review be eliminated altogether. Amendments to the Constitution have been proposed, for example, that would make all acts of Congress or state legislatures binding on the Supreme Court.[333] Proponents of this proposal usually argue that the Constitution does not authorize judicial review.[334]

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328. *See, e.g.*, R. TUGWELL, THE COMPROMISING OF THE CONSTITUTION: EARLY DEPARTURES 174 (1976). In 1962 the State Assembly of the Council of State Governments, a semi-official agency, recommended the following amendments to the Constitution: (1) revise the method of amending the Constitution so as to permit state legislatures to initiate amendments and secure their submission to the states for ratification without the approval of Congress; (2) restrict the authority of the Court to deal with political questions by denying jurisdiction over cases affecting the apportionment of representatives in state legislatures; (3) create a new "Court of the Union" consisting of the chief justices of the highest courts in the 50 states, with power to hear appeals from the Supreme Court in constitutional cases and correct such errors as in the opinion of this new super Supreme Court might he committed by the Supreme Court. A. HOLCOMBE, *supra* note 232, st 151.

329. R. STEAMER, THE SUPREME COURT IN CRISIS: A HISTORY OF CONFLICT 282 (1971).

330. *See, e.g.*, S. 1710, 96th Cong, 1st Sess., 125 CONG. REC. 22,945 (1979).

331. *See, e.g.*, R. STEAMER, *supra* note 329, at 287.

332. W. Burger, *supra* note 112, at 4; *see also* S. 381, 98th Cong., 1st Sess., 129 CONG. REC. S889 (1983); *To Establish a Commission to Study the Federal Courts: Hearings on S. 675 and S. 1530 Before the Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982).

333. *See* C. HYNEMAN, *supra* note 232, at 49.

334. *E.g.*, T. HIGGINS, JUDICIAL REVIEW UNMASKED 261-66 (1981).

2. *Substantive legislation*

Some have proposed that, in addition to exercising its power to regulate the jurisdiction of the courts, Congress pass legislation under section 5 of the fourteenth amendment to reverse selected Supreme Court decisions.[335] These proposals are premised upon the view that Congress, rather than the courts, was intended to be the primary enforcer of the fourteenth amendment.[336] It is argued that Congress is better suited to decide many fourteenth amendment issues[337] because it is able to study all sides of an issue and to collect all relevant data through various means, including hearings, staff studies, and committee reports.[338] Opponents of direct legislative measures express concern that such statutes might infringe upon individual rights.[339] Moreover, as a practical consideration, Congress's power to enact remedial legislation overruling certain cases would be limited to cases involving rights granted under the fourteenth amendment. Accordingly, to the extent that the right granted in a given case derived from constitutional provisions other than the fourteenth amendment, the effectiveness of such a remedy would be limited.[340]

3. *Limitations on judicial personnel*

a. Court-packing. This proposal, which received a great deal of attention in connection with President Roosevelt's attempt to

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335. *E.g.*, Galebach, *A Human Life Statute*, 1981 HUMAN LIFE REV., Winter 1980, at 5. For a review of the legal issues relating to Congress's enforcement powers under the fourteenth amendment, see Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Gordon, *The Nature and Uses of Congressional Power Under Section 5 of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 NW. U.L. REV 656 (1977).

336. R. BERGER, GOVERNMENT BY JUDICIARY, *supra* note 157 at 221-29; *cf.* Agresto, *supra* note 157, at 479-84 (arguing that dictum in court decisions, while binding upon the parties, is not binding upon the other branches with respect to future conduct; accordingly, Congress and the president can formulate law contrary to the principles enunciated in a Supreme Court decision, which Lincoln and Congress did after the Dred Scott decision).

337. *See, e.g.*, Agresto, *supra* note 157, at 492; Browne, *supra* note 231, at 434; Galebach, *supra* note 335. *See generally* Wallace, *supra* note 198, at 103-07.

338. White, *Judicial Review in Our American Heritage*, 19 COLO. Q. 5, 17-18 (1970).

339. AEI Conference, *supra* note 283, at 43-44 (remarks of Walter E. Dellinger III).

340. *See id.* at 116-17 (remarks of Ralph Winter).

enlarge the Supreme Court in 1937,[341] is frequently mentioned in connection with possible congressional restraints on the judiciary.[342] It has been suggested that since the size of the Supreme Court has been changed from time to time in the past,[343] the legality of the proposal, unlike jurisdiction-stripping proposals, should not significantly hinder its implementation. Moreover, it has been remarked, court-packing may be preferable to eliminating jurisdiction with respect to certain issues, since such issues would still be decided by the nation's highest court.[344]

Opponents have observed, however, that not only would court-packing be difficult to implement as a practical matter, but it may not achieve the desired result, since no one really knows how a new appointee will decide future cases.[345] Chief Justice Burger has stated, in response to the suggestion that the Court's size be increased to facilitate the handling of its case load, that having more than nine justices would make it difficult for the Court to function and make collegial decisions.[346]

Aviam Soifer has recently proposed a variation on the court-packing theme. He suggested that the number of district court judges required to decide institutional cases be increased, perhaps to three.[347]

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341. *See Reorganization of the Federal Judiciary: Hearings Before the Senate Comm. on the Judiciary on S. 1392*, 75th Cong., 1st Sess. (1937); S. REP. No. 711, 75th Cong., 1st Sess. (1937). *See generally* J. ALSOP & T. CATLEDGE, THE 168 DAYS (1938); L. BAKER, BACK TO BACK (1967); J. BURNS, ROOSEVELT, THE LION AND THE FOX (1956); R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941); W. LIPPMAN, THE SUPREME COURT: INDEPENDENT OR CONTROLLED? (1937); A. MASON & W. BEANEY, THE SUPREME COURT IN A FREE SOCIETY 176-86 (1968); M. PUSEY, THE SUPREME COURT CRISIS (1937).

342. *See* AEI Conference, *supra* note 283, at 120-22 (remarks of Walter E. Dellinger III); *id.* at 124-25 (remarks of Leonard G. Ratner).

343. The Court has varied in size from five (1801-1802), to six (1789-1801, 1802-1807), to seven (1907-1937, 1866-1869), to nine (1837-1863, 1869-present), to ten (1863-1866) justices. CONGRESSIONAL QUARTERLY, GUIDE TO THE U.S. SUPREME COURT 10 (1979).

344. AEI Conference, *supra* note 283, at 122-23 (remarks of Walter E. Dellinger III).

345. *Id.* at 122 (remarks of Walter E. Dellinger III); *id.* at 125 (remarks of Leonard G. Ratner).

346. *Chief Justice Burger's Challenge to Congress*, U.S. NEWS & WORLD REP., Feb. 14, 1983, at 39; W. Burger, *supra* note 112, at 7.

347. AEI Conference, *supra* note 283, at 192-93 (remarks of Aviam Soifer). Prior to 1976, three-judge district courts were required to hear cases in which an interlocutory injunction was issued against the enforcement of a state statute or act of Congress. Currently, a three-judge court is required only when an action is filed challenging the constitutionality of the appointment of any statewide legislative body or under certain provisions of the Civil Rights Act of 1964 or the Voting Rights Act of 1965. 28 U.S.C. § 2284(a) (1976); 42 U.S.C. §§ 1973(a), 1973c, 1973h(c), 2000a-5(b) & 2000e-6(b) (1965). *See generally* C. WRIGHT, FEDERAL COURTS 295-99 (4th ed. 1983).

b. Judicial appointments. The effectiveness of controlling judicial outcomes through the appointment process has frequently been debated.[348] Various proposals have been made to structure the appointment process in ways that will ensure consideration of nominees who are sensitive to the effects of judicial encroachment. Some have suggested that more state judges be appointed to the federal bench,[349] that increased judicial experience be required of nominees for federal judgeships,[350] or that attempts be made to select candidates whose views are consistent with the president's[351] or who demonstrate a commitment to judicial self-restraint.[352]

Senator East suggested that inasmuch as the Supreme Court is a political body, it should represent the entire nation.

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348. *See, e.g.*, M. FLEMING, *supra* note 29, at 163; Graglia, *supra* note 294, at 154-55; L. TRIBE, GOD SAVE THIS HONORABLE COURT (1985); Address by Justice Powell, Southwestern Legal Foundation 5 & n.6 (May 1, 1980). Approximately one-fifth (28 out of 136) of all Supreme Court nominees prior to 1977 failed to gain Senate confirmation. H. BALL, COURTS AND POLITICS 167 (1980).

349. C. KILGORE, JUDICIAL TYRANNY 351 (1977).

350. *See* R. STEAMER, *supra* note 329, at 283.

351. C. SWISHER, THE SUPREME COURT IN MODERN ROLE 194-95 (rev. ed. 1965). *Contra* H. Abraham, Reflections on the Recruitment, Nomination, and Confirmation Process to the Federal Bench 21 (unpublished, undated paper in possession of the author) (opposing goal of imposing ideological or political standard on judicial nomination process).

352. *See* A Plan to Aid in the Identification of Qualified Nominees for the Federal Judiciary (National Legal Center for the Public Interest 1982) A questionnaire by the Senate Judiciary Committee, which is given to all nominees, contains the following question concerning "judicial activism":

> "1. Please discuss your views of the following criticism involving 'judicial activism.'
>
> The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this 'judicial activism' have been said to include:
>
> a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
> b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
> c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
> d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
> e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities."

Id. at 5.

Accordingly, he proposed that Supreme Court justices be appointed from the territory of the federal judicial circuit to which they are assigned.[353] Senator Grassley argued that, notwithstanding the refusal of many to do so, Supreme Court nominees should give their views on the meaning of the Constitution so senators can decide whether their views are consistent with what the Constitution requires.[354]

c. Judicial tenure. Suggestions that judges be elected or that they be required to retire at a fixed age are frequently included among proposals to limit judicial personnel.[355] According to Charles S. Hyneman, one proposal with respect to the tenure of Supreme Court justices is "removal from office by some process requiring the approval of both the President and one or both houses of Congress."[356]

Proposals to limit the tenure of judges are generally criticized on the grounds that any limitation would impair judicial independence. Moreover, it is argued, history has not shown that advanced age necessarily impairs judicial ability.[357] Some have suggested that if judges were required to retire at a fixed age, personnel in the other branches of government should be under the same restriction.[358]

A number of recent bills and resolutions in Congress have proposed legislation and constitutional amendments that would limit the service of federal judges to a fixed term,[359] or otherwise regulate their tenure under specified circumstances.[360] For example, the Judicial Reform Act of 1982 would establish a procedure for periodic review of federal judges according to the standard of "good behavior."[361] A memorandum from the staff of the Senate

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353. *See* S. 3018, 97th Cong., 2d Sess., 128 CONG. REC. 13,297 (1982); *see also* H. Abraham, *supra* note 351, at 20, 22 (notion that judiciary should be "representative" is widespread; also argues that President Carter's approach was to achieve proportional ethnic and sexual representation).

354. Grassley, *Judicial Nominations and the Senate's "Advice and Consent" Function*, in A BLUEPRINT FOR JUDICIAL REFORM 107 (P. McGuigan & R. Rader eds. 1981).

355. R. STEAMER, *supra* note 329, at 284.

356. C. HYNEMAN, *supra* note 232, at 51-52.

357. R. STEAMER, *supra* note 329, at 284.

358. *See* H.R.J. Res. 315, 96th Cong., 1st Sess. (1979).

359. *See, e.g.*, H.R.J. Res. 465, 96th Cong., 1st Sess. (1979).

360. *See* H.R. 622, 96th Cong., 1st Sess. (1979); H.R. 994, 97th Cong., 1st Sess. (1982); H.R. 2502, 96th Cong., 1st Sess. (1979) (three-judge panel to review behavior of federal judge); S. 295, 96th Cong., 1st Sess. (1979).

361. S. 3018, 97th Cong., 2d Sess., 128 CONG. REC. S13,297 (1982).

Subcommittee on Separation of Powers set forth the objectives of the bill as follows:

> It also would repeal statutes which permit committees of judges to discipline and regulate the caseload of federal judges. Congress, not other federal judges, should determine which judges are performing their duties under the Constitution and whether a judge has transgressed the terms of his office. This part would create a joint congressional committee to review the records of federal judges, thus establishing oversight of the bench. It would also integrate this ongoing investigation [sic] function into the longstanding procedure of impeachment. Fair and reasonable guidelines for what shall be deemed a breach of the good behavior standard will be adopted, fully in keeping with the Framers' understanding of the standard.[362]

Others have proposed to limit tenure of Supreme Court justices in a manner similar to the twenty-second amendment limitation on the president. Supreme Court justices would be limited to service for a fixed term, after which they would be ineligible for reappointment.[363]

d. Impeachment. Impeachment is another method for controlling the personnel of the courts, which, some have suggested, needs to be utilized more readily in cases involving abuse of judicial power.[364] However, excessive use of impeachment, it has been noted, may result in the politicization of the judiciary.[365] Moreover, one scholar argues that using impeachment to remedy a judicial decision or set of decisions "smacks too much of a civil penalty for the expression of a considered judgment."[366]

4. Legislative oversight of administrative process

Some commentators suggest that Congress can reform the administrative process so that results are achieved without court involvement. In this regard, it has been suggested that restrictions that unduly limit an administrator's effectiveness be removed, including restrictions imposed by the Administrative

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362. Judicial Legislative Watch Report 5 (National Legal Center for the Public Interest Nov. 5, 1982); *see also* Next Agenda, *supra* note 296, at 32 (recommending periodic reconfirmation of federal judges).

363. M. FLEMING, *supra* note 29, at 163-65.

364. *See, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY, *supra* note 157, at 414; C. KILGORE, supra note 349, at 350.

365. AEI Conference, *supra* note 283, at 117-18 (remarks of Ralph Winter).

366. Agresto, *supra* note 157, at 487.

Procedure Act and subsequent court interpretations thereof.[367] A number of regulatory reform proposals have been introduced in Congress in recent years, including proposals that would restrict judicial review of administrative action.[368]

Other suggestions for reforming the administrative process include suggestions that Congress clearly define the standards controlling the delegation of legislative power to administrators,[369] rely more upon experienced administrators in drafting legislation to accomplish regulatory reform measures,[370] and channel many issues related to the economy that are presently litigated in the courts to administrative agencies that would report to Congress. In addition, proposals for continuing congressional oversight of agency action include such measures as the legislative veto; use of the appropriation process; the committee veto; administrative reports; periodic or continuing consultations between agencies and committees, or committee investigations; concurrent resolutions; and review and reenactment of enabling legislation.[371] William F. Harvey proposed that all federal regulatory agencies justify each rule and regulation on a cost-benefit basis to a state court or state reviewing agency located where the principal economic impact of the action is to occur. In cases in which impact crosses state lines, a multistate reviewing agency would evaluate the impact.[372]

Some warn that increased legislative involvement may reduce the effectiveness of the administrative process.[373] Others point out that, as a practical matter, Congress may be incapable of undertaking the kind of supervision necessary to bring about any appreciable reform in the administrative process.[374]

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367. M. DIMOCK, *supra* note 296, at 115.

368. *See, e.g.*, H.R. 4838, 97th Cong., 1st Sess. (1981); H.R. 3339, 97th Cong., 1st Sess. (1981); H.R. 1866, 97th Cong., 1st Sess. (1981) (clarify standards for judicial review of administrative action); H.R. 1108, 97th Cong., 1st Sess. (1981); H.R. 1043, 97th Cong., 1st Sess. (1981); H.R. 807, 97th Cong., 1st Sess. (1981); H.R. 220, 98th Cong., 1st Sess. (1983).

369. *See* M. DIMOCK, *supra* note 296, at 145.

370. *Id.* at 150.

371. See Greanias & Windsor, *supra* note 166, at 410, for a discussion of these various proposals.

372. Harvey, *A Proposal for Reform of Federal Judicial Review and Federal Regulatory Agencies: A New Beginning*, in A BLUEPRINT FOR JUDICIAL REFORM 195 (P. McGuigan & R. Rader eds. 1981).

373. *Id.*

374. A. BERLE, supra note 272, at 70-75.

5. *Restriction of funding for public interest litigation*

Several commentators have suggested that Congress limit public monies used to directly or indirectly pay lawyers to litigate "public interest" lawsuits.[375] A number of proposals directed towards reducing the amount of public funds available for public interest litigation have received considerable attention in connection with the Reagan administration's attempt to reduce funding for the Legal Services Corporation.[376] In the past, legislation has been proposed that would modify attorneys' fees awarded in certain cases.[377]

6. *Limitation of venue shopping*

Several commentators have proposed that venue provisions be modified to permit suit in regulatory actions in the district where the injury occurs, rather than limiting suit to the Court of Appeals for the District of Columbia Circuit.[378] Others have suggested that venue provisions be tightened to limit venue shopping by litigants in search of sympathetic judges.[379]

C. Public Administrators

Considering the increase in litigation that has resulted from the increasing number of federal regulations, deregulation efforts can be expected to reduce judicial encroachment. Such efforts may include the transfer of management responsibility for federal programs to state and local governments and even in some cases to the private sector.[380] In addition to deregulation, calls

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375. *See, e.g.*, AEI Conference, *supra* note 283, at 46-47 (remarks of Charles Fried).

376. *See Legal Service Corp. Controversy Simmers*, NAT'L L.J., Jan. 3, 1983, at 6, col. 2. *But see* AEI Conference, *supra* note 283, at 176 (remarks of Mark Tushnet) (passage of Attorneys' Fee Awards Act and Civil Rights of Institutionalized Persons Act indicative of congressional approval of large scale institutional litigation).

377. *See, e.g.*, S. 3018, 97th Cong., 2d Sess., 128 CONG. REC. 13,297 (1982) (repeal provisions of 42 U.S.C. § 1988 that provide for the award of attorney's fees in civil rights actions); *see also* Rader, *The Fee Awards Act of 1976: Examining the Foundation for Legislative Reform of Attorney's Fees Shifting*, 18 J. MAR. L. REV. 77 (1984); Sylvester, *OMB's New Assault on Legal Fees*, NAT'L L.J., Nov. 29, 1982, at 1, col. 4. *But see* AEI Conference, *supra* note 283, at 176-77 (remarks of Mark Tushnet).

378. Brimelow & Markman, *supra* note 28, at 20.

379. *Id.*

380. *See* Next Agenda, *supra* note 296, at 10 (recommending, "for example, a phased-in, private-sector alternative to social security that is specified in law and gradual transfer to the private sector" of "unemployment insurance (with some minimums and mandatory coverage requirements)").

have been made for regulatory reforms that might alleviate the necessity of court supervision of administrative action.[381]

In addition to efforts to upgrade the administrative process, some urge the president to "use the teaching power of the presidency to focus public debate on the issue of judicial supremacy."[382] Others propose that the executive branch limit the number of lawyers in government service[383] or otherwise support efforts to restrict attorneys' incentives to utilize the courts to bring about social change.[384]

D. Lawyers and Academics

Many recommendations directed toward the legal profession aim at reducing lawyers' influence, either through a direct reduction in the number of lawyers or through efforts to alter the attitude that lawyers are social engineers.[385] Such a change in attitude, it has been suggested, would involve a massive reeducation of the bar, law professors, and law students.[386]

Judge Winter suggests that the legal profession, which is perhaps the only constituency in the country that can exercise some sway over the judiciary, must insist that judges in the interpretative mode are appointed to the bench, and that once appointed, such judges remain in the interpretative mode.[387] It has

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381. Judge Friendly has recommended, for example, that agencies provide ombudsmen to provide input for reform from an agency's clients. Friendly, *supra* note 42, at 22. Marshall Dimock has made a number of suggestions for upgrading the administrative process, including the following: 1) give more attention to the training and recruiting of executives, including overhauling civil service programs to facilitate hiring of specialists; 2) emphasize and enlarge the administrators' political and policymaking role; 3) return autonomy and leadership roles to the administrative program manager; 4) place less emphasis on procedure in the administrative process; 5) teach administrative law and the importance of administrative policy to lawyers and others involved in government; 6) encourage career administrators to take more initiative in the legislative process; 7) educate the public concerning the importance of administrative policy and law; 8) intensify training programs for existing administrative personnel; and 9) initiate the use of administrative audits to ensure that administrators are performing in accordance with citizens' expectations. M. DIMOCK, *supra* note 296, at 12.

382. Brimelow & Markman, *supra* note 28, at 20. The current administration's legal officers have heen involved in this process. *See, e.g.*, Smith, *Urging Judicial Restraint*, 68 A.B.A. J. 59 (1982); Barbash, *The Solicitor General in Time of Tension*, Wash. Post, Mar. 8, 1982, at A2, col 1; Thornton, *Smith Says U.S. Courts Must Show Restraint*, Wash. Post, Nov. 17, 1981, at A14, col. 1.

383. *See, e.g.*, M. DIMOCK, *supra* note 296, at 148.

384. *See supra* note 375 and accompanying text.

385. AEI Conference, *supra* note 283, at 46-47 (remarks of Charles Fried).

386. *Id.*; Silberman, *supra* note 213, at 18.

387. AEI Conference, *supra* note 283, at 117 (remarks of Ralpb Winter).

also been suggested that academics and practitioners alike insist that judges elaborate the reasons for their decisions[388] and not tolerate "arrogations of judicial power" by calling them interpretations.[389]

Other proposals related to this reeducation process include creating public law schools committed to education and statesmanship,[390] and reemphasis of the importance of political science, administrative law, and public policy.[391] Professor Charles Fried has urged that law schools begin teaching "an older and . . . nobler conception of the law . . . that law is more than just a continuation of politics by other means."[392]

E. Media

Some have suggested that media participation is essential to the success of the education process described above. It has been proposed that the media report on the adverse consequences of judicial encroachment, including the threat to democracy posed by the unwarranted expansion of the legal process.[393] It has also been suggested that dissenting opinions be publicized more extensively.[394]

F. General Public

1. Insistence on accountability

Many of the recommendations described above are directed toward elected officials or their appointees. In order to encourage action on the part of elected officials, it has been suggested that individual citizens must insist that their elected representatives support those measures calculated to restrain judicial encroachment and influence those appointed and di-

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388. *See supra* notes 294-95 and accompanying text.

389. R. Donnelly, Address to the 81st General Assembly, 2d Session, State of Missouri 10 (Jan. 7, 1982) (Chief Justice, Missouri Supreme Court) ("[A]cademicians, the media and other molders of public opinion in America prostitute their talents when, for whatever reason, they persist in tolerating 'arrogations' by calling them 'interpretations.' "); *see also* H. BALL, *supra* note 294, at 148.

390. M. DIMOCK, *supra* note 296, at 148.

391. *Id.* at 152-53.

392. C. Fried, *supra* note 159, at 9.

393. *See, e.g.*, C. KILGORE, *supra* note 349, at 353.

394. *Id.*

rected by them to do the same.[395] Judge Aldisert describes the public's role as follows:

> The solution and the ultimate responsibility [for curbing judicial encroachment], then, rests with the public—with the American people themselves. It is they, the people, who must decide who the decision makers should be today and in the decades to follow. Shall difficult decisions be made by the local school boards elected by neighbors, or by an unknown federal judge sitting 100 miles distant? Shall decisional responsibility lie with state representatives elected from local districts, or with a panel of United States Circuit Judges sitting 300 miles away and, conceivably, composed entirely of non-resident judges? Shall the elected governor and the executive branch administer state mental hospitals and prisons? Shall trustees run the university? Or shall judges be our administrators and supervisors?[396]

2. *Use of alternative dispute resolution mechanisms*

Individual accountability is equally important to governmental accountability, particularly as it relates to resolving conflicts.[397] Part of this process involves resolving differences on a person-to-person basis or through other informal mechanisms.

In recent years tremendous resources have been directed toward studying and implementing methods of resolving disputes outside the traditional judicial system. The business community, members of the public, and the legal profession have recognized the need for such alternatives, not just to promote individual liberty and responsibility, but to reduce the cost of traditional civil court litigation.[398] At the influential Pound Conference in

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395. Some commentators believe the Supreme Court has shown more restraint in recent years due in part to the wave of criticism being leveled at judges. *E.g.*, *The "Hidden Judiciary" and What It Does*, U.S. NEWS & WORLD REP., Nov. 1, 1982, at 56, 57.

396. Aldisert, *supra* note 216, at 475.

397. *See, e.g.*, Hand, *The Contribution of an Independent Judiciary to Civilization*, in R. ALDISERT, THE JUDICIAL PROCESS 128 (1976).

398. Minor dispute resolution has been a top priority of the American Bar Association in recent years, which has established a Special Committee on Resolution of Minor Disputes. *See* AMERICAN BAR ASSOCIATION, DIRECTORY: DISPUTE RESOLUTION PROGRAMS (1983); *see also* W. Burger, *supra* note 112, at 9-11; Resnick, *supra* note 159, at 438.

Organizations within the legal community presently studying various means of improving the administration of justice through increased use of alternative dispute resolution mechanisms include the American Arbitration Association, American Bar Foundation, American Law Institute, Federal Judicial Center, Law Enforcement Assistance Administration, National Center for State Courts, National Conference of Commissioners on Uniform State Laws, National Institute for Justice, National Judicial College, and

1976, for example, considerable attention was directed to the need for alternative dispute resolution mechanisms. The American Bar Association published a summary of the proceedings of the Pound Conference, including twenty-six recommendations relating to the creation of "new forums for dispute resolution providing for alternatives to both jury and non-jury trials."[399]

Among the alternatives tested and in some cases extensively implemented in recent years are the following: (1) minitrials or private hearings conducted by retired judges or neutral advisers;[400] (2) rent-a-judge, a program authorized under certain states' laws by which "parties to a lawsuit can agree to hire someone of their own choosing, usually a retired judge, to resolve their dispute, and can then have the judge's report entered as the judgment of the trial court, with full rights of appeal;"[401] (3) neighborhood justice centers;[402] (4) arbitration and mediation,[403] including business warranty tribunals;[404] and (5) ombudsmen.[405]

Many companies have been involved in studying and implementing various alternative dispute resolution mechanisms.[406] In addition, the National Institute for Dispute Resolution and Endispute, Inc.[407] have made significant contributions to this field.

IV. Conclusion

Limiting judicial remedies may prove to be the most fruitful method of redefining and reexamining the relationship of the judiciary to policy makers and administrators. The impact of a

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the Justice Department's Office for Improvement in the Administration of Justice. L. Morgen, Developments in Alternatives to Litigation for Minor Disputes 19 (Jan. 1982) (unpublished paper).

399. Report of the Pound Conference Follow-Up Task Force, 74 F.R.D. 159 (1976).

400. *Managing Company Lawsuits to Stay Out of Court*, Bus. Wk., Aug. 23, 1982, at 54; Lewin, *New Alternatives to Litigation*, N.Y. Times, Nov. 1, 1982, at D1, col. 3; *Minitrial Successfully Resolves NASA-TRW Dispute*, Legal Times of Wash., Sept. 13, 1982, at 13-21, col. 1.

401. Lewin, *supra* note 400, at D2, col. 4.

402. L. Morgan, *supra* note 398, at 30-35.

403. W. Burger, *supra* note 112, at 3-9; Burger, *Arbitration, Not Litigation*, Nation's Bus., Aug. 1982, at 52; L. Morgan, *supra* note 398, at 43-44.

404. Ford Motor Compeny and General Motors have sponsored warranty tribunals and consumer appeals boards. L. Morgan, *supra* note 398, at 38-39.

405. L. Morgan, *supra* note 398, at 52. A directory published by the American Bar Association lists alternative dispute resolution programs operating in the United States. *See supra* note 398.

406. Lewin, *supra* note 400, at D2, col. 1.

407. *Id.*; L. Morgan, *supra* note 398, at 19-20.

court's remedial decree is more readily measured than its construction of a constitutional or statutory right. Moreover, proposals urging restraint in the exercise of a court's equitable powers may be more readily accepted than proposals urging restraint in the construction of rights. Nevertheless, it may not be possible to separate the right from the remedy, particularly when, as Professor Mishkin argues, the definition of the right is phrased in expansive terms that "imply an institutional remedy."[408]

In the long run, any effective strategy for slowing or reversing the trend toward increased judicial encroachment will require the cooperative input of the policy and administrative branches of government. As various commentators have suggested, these branches of government have played a significant role in the expansion of the judiciary.[409] The trend of encroachment will not be reversed without the cooperation of those who helped bring it about. In addition, corrective suggestions directed toward the elective branches will most likely focus attention on the proper relationship between legislators, regulators, and judges.

While numerous legislative measures have been recommended, proposals that apply equally to all causes of actions, such as jurisdictional restrictions and limitations on remedial powers, may be more readily implemented. They also may be more effective in the long run in ameliorating the symptoms leading to an expanded judicial role than measures aimed at specific classes of cases.

To be successful, any initiative by the elective branches will require a broad-based consensus among public officials, citizens, and scholars. Indeed, an educational effort concerning the dangers of imbalance among the governmental branches may be the paramount corrective measure. As the commentary summarized in Part II indicates, many reasons exist for concern about judicial overreaching in public policy areas. Three concerns often voiced in the literature particularly merit repetition.

The first involves what Professor Griswold characterized as the "self-repeating nature" of judicial activism.[410] Simply stated, this means that broadly worded judicial opinions provide a basis

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408. Mishkin, *supra* note 162, at 955.

409. *See* Horowitz, *supra* note 159, at 138; *see also supra* notes 141-42, 145, 177, 179-80, 206-10 and accompanying text.

410. *See supra* note 200 and accompanying text.

for ever expanding judicial activity. Some have observed, for example, that the law generally develops from certain basic rights to increasingly particularized rights.[411] More important, the temptation to use litigation likely increases as it becomes easier to achieve political objectives through the judicial process.[412]

A second concern involves the increased caseload that results from using the judiciary to achieve political ends. As the caseload increases, pressure is exerted on the courts to meet the increased demand. It is not surprising, therefore, that the recent revolution in judicial administration has occurred during a period of unprecedented judicial activity.[413] Professor Resnick's warnings concerning the possible adverse consequences of the "managerial" movement in the judiciary,[414] and the observations of Professors Glazer[415] and Horowitz,[416] among others, concerning the bureaucratization of the judiciary should give rise to serious reflection concerning the ultimate destination of the managerial movement.

Finally, judicial supremacy may weaken democracy by removing from the people and their representatives the ability to shape policy. It may also weaken democracy by undermining and even superseding the traditional values held by the public—in favor of values held by the intellectual class.[417] If this is true, the findings contained in the Connecticut Mutual Life Report on American Values in the 1980's are particularly troubling. This study on the values of different segments of American society revealed widespread disparities between attitudes of law and justice leaders and the public on such moral issues as abortion, homosexuality, and smoking marijuana, and such traditional political issues as criminals' rights and the role of government.[418]

For these and other consequences not yet apparent, a renewed educative effort must be directed at all levels of society, from policymakers in the legislative and executive branches to the public at large; from state and federal judges and elected officials to legal practitioners, teachers, and students; from social

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411. *See generally* notes 167-80 and accompanying text.

412. *See* Horowitz, *supra* note 159, at 137.

413. *See, e.g., supra* note 263.

414. *See supra* notes 264-65 and accompanying text.

415. *See supra* notes 250-56 and accompanying text; Horowitz, *supra* note 159, at 142-43.

416. *See supra* notes 266-67 and accompanying text.

417. *See supra* notes 278-79 and accompanying text.

418. McGuigan & Rader, *supra* note 280, *passim*.

policy theorists to program managers and service providers. "The solution and the ultimate responsibility for restraining the judiciary," as Judge Aldisert has suggested, "rests . . . with the American people themselves. It is they, the people, who must decide who the decision makers should be today and in the decades to follow."[419] Moreover, it is ultimately each American who individually must determine whether, and to what extent, the courts will be given responsibility for resolving his or her personal grievances. As Justice Learned Hand cautioned over 40 years ago:

> [T]his much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where the spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.[420]

419. Aldisert, *supra* note 216, at 475 (quoted in text accompanying note 396, *supra*).
420. Hand, *supra* note 397, at 128.