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Where The Money Is: Remedies to Finance Compliance with Strict Structural Injunctions

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WHERE THE MONEY IS: REMEDIES TO FINANCE COMPLIANCE WITH STRICT STRUCTURAL INJUNCTIONS

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Since the early 1970's, the federal district courts have been enforcing the constitutional and statutory rights of those dependent on state and local government institutions by injunctions requiring improvements in the services provided. The process frequently has involved substantial increases in government spending on staff and facilities,[1] and the governments involved were at times reluctant or unable to provide the necessary funds.[2] While the courts have consistently taken the position that lack of funds does not relieve the defendants of their duty to protect constitutional rights,[3] they have also tended to avoid confrontation over finances by negotiation or by arranging for federal subsidies.[4] Since 1980, however, there have been several instances of outright refusal by the political authorities to appropriate the money needed to comply with structural decrees.[5] Executive branch defendants have attempted either to defend against contempt proceedings[6] or to obtain a modification of the decree[7] on the ground that the failure of independent nonparties, *i.e.*,

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1. *See* notes 4-53 *infra* and accompanying text.

2. *See* D. HOROWITZ, THE COURT AND SOCIAL POLICY 258-59 (1977); Weinstein, *The Effect of Austerity on Institutional Litigation,* 6 LAW & HUM. BEHAV. 145 (1982); Note, *Implementation Problems in Institutional Reform Litigation,* 91 HARV. L. REV. 428, 453 (1977) [hereinafter cited as Note, *Implementation Problems*]; *Note, Federal Courts and State Prison Reform: A Formula for Large Scale Federal Intervention Into States Affairs,* 14 SUFFOLK U. L. REV. 545, 575-76 (1980); *Developments in the Law — Section 1983 and Federalism,* 90 HARV. L. REV. 1133 (1977) [hereinafter cited as *Developments — 1977*]. *See generally* Gelfland, *The Burger Court and the New Federalism,* 21 B.C. L. REV. 763, 825-29 (1980).

3. *See* note 122 *infra* and accompanying text.

4. *See, e.g.,* Arthur v. Nyquist, 547 F. Supp. 468, 469-70 (W.D.N.Y. 1982), *aff'd.,* 712 F.2d 809 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 1907 (1984); Weinstein, *supra* note 2, at 146-47.

5. *E.g.,* Brewster v. Dukakis, 675 F.2d 1 (1st Cir. 1982); Ricci v. Okin, 537 F. Supp. 817 (D. Mass. 1982); Delaware Valley Citizens Council v. Pennsylvania, 533 F. Supp. 869 (E.D. Pa.), *aff'd.,* 678 F.2d 470 (3d Cir.), *cert. denied,* 459 U.S. 969 (1982); Halderman v. Pennhurst State School & Hosp., 533 F. Supp. 631 (E.D. Pa. 1981), *aff'd.,* 673 F.2d 628 (3d Cir. 1982), *cert. denied,* 104 S. Ct. 1315 (1984); New York State Assn. for Retarded Children v. Carey, 492 F. Supp. 1110 (E.D.N.Y.), *revd.,* 631 F.2d 162 (2d Cir. 1980).

6. *E.g.,* New York State Assn. for Retarded Children v. Carey, 492 F. Supp. 1110 (E.D.N.Y.), *revd.,* 631 F.2d 162 (2d Cir. 1980).

7. *E.g.,* Brewster v. Dukakis, 675 F.2d 1 (1st Cir. 1982); *cf.* Vecchione v. Wohlgemuth, 558

the legislature, to provide funds made it impossible to comply. Since actual impossibility is a recognized defense to contempt,[8] the lower courts have had to consider whether the asserted lack of money excused failure to obey the decree and, if not, how the court could obtain the resources needed for compliance.

This Article examines the formal powers that are available to the federal courts[9] to meet this situation. Part I places the problem in perspective, describing the party structure of the institutional reform decree, the financial burdens it places on the government defendants, and the relationship of these defendants to the fiscal authorities. Part II surveys the coercive powers historically available to the federal courts sitting in equity. Part III discusses the use of these devices against government defendants who claim financial impossibility. It emphasizes the limited recognition of impossibility, the power to compel the defendants to use available resources efficiently and the indirect coercion of the fiscal authorities by direct pressure on the defendant. Part IV deals with direct proceedings against the treasury or the appropriating body with emphasis on the possible constraints on such proceedings arising from eleventh amendment immunity. It suggests that, where permitted by the eleventh amendment, direct proceedings may better protect both the public's interest in continued services and political control of ultimate taxing and spending decisions than indirect pressure through such actions as closing the institution.

It should be noted that this Article is intended not as a plan of campaign but only a tour of the judicial arsenal. The judge who

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F.2d 150 (3d Cir. 1977) (upholding a decree ordering the state to restore funds taken from mental patients under a statutory scheme designed to cover the costs of care in state institutions).

8. *See* notes 75-82 *infra* and accompanying text.

9. It is true that the current behavior of the Supreme Court has occasioned a call for more creative interpretation and aggressive protection of fundamental rights derived from state constitutions by state courts. *See, e.g.*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Some state courts have responded. *See, e.g.*, Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973); *cf.* Perez v. Boston Housing Auth., 379 Mass. 703, 400 N.E.2d 1231 (1980) (city housing authority placed under receivership to vindicate tenants' rights under state law). *See generally Developments in the Law — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1356-67 (1982) [hereinafter cited as *Developments — 1982*]. Nevertheless, compared to federal courts, the power of the state courts to give sustained support to expensive, unpopular, counter-majoritarian claims is limited, both by the more politically responsive selection and tenure of most state judges and by the greater ease with which state constitutions may be amended. *See Developments — 1982, supra*, at 1351-54. Moreover, the Supreme Court's most recent decision in Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900 (1984), apparently prevents the lower federal courts from basing structural relief on state law. This Article therefore assumes that the *federal* courts enforcing *federal* law will remain the primary engines of major institutional reform litigation.

oversees a structural litigation is involved in a continuing process of inducement and adjustment with the political authorities behind the official defendants. His or her primary goal is to maximize compliance and if accommodation works better than coercion, then accommodation is to be preferred.[10] As a part of the process, the judge needs a realistic sense of the total funds available to the political authorities for all purposes and the tradeoffs the decree forces them to make.[11] Nevertheless, the judge is not merely a negotiator. His or her ability to persuade depends in large part on the ultimate power to command. This Article concerns itself with that power.

I. THE STRUCTURAL DECREE AND THE PUBLIC FISC

The phenomenon of the structural injunction has been copiously described over the past ten years,[12] and there is no need to repeat the process in detail here. For the purposes of this Article it is enough to say that a structural decree is one that responds to the systematic denial of the rights of the plaintiff class as a necessary consequence of the formal organization or the actual pattern of activity in a governmental institution. The earliest example of structural relief, discussed by Professor Fiss, was in response to the *de jure* dual school system and the patterns of pupil and staff assignment that survived its formal abolition.[13] Another early application of structural relief was to correct the comprehensive denial of eighth amendment rights in the Arkansas prison system which arose from a combination of brutal discipline, insufficient food and medical care, placing some prisoners in authority over others and a lack of physical safety from violent prisoners.[14] The characteristic relief sought in such cases is

10. *See* Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1293-94 (1976); Fiss, *The Forms of Justice,* 93 HARV. L. REV. 1, 50-56 (1979); Note, *Implementation Problems, supra* note 2, at 445-56.

11. *See* Weinstein, *supra* note 2, at 145-48.

12. *See generally,* O. FISS, THE CIVIL RIGHTS INJUNCTION (1978); D. HOROWITZ, *supra* note 2; Chayes, *supra* note 10, at 1281; Fiss, *supra* note 10; Special Project, *The Remedial Process in Institutional Reform Litigation,* 78 COLUM. L. REV. 784 (1978) [hereinafter cited as Special Project, *Remedial Process*]; Note, *Implementation Problems, supra* note 2, at 428; 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, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change,* 84 YALE L.J. 1338 (1975) [hereinafter cited as Note, *The* Wyatt *Case*].

13. O. FISS, *supra* note 12, at 4-6; Fiss, *supra* note 10, at 2-4.

14. *See* Hutto v. Finney, 437 U.S. 678, 680-88 (1978), for a history of the litigation, which began in 1969. *See generally* Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970) (*Holt II*), *affd.,* 442 F.2d 304 (8th Cir. 1971); Holt v. Hutto, 363 F. Supp. 194 (E.D. Ark. 1973) (*Holt III*), *revd. sub nom.* Finney v. Arkansas Bd. of Corrections, 505 F.2d 194 (8th Cir. 1979); Finney v. Hutto, 410 F. Supp. 251 (E.D. Ark. 1976), *affd.,* 548 F.2d 740 (8th Cir. 1977), *affd.,* 437 U.S. 678 (1978). The litigation actually began in

to reorganize the defendant institution so that it will routinely deal with the plaintiff class in a way that does not deprive them of the rights at issue.[15]

Typically, the government agency is providing some type of service[16] to a class of dependent plaintiffs. The most extreme type of dependence occurs in custodial institutions — prisons, mental hospitals, "schools" for the mentally handicapped — in which the plaintiffs are either legally confined or incompetent and the institution furnishes their entire surroundings.[17] In a less extreme but still substantial instance of dependence, a client class receives an essential or extremely desirable service — education, housing, subsistence allowances — from the agency.[18] In other cases, the plaintiff class depends on government regulatory activity to secure its private interests.[19] The rights involved may be either statutory claims to a given level of service[20] or the conditional claim to have the relationship with an agency exist, if at all, without denial of constitutional rights.[21] The dependence of the plaintiff class insures that its members' claim on the agency has been and will be a continuing one.[22]

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two earlier cases: Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967), *vacated,* 404 F.2d 571 (8th Cir. 1968); Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965). Conditions in the Arkansas system at the beginning of the litigation could be fairly described as like those in the Soviet Gulag, only warmer. *Compare Hutto v. Finney,* 437 U.S. at 681-83, nn.3-7, *with* A. SOLZHENITSYN, ONE DAY IN THE LIFE OF IVAN DENISOVICH, *passim* (1962).

15. *See* Chayes, *supra* note 10, at 1298-302; Special Project, *Remedial Process, supra* note 12, at 809-15.

16. It seems peculiar to call detention a "service," but the keeper, as such, is comprehensively responsible for the inmates' shelter, diet, health care, and physical safety. *See, e.g.,* Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), *cert. denied,* 450 U.S. 1041 (1981); Stickney v. List, 519 F. Supp. 617, 619-20 (D. Nev. 1981); New York State Assn. for Retarded Children v. Rockefeller, 357 F. Supp. 752, 764-65 (E.D.N.Y. 1973); Gates v. Collier, 349 F. Supp. 881, 893-94 (N.D. Miss. 1972), *aff'd.,* 501 F.2d 1291 (5th Cir. 1974). *See generally* E. GOFFMAN, ASYLUMS (1961) (essays on the social situations of mental patients and other inmates).

17. Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974); Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1978), *aff'd. in part and revd. in part,* 612 F.2d 84 (3d Cir. 1979), *revd.,* 451 U.S. 1 (1981); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd. in part and revd. in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

18. *See, e.g.,* Fortin v. Commr. of Mass. Dept. of Pub. Welfare, 692 F.2d 790 (1st Cir. 1982) (general assistance benefits) [hereinafter cited as Fortin v. Commr.]; White v. Mathews, 559 F.2d 852 (2d Cir. 1977) (disability benefits), *cert. denied,* 435 U.S. 908 (1978); Perez v. Boston Housing Auth., 379 Mass. 703, 400 N.E.2d 1231 (1980) (public housing).

19. *See, e.g.,* Delaware Valley Citizens' Council v. Pennsylvania, 533 F. Supp. 869 (E.D. Pa.) (enforcement of air pollution control), *aff'd.,* 678 F.2d 470 (3d Cir.), *cert. denied,* 459 U.S. 969 (1982).

20. Halderman v. Pennhurst State School & Hosp., 673 F.2d 647 (3d Cir. 1982), *revd.,* 104 S. Ct. 900 (1984).

21. *See* notes 285-89 *infra* and accompanying text.

22. *See* Fiss, *supra* note 10, at 19-20; Special Project, *Remedial Process, supra* note 12, at 870-77.

The Supreme Court appears to consider the continuing dependent relationship of a definable class as an essential prerequisite to this type of relief. One of the principal obstacles to

The reasons why a government institution systematically denies the claims of a dependent class are complex,[23] but for the purpose of this Article it is only necessary to mention one: the lack of political will to provide enough resources — *i.e.*, money — to permit the institution to function properly. In the case of prisoners, the dependent class is the object of positive ill-will by the political authorities and the public at large.[24] More usually, it consists of groups of persons such as the mentally ill, the retarded, the poor and, of course, nonwhites, who are the object of dislike or indifference. This dislike, together with some degree of exclusion from the political process, prevents them from competing politically with other demands on the public purse, including lowering taxes. Such resources as are made available to the agency may be diverted by its management to claims which it considers superior to those of the intended beneficiaries.[25] One of the objects of a plaintiff class in litigation requesting structural relief is therefore to force the defendants to provide enough money in the form of trained staff, physical facilities, or otherwise, to meet plaintiffs' claims on the institution for service.[26]

The selection of defendants in actions for structural injunctive

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using the structural injunction to control police behavior in the field has been the Court's unwillingness to find either standing or an imminent threat of irreparable injury where police misconduct is inflicted more or less at random, without racial, political, or other forbidden class animus. *See* Los Angeles v. Lyons, 103 S. Ct. 1660, 1667-70 (1983); Rizzo v. Goode, 423 U.S. 362, 371-77 (1976); *see also* Campbell v. McGruder, 580 F.2d 521, 526 (D.C. Cir. 1978) (interpreting *Rizzo* to say that a federal court should refrain from assuming a comprehensive supervisory role over broad areas of local government for the purpose of preventing speculative future misconduct by local officials toward an imprecise class of potential victims); *cf.* Allee v. Medrano, 416 U.S. 802, 812 (1974) (injunctive relief held appropriate where a persistent pattern of police misconduct was directed at a discrete group).

23. The complexities of conflicting interests within institutions, the absence of positive lines of authority, the making of decisions by interest accommodation and their effect on structural relief are well described in Note, *Implementation Problems, supra* note 2, at 431-35. The opinion of Judge Justice in Ruiz v. Estelle, 503 F. Supp. 1265, 1386-89 (S.D. Tex. 1980), *modified,* 650 F.2d 555 (5th Cir. 1981), *and* 679 F.2d 1115 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 1438 (1983) perceptively illustrates the problem that those in nominal control of a complex organization have in getting their orders carried out, even when they have the best of intentions.

24. The extreme case is the idea that a prison system should be self-supporting, or even profitable. *See, e.g.,* Ruiz v. Estelle, 503 F. Supp. 1265, 1376 (S.D. Tex. 1980), *modified,* 650 F.2d 555 (5th Cir. 1981), *and* 679 F.2d 1115 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 1438 (1983); Holt v. Sarver, 300 F. Supp. 825, 828-30 (E.D. Ark. 1969). *See also* Rhodes v. Chapman, 452 U.S. 337, 353-60 (1981) (Brennan, J., concurring).

25. In Perez v. Boston Housing Auth., 379 Mass. 703, 711-12, 722-24, 400 N.E.2d 1231, 1237-38, 1243-44 (1980), the agency's failure was caused in large part by management's insistence on hiring, contracting, and adjusting tenant grievances by the traditional methods of Boston patronage politics.

26. *See* Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals,* 62 CALIF. L. REV. 40, 68 (1974); Note, *The* Wyatt *Case, supra* note 12, at 1347; *cf.* Ricci v. Okin, 537 F. Supp. 817, 819-21 (D. Mass. 1982); D. HOROWITZ, *supra* note 2, at 257-59.

relief is limited by the eleventh amendment immunity[27] of state governments from suit in the federal courts and the legal fiction used to evade it. As the Supreme Court has applied the eleventh amendment, a state may not be sued in its own name in the federal courts without its consent.[28] Suit brought in form against a state agency or officer will be regarded as one against the state itself if the effect of a judgment will be to require payment of damages or monetary restitution, such as back pay or a refund, from the state treasury.[29] Since the Supreme Court's decision in *Ex parte Young*,[30] however, it has been possible to enjoin violations of federal law by state officers without interference by the eleventh amendment through the thinly-veiled fiction that a state officer who acts in violation of federal law is not acting on behalf of the state but is merely a private individual who has gone beyond the scope of his office. Transparent though this device may be, it permits the federal courts to compel state officers to conform their official conduct to federal law.[31] As a result, a suit for structural injunctive relief against a state agency will be cast as a suit against the executive officers who control it, in their official capacity, rather than as a suit against the state, and the decree will run accordingly.[32]

While the substance of structural decrees varies with the rights involved and the facts of the case, they tend to share certain common features. The decree, or rather the series of decrees, will begin by prohibiting specific actions or conditions in violation of plaintiff's rights and setting out a standard of proper performance of the defendant agency's functions. Both from deference to state or local government responsibilities[33] and from practical considerations, the

27. "Eleventh amendment immunity" is used as a shorthand for the entire judicially developed doctrine of immunity of the state from suit in the federal courts, whether by its own citizens or other persons. *See generally* Edelman v. Jordan, 415 U.S. 651 (1974); Principality of Monaco v. Mississippi, 292 U.S. 313 (1934); Hans v. Louisiana, 134 U.S. 1 (1890); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One,* 126 U. PA. L. REV., 515, 516-18 (1978).

28. Alabama v. Pugh, 438 U.S. 781 (1978).

29. *See* Quern v. Jordan, 440 U.S. 332, 337 (1979); Edelman v. Jordan, 415 U.S. 651, 663 (1974).

30. 209 U.S. 123 (1908).

31. *See* notes 209-17 *infra* and accompanying text.

32. *See, e.g.,* Milliken v. Bradley, 433 U.S. 267 (1977); Edelman v. Jordan, 415 U.S. 651 (1974). When a state agency is sued in its own name for injunctive relief, the suit is treated as if it were against the agency head, his or her subordinates, and their successors in office. *E.g.,* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), *modified,* 612 F.2d 84 (3d Cir. 1979), *revd. on other grounds,* 451 U.S. 1 (1981), *modified,* 673 F.2d 647 (3d Cir. 1982), *revd. on other grounds,* 104 S. Ct. 900 (1984). *See also* FED. R. CIV. P. 25(d)(2); C. WRIGHT, THE LAW OF FEDERAL COURTS § 77, at 522 (4th ed. 1983).

33. Since the decision in Brown v. Board of Educ., 349 U.S. 294, 300 (1954), the Supreme

initial decree may leave the defendants wide discretion to select the specific methods for meeting their substantive obligations. As defendants fail to comply because of recalcitrance, incompetence, or a combination of the two, the court will increasingly direct the detail of their performance through subsequent orders. These modifications of the original decree frequently come in the guise of civil contempt sanctions for noncompliance with prior orders.[34]

Enforcing structural relief often requires the court to appoint a variety of ancillary persons to assist it. These fall into three groups. The first, masters, are quasi-judicial officials to whom the court delegates the formulation of further orders, the detailed supervision of compliance, or the preliminary determination of factual matters involving members of the plaintiff class.[35] The second group, generally known as "monitors," who scrutinize defendant's actions with continuity, skill, and zeal beyond the ability of the diffuse and often helpless members of the plaintiff class, essentially supplement that class.[36] The third group, receivers and quasi-receivers,[37] are appointed in cases of severe, continuing noncompliance. They displace the defendant officials and exercise some or all of their powers to administer the institution in compliance with the decree.[38] Official defendants can be expected to resist the appointment and activity of any of these ancillary persons since these persons reduce their own freedom of action.[39]

Court has continued to emphasize the need to rely on the integrity, good faith, technical skill and knowledge of local officials, insofar as possible, in order to develop methods of implementing the requirements of substantive law. *E.g.,* Milliken v. Bradley, 433 U.S. 267, 280-81 (1977). *See generally* Special Project, *Remedial Process, supra* note 12, at 864-65.

34. *See* O. Fiss, *supra* note 12, at 36; Note, *Implementation Problems, supra* note 2, at 449; Special Project, *Remedial Process, supra* note 12, at 817-21.

35. *See, e.g.,* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1326-28 (E.D. Pa. 1978), *modified,* 612 F.2d 84 (3d Cir. 1979), *revd.,* 451 U.S. 1 (1981), *modified,* 673 F.2d 647 (3d Cir. 1982), *revd.,* 104 S. Ct. 900 (1984); Morgan v. Kerrigan, 401 F. Supp. 216, 227 (D. Mass.), *affd.,* 530 F.2d 401 (1st Cir. 1975), *cert. denied,* 426 U.S. 935 (1976). *See generally* Note, *Implementation Problems, supra* note 2, at 451-52; Special Project, *Remedial Process, supra* note 12, at 827-28. To the extent that they may take binding action, rather than report to the court, this category should include those officials who approve the application of relief to individual class members, which the latter article calls "administrators." Special Project, *Remedial Process, supra* note 12, at 831-35. An example is the "Special Master" established in the *Pennhurst* decree to review and approve an individuated treatment plan for each child. *See* Halderman v. Pennhurst State School & Hosp., 526 F. Supp. 428 (E.D. Pa. 1981).

36. *See* Note, *Implementation Problems, supra* note 2, at 440-45; Special Project, *Remedial Process, supra* note 12, at 828-30.

37. The term "quasi-receiver" refers to an official inserted into the institution's management structure with power to coordinate compliance with the decree. *See, e.g.,* Reed v. Rhodes, 455 F. Supp. 569, 605-06, 617-18 (N.D. Ohio 1978), *affd.,* 607 F.2d 714 (6th Cir. 1979).

38. *E.g.,* Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976) *cert. denied,* 429 U.S. 1042 (1977).

39. *See, e.g.,* Halderman v. Pennhurst State School & Hosp., 673 F.2d 628, 632-33 (3d Cir.

The decree directs future actions, not specific expenditures as such.[40] These actions, nevertheless, impose three types of fiscal burdens on the defendant agency. The first are corrective expenditures that seek to ameliorate the abuse and neglect caused by past funding. The effect of orders to provide adequate numbers of properly trained staff, improve food and sanitation, or upgrade the facility physically is no more than to put the institution in the position of adequately performing its existing mission.[41] Such orders are frequently welcomed by the executive defendants, who can use them to extract more money from the political authorities to carry out what defendants already regard as their proper functions.[42]

Many structural decrees also create a need for transforming expenditures — expenditures to undertake *new* functions required by the substantive rights declared in the decree. One very common type of transforming expenditure is pupil transportation cost in school desegregation cases.[43] Other examples are the proposed creation of work and rehabilitation programs in prisons[44] and the shift from institutionalization to community-based care of the mentally ill or

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1982), *cert. denied,* 104 S. Ct. 1315 (1984); Newman v. Alabama, 559 F.2d 283, 289-90 (5th Cir. 1977), *cert. denied,* 438 U.S. 915, *revd. in part by companion case* Alabama v. Pugh, 438 U.S. 781 (1978); Halderman v. Pennhurst State School & Hosp., 526 F. Supp. 428 (E.D. Pa. 1981); *see* Note, *The* Wyatt *Case, supra* note 12, at 1360-69.

40. *See* Milliken v. Bradley, 433 U.S. 267, 289-90 (1977); Edelman v. Jordan, 415 U.S. 651, 667-68 (1974).

41. An example is Judge Judd's opinion in New York State Assn. for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973). Confronted with the squalid conditions at Willowbrook State School for the Mentally Retarded, he entered a preliminary injunction requiring that conditions of custody be brought up to a permanent injunction that would implement a right to habilitation in the least restrictive environment.

42. *See* Kirp, Buss & Kuriloff, *supra* note 26, at 60-61; Note, *Implementation Problems, supra* note 2, at 454; Special Project, *Remedial Process, supra* note 12, at 904-05; Note, *The* Wyatt *Case, supra* note 12, at 1367-68.

State legislatures may suspect that this is what is happening, particularly if a consent decree was involved or a political change of administration has taken place. After some unhappy experiences with what turned out to be improvident consent decrees, *see* Delaware Valley Citizens' Council v. Pennsylvania, 678 F.2d 470 (3d Cir. 1982), *cert. denied,* 459 U.S. 969 (1982); Vecchione v. Wohlgemuth, 558 F.2d 150 (3d Cir.), *cert. denied,* 434 U.S. 943 (1977), the Pennsylvania Legislature enacted a statute prohibiting any state officer from entering into a consent decree without the express approval of the Governor and advance notice to the Legislature. 71 PA. CONS. STAT. ANN. § 732-204(e) (Purdon Supp. 1981).

In Ricci v. Okin, 537 F. Supp. 817, 820-21 (D. Mass. 1982), the district court denied at some length the apparent insinuation of the state's counsel that the decree had been collusively entered into by the prior administration.

43. *E.g.,* Reed v. Rhodes, 455 F. Supp. 569, 602-04, 615-17 (N.D. Ohio 1978), *affd.,* 607 F.2d 714 (6th Cir. 1979); Morgan v. Kerrigan, 401 F. Supp. 216, 263-64 (D. Mass.), *affd.,* 530 F.2d 401 (1st Cir. 1975), *cert. denied,* 426 U.S. 935 (1976).

44. *E.g.,* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *affd. and modified sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977) (work and education programs in prison), *cert. denied,* 438 U.S. 915, *revd. in part by companion case* Alabama v. Pugh, 438 U.S. 781 (1978).

handicapped.[45] Unlike corrective measures, transforming expenditures support actions more likely to have been opposed by defendants, the political authorities and segments of the public on substantive grounds, including aversion to the plaintiff class.[46] They are apt to be resisted accordingly.

Finally, structural decrees may impose on the defendant the expenses of supporting ancillary persons appointed by the court. Expenses of masters, monitors and receivers are generally imposed on the defendant.[47] Such expenses may be resisted for a variety of reasons: the presence of the ancillary person is offensive to the defendants' self-esteem, the expenditures amount to subsidizing the adversary, or the costs are merely too great a burden.[48]

Thus, the structural decree, while not requiring the payment of specific amounts, imposes a variety of financial burdens which may give rise to obstruction both by recalcitrant defendants and by the legislative authorities on whom defendants depend for funding. The practical effect of the decree may be to require the defendants to spend a larger amount than they would wish in a manner they oppose. The decree gives a claim of priority to expenditures made to achieve compliance — insofar as the decree is enforceable — first within the budget of the defendant organization and, beyond that, on behalf of the defendant against the total revenues available to the taxing and appropriating legislature.[49]

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45. *E.g.,* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1978), *modified,* 612 F.2d 84 (3d Cir.), *revd.,* 451 U.S. 1 (1979), *modified,* 673 F.2d 647 (3d Cir. 1982), *revd.,* 104 S. Ct. 900 (1984).

46. *See, e.g.,* People of New York *ex rel* Abrams v. 11 Cornwell Co., 695 F.2d 34 (2d Cir. 1982) (neighboring property owners obstructing group home for the mentally handicapped), *modified,* 718 F.2d 22 (2d Cir. 1983); New York State Assn. for Retarded Children v. Carey, 456 F. Supp. 85, 94-95 (E.D. N.Y. 1978) (employees of institution for the mentally handicapped object to transfer of functions to private nonprofit organization).

At the remedial phase of the *Pennhurst* litigation the parents split into two groups: one favoring deinstitutionalization and one, aligned with the state defendants, wanting upgraded custodial care in the institution. *See* Halderman v. Pennhurst State School & Hosp., 612 F.2d 131 (3d Cir. 1979).

47. *See, e.g.,* Reed v. Cleveland Bd. of Educ., 607 F.2d 737 (6th Cir. 1979); Halderman v. Pennhurst State School & Hosp., 533 F. Supp. 631 (E.D. Pa. 1981), *affd.,* 673 F.2d 628 (3d Cir. 1982), *cert. denied,* 104 S. Ct. 1315 (1984).

48. The first motive was present in Halderman v. Pennhurst State School & Hosp., 533 F. Supp. 631, 634-35 (E.D. Pa. 1981), *affd.,* 673 F.2d 628 (3d Cir. 1982), *cert. denied,* 104 S. Ct. 1315 (1984). The second was involved in the cutoff of appropriations to the monitor in the Willowbrook litigation. *See* New York State Assn. for Retarded Children v. Carey, 492 F. Supp. 1110, 1112-13 (E.D.N.Y.), *revd.,* 631 F.2d 162 (2d Cir. 1980); N.Y. Times, Apr. 11, 1980, § 2, at 8, col. 1. For the third, see Reed v. Cleveland Bd. of Educ., 607 F.2d 737 (6th Cir. 1979).

49. *See* Arthur v. Nyquist, 547 F. Supp. 468, 478-82 (W.D.N.Y. 1982), *affd.,* 712 F.2d 809 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 1907 (1984); Ricci v. Okin, 537 F. Supp. 817, 827-28 (D. Mass. 1982).

As discussed in more detail below, a defendant is not subject to civil contempt penalties for failure to comply with an injunction when compliance is not possible.[50] Official defendants unwilling to comply with a structural decree are therefore apt to assert that lack of available funds excuses their nonperformance. In addition, legislatures opposed to the decree may attempt to make compliance impossible, either by holding down the general level of funds appropriated to the defendant or by placing specific limits on the use to which appropriated funds can be put.[51] When plaintiffs respond to the subsequent failure to comply with the decree by bringing civil contempt proceedings,[52] the court must first determine the validity of defendants' claim that it is financially out of their power to comply. If this claim is valid, the court must determine how it can get the necessary resources made available. It must do so, moreover, within the constraints imposed by *Ex parte Young* on the choice of defendants.[53]

II. Traditional Coercive Devices Used in Structural Litigation

An examination of how the courts can deal with financially based noncompliance must begin with a survey of the traditional powers of an equity court to compel obedience to its orders and to direct the management of property under its control. In its second *Brown v. Board of Education* opinion,[54] the Supreme Court stated that "equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."[55] This often-reiterated[56] invocation of the chancery tradi-

50. *See* text at notes 75-82 *infra.*

51. *See, e.g.,* Delaware Valley Citizens' Council v. Pennsylvania, 678 F.2d 470, 473-74 (3d Cir.), *cert. denied,* 459 U.S. 969 (1982); Halderman v. Pennhurst State School & Hosp., 673 F.2d 628, 632-34 (3d Cir. 1982), *cert. denied,* 104 S. Ct. 1315 (1984); Note, *Implementation Problems, supra* note 2, at 453 nn.141-42.

52. Alternatively, executive branch defendants may move to modify the decree in the light of the supposed impossibility of compliance. *See, e.g.,* Vecchione v. Wohlgemuth, 558 F.2d 150 (3d Cir.), *cert. denied,* 434 U.S. 943 (1977).

53. *See* notes 204-19 *infra* and accompanying text.

54. Brown v. Board of Educ., 349 U.S. 294 (1955).

55. Brown v. Board of Educ., 349 U.S. 294, 300 (1955).

56. *E.g.,* Lemon v. Kurtzman, 411 U.S. 192, 200 (1973); Park View Heights Corp. v. City of Black Jack, 605 F.2d 1033, 1036 (8th Cir. 1979), *cert. denied,* 445 U.S. 905 (1980); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 288 (6th Cir. 1974); Gautreaux v. Chicago Housing Auth., 503 F.2d 930, 935 (7th Cir. 1974), *aff'd. sub nom.* Hills v. Gautreaux, 425 U.S. 284 (1976); United States v. City of Parma, 504 F. Supp. 913, 917 (N.D. Ohio 1980), *aff'd. in part,* 661 F.2d 562 (6th Cir. 1981), *cert. denied,* 456 U.S. 926 (1982). *Cf.* A. Cox, The Role of the Supreme Court in American Government 76-78 (1976); O. Fiss, *supra* note 12, at 4-6.

tion has blessed the increasing elaboration of structural remedies in the ensuing thirty years. In addition to the general equity tradition of common sense coupled to firmness of will,[57] the federal courts handling institutional reform cases have been able to draw from a well-filled store of specific remedial techniques developed by the chancery courts in complex property litigation. Supposedly radical departures from judicial self-restraint through such devices as receivers, monitors and anti-obstruction orders against third parties all have their counterparts in the equity receiverships and corporate reorganizations of the late nineteenth century.[58] Except where con-

57. Justice Douglas put the contrast well. On the one hand, "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs . . . ." Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). On the other, "[a]n act does not cease to be a violation of a law and of a decree merely because it may have been done innocently. The force and vitality of judicial decrees derive from more robust sanctions," McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949), and "[t]he measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." 336 U.S. at 193. *See also* Hutto v. Finney, 437 U.S. 678, 690-91 (1978); Milliken v. Bradley, 433 U.S. 267, 281-82 (1977).

58. *See* Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation,* 93 HARV. L. REV. 465, 481-86 (1980); Comment, *Equitable Remedies: An Analysis of Judicial Utilization of Neoreceiverships to Implement Large Scale Institutional Change,* 1976 WIS. L. REV. 1161, 1165-72.

The equity receivership for the readjustment of the various classes of debt of an insolvent corporation was well developed by the first decade of the twentieth century. *See, e.g., In re* Metropolitan Ry. Receivership, 208 U.S. 90 (1908); *see* 1 J. GERDES, CORPORATE REORGANIZATIONS §§ 10-13 (1936). The receivership itself involved the displacement of corporate management by the court-appointed receiver. As an ancillary matter, it encouraged the use of the anti-obstruction injunction against third parties. *See* text at notes 97-101 *infra.*

Moreover, the corporate reorganization produced a device, the "protective committee," which strikingly prefigures the relation of the plaintiff class to its representative in structural reform litigation. As a writer on corporate reorganization said during the Depression:

> Theoretically, individual creditors and stockholders may prepare a plan of reorganization, secure the approval necessary to propose the plan, and have the plan accepted and confirmed. Practically, however, this is possible only in the case of a small corporation where the number of creditors and stockholders is small and the problems of readjustment are simple. The engineering of a reorganization by the independent action of individual creditors or stockholders is generally impractical in the case of a large corporation.
>
> The preparation and execution of a plan for a large corporation requires an intimate knowledge of the business in which the debtor is engaged, a keen grasp of the debtor's condition and the reasons why it finds itself in that condition, an appreciation of the equities existing in favor of and against each interested group, an understanding of intricate financial ramifications and of many other kindred subjects which are beyond the knowledge of the average creditor or stockholder. . . .
>
> The most efficient way of gaining a division of expense among interested parties, so that competent aids can be hired to prepare the plan, is by the use of a protective committee.
>
> Protective committees are organized to represent the interests of a class or classes of creditors or stockholders. The members of the committee are sometimes self-chosen, sometimes designated by an individual or group of individuals, or by an organization, but they are rarely elected by those whom they are organized to represent.

2 J. GERDES, *supra,* §§ 988, 990, at 1585-86. The protective committee represented those security holders of its class who chose to adhere to it, proposed plans of reorganization, obtained the necessary consent, and scrutinized interim management. *See* Douglas, *Protective Committees*

strained by constitutional prohibition or self-imposed considerations of comity, the federal courts have applied the full range of doctrines for structuring equitable relief to public as well as to private defendants. Their potential power to coerce public defendants to obedience should therefore be examined in the same light.

The coercive resources of the equity court fall into three groups. The first is the civil contempt sanction in which escalating penalties are applied to the recalcitrant defendant until he complies with the decree's command to act or forbear. Secondly, by way of ancillary relief, the equity court may enjoin third persons, otherwise unrelated to the matter, from abetting noncompliance by a defendant or from compelling noncompliance by a defendant otherwise prepared to obey the court. Finally, *in rem* relief, in which the court or its officers themselves do that which the defendant has refused to do, has developed to correct the occasional failure of civil contempt.

A. *Contempt*

Historically, the primary recourse of the equity court has been personal coercion of the recalcitrant defendant through the use of the power to hold him in civil contempt until he complies.[59] The essence of the civil contempt power is the indefinite cumulative sanction which continues until the defendant has purged himself of contempt by obeying the underlying order.[60] The most familiar of these sanctions are the *per diem* fine and the continuing imprisonment of the disobedient individual,[61] but other devices are available. For example, the court may sequester property within its power and retain it until compliance: this is a particularly useful technique when the person to be coerced is, as a practical matter, beyond the power of the court.[62] In addition to coercing the defendant, the court may use the civil contempt power to require him to compensate plaintiffs for

in Railroad Reorganizations, 47 HARV. L. REV. 565, 577 (1934); Rohrlich, *Protective Committees,* 80 U. PA. L. REV. 670, 676-86 (1932). Its members were not infrequently, and sometimes justly, accused of conflicts of interest with those they represented. *See* Douglas, *supra,* at 567-68. The relation of the plaintiff class to its self-appointed representatives is not dissimilar. *See* Fiss, *supra* note 10, at 19-21; Special Project, *Remedial Process, supra* note 12, at 883-87.

59. *See* 2 E. DANIELL, PLEADING AND PRACTICE IN THE HIGH COURT OF CHANCERY *1032-33; 4 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1433 (4th ed. 1919); 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 90 (14th ed. 1918).

60. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441-43 (1911).

61. The clichéd phrase is that the contemnors "carry the keys of their prison in their own pocket." *In re* Nevitt, 117 F. 448, 461 (8th Cir. 1902).

62. *See* Kroese v. General Steel Castings Corp., 179 F.2d 760, 764-65 (3d Cir.), *cert. denied,* 339 U.S. 983 (1950); Grew v. Breed, 53 Mass. (12 Met.) 363, 370 (1847); Miller v. Huddlestone, 22 Ch. D. 233, 234 (1882); 2 E. DANIELL, *supra* note 59, at *1050-51.

the cost of his noncompliance, both for damages and litigation expenses.[63]

Experience with litigation involving title or possession of property demonstrated that *in personam* coercion sometimes failed to compel defendants to execute deeds or surrender possession of property as ordered.[64] In most of the American states, statutes gave equity courts the power to transfer property directly by one of two methods: either the court could appoint an officer to do the act with the same legal effect as if the defendant had done it or, if the property were within the court's jurisdiction, the decree itself would transfer title.[65] Similarly, the court could issue a writ directing the sheriff to place and maintain the plaintiff in possession. By the end of the nineteenth century, these powers had become the norm for state equity courts. They were expressly conferred on the federal district courts in 1912 by Equity Rule 8,[66] whose successor, Rule 70 of the Federal Rules of Civil Procedure provides:

> If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.[67]

The powers enumerated in rule 70 have been applied not merely to transfer real property,[68] but to contract at the expense of a private

63. *See* Hutto v. Finney, 437 U.S. 678, 691 (1978); United States v. United Mine Workers, 330 U.S. 258, 303-04 (1947); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 448-49 (1911).

64. *See* O. FISS, INJUNCTIONS 710-11 (1972); 2 E. DANIELL, *supra* note 59, at *1048 n.8.

65. *See* 4 J. POMEROY *supra* note 59, § 1317.

66. Rules of Practice of the Courts of Equity of the United States, Rule 8, 226 U.S. 627, 651 (1912). *See* Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276, for the authority to promulgate the rules. *See generally* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1002, at 34-35 nn.29-36 (1969) (discussing the rules governing equity in the federal courts).

67. FED. R. CIV. P. 70.

68. *See, e.g.,* Buzzell v. Edward H. Everett Co., 180 F. Supp. 893, 902-03 (D. Vt. 1960).

defendant for the abatement of a nuisance,[69] to transfer possession of personal property,[70] and to perform an accounting which defendant refused to do.[71]

Whether the relief sought is coercive or direct,[72] it is available only to procure the effect of obedience to the court's orders. Put differently, the district court's inherent civil contempt power and its powers under Rule 70 cannot be invoked by plaintiff unless the defendant has refused to act as some provision of the decree requires.[73] One recourse of the defendant in response to civil contempt charges is therefore to deny that it has violated the decree, for without a violation, there can be nothing for civil contempt to remedy.[74] The remedial nature of the power also governs the response to two other defenses commonly raised to civil contempt charges: impossibility of compliance and lack of willfulness.

The purpose of conditional civil contempt sanctions is to compel compliance with the decree. Accordingly, they may not be inflicted on one who lacks the "present ability to comply,"[75] since the injury to the defendant would not result in a countervailing benefit to the plaintiff. The temptation to assert this defense is evident,[76] and the judicial response has been to hedge it about with restrictive conditions. The party claiming impossibility must produce evidence of and, apparently, prove in detail the circumstances that prevent compliance.[77] He must demonstrate his own, diligent, good-faith efforts to comply.[78] These efforts, however, are not a defense in themselves.

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69. Clarke v. Chicago, B. & Q. R. Co., 62 F.2d 440, 442 (10th Cir.) (decided under Equity Rule 8), *cert. denied*, 290 U.S. 629 (1932).

70. *In re* Waltham Watch Co., 92 F. Supp. 871, 873 (D. Mass. 1950).

71. Standard Scale & Supply Co. v. Cropp Concrete Mach. Co., 6 F.2d 447, 450 (7th Cir. 1925) (decided under Equity Rule 8).

72. I believe this terminology more clearly states the distinction between relief that depends on inducing the defendant to cooperate and relief that does not than the customary terms, "*in personam*" and "*in rem*."

73. *See* Taylor v. Finch, 423 F.2d 1277, 1280 (8th Cir.), *cert. denied*, 400 U.S. 881 (1970); Lichtenstein v. Lichtenstein, 425 F.2d 1111, 1113 (3d Cir. 1970).

74. *See* Brewster v. Dukakis, 675 F.2d 1, 4-5 (1st Cir. 1982); New York State Assn. for Retarded Children v. Carey, 631 F.2d 162, 163-65 (2d Cir. 1980).

75. Maggio v. Zeitz, 333 U.S. 56, 76 (1948); *accord* United States v. Rylander, 103 S. Ct. 1548, 1552 (1983); Shillitani v. United States, 384 U.S. 364, 371 (1966).

76. As Judge Leventhal put it, "An equity court can never exclude claims of inability to render absolute performance, but it must scrutinize such claims carefully since officials may seize on a remedy made available for extreme illness and promote it into the daily bread of convenience." Natural Resources Defense Council v. Train, 510 F.2d 692, 713 (D.C. Cir. 1975).

77. *See* United States v. Rylander, 103 S. Ct. 1548, 1552 (burden of production is on defendant); Fortin v. Commr., 692 F.2d 790, 796 (1st Cir. 1982) (burden of proof on defendant); Ricci v. Okin, 537 F. Supp. 817, 824 (D. Mass. 1982) (burden of proof on defendant).

78. *See* Natural Resources Defense Council v. Train, 510 F.2d 692, 713 (D.C. Cir. 1975);

They are only circumstantial evidence of objective impossibility.[79] The fact that a party's efforts to date have not produced compliance is not conclusive proof that it cannot be accomplished.[80] Finally, the fact that compliance depends in part on the withheld cooperation of others does not excuse a party from the duty to exert his own powers as far as possible.[81]

Good faith, diligent attempts to comply are circumstantial evidence of impossibility, but this principle is sometimes confused with the proposition that a mistaken but good-faith belief that one is complying with a decree is a defense to civil contempt proceedings for violating it.[82] It is not. Unlike criminal contempt,[83] civil contempt proceedings are concerned not with the defendant's attitude to the court's authority but with assuring the plaintiff the fruits of his victory.[84] Non-compliance, for whatever reason, deprives him of that, and, unless compliance is impossible, the threat of contingent sanctions can usually correct the situation. There are, therefore, numerous decisions to the effect that willful disobedience need not be

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cf. Maggio v. Zeitz, 333 U.S. 56, 77 (1948) (civil contempt sanction unjustified where disobedience was not willful or deliberate); Fortin v. Commr., 692 F.2d 790, 796 (1st Cir. 1982) (diligence relevant to issue of ability to comply).

79. *See* Fortin v. Commissioner, 692 F.2d 790, 796-97 (1st Cir. 1982); Washington Metropolitan Area Transit Auth. v. Amalgamated Transit Union, 531 F.2d 617, 621 (D.C. Cir. 1976); Palmigiano v. Garrahy, 448 F. Supp. 659, 672-73 (D.R.I. 1979).

80. *See* Fortin v. Commissioner, 692 F.2d 790, 797 (1st Cir. 1982).

81. United States v. Fleischman, 339 U.S. 349, 362-64 (1950); United Mine Workers v. United States, 177 F.2d 29, 36 (D.C. Cir.), *cert. denied,* 338 U.S. 871 (1949); Palmigiano v. Garrahy, 448 F. Supp. 659, 671-72 (D.R.I. 1978).

82. The distinction between the two is clearly explained by Judge Swygert in Fortin v. Commr., 692 F.2d 790, 796-97 (1st Cir. 1982).

83. Criminal contempt is a punitive sanction for past disobedience to an order, inflicted for the purpose of vindicating the court's authority. Accordingly, it is prosecuted by the court itself, is styled a criminal proceeding and survives the reversal of the underlying decree. Civil contempt, in contrast, is prosecuted by a party as a part of the main action and is mooted by reversal of the decree or settlement of the case. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 445-46, 451-52 (1911). Criminal contempt is treated much as any other crime; its limits are defined by statute, *e.g.,* 18 U.S.C. § 401(3) (1982), and it may carry with it the sixth amendment right to jury trial. Bloom v. Illinois, 391 U.S. 194, 201-08 (1968). It differs from other crimes only due to the absence of the fifth amendment right to grand jury indictment, *see* United States v. United Mine Workers, 330 U.S. 258, 296 (1947); United States v. Bukowski, 435 F.2d 1094 (7th Cir. 1970); *cf.* FED. R. CRIM. P. 42(b); the substantive obligation to obey an invalid decree, *see* Walker v. City of Birmingham, 388 U.S. 307 (1967); and the vesting of prosecutorial discretion in the court itself, *see* United States v. Barnett, 346 F.2d 99, 100 (5th Cir. 1965); *Barnett,* 346 F.2d at 102 (Brown, J., dissenting), *but cf. Barnett,* 346 F.2d at 104-08 (Wisdom, J., dissenting) (rejecting the proposition that the court should exercise its discretion to refuse to pursue criminal contempt proceedings on the ground that such proceedings would be contrary to the public interest because they might cause social unrest), all of which are required by the need of the court to control the means of defending its own authority. From this perspective, willfulness is merely the *mens rea* of this crime. *See, e.g.,* United States v. Baker, 641 F.2d 1311, 1317 (9th Cir. 1981).

84. *See* McComb v. Jacksonville Paper Co., 336 U.S. 187, 193 (1949).

proved to establish civil contempt.[85]

B. *Control of Third Parties*

The traditional powers of a court of equity to procure compliance extended beyond the parties named in the decree to three further classes of persons: those subject to the decree because represented by a party, those added as parties by the plaintiff to prevent them from interfering with the execution of a decree and those required to add themselves as parties in order to assert claims that might interfere with the decree. The first were "bound" by the main decree in the sense that they could be subject to civil or criminal contempt proceedings for causing a defendant to violate it.[86] As the law developed in the United States the second and third classes were not so "bound" but could be made subject to further orders and to sanctions for violating these later decrees of the court.

A decree, of course, is a command to a specific party to do or refrain from a more or less specific series of acts. Individuals and organizations, however, may act through agents as well as by themselves; organizations necessarily act through the individuals of whom they are composed.[87] In order to perfect their control over the defendants' actions, courts of equity have therefore long asserted the power to hold in criminal or civil contempt persons acting either as defendants' agents or knowingly cooperating with a defendant to bring about behavior by the defendant contrary to the decree.[88] This power and its limits are now codified for the federal courts by Rule 65(d) of the Federal Rules of Civil Procedure which provides in pertinent part:

> Every order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.[89]

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85. *See, e.g.,* McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949); Fortin v. Commr., 692 F.2d 790, 796 (1st Cir. 1982); Palmigiano v. Garrahy, 448 F. Supp. 659, 670 (D.R.I. 1978), *aff'd.,* 616 F.2d 598 (1st Cir. 1980), *cert. denied,* 449 U.S. 839 (1980).

86. Professor Fiss points out that an individual may be "bound" by an injunction in several senses: he may be unable to relitigate points because of *res judicata* or *stare decisis;* he may be subject to criminal sanctions for interfering with its enforcement; or he may be subject to civil or criminal contempt for violating its terms. O. FISS, *supra* note 64, at 620-21 (1972). I use the term "bound" in this last, narrowest sense.

87. *See* United States v. Fleischman, 339 U.S. 349, 356-58 (1950); Wilson v. United States, 221 U.S. 361, 376-77 (1911); Commissioners v. Sellew, 99 U.S. 624, 627 (1879).

88. *See In re* Lennon, 166 U.S. 548 (1897); Alemite Mfg. Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930); 2 E. DANIELL, *supra* note 59, at *1673 n.1, *1685 n.(a).

89. FED. R. CIV. P. 65(d).

For reasons having to do with the due process rights of non-parties to assert the legality of the conduct governed by the decree,[90] the cases applying Rule 65(d) have emphasized that it extends only to acts on behalf of or in concert with the enjoined party and does not apply the decree to independent acts of non-parties in pursuit of their own interests.[91]

Prior to the 1930 decision of *Alemite Manufacturing Corp. v. Staff*,[92] and the promulgation of Rule 65(d) in 1938, a line of authority in England and the United States had held that a non-party acting independently with knowledge of the decree would be in contempt if he willfully produced a result contrary to it.[93] While this proposition has been in disrepute since Learned Hand rejected it in

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90. *See* Chase Natl. Bank v. City of Norwalk, 291 U.S. 431, 436-37 (1934); Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 833 (2d Cir. 1930); *see also* Rendleman, *Beyond Contempt: Obligors to Injunctions,* 53 TEX. L. REV. 873, 892-97 (1975) (criticizing Judge Hand's due process analysis of the inadequacy of the principal's representation of the agent's independent interests in *Alemite*); *cf.* notes 92-94 *infra* and accompanying text.

91. *See* Thompson v. Freeman, 648 F.2d 1144 (8th Cir. 1981); Royal News Co. v. Schultz, 350 F.2d 302 (6th Cir. 1965); Thaxton v. Vaughan, 321 F.2d 474 (4th Cir. 1963); *cf.* Pasco Intl. (London) Ltd. v. Stenograph Corp., 637 F.2d 496 (7th Cir. 1980) (any injunction against a corporation also binds the agent to the extent of his agency); United Pharmaceutical Co. v. United States, 306 F.2d 515 (1st Cir. 1962) (an injunction is not binding on an independent corporation solely by virtue of its distributorship agreement with the enjoined corporation).

92. 42 F.2d 832 (2d Cir. 1930).

93. *See In re* Reese, 107 F. 942 (8th Cir. 1901); Seaward v. Paterson, [1897] 1 Ch. 545; Rendleman, *supra* note 90, at 901-03, 908-10.

Seaward v. Paterson, on which this line of cases rests, appears to have been misunderstood because it draws the distinction between civil and criminal contempt in a terminology not used in the United States. The Court of Appeals opinions in that case, cited by Judge Hand in Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 833 (2d Cir. 1930), carefully distinguish between "breach of the injunction" and "contempt of court." As stated by Lindley, L.J.:

> In the one case the party who is bound by the injunction is proceeded against for the purpose of enforcing the order of the Court for the benefit of the person who got it. In the other case the Court will not allow its process to be set at naught and treated with contempt. In the one case the person who is interested in enforcing the order enforces it for his own benefit; in the other case, if the order of the Court has been contumaciously set at naught the offender cannot square it with the person who has obtained the order and save himself from the consequences of his act.

[1897] 1 Ch. at 555-56. Justice Rigby agreed that the case in question involved contempt "by way of punishment" with the court acting "upon its own authority." [1897] 1 Ch. at 558, 559. The distinction corresponds exactly to the American one between criminal and civil contempt. *See* note 83 *supra.*

Paterson, the defendant, had been enjoined from holding boxing matches on certain premises. [1897] 1 Ch. at 546-47. Murray, the contemnor, was the principal who had used Paterson as his straw man. [1897] 1 Ch. at 556. He was found in contempt in the Chancery Division for having aided and abetted Paterson in violating the decree by holding more boxing matches. Both judges in the Court of Appeals agreed that Murray was not an independent actor but was cooperating with Paterson. He received a fixed term of imprisonment. [1897] 1 Ch. at 552, 556-58.

It therefore appears that the result in *Seaward,* a criminal contempt conviction of one knowingly assisting a party to violate a decree, would fall within the FED. R. CIV. P. 65(d) concept of "active concert or participation." The emphasis placed by the Court of Appeals on Murray's nonparty status goes to his possible nonliability for "breach of the injunction," or civil contempt, which was not involved. [1897] 1 Ch. at 554. The broad reading given the case

Alemite,[94] another traditional doctrine has provided a basis to control nonparties. Chancery commonly took under its control, directly or through receivers, specific property or legal entities, in order to resolve multiple claims against them. To protect its power to determine the underlying dispute, the equity court would enjoin third parties from attempting to interfere with its control of the *res*, either by proceedings in other courts,[95] physical invasion,[96] or obstruction of operations by a strike.[97] Moreover, the order appointing the receiver itself served to prohibit any person with notice of it from enforcing claims against the *res* in another forum without the leave of the court.[98] As a result, independent nonparties could be made subject to the contempt power by a separate injunction directing them not to obstruct the resolution of the case.[99] This principle has been applied in recent cases, both to consolidate litigation in one forum[100] and, on the theory that the defendant institution is equivalent to a *res* under the court's control, to keep independent third persons from obstructing a defendant's compliance.[101]

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in *In re Reese*, 107 F. at 946-47, is simply incorrect. *But cf.* Rendleman, *supra* note 90, at 908-09.

94. *See* Rendleman, *supra* note 90, at 907-08.

95. *See* J. POMEROY, *supra* note 59, §§ 1583, 1592.

96. *See id.* § 1585.

97. *See id.* § 1590, at 3742.

98. *See id.* § 1592, at 3751-52 n.1.

99. *See id.* 3756 nn.7-8.

100. Environmental Defense Fund v. EPA, 485 F.2d 780 (D.C. Cir. 1973); Buffalo Teachers Fedn. v. Board of Educ. of Buffalo, 477 F. Supp. 691 (W.D.N.Y. 1979); New York State Assn. for Retarded Children v. Carey, 456 F. Supp. 85, 96-98 (E.D.N.Y. 1978).

101. *See* Kasper v. Brittain, 245 F.2d 92, 96-97 (6th Cir. 1957); *cf.* United States v. Faubus, 254 F.2d 797 (8th Cir. 1958) (Governor of Arkansas violated school desegregation order by using national guard troops to prevent black children from attending city high school). This theory was most fully set out in Judge Wisdom's opinion in United States v. Hall, 472 F.2d 261 (5th Cir. 1972). The case arose out of an *ex parte* order entered at defendants' request in a school desegregation case, which enjoined "all students at Ribault Senior High School . . . and other persons acting independently or in concert with them and having notice of this order" from a variety of disruptive conduct that obstructed the peaceful desegregation of the school. 472 F.2d at 262-63. The district court directed that Hall, an "outside agitator," be personally served with the order. Hall, after being served, violated it independently four days after it was issued and was convicted of criminal contempt. 472 F.2d at 263-64. The affirming opinion analogized the order to an *in rem* injunction "binding on all persons, regardless of notice, who come into contact with property which is the subject of a judicial decree." 472 F.2d at 265-66. The court also said that FED. R. CIV. P. 65(d) was merely declaratory of the federal courts' inherent powers to issue such an order and did not restrict them. 472 F.2d at 267. However, the opinion qualified this broad sweep by noting that, since the contempt occurred within 10 days of the order's issuance, the order could be regarded as an *ex parte* temporary restraining order, valid under FED. R. CIV. P. 65(b), directed to Hall. 472 F.2d at 267.

Despite the seeming breadth of Judge Wisdom's language, it is by no means clear that the order could have been enforced against anyone who happened to violate its terms or even against Hall after the 10-day limit of rule 65(b) expired. *See* Rendleman, *supra* note 90, at 919-

C. *Displacing the Defendant*

Finally, in disputes involving multiple claims to property, the equity court had the power to safeguard the claimants' interests by appointing a receiver for the property during the litigation. A late nineteenth century treatise described the receiver's function as follows:

> By means of the appointment of a receiver, a court of Equity takes possession of the property which is the subject of the suit, preserves it from waste or destruction, secures and collects the proceeds or profits, and ultimately disposes of them according to the rights and priorities of those entitled . . . .[102]

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22. *But see* Washington v. Washington State Commercial Passenger Fishing Assn., 443 U.S. 658, 692 n.32, *modified on rehg.*, 444 U.S. 816 (1979). If the order were not so broadly enforceable, the court could enjoin further interference only after an adversary proceeding in which the "obstructor" could assert any independent rights to pursue his conduct despite its effect on the relations among the parties to the decree. *See* Herrlein v. Kanakis, 526 F.2d 252, 255 (7th Cir. 1975); Rendleman, *supra* note 90, at 879-81, 886-88, 919-20. *See generally* FED. R. CIV. P. 65(a) (requiring notice to the other party before an injunction can be issued); National City Bank v. Battisti, 581 F.2d 565 (6th Cir. 1977) (overturning a district court injunction which would have prohibited a nonparty from seeking relief in the state courts on an issue only tangentially related to the federal action); Sims v. Green, 160 F.2d 512 (3d Cir. 1947) (requiring findings of irreparable harm before a temporary injunction would issue). The purpose of the stay on other litigation in traditional receivership cases, on which Judge Wisdom relied for his analogy, was not to prevent claims from being asserted, but rather to require them to be asserted in the receivership court. *See* 4 J. POMEROY, *supra* note 59, § 1592; *cf.* Environmental Defense Fund v. EPA, 485 F.2d 780, 783-84 (D.C. Cir. 1973) (where federal law gives Courts of Appeals exclusive jurisdiction to review decisions of an administrative agency, a district court may not entertain an action challenging that body's ruling).

It should also be noted that Hall, like the contemnor in Seward v. Paterson, [1897] 1 Ch. 525 (discussed at note 93 *supra*), had been forbidden to take action that would prevent the defendant from complying with the injunction and was held in criminal contempt for acting in violation of this proscription. Neither case involved an affirmative duty imposed on an independent third party enforced by civil contempt to assist a defendant in complying. Absent some independent legal duty which the third party had violated, it is doubtful that such an obligation could be imposed in the present state of the law. *Compare* Milliken v. Bradley (*Milliken* I), 418 U.S. 717, 744-45 (1974) (federal courts may not order a suburban school district to enter into a desegregation plan without showing that it was guilty of *de jure* segregation), *with* Hills v. Gautreaux, 425 U.S. 284, 292-300 (1976) (limiting *Milliken* I by allowing a remedial order against the Dept. of Housing and Urban Development (HUD) affecting an entire metropolitan area where violations committed by HUD had occurred only in the inner city).

However, in at least two instances, nonparty state officers who used their legal authority to obstruct the performance of desegregation decrees were added as parties, enjoined from obstruction, and further enjoined to use their powers to impose compliance on subordinates. United States v. Barnett, 330 F.2d 369, 376-77 (5th Cir. 1963); Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 464-70, 478-79 (M.D. Ala. 1967), *aff'd. sub nom.* Wallace v. United States, 389 U.S. 215 (1967); Lee v. Macon County Bd. of Educ., 231 F. Supp. 743, 751-52 (M.D. Ala. 1964). In *Lee,* the district court found an independent legal duty under the fourteenth amendment for the state officials to further desegregation. 267 F. Supp. at 478. In *Barnett,* the affirmative duty to maintain law and order was imposed on Governor Barnett only after he was found in civil contempt of a prior order not to obstruct the admission of James Meredith to the University of Mississippi.

102. 4 J. POMEROY, *supra* note 59, § 1483, at 3500-01 (quoting Beverly v. Brooke, 45 Va. (4 Gratt.) 187, 208 (1847)).

The receivership was commonly used to liquidate or reorganize corporations and to protect beneficiaries, shareholders or creditors in suits against corporate management or a fiduciary when the defendants' behavior indicated that they could not be trusted with possession of the *res* pending the outcome of the litigation.[103] As noted above, the receiver often used the anti-obstruction injunction both to compel outsiders to bring claims before the court that had appointed him and to prevent anyone from interfering with his possession and management of the *res*.[104] Since the appointing court had *in personam* jurisdiction of the parties to the underlying suit, the receiver could obtain orders in that court directing the parties, their agents, and persons holding through them, such as tenants, to turn the property over to him without any further service of process.[105] Against nonparties, however, the receiver could assert claims for money or property only in a forum where he could obtain *in personam* jurisdiction and only subject to any defenses the nonparties had against the parties.[106] In other words, the receivership was a remedy among the parties but created no substantive rights against others.

From the historical resources of equity, then, a federal district court that has issued a structural injunction inherits a broad, powerful array of resources to meet the defendants' claim that financial circumstances beyond their control have made it impossible to comply. It receives a narrow, skeptical view of the claimed impossibility, based on an objective standard of performance that discounts expressions of good faith. It has a power of personal coercion that

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103. See *id.* §§ 1509, 1510, at 3559-61, § 1546, at 3636-37; 1 J. GERDES, *supra* note 58, § 13, at 31-40. The following comment from Pomeroy has a familiar ring:

> It is not uncommon, in railroad receivership cases, to find strong statements as to the great reluctance of the courts to undertake the management of railroads, except in the most urgent cases; but the experience of the last twenty-five years has tended to raise the question in some minds whether these expressions are to be taken very seriously, or whether the magnitude of the interests involved actually does — if, indeed it should — exercise any strong deterring influence on the action of the courts.

4 J. POMEROY, *supra* note 59, § 1549, at 3661 (footnotes omitted). Compare Justice Brennan's remarks on structural relief in prisons:

> Thus the lower courts have learned from repeated investigation and bitter experience that judicial intervention is *indispensable* if constitutional dictates — not to mention considerations of basic humanity — are to be observed in the prisons. No one familiar with the litigation in this area could suggest that the courts have been overeager to usurp the task of running prisons, which, as the Court today properly notes, is entrusted in the first instance to the "legislature and prison administration rather than a court."

Rhodes v. Chapman, 452 U.S. 337, 354 (1981) (Brennan, J., concurring) (emphasis in original) (citations omitted). *See also* Ruiz v. Estelle, 679 F.2d 1115, 1126, 1144-45 (5th Cir.), *modified*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); Eisenberg & Yeazell, *supra* note 58, at 493-94.

104. *See* text at notes 95-99 *supra*.

105. *See* 4 J. POMEROY, *supra* note 59, § 1582, at 3717-18.

106. *See id.* § 1582, at 3719-20.

extends not only to defendants but also their subordinates and those who knowingly assist them. It has the power to withhold defendants' property from them, in order to coerce both defendants and persons beyond the jurisdiction of the court. Where the defendants' task has been made more difficult by independent persons such as a legislature, it has the power to prohibit acts of obstruction, although the power to command cooperation is more doubtful. Finally, it has the power to take over the management of the defendants' institution and safeguard its property, though this is limited with respect to property held by a third party, such as a fiscal official, under claim of right.

III. Coercing the Executive Branch Defendant

At some point in a structural case, the court imposes an order on the defendant executive agency that contains fairly specific objectives, directives for reaching them, an enforcement review mechanism and a timetable.[107] When, as often happens, deadlines pass without compliance, civil contempt proceedings begin and defendants may try to excuse themselves on the ground that compliance was financially impossible. This assertion can mean several things: the budget is not big enough without cutting other activities with a higher priority,[108] the legislature will not permit the agency to spend appropriated funds to comply,[109] or, finally, the legislature is unwilling or unable to appropriate as much as the agency needs.[110] Once this point is reached, the trial court is faced with the three questions with which the remainder of this Article is concerned. First, is the supposed impossibility a good defense to the civil contempt charge? Second, if not, how can the executive agency and its officials be most effectively coerced to make more effective use of the resources at hand? Third, if the resources at hand are not enough to achieve compliance, can those who control the public treasury be compelled to provide more and, if so, how?

The first two of these questions are addressed in this part of the Article. Part IV is devoted to the third.

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107. Since a consent decree is enforceable in the same way as any other injunction, this discussion includes consent decrees. *See* Brewster v. Dukakis, 675 F.2d 1, 3-4 (1st Cir. 1982); Ricci v. Okin, 537 F. Supp. 817, 823-24 (D. Mass. 1982).

108. *See* notes 112-14 *infra* and accompanying text.

109. *See* notes 115-21 *infra* and accompanying text.

110. *See* notes 125-38 *infra* and accompanying text.

A. *The Impossibility Defense*

The preceding section pointed out that, while impossibility of compliance is a defense to coercive civil contempt sanctions, the defendant bears the burden of convincing the court that it could not comply despite diligent good-faith efforts. Courts handling structural litigation have preserved the traditional skeptical hostility to this defense and most claims of financial impossibility are rejected.[111] The false impossibilities fall into three main groups: mere inefficiency, self-inflicted impossibility, and legal impossibility. The first two of these are straightforward. The courts have shown themselves unwilling to accept pleas of financial impossibility until satisfied that the executive branch defendants have used the money allotted them in good faith and in an efficient manner to comply with the decree.[112] This may involve detailed scrutiny of the defendants' planning in response to budget cuts, together with the requirement that the response minimize harm to the substantive portions of the decree.[113] Moreover, "self-inflicted" impossibility, in which defendants deprive themselves of resources, meets no sympathy and provokes unusually severe sanctions.[114] At the threshold, then, fiscal impossibility can only be claimed plausibly when produced by factors beyond the executive defendants' control.

Legal fiscal impossibility is asserted when the agency has available enough appropriated funds to meet the decree's obligation but contends that some provision of state law prohibits it from spending

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111. *See, e.g.,* Delaware Valley Citizens' Council v. Pennsylvania, 678 F.2d 470 (3d Cir.), *cert. denied,* 459 U.S. 969 (1982); Halderman v. Pennhurst State School & Hosp., 673 F.2d 628 (3d Cir. 1982), *cert. denied,* 104 S. Ct. 1315 (1984); Ricci v. Okin, 537 F. Supp. 817, (D. Mass. 1982); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *affd.,* 442 F.2d 304 (8th Cir. 1971); *cf.* Coalition for Basic Human Needs v. King, 654 F.2d 838 (1st Cir. 1981) (failure of state to finish its budgeting process is not a valid excuse for its late mailing of welfare checks).

112. *E.g.,* Fortin v. Commr., 692 F.2d 790 (1st Cir. 1982); Brewster v. Dukakis, 675 F.2d 1 (1st Cir. 1982); Ricci v. Okin, 537 F. Supp. 817 (D. Mass. 1982); Perez v. Boston Housing Auth., 379 Mass. 703, 400 N.E. 2d 1231 (1980); *cf.* Reed v. Rhodes, 472 F. Supp. 623 (N.D. Ohio 1979) (school board which fails to provide for adequate compliance with a desegregation order can be required to make complete financial accountings to the court in the future); Palmigiano v. Garrahy, 448 F. Supp. 659 (D.R.I. 1978) (where state officials were dilatory in not correcting prison defects, they could be held in contempt and sanctions, including fines, could be levied). These cases apply the principle of United States v. Fleischman, 339 U.S. 349, 356-57 (1950), that the alleged contemnor is responsible for doing all within his power despite the noncooperation of others. *Cf.* Jones v. Wittenberg, 73 F.R.D. 82, 83 (N.D. Ohio 1976) (alleged contemnor liable even where injunction was issued against his predecessor in office).

113. Ricci v. Okin, 537 F. Supp. 817, 828-36 (D. Mass. 1982).

114. *See* Halderman v. Pennhurst State School & Hosp., 533 F. Supp. 631, 636-41 (E.D. Pa. 1981), *affd.,* 673 F.2d 628 (3d Cir. 1982), *cert. denied,* 104 S. Ct. 1315 (1984); *cf.* Griffin v. County School Bd., 363 F.2d 206 (4th Cir.), *cert. denied,* 385 U.S. 960 (1966) (holding state officials in contempt for willful disbursal of money to schools while this act's legality was being appealed even though the officials were under no specific prohibitory injunction).

them that way. These legal restraints appear to fall into two categories. The most common is a state law prohibition of paying any judgments against the state or its agencies without specific legislative approval.[115] It is usually raised in response to orders requiring payment of attorneys' fees. In addition to such general restrictions, there are several instances in which the state legislature included in the specific appropriation for the defendant agency an express prohibition on using the appropriated funds to comply with provisions of a particular structural decree.[116] Apart from questions of sovereign immunity and comity[117] there is little doctrinal difficulty in pushing these restraints aside. Cases involving nonfinancial, state-law restrictions on compliance with federal decrees clearly indicate that the supremacy clause of the United States Constitution[118] requires a state officer to act in accord with a valid federal decree regardless of any prohibition or lack of authority created by state law.[119] If an expenditure restriction conflicts with the decree, it would seem simple and proper to require the defendant to disregard it. If the agency lacks enough money under its own control, the state's treasurer could be added as an ancillary party and ordered to release funds on the ground that his refusal to do so is obstructing the agency's compliance.[120] In cases involving orders to pay attorneys' fees, this has

115. *E.g.,* ARIZ. REV. STAT. ANN. § 12-826 (Supp. 1983); MISS. CODE ANN. § 11-45-5 (1972); WASH. REV. CODE § 4.92.040 (1983); *see* Spain v. Mountanos, 690 F.2d 742, 744-45 (9th Cir. 1982); Gary W. v. Louisiana, 622 F.3d 804, 806 (5th Cir. 1980), *cert. denied,* 450 U.S. 994 (1981); Gates v. Collier, 616 F.2d 1268, 1271 (5th Cir. 1980), *rehg. granted,* 636 F.2d 942 (5th Cir. 1981).

116. *E.g.,* Delaware Valley Citizens' Council v. Pennsylvania, 678 F.2d 470, 473-74 (3d Cir.), *cert. denied,* 459 U.S. 969 (1982); Halderman v. Pennhurst State School & Hosp., 673 F.2d 628, 633 (3d Cir. 1982), *cert. denied,* 104 S. Ct. 1315 (1984); New York State Assn. for Retarded Children v. Carey, 631 F.2d 162, 164 (2d Cir. 1980).

California has unsuccessfully tried to prohibit the use of appropriated funds to pay awards of attorneys' fees unless specifically authorized by the legislature. *See* California Budget Act of 1980, § 4.5, 1980 Cal. Stat. 510, § 4.5; Spain v. Mountanos, 690 F.2d 742 (9th Cir. 1982); La Raza Unida v. Volpe, 545 F. Supp. 36 (N.D. Cal. 1982).

117. *See* notes 262-88 & 315-17 *infra* and accompanying text.

118. U.S. CONST. art. VI.

119. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971); Cooper v. Aaron, 358 U.S. 1 (1958); Bell v. Southwell, 376 F.2d 659 (5th Cir. 1967); Gross v. Tazewell County Jail, 533 F. Supp. 413, (W.D. Va. 1982); Gautreaux v. Chicago Housing Auth., 342 F. Supp. 827 (N.D. Ill. 1972), *aff'd.,* 480 F.2d 210 (7th Cir. 1973), *cert. denied,* 414 U.S. 1144 (1974).

120. *See* Halderman v. Pennhurst State School & Hosp., 533 F. Supp. 631, 640 (E.D. Pa. 1981), *aff'd.,* 673 F.2d 628 (3d Cir. 1982), *cert. denied,* 104 S. Ct. 1315 (1984); *see also* Part IV *infra; cf.* Welsch v. Likins, 550 F.2d 1122, 1129-30 (8th Cir. 1977) (approving, under certain circumstances, a court order "designed to short circuit ordinary legislative and administrative processes involving the expenditure of state funds"). *But cf.* Delaware Valley Citizens' Council v. Pennsylvania, 533 F. Supp. 869, 878-81 (E.D. Pa.) (concluding that the court lacked

been done regularly.[121]

However, the judicial response has been more complex where substantial operating funds are involved. While much judicial language states that refusal of the legislature to appropriate funds does not excuse executive defendants from providing services or protecting rights as required by a structural decree,[122] this is not always the result. Some consent decrees in institutional litigation merely obligate executive branch defendants to act "[w]ithin their lawful authority, including the State constitution and applicable State laws, and subject to any legislative approval that may be required,"[123] or language to that effect. Under such a decree, the defendants are obliged only to seek appropriations diligently and in good faith. If they use their best efforts, and the legislature does not cooperate, they do not violate the decree by then refusing to reprogram funds, in violation of an otherwise valid general state law.[124]

Apart from muttering threats and menaces,[125] few courts have

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power to countermand the decision of a state legislature not to expend state funds on a certain program), *aff'd.*, 678 F.2d 470 (3d Cir.), *cert. denied*, 459 U.S. 969 (1982).

It should be noted that most state constitutions, like the United States', prohibit dispensing money from the treasury except by appropriation. U.S. CONST. art. I, § 9, cl. 7; *e.g.*, ARK. CONST. art. V, § 41; CAL. CONST. art. XVI, § 7; IOWA CONST. art. III, § 24; N.Y. CONST. art. VII, § 7; PA. CONST. art. III, § 24; *see* Humbert v. Dunn, 84 Cal. 57, 24 P. 111 (1890); Graham v. Worthington, 259 Iowa 845, 146 N.W.2d 626 (1966); Anderson v. Regan, 53 N.Y.2d 356, 425 N.E.2d 792, 422 N.Y.S.2d 404 (1981); Ashbourne School v. Department of Educ., 43 Pa. Comm. 593, 403 A.2d 161 (1979). A proceeding against the state's disbursing officer necessarily involves overriding such a provision on supremacy grounds. *See* Spain v. Mountanos, 690 F.2d 742, 746 (9th Cir. 1982); Gary W. v. Louisiana, 622 F.2d 804, 806 n.8 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981).

121. *E.g.*, Spain v. Mountanos, 690 F.2d 742 (9th Cir. 1982); Collins v. Thomas, 649 F.2d 1203 (5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982); Gary W. v. Louisiana, 622 F.2d 804 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981); Gates v. Collier, 616 F.2d 1268 (5th Cir.), *rehg. granted*, 636 F.2d 942 (5th Cir. 1980); La Raza Unida v. Volpe, 545 F. Supp. 36 (N.D. Cal. 1982).

122. *E.g.*, Campbell v. McGruder, 580 F.2d 521, 540 (D.C. Cir. 1978); Battle v. Anderson, 564 F.2d 388, 395-96 (10th Cir. 1977); Wyatt v. Aderholt, 503 F.2d 1305, 1314-15 (5th Cir. 1974); Gates v. Collier, 501 F.2d 1291, 1319-20 (5th Cir. 1974); Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968); Holt v. Sarver, 309 F. Supp. 362, 385 (E.D. Ark. 1970), *aff'd.*, 442 F.2d 304 (8th Cir. 1971).

123. New York State Assn. for Retarded Children v. Carey, 631 F.2d 162, 163 (2d Cir. 1980); *see also* Brewster v. Dukakis, 675 F.2d 1, 4 n.3 (1st Cir. 1982).

124. Brewster v. Dukakis, 675 F.2d 1 (1st Cir. 1982); New York State Assn. for Retarded Children v. Carey, 631 F.2d 162 (2d Cir. 1980). Thus, one incentive for defendants to settle structural litigation through a consent decree is the potential ability to limit the government's financial exposure through such an agreement.

125. A failure to fund could, therefore, raise the question as to whether these class members have now acquired a right to continued funding based on the legislative and executive branches' clear and ongoing commitment to the decrees. . . . Given an intransigent legislature, essential remedial effort called for by the consent decrees may permissibly have '. . . a direct and substantial impact on the state treasury.' On that score, it is reasonable to have in mind the Governor's well publicized pronouncements that, under his stewardship, the Commonwealth's treasury now enjoys a 100 million dollar surplus.

Ricci v. Okin, 537 F. Supp. 817, 827-28 (D. Mass. 1982) (citation omitted); *accord* Wyatt v.

directly faced the issue of setting aside appropriation restrictions on supremacy clause grounds. The results have been mixed where they have tried to do so. In *New York State Association for Retarded Children v. Carey,*[126] the Second Circuit confronted the New York legislature's refusal to fund a monitoring committee established in a "best efforts" consent decree. The Governor had sought appropriations diligently and in good faith. The district court had ordered the Governor and Comptroller to make the money available despite constitutional and statutory restrictions. The court of appeals reversed. While the entire panel found that the state's executive officers had complied with the decree and were not in contempt, the majority opinion went on to state that, despite the supremacy clause, the district court "ought not to put itself 'in the difficult position of trying to enforce a direct order . . . to raise and allocate large sums of money.' "[127] Instead, the majority said, the appropriate use of the contempt power would be to shut down a noncomplying institution. This would "[leave] the question of the expenditure of state funds in the hands of citizens of the state, not in the hands of federal judges."[128] The court considered this view particularly appropriate when the money was to be used, not for direct compliance with constitutional standards, but for an ancillary expenditure.

The Third Circuit approved a similar approach to that of a district court in *Delaware Valley Citizens' Council v. Pennsylvania.*[129] In that case the Pennsylvania legislature had forbidden the use of appropriated funds for an automobile inspection system required by a consent decree implementing the Federal Clean Air Act. The district court found the state defendants in contempt but refused to hold that the appropriation restriction was void under the supremacy clause. Instead, it ordered the United States, also a party, to withhold other funds from the state.[130] The Third Circuit affirmed with-

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Stickney, 344 F. Supp. 373, 377 (M.D. Ala. 1972) (threat to sell state-owned land to finance compliance), *modified sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). *See generally* Special Project, *Remedial Process, supra* note 12, at 838.

126. 631 F.2d 162 (2d Cir. 1980).

127. *Carey,* 631 F.2d at 165, (quoting Rhem v. Malcolm, 507 F.2d 333, 341 (2d Cir. 1974)).

128. *Carey,* 631 F.2d at 165. *But cf.* Arthur v. Nyquist, 712 F.2d 809 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 1907 (1984), in which the Second Circuit affirmed a district court order that required the Mayor and City Council of Buffalo to appropriate an additional $7.4 million needed to comply with a school desegregation decree. *Carey* was not cited.

129. 678 F.2d 470 (3d Cir.), *cert. denied,* 459 U.S. 969 (1982); *see* Clean Air Act §§ 110(1)(2)(G), 172(b)(11)(B), 42 U.S.C. §§ 7410(a)(2)(G), 7502(b)(11)(B) (1982); 71 PA. STAT. ANN. § 523 (Purdon 1981) (repealed 1983).

130. Delaware Valley Citizens' Council v. Pennsylvania, 533 F. Supp. 869, 882-84 (E.D. Pa. 1982); *see* Clean Air Act § 176(a), 42 U.S.C. § 7506(a) (1982).

out reaching the supremacy clause issue.[131]

In contrast, the Third Circuit did permit more direct relief in *Halderman v. Pennhurst State School & Hospital.*[132] There the executive defendants, relying in part on an optimistic reading of *Carey,* persuaded the Pennsylvania legislature to cut off further appropriations for the special master required by the primary decree. When the executive defendants failed to pay the next installment of the master's expenses, the district court found them in contempt and imposed a $10,000 *per diem* fine.[133] Civil contempt fines totalling more than the amount of the needed appropriation were paid and were applied by the district court to the master's expenses.[134] The Third Circuit affirmed, stating that the supposed legal impossibility could not be used as a defense in the civil contempt proceeding when the executive defendants had intentionally failed to raise the issue in an orderly way by moving for a modification of the primary decree after the legislature acted.[135]

These few cases have uniformly rejected the validity of a financial impossibility created by state law as an excuse for noncompliance, but they have shown a reluctance to ignore wholly the state-law restriction and to attempt to draw directly on the state treasury for the necessary funds. While the district court in *Halderman* achieved that result indirectly, it must be pointed out that the state defendants did not resist paying the contempt fines that were used to finance the special master. Moreover, it is by no means clear that the Third Circuit would have supported the district court's threat of direct relief had the state resisted.[136] The Eighth Circuit has avoided

131. Delaware Valley Citizens' Council v. Pennsylvania, 678 F.2d 470, 476 n.14 (3d Cir.), *cert. denied,* 459 U.S. 969 (1982).

132. 533 F. Supp. 631 (E.D. Pa. 1981), *aff'd.,* 673 F.2d 628 (3d Cir. 1982), *cert. denied,* 104 S. Ct. 1315 (1984).

133. *Pennhurst,* 533 F. Supp. at 639-40.

134. *Pennhurst,* 533 F. Supp. at 641. The district court paid the master's expenses out of the $1.2 million in contempt fines paid by defendants, retained the balance and purged defendants of contempt. 533 F. Supp. at 647-48. The funds had apparently been paid out of Pennsylvania Department of Public Welfare Funds. 533 F. Supp. at 646; Halderman v. Pennhurst State School & Hosp., 673 F.2d at 634-35 (3d Cir. 1982).

135. *Pennhurst,* 673 F.2d at 636-39. The appropriate course, in the court of appeals' view, would have been for the executive defendants to have moved to modify the order for paying the master's expenses, under FED. R. CIV. P. 60(b)(5)-(6) in the light of the changed circumstances caused by the legislature's refusal to appropriate. 673 F.2d at 637-39. The course of seeking modification under rule 60(b) has been followed, although without success on the merits, by other state agencies faced with refusal to appropriate. *See, e.g.,* Fortin v. Commr., 692 F.2d 790, 799 (1st Cir. 1982).

136. The contempt decision was by a vote of 5-3, with one concurrence. Halderman v. Pennhurst State School & Hosp., 673 F.2d 628 (3d Cir. 1982), *cert. denied,* 104 S. Ct. 1315 (1984). The Third Circuit has been deeply divided on both the substantive rights involved and the scope of the decree throughout the litigation. Chief Judge Seitz and Judge Hunter have

the issue,[137] and the Second, in dictum, has expressed strong disapproval of direct financial relief.[138] At the least, however, the cases do accept the propriety of indirect pressure on the financing body, either by threatening to close the institution or by direct coercion of the executive branch defendants.

B. *Methods of Coercion of Executive Agency Officials*

Coercion of responsible individuals through imprisonment or fine is the oldest and most characteristic of equity's remedial sanctions. It is striking, however, how little it is used in institutional reform litigation even in the face of repeated, willful refusal to comply with the decree. While it is unsafe to state a negative proposition absolutely, I am aware of no federal case decided within the past twenty-five years in which a public official has been imprisoned for civil or criminal contempt for violating an injunction. This includes such instances of flagrant defiance as the Commerce and Justice Departments repeatedly refusing to restore property in their possession to its owners because the President disagreed with the court's decision,[139] Governor Barnett leading the resistance to the integration of the University of Mississippi,[140] the Prince Edward County School

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dissented at all points, Halderman v. Pennhurst State School & Hosp., 673 F.2d 628, 640, 642 (3d Cir. 1982); Halderman v. Pennhurst State School & Hosp., 673 F.2d 647, 662 (3d Cir. 1982), *cert. denied,* 104 S. Ct. 1315 (1984), and Judge Garth has joined them on the scope of the structural decree, 673 F.2d at 642; 673 F.2d at 662-67. Judge Aldisert, who dissented on the merits in the original decision, concurred on the contempt decision but professed himself "disenchanted" with the decree and urged modification by the district court, 673 F.2d 628, 640 (3d Cir. 1982); Halderman v. Pennhurst State School & Hosp., 612 F.2d 84, 116 (3d Cir. 1979). It appears likely from this distribution of votes that four judges, Seitz, Aldisert, Garth, and Hunter, would not have supported the district court in stronger measures.

137. In Welsch v. Likens, 550 F.2d 1122 (8th Cir. 1977), the district court had joined the fiscal control officers of Minnesota as parties after the legislature did not appropriate funds to implement a structural decree involving mental hospitals and enjoined them from obeying any state law that would prohibit the executive defendants from drawing the necessary funds from the state treasury. The court of appeals vacated, preferring to give the legislature another chance. 550 F.2d at 1129-33. It intimated that shutdown, rather than direct financial relief, was the district court's last resort. 550 F.2d at 1132 n.8.

138. New York State Assn. for Retarded Children v. Carey, 631 F.2d 162, 165-66 (2d Cir. 1980).

139. *See* Sawyer v. Dollar, 190 F.2d 623, 626-32, 646-48 (D.C. Cir. 1951), *vacated as moot,* 344 U.S. 806 (1952). *See also* Kearney v. United States, 285 F.2d 797, 798 n. 2 (Ct. Cl.) (listing cases used in support of the companion case to *Sawyer*), *cert. denied,* 366 U.S. 935 (1961); *see generally* Note, *Collateral Estoppel and the Dollar Litigation,* 20 GEO. WASH. L. REV. 749, 750-54 (1952) (dealing with the general situation which gave rise to *Sawyer, supra,* and its companion cases).

140. *See* United States v. Barnett, 330 F.2d 369 (5th Cir. 1963); *see also* Valley v. Rapides Parish School Bd., 646 F.2d 925, 934-35, 943 (5th Cir. 1981) (contempt order against a state judge who had willfully thwarted a federal court's 16-year-old effort to desegregate the Rapides Parish school system was dismissed when the judge promised not to continue his actions), *cert. denied,* 455 U.S. 939 (1982).

Board disbursing tuition grants to segregated private schools before it could be ordered not to do so,[141] the members of the Boston School Committee knowingly submitting an inadequate desegregation plan and publicly stating that they would do no more than obey the letter of direct court orders,[142] and the Secretary of the Pennsylvania Department of Public Welfare urging the legislature to cut off funds for a special master that her Department opposed.[143] While the federal district courts have apparently been more willing to impose *per diem* fines for civil contempt,[144] the size of the fines and the fact that they are assessed against the officers in their official capacity make it evident that they will be paid from official funds. The decisions reflect this understanding.[145] For practical purposes, public officials are not held individually responsible for their failure or refusal to comply with structural decrees.[146]

The stated reason for this judicial tenderness is a combination of divided responsibility, inefficacy and comity. Compliance with a structural decree, it is said, requires the cooperation of a large number of individuals among whom responsibility is divided in making numerous discretionary decisions needed to operate a complex organization.[147] Individual fault for noncompliance is often difficult to determine, and successful compliance usually depends on the good will of the defendants, which cannot be obtained by penalties.[148] Moreover, individual sanctions are said to be inconsistent

141. *See* Griffin v. County School Bd., 363 F.2d 206 (4th Cir.), *cert. denied,* 385 U.S. 960 (1966); *cf.* United States v. Shipp, 214 U.S. 386 (1909) (citing a sheriff and deputies for contempt in negligently allowing a federal prisoner to be lynched).

142. *See* Morgan v. Kerrigan, 530 F.2d 401, 427 (1st Cir.), *cert. denied,* 426 U.S. 935 (1976).

143. *See* Halderman v. Pennhurst State School & Hosp., 533 F. Supp. 631 (E.D. Pa. 1981), *aff'd.*, 673 F.2d 628 (3d Cir. 1982), *cert. denied,* 104 S. Ct. 1315 (1984).

144. *See, e.g.,* Cabrera v. Municipality of Bayamon, 622 F.2d 4 (1st Cir. 1980); United States v. Watson Chapel School Dist. No. 24, 446 F.2d 933, 938 (8th Cir. 1971), *cert. denied,* 404 U.S. 1059 (1972); Spangler v. Pasadena City Bd. of Educ., 384 F. Supp. 846 (C.D. Cal. 1974); *vacated and remanded as moot,* 537 F.2d 1031 (9th Cir. 1976); Hamilton v. Love, 358 F. Supp. 338 (E.D. Ark. 1973).

145. *E.g.,* Halderman v. Pennhurst State School & Hosp., 673 F.2d 628, 634-35 (3d Cir. 1982), *cert. denied,* 104 S. Ct. 1315 (1984) ($10,000 per day fine against Secretary and Dept. of Public Welfare, $1.2 million paid by the state); Cabrera v. Municipality of Bayamon, 622 F.2d 4, 7 (1st Cir. 1980) ($1,000 per day fine against Mayor, $200,000 paid); *see also* Hutto v. Finney, 437 U.S. 678, 692 (1978) (attorneys' fees awarded for litigation in bad faith "to be paid out of Department of Correction funds"); Palmigiano v. Garrahy, 448 F. Supp. 659, 673-74 (D.R.I. 1978) ("The court is aware that the final burden of the [contempt] fine [against the director of the Dept. of Corrections] will fall on the taxpayers of Rhode Island . . . .").

146. This fact is, on its face, difficult to reconcile with the fiction of their personal responsibility used to avoid eleventh amendment immunity. *See* notes 27-32 *supra* and accompanying text.

147. *See* Special Project, *Remedial Process, supra* note 12, at 839-40; Note, *Implementation Problems, supra* note 2, at 432-34.

148. *See, e.g.,* Reed v. Rhodes, 635 F.2d 556, 558 (6th Cir.), *modified,* 642 F.2d 186 (6th Cir.

with the duty to minimize, in the name of comity, federal judicial intrusion into state institutions.[149] It should also be noted that the federal courts' behavior in this area is consistent with the rapid growth, in the past thirty years, of the good-faith immunity defense to officials' liability for constitutional torts.[150]

Thus, whether consciously or not, the federal courts have on the whole taken the position that sanctions for an organization's failure to comply with a structural decree are to be directed against the organization itself and not against the individuals through whom it acts.[151] To bring that organization into compliance the court has several methods: the conditional and remedial fine, the appointment of a receiver, sequestration and shutdown of the institution.[152] The practical effects of these techniques may be fourfold: reprogramming the organization's budget, displacing recalcitrant individual defendants, imposing undesirable side effects on the organization and, finally, putting the plaintiff class out of defendants' power. The imposition of fines or appointment of a receiver respond to claims of financial impossibility by controlling expenditure directly; sequestration or institutional shutdown pressure both defendants and the source of funds to provide more resources by threatening adverse consequences if they do not.

1. *Conditional and Remedial Fines*

The contempt proceedings in *Halderman v. Pennhurst State School & Hospital*[153] provide an illustration of the use of the conditional and remedial fine. The official defendants had procured the appropriation restriction that made their budget unavailable to pay for the special master. The district court first found them in con-

1980); Jones v. Wittenberg, 73 F.R.D. 82, 85 (N.D. Ohio 1976); *see also* Special Project, *Remedial Process, supra* note 12, at 839-40, nn.464-71 (setting forth reasons why contempt citations may fail to induce compliance).

149. *See* Hutto v. Finney, 437 U.S. 678, 691 (1978).

150. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982); Butz v. Economou, 438 U.S. 478 (1978); Scheuer v. Rhodes, 416 U.S. 232 (1974). *See generally* Castro, *Innovation in the Defense of Official Immunity Under Section 1983,* 47 TENN. L. REV. 47, 54-73 (1979); Newman, *Suing The Law Breakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct,* 87 YALE L.J. 447, 459-60 (1978).

151. *But cf.* Lasky v. Quinlan, 419 F. Supp. 799, 808 (S.D.N.Y. 1976), *vacated,* 558 F.2d 1133 (2d Cir. 1977) (sheriff held in contempt).

152. These techniques may be imposed by ancillary orders, which in this sense go beyond the normal process of tightening the substantive and procedural requirements of the main decree. *See* text at note 34 *supra; see also* Newman v. Alabama, 683 F.2d 1312, 1318-19 (11th Cir. 1982) (discussing the various sanctions available to the court), *cert. denied,* 103 S. Ct. 1773 (1983).

153. 533 F. Supp. 631 (E.D. Pa. 1981), *aff'd.,* 673 F.2d 628 (3d Cir. 1982), *cert. denied,* 104 S. Ct. 1315 (1984).

tempt for nonpayment and imposed a substantial coercive *per diem* fine.[154] As the payments accumulated, they were applied to the master's expenses, and the contempt was ultimately purged.[155] The expenses involved were in the nature of court costs, ancillary to the main relief, and the court could pay them from accrued fines without further intrusion into defendants' internal affairs. However, other federal courts have suggested or threatened that accumulated coercive fines could be used to benefit prisoner plaintiffs directly[156] or spent to abate a nuisance.[157] The legal basis for using the funds in this manner is the court's traditional power, incorporated in Rule 70 of the Federal Rules of Civil Procedure, to appoint an agent of the court to perform an act which the defendant has refused to perform.[158] As a practical matter, if the "act" involved were intertwined with the continuing operation of the institution, appointing such an agent would amount to a partial displacement of the defendants and would be subject to the restrictions on that form of relief.[159] A more limited form of intrusion, applied by the district court at one point in the Cleveland school desegregation litigation, is to meet claims of financial impossibility by ordering defendants to appropriate the proceeds of the sale of specific property within their control to costs of compliance.[160] The common element is the direct control by the court of the expenditure of funds under defendants' control. In effect, the court reallocates defendants' budget to meet the decree's priorities.

2. *Displacement of Officials*

When faced with continuing lack of cooperation by official defendants, the court may oust them from control over the institution and replace them, at least for a time, with individuals willing to comply with the decree. The court may displace them totally with a re-

154. 533 F. Supp. at 639-40.

155. 533 F. Supp. at 639-40.

156. Palmigiano v. Garrahy, 448 F. Supp. 659, 672-73 (D.R.I. 1978).

157. Cabrera v. Municipality of Bayamon, 622 F.2d 4, 7-8 (1st Cir. 1980).

158. *See* notes 64-71 *supra* and accompanying text; *see also* Clarke v. Chicago, B. & Q. Ry. Co., 62 F.2d 440 (10th Cir.) (affirmed lower court's order allowing the marshal to remove a nuisance that defendant failed to remove), *cert. denied,* 290 U.S. 629 (1932).

159. *See* note 165 *infra* and accompanying text.

160. *See* Reed v. Rhodes, 472 F. Supp. 623, 624-25 (N.D. Ohio 1979). At an earlier stage of the *Reed* litigation, the district court had ordered the Cleveland School Board not to make payments on its debt in order to release funds for compliance; the order was stayed pending findings on the issue of discrimination. National City Bank v. Battisti, 581 F.2d 565 (6th Cir. 1977). In Wyatt v. Stickney, 344 F. Supp. 373, 377-78 (M.D. Ala.), *modified sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974), the district judge threatened to sell land under the control of the executive branch defendants if necessary to fund compliance.

ceiver,[161] may appoint officials within the organization to coordinate compliance[162] or may direct that particular functions be performed by outsiders brought into the organization for the task.[163] In each instance, the appointed person is not an outside adversary: he exercises managerial control from within the institution to the extent of his appointment.[164] Displacement is thus one of the most intrusive coercive devices, and it is generally considered an abuse of discretion to use it until defendants have repeatedly shown that they will not comply because of willful defiance or gross ineptitude.[165]

If these preconditions are met, displacement by a receiver may be an effective and permissible response to repeated claims of the type of financial impossibility involved in *Ricci v. Okin.*[166] There the court was faced with unilateral decreases in staff, contrary to a consent decree, in response to the Governor's instructions to cut the personnel budget by $5.1 million. In finding that defendants had failed to comply with the consent decrees, the district court found itself reviewing the defendants' planning and budgeting procedures in considerable detail.[167] That work could have more effectively been done by a receiver. Direct control of the budgeting process and

161. *E.g.,* Morgan v. Kerrigan, 409 F. Supp. 1141 (D. Mass. 1975), *aff'd sub nom.* Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976).

162. For example, in Reed v. Rhodes, 500 F. Supp. 252, 402-03 (N.D. Ohio), *aff'd. in part,* 635 F.2d 556 (6th Cir.), *modified,* 642 F.2d 186 (6th Cir. 1980), the district court directed the appointment of a single official in the Cleveland school system with authority to coordinate all activities related to complying with the desegregation decree. *See also* Special Project, *Remedial Process, supra* note 12, at 831-34.

163. For example, the district judge in Pugh v. Locke, 406 F. Supp. 318, 333 (M.D. Ala. 1976), *aff'd. sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied,* 438 U.S. 915, *revd. in part by companion case,* Alabama v. Pugh, 438 U.S. 781 (1978), ordered the officials in charge of the Alabama prison system to contract with the University of Alabama Dept. of Correctional Psychology to classify the inmates. After the contract was completed, the court of appeals expressed disapproval of the order, apparently because it thought it more intrusive than the situation warranted. Newman v. Alabama, 559 F.2d at 290. *See also* New York State Assn. for Retarded Children v. Carey, 456 F. Supp. 85 (E.D.N.Y. 1978) (7 of the 27 buildings at a state developmental center for the mentally handicapped turned over to a private agency for complete operation and control).

164. *See, e.g.,* Perez v. Boston Housing Auth., 379 Mass. 703, 735-38, 400 N.E.2d 1231, 1250-52 (1980); Special Project, *Remedial Process, supra* note 12, at 831-37, 841-42. Not infrequently the court will appoint someone who already has authority over the defendant institution. The effect of the receivership is then to make him solely and directly responsible to the court and relieve him from internal constraints. *See, e.g.,* Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976) (Superintendent of Schools appointed receiver of South Boston High School), *cert. denied,* 429 U.S. 1042 (1977); Newman v. Alabama, 466 F. Supp. 628 (M.D. Ala. 1979) (Governor appointed receiver of Board of Corrections).

165. *See* Morgan v. McDonough, 540 F.2d 527, 533-35 (1st Cir. 1976), *cert. denied,* 429 U.S. 1042 (1977); Newman v. Alabama, 466 F. Supp. 628, 635 (M.D. Ala. 1978); Perez v. Boston Housing Auth., 379 Mass. 703, 735-38, 400 N.E.2d 1231, 1250-52 (1980); *see also* Special Project, *Remedial Process, supra* note 12, at 835-37, 836 n.430.

166. 537 F. Supp. at 817 (D. Mass. 1982).

167. *Ricci,* 537 F. Supp. at 828-36.

detailed management by a knowledgeable official dedicated to compliance may be necessary to satisfy the court and the plaintiffs as to precisely what it is possible to accomplish with the resources at the defendant's disposal.[168] If such an official fails to attain compliance because of lack of resources, the court's attention must turn to the ultimate sources of funds.

3. *Sequestration*

Both sequestration and shutdowns indirectly coerce the defendant, as well as the political audience, including the legislature, through unpleasant collateral consequences. Historically, a plaintiff could coerce an individual who was not responsive to fine or imprisonment to comply with a decree by detaining his property under a writ of sequestration. This process was employed against both private[169] and municipal[170] corporations in lieu of imprisonment. It could also be applied to the property of a party to induce a nonparty interested in that property to cooperate in complying.[171] In *Gautreaux v. Romney*,[172] when the nonparty city of Chicago prevented the defendant Chicago Housing Authority from building public housing in compliance with the decree, the district court used a technique similar to sequestration by ordering the defendant Secretary of Housing and Urban Development not to pay federal Model Cities funds to the city until it cooperated. That order was reversed by the Seventh Circuit in an opinion that set limits on quasi-sequestration of federal funds owed to state and local governments.[173] The funds in question were to be used to provide services to the predominantly nonwhite urban poor population of Chicago. As far as the record showed, they had been used lawfully, and the activities they

168. It would be less intrusive for a monitor or an expert, responsible to the special master, to scrutinize the agency's budget process as it proceeds. *See, e.g.*, Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 746-47 (6th Cir. 1979).

169. *E.g.*, Grew v. Breed, 53 Mass. (12 Met.) 363 (1847); *see* Kroese v. General Steel Castings Corp., 179 F.2d 760, 764-65 (3d Cir.), *cert. denied*, 339 U.S. 983 (1950); 2 E. DANIELL, *supra* note 59, at *1050-51, *1053 n.4.

170. *E.g.*, Spokes v. Banbury Bd. of Health, 1 L.R.-Eq. 42, 51 (V.C. 1865).

171. The court of appeals suggested this procedure in Kroese v. General Steel Castings Corp., 179 F.2d 760 (3d Cir.), *cert. denied*, 339 U.S. 983 (1950), in which the defendant corporation allegedly could not declare a dividend, as it had been ordered, because a majority of its board of directors, who were not parties and could not be found in the jurisdiction, would not vote for one. The Third Circuit believed that sequestering the corporation's bank account would make the directors see reason. 179 F.2d at 764-65.

172. 332 F. Supp. 366 (N.D. Ill. 1971), *revd.*, 457 F.2d 124 (7th Cir. 1972).

173. Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972); *see also* Delaware Valley Citizens' Council v. Pennsylvania, 678 F.2d 470, 478-79 (3d Cir.), *cert. denied*, 459 U.S. 969 (1982); United States v. School Dist. of Ferndale, 460 F. Supp. 352 (E.D. Mich. 1978), *vacated on other grounds*, 616 F.2d 895 (6th Cir. 1980).

supported were not involved in the litigation. As the court of appeals saw the situation, the certain loss to the beneficiaries of the Model Cities Program (many of whom belonged to the plaintiff class) if the funds were cut off outweighed the possible coercive effect on the city. Accordingly, it reversed for abuse of discretion and remanded.[174]

In a subsequent decision, however, the Seventh Circuit affirmed the district court's suspension of the distribution of general revenue sharing funds to Chicago as a means of compelling the city to end racial discrimination in its police department.[175] *Gautreaux* was distinguished on the ground that the funds in the instant case were payable to a contumacious party and had been used in large part to fund the police department which was the focus of the wrongful conduct.[176] The Third Circuit has also clarified the limits of *Gautreaux* in *Delaware Valley Citizens Council v. Pennsylvania.*[177] As noted above,[178] the Pennsylvania legislature had refused to appropriate funds needed to comply with a consent decree establishing an anti-pollution vehicle inspection system, and the district court had responded by ordering the federal Department of Transportation not to pay highway construction and maintenance funds to the state highway department until the state complied.[179] In affirming, the court of appeals held that, in contrast to *Gautreaux,* the district court had acted within its discretion. The Third Circuit cited four reasons:

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174. *Gautreaux,* 457 F.2d at 128.

175. United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977), *affg. in part* 411 F. Supp. 218 (N.D. Ill. 1976), *cert. denied,* 436 U.S. 932 (1978).

It should be noted that the general revenue sharing statute itself prohibits racial discrimination by governments receiving funds under it, 31 U.S.C. § 6716(a) (1982), and gives the Attorney General and private persons a right of action to enforce that prohibition by measures including the termination, suspension, or escrow of payments. 31 U.S.C. §§ 6720-21 (1982).

The nondiscrimination and federal action provisions appeared in the original statute. *See* Pub. L. 92-512 § 122(a), (c), 86 Stat. 919, 932 (1972). They were clarified, and the private right of action added, in 1976. *See* Pub. L. 94-488, § 7(b), 90 Stat. 2341, 2349-50 (1976); S. REP. NO. 1207, 94th Cong., 2d Sess. 33-34, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5151, 5183-84; H.R. REP. NO. 1720, 94th Cong., 2d Sess. 37, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5188, 5205. The statute was renumbered, without substantive change, when title 31 was codified and enacted into positive law in 1982. *See* Pub. L. 97-258, 96 Stat. 1010, 1024-25, 1027-28 (1982); H.R. REP. NO. 651, 97th Cong., 2d Sess. 1, 3-4 *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 1895, 1895-98.

176. United States v. City of Chicago, 549 F.2d 415, 422 (7th Cir. 1977).

177. 678 F.2d 470 (3d Cir.), *affg.* 533 F. Supp. 869 (E.D. Pa.), *cert. denied,* 459 U.S. 969 (1982). Since the United States was one of the plaintiffs, the Third Circuit concluded Pennsylvania could be made a defendant without eleventh amendment problems. *See* 678 F.2d at 475. *But cf.* Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900, 909 (1984) (where the Supreme Court stated that the presence of the United States as a party does not affect the eleventh amendment immunities of a state defendant vis-à-vis private parties).

178. *See* text at notes 129-31 *supra.*

179. *Delaware Valley,* 533 F. Supp. at 884.

the funds were being denied to a contumacious party; the decision was not inconsistent with the policy underlying the funding program; spending the funds would contribute to solving the pollution problem that the primary decree was intended to remedy; and any collateral harm to the road-using public in Pennsylvania could be ended by the action of their legislators.[180]

The object of quasi-sequestration is to get executive branch defendants to comply by holding hostage funds for activities they want to pursue.[181] While it acts on them, it can also be expected to influence the attitude of a legislature which also favors the use to which the sequestered funds would be put, giving that body the unpleasant choice between foregoing the suspended program or finding the money to replace the sequestered funds.[182] The drawbacks of this method of coercion are the harm to the innocent members of the public who benefit from the program funded by the sequestered money and also the administrative inconvenience to the federal funding agency. The few cases involving such quasi-sequestration have therefore limited its use to instances where the source of federal funds was before the court,[183] the recipient was not in compliance and withholding would not be an abuse of discretion. On the latter point, the district court has been required to take into account the effect of suspension on program beneficiaries, the relation of the pro-

180. *Delaware Valley,* 678 F.2d at 478-79.

181. *See* Delaware Valley Citizens' Council v. Pennsylvania, 551 F. Supp. 827, 833-34 (E.D. Pa. 1982).

An interesting example of sequestration as a coercive device is Dowdell v. City of Apopka, 511 F. Supp. 1375, 1383-84 (M.D. Fla. 1981), *modified,* 698 F.2d 1181 (11th Cir. 1983), in which the district court found the city had intentionally failed to provide street paving, water and sewer services to black neighborhoods in violation of the fourteenth amendment, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1982), and the Revenue Sharing Act, 31 U.S.C. § 6716(a) (1982). The interim remedy was an injunction prohibiting defendants from spending "any funds on the construction or improvement of municipal services in the white community until such time as the street paving, storm water drainage and water distribution systems in the black community are on par with that of the white sections." 511 F. Supp. at 1384. *See also* note 175 *supra* and accompanying text.

182. *See Delaware Valley,* 678 F.2d at 478-79; *Dowdell,* 551 F. Supp. at 834.

183. *See* Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972) (Secretary of Housing and Urban Development named as a co-defendant, charged with aiding and abetting the Chicago Housing Authority's allegedly discriminatory policies); *see also* United States v. City of Chicago, 549 F.2d 415, 439-42 (7th Cir. 1977) (action consolidating two private anti-discrimination suits with action brought by the United States), *cert. denied,* 436 U.S. 932 (1978); Delaware Valley Citizens' Council v. Pennsylvania, 533 F. Supp. 869 (E.D. Pa.) (consolidation of a private suit with one brought by the United States), *affd.,* 678 F.2d 470 (3d Cir.), *cert. denied,* 459 U.S. 969 (1982). *But cf.* Dowdell v. City of Apopka, 511 F. Supp. 1375 (M.D. Fla. 1981) (revenue sharing funds sequestered despite lack of a federal party), *modified,* 698 F.2d 1181 (11th Cir. 1983). The court in Dowdell acted, however, by ordering local defendants to pay the funds over after they had been received from the federal government. 511 F. Supp. at 1386. Moreover, the court had explicit statutory authority to act in this manner. *See* 31 U.S.C. § 6721 (1982).

gram to the purposes of the primary decree, and the likelihood that any harm to beneficiaries will be offset by compliance or prevention of further harm to the plaintiffs.[184]

4. *Shutdown of the Institution*

The most extreme sanction is to shut down the institution and, in some cases, release the inmates if the executive branch defendants will not or cannot bring it into compliance with the substantive standards of the decree. Shutdown is a permissible sanction because of the conditional nature of the defendants' duties: they may not operate the institution unless they observe plaintiffs' federally protected rights in the process, though they need not necessarily operate the institution at all.[185] Shutdown is often threatened as a response to financially based noncompliance.[186] However, the threats rarely turn into action even in the face of continuing noncompliance.[187]

Shutdown is the nuclear deterrent of structural litigation, threat-

184. *See* Delaware Valley Citizens' Council v. Pennsylvania, 678 F.2d 470, 478-79 (3d Cir.), *cert. denied,* 459 U.S. 969 (1982).

185. *See* notes 279-84 *infra* and accompanying text.

186. *E.g.,* New York State Assn. for Retarded Children v. Carey, 631 F.2d 162, 165 (2d Cir. 1980); Welsch v. Likins, 550 F.2d 1122, 1132 n.8 (8th Cir. 1977); Hamilton v. Love, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971); Robinson v. Cahill, 70 N.J. 155, 160, 358 A.2d 457, 459, *modified,* 70 N.J. 464, 360 A.2d 400 (1976).

187. Most actual shutdowns involve the closure of uninhabitable portions of prisons, *e.g.,* Palmigiano v. Garrahy, 443 F. Supp. 956, 958 (D.R.I. 1977), *affd.,* 616 F.2d 598 (1st Cir.), *cert. denied,* 449 U.S. 839 (1980); Gates v. Collier, 390 F. Supp. 482, 490 (N.D. Miss.), *affd.,* 501 F.2d 1291 (5th Cir. 1975); Battle v. Anderson, 376 F. Supp. 402, 428 (E.D. Okla. 1974), *affd.,* 564 F.2d 388 (10th Cir. 1977). In Rhem v. Malcolm, 389 F. Supp. 964, 966 (S.D.N.Y.), *affd.,* 527 F.2d 1041 (2d Cir. 1975), New York City closed the Manhattan House of Detention (the "Tombs") and transferred the inmates rather than renovate the facility. *Cf.* Inmates of Suffolk County Jail v. Kearney, 573 F.2d 98 (1st Cir. 1978) (in which the court, citing unconscionable delay, ordered the Charles St. Jail to close six months after the date of the opinion). Similar to shutdowns are injunctions limiting the number of detainees to the institution's capacity. *E.g.,* Miller v. Carson, 401 F. Supp. 835, 899 (M.D. Fla. 1975), *affd. in part,* 563 F.2d 741 (5th Cir. 1977); Hamilton v. Love, 328 F. Supp. 1182, 1195 (E.D. Ark. 1971).

In Newman v. Alabama, 683 F.2d 1312, 1315-17 (11th Cir. 1982), *cert. denied,* 103 S. Ct. 1773 (1983), the district court, after a history of violation of a structural consent decree, attempted to reduce overcrowding by ordering the release of 627 named inmates of the Alabama Prison System. The court of appeals reversed, holding that the new order was improper until it was shown that contempt proceedings could not produce compliance and that, in any event, the district court abused its discretion by designating individual prisoners for release. 683 F.2d at 1318-20; *cf.* Smith v. Sullivan, 611 F.2d 1039, 1044-46 (5th Cir. 1980); Union County Jail Inmates v. Scanlon, 537 F. Supp. 993, 1011 (D.N.J. 1982).

On the other hand, the New Jersey Supreme Court finally obtained compliance with its decree regarding financial support for public schools, Robinson v. Cahill, 69 N.J. 133, 351 A.2d 713 (1975), by forbidding the expenditure of state funds for support of the public schools after July 1, 1976. Robinson v. Cahill, 70 N.J. 155, 358 A.2d 457 (1976). The legislature enacted satisfactory income tax and school aid measures before the school year began in September and the injunction was lifted. *See* D. MANDELKER & D. NETSCH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 821 (1977); Note, Robinson v. Cahill: *A Case Study in Judicial Self-Legitimization,* 8 RUT-CAM. L.J. 508, 518 n.83 (1977).

ening to destroy the institution in order to save it. It works on two assumptions: that the legislature would rather provide the necessary money than see the institution closed and, if not, that the plaintiff class will benefit from the shutdown more than the defendants and the public will be harmed by it. The first is only plausible when there is a broad-based constituency beyond the friends of the plaintiff class who demand that the institution stay open. When this assumption is weak, the court's threat is an empty bluff. It is perhaps true that political decision makers are willing to pay any price to keep open the prisons and those mental institutions whose inmates would be a danger to the public if released. There may likewise be a general demand that the schools remain open.[188] However, when merely "benevolent" institutions, such as institutions for the mentally handicapped or non-dangerous mentally ill are concerned, the threat with which the court is trying to raise money is merely the forced abandonment of what may be seen as a public charity whose inmates will be a burden only on their families or, at worst, an unsettling public presence in some communities.[189] Without the incentive generated by a broad-based benefit, the political will to pay for benevolent institutions may be weak enough that the legislature would consider shutdown to be a viable alternative to the costs imposed by the decree.

Shutdown is frequently not a credible threat for another reason. When a benevolent institution is involved, the plaintiff class does not want to be released from its relation to the state. Instead it wants better services from the state than it has been getting. Putting its members on the street is not the way to get them. The plaintiff class in prison litigation, it is true, would be happy to end their dependance on the state, and shutdown is thus a more plausible threat in these cases.[190] However, the gain to such plaintiffs, duly convicted criminals, would be both a windfall beyond their rights under the primary decree[191] and a genuine and substantial injury to the public among whom they would be released. Therefore, while the threat of shutdown has some use in prison cases, its effect on its supposed ben-

188. *See* D. MANDELKER & D. NETSCH, *supra* note 187. This demand is not inexhaustible, however, and there are instances of public schools being closed because of voter rejection of tax increases. *See, e.g.*, N.Y. Times, Jan. 3, 1977, at 22, col. 3 (Ohio); *id.*, Oct. 30, 1977, § 4, at 4, col. 5 (Toledo, Ohio).

189. *See* People of New York *ex rel.* Abrams v. 11 Cornwell Corp., 695 F.2d 34 (2d Cir. 1982); Seide v. Prevost, 536 F. Supp. 1121 (S.D.N.Y. 1982); N.Y. Times, Dec. 30, 1980, § 2, at 7, col. 1.

190. *See* note 187 *supra.*

191. *See* Newman v. Alabama, 683 F.2d 1312, 1318-19 (11th Cir. 1982).

eficiaries makes it a weak device for coercing the legislature in other institutional litigation.

IV. Proceeding Against the Fisc

A. *Preliminaries: Why and How*

Responding to claims of financial impossibility by coercing the defendant institution has inherent limits. If the contempt power is used to reallocate funds under the control of the executive branch defendants, it operates within the limits of their total budget. Even if the defendants are displaced by court appointed actors without more, the new management merely stands in the financial shoes of the old. The court is constrained in putting indirect pressure on the legislature through quasi-sequestration by the potential collateral harm to innocent beneficiaries of the withheld funds. Finally, the threat of shutdown is not a plausible one except for instances such as prisons and schools, and there the collateral harm to the public limits its usefulness. A legislature that is recalcitrant either because of political hostility to the decree or because of genuine lack of resources to meet the demand for essential public services can withstand indirect pressure if it has the political will. Whether the legislature successfully resists or ultimately provides the funds,[192] the process of indirect financial pressure through the executive branch defendants is time consuming and full of friction because it consists in large part of bluff and counter-bluff.[193] Both plaintiffs' interests in the fruits of the new decree and the court's interest in its own efficiency and authority therefore press toward direct proceedings against the source of funds as a more effective means of obtaining compliance.[194]

192. *Compare* New York State Assn. for Retarded Children v. Carey, 631 F.2d 162 (2d Cir. 1980) (court reversed contempt order against the Governor when he was unable to provide funding for review panel for institution due to lack of appropriation by legislature), *with* Palmigiano v. Garrahy, 599 F.2d 17, 20-21 (1st Cir. 1979) (court of appeals remanded case for further consideration after legislature approved required funding to attain goal of the injunction); *see* Note, *Federal Courts and State Prison Reform: A Formula for Large Scale Federal Intervention into State Affairs,* 14 Suffolk U. L. Rev. 545, 575 (1980).

193. *See* D. Horowitz, *supra* note 2, at 258-59; Note, *Implementation Problems, supra* note 2, at 454-55; Note, *Federal Courts and State Prison Reform, supra* note 192, at 575.

194. *See, e.g.,* Welsch v. Likins, 550 F.2d 1122, 1129-31 (8th Cir. 1977); Halderman v. Pennhurst State School & Hosp., 533 F. Supp. 631, 640 (E.D. Pa. 1981), *aff'd.,* 673 F.2d 628 (3d Cir. 1982), *cert. denied,* 104 S. Ct. 1315 (1984); New York State Assn. for Retarded Children v. Carey, 492 F. Supp. 1110, (E.D.N.Y.), *revd.,* 631 F.2d 162 (2d Cir. 1980); *cf.* Delaware Valley Citizens' Council v. Pennsylvania, 533 F. Supp. 869, 880-81 (E.D. Pa.), *aff'd.,* 678 F.2d 470 (3d Cir.) (where it is clear the Commonwealth defendants are physically, practically and financially able to comply with the consent decree and there is no legal barrier to implementation, then proceeding against the fisc is an effective means of obtaining compliance), *cert. denied,* 459 U.S. 969 (1982).

If there is substantive authority to proceed against a government treasury, the mechanics of the operation are relatively simple. Under Rule 70 of the Federal Rules of Civil Procedure,[195] the court's order to the state disbursing officer to pay the required amount will have the same effect as if the executive branch defendant had drawn the funds under valid state law.[196] Some courts have also issued writs of execution against government bodies under Rule 69 of the Federal Rules.[197] The utility of this practice is limited, however, because the rule authorizes execution "in accordance with the practice of the state where the district court is held" and many states restrict or prohibit execution against government funds or property.[198] While the exercise of some judicial ingenuity permits this stricture to be avoided,[199] a Rule 70 order directed to the disbursing officer or to a bank holding government funds[200] is the more straightforward and certain method.

The real problem is not with the mechanics of the order but with the existence of substantive authority to issue it. If the executive branch defendants are state officers or agencies, the attempt to proceed against the treasury raises questions of eleventh amendment immunity. No such problems are involved if the defendants are a

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195. *See* text at note 67 *supra* for the content of this rule.

196. *See* Spain v. Mountanos, 690 F.2d 742, 744-47 (9th Cir. 1982); Gary W. v. Louisiana, 622 F.2d 804 (5th Cir. 1980), *cert. denied,* 450 U.S. 994 (1981); Gates v. Collier, 616 F.2d 1268, 1271 (5th Cir. 1980), *rehg. granted,* 636 F.2d 942 (5th Cir. 1981).

197. *See, e.g.,* Collins v. Thomas, 649 F.2d 1203 (5th Cir. 1981), *cert. denied,* 456 U.S. 936 (1982); La Raza Unida v. Volpe, 545 F. Supp. 36 (N.D. Cal. 1982). FED. R. CIV. P. 69(a) provides in pertinent part:

> The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held . . . except that any statute of the United States governs to the extent that it is applicable.

198. *See, e.g.,* MISS. CODE ANN. § 11-45-5 (1972); N.Y. CIV. PRAC. LAW § 5207 (McKinney 1978); S.D. CODIFIED LAWS ANN. § 21-32-14 (1979); WASH. REV. CODE ANN. § 4.92.040 (1983); *cf.* ARIZ. REV. STAT. ANN. § 12-826 (1982) (establishing reporting requirements for judgments against the state); MICH. STAT. ANN. § 27A.6458 (Callaghan 1977) (court judgment against the state to specify the agency from whose appropriation judgment shall be paid).

199. In La Raza Unida v. Volpe, 545 F. Supp. 36, 38 (N.D. Cal. 1982), the district court found that 42 U.S.C. § 1988, which authorizes an award of attorneys' fees, was a "statute of the United States" within the meaning of rule 69(a). It is arguable that substantive statutes such as 42 U.S.C. § 1988 (1982) were not intended to be included in this language. *See* FED. R. CIV. P. 69(a) advisory committee note.

200. The writ of sequestration was available in equity for use as a collection device in the same manner as garnishment, at least when the third party did not contest that the funds in his hands were owed to the defendant in the main action. *See* Grew v. Breed, 53 Mass. (12 Met.) 363, 370 (1847); Miller v. Huddlestone, 22 Ch. D. 233 (1882). When there is substantive authority for an order, FED. R. CIV. P. 71 permits process to be directed to non-parties as if they were parties. *See generally* 12 C. WRIGHT & A. MILLER, *supra* note 66, §§ 3031, 3033. Such an order would clearly entail less confrontation with state authorities than one directed to the disbursing officer.

local government or its officers — the eleventh amendment does not apply to local government units.[201] Moreover, since *Monell v. Department of Social Services of the City of New York*[202] and *Owen v. City of Independence*,[203] local governments may be sued in their own name under 42 U.S.C. § 1983 for both injunctive relief and compensatory damages arising from government policy that violates the Constitution or a federal statute. However, the direct enforcement against either a state or local government treasury of the indefinite future financial obligations of a structural decree, with its concomitant effect on the political decision to tax and appropriate, raises serious questions of comity under the present Supreme Court's view of the appropriate relationships between the federal courts and state and local governments.

B. Ex parte Young *and Eleventh Amendment Immunity*

If a state officer or agency is the executive branch defendant, the attempt to proceed directly against the treasury reaches the limit of the convenient fiction erected in *Ex parte Young*[204] whereby a federal court may enjoin the acts of a state government without falling foul of the eleventh amendment.[205] The *Young* doctrine permits the federal courts to issue both prohibitory and mandatory injunctions against acts of state executive officers that violate federal law on the ground that the acts, if unconstitutional, are not the state's and therefore not immune. In the words of the opinion:

> The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in

201. *See* Monell v. Department of Social Servs. of the City of New York, 436 U.S. 658, 690 n. 54 (1978); Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).

202. 436 U.S. 658 (1978).

203. 445 U.S. 622 (1980).

204. 209 U.S. 123 (1908).

205. "Eleventh amendment" is used in the sense of the entire body of law governing state immunity from suit in the federal courts. *See* note 27 *supra*.

> his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.[206]

Under the pretense that the officer is being held personally responsible for acts beyond his legal authority,[207] he, or his successors in authority,[208] are subject to the federal court's control of their future official behavior. Since the state government, as an entity, can act only through its individual officers, the effect of the injunction is therefore to control the action of the state, or at least its executive branch, as effectively as if the state had been enjoined in its own name.[209] The *Young* doctrine is at the source of the federal court's power to protect affirmatively federal rights against the unconstitutional implementation of state law.[210] Though a transparent fiction,[211] its "evident necessity"[212] renders its existence secure.

The eleventh amendment forbids unconsented suit in the federal courts by an individual against a state in its own name for any type of relief.[213] Given *Young,* it would be superfluous, indeed a "gross pleading error,"[214] for a plaintiff seeking injunctive relief based on federal law against state executive action to name the state as a

206. 209 U.S. at 159-60.

207. Despite the officer's supposedly "personal" and "unauthorized" use of the state's authority, his acts constitute "state action" for the purpose of the fourteenth amendment. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 287-88 (1913).

208. *See* FED. R. CIV. P. 25(d)(1); Maria Santiago v. Corporacion de Renovacion Urbana, 554 F.2d 1210, 1213 (1st Cir. 1977); Lucy v. Adams, 224 F. Supp. 79 (N.D. Ala. 1963), *aff'd.,* 328 F.2d 892 (5th Cir. 1964). For an injunction to apply against a successor, however, there must be some indication that the unlawful practice continues under his administration. *See* Spomer v. Littleton, 414 U.S. 514, 520-23 (1974); Sarteschi v. Burlein, 508 F.2d 110, 114 (3d Cir. 1975).

209. *See In re* Ayers, 123 U.S. 443, 502-04 (1887); Maria Santiago v. Corporacion de Renovacion Urbana, 554 F.2d 1210, 1212 (1st Cir. 1977); *cf.* Wilson v. United States, 221 U.S. 361, 366-77 (1911) (subpoena issued to "corporation" is binding on those individuals who comprise entity).

210. Edelman v. Jordan, 415 U.S. 651, 664 (1974) ("[*Young*] has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect.").

211. The cases referring to the *Young* doctrine as a fiction are legion. For recent examples, see Jackson v. Hyakawa, 682 F.2d 1344, 1351 (9th Cir. 1982); Downing v. Williams, 624 F.2d 612, 626 n.21 (5th Cir. 1980), *vacated,* 645 F.2d 1226 (5th Cir. 1981); Arthur v. Nyquist, 573 F.2d 134, 138 (2d Cir.), *cert. denied,* 439 U.S. 860 (1978); Vecchione v. Wohlgemuth, 558 F.2d 150, 156 (3d Cir.), *cert. denied,* 434 U.S. 943 (1977); Maria Santiago v. Corporacion de Renovacion Urbana, 554 F.2d 1210, 1212 (1st Cir. 1977); Hucker v. Milburn, 538 F.2d 1241, 1243-44 n.4 (6th Cir. 1976).

212. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-38, at 146 (1978). In its recent holding that the eleventh amendment prohibits a federal injunction against a state officer's violation of *state* law, the Supreme Court's majority opinion reiterates the fictitious underpinnings of *Young* as an anomalous, but essential, protection of the supremacy of federal law. *See* Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900 (1984).

213. Alabama v. Pugh, 438 U.S. 781 (1978).

214. L. TRIBE, *supra* note 212, § 3-35, at 133.

party. One does not, however, avoid eleventh amendment immunity merely by designating an executive officer or agency as defendant and enjoining the officer or agency to disburse funds. It is well settled that the substance of the relief sought, rather than the name of the defendant, governs eleventh amendment immunity; the state may be the real party in interest although an officer or agency is named as defendant.[215]

Against what relief, then, does the eleventh amendment provide immunity? Essentially, it protects the state against federally-based claims for monetary relief that will necessarily be borne by the state's treasury.[216] The clearest instance is the money judgment against the state or a disbursing officer in his official capacity.[217] However, the Supreme Court has also applied it to preclude specific enforcement of accrued state obligations by injunction against officers where the effect on the treasury would be equivalent to that of a money judgment.[218] Regardless of form, the substance of the immunity has been

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215. *See* Edelman v. Jordan, 415 U.S. 651, 668 (1974); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 463 (1945); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 50 (1944); *In re* Ayers, 123 U.S. 443, 465 (1887).

216. *See* Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900, 909-11 (1984); Edelman v. Jordan, 415 U.S. 651, 663 (1974); Great N. Life Ins. Co. v Read, 322 U.S. 47, 49-51 (1944); Smith v. Reeves, 178 U.S. 436 (1900).

217. *See, e.g.*, Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945).

218. See Edelman v. Jordan, 415 U.S. 651, 666 (1974), which cites *In re* Ayers, 123 U.S. 443 (1887), and Hagood v. Southern, 117 U.S. 52 (1886), two cases which arose from the rash of post-Reconstruction defaults on Southern state bonds.

The leading case in this line is Louisiana v. Jumel, 107 U.S. 711 (1883), which grew out of an issue of $15 million in seven percent bonds by the Reconstruction-era government of Louisiana, backed by a dedicated property tax and by an amendment to the state constitution declaring the bonds to be a contract. A "Board of Liquidation" consisting of the governor, lieutenant governor, treasurer, auditor, and several other state officers was established to collect the tax and pay the bonds. In 1880, the post-Reconstruction government amended the constitution to reduce the interest rate on the outstanding bond coupons to between two and four percent and to limit the total state property tax to an amount insufficient to pay their face value. 107 U.S. at 713-16. Bondholders brought suit against the Board members under the contract clause, U.S. CONST. art. I, § 10, cl. 1, for a mandamus compelling them to pay the defaulted coupons at face value. The federal circuit court denied the relief as being, in effect, a suit against the state. 107 U.S. at 719.

The Supreme Court affirmed. The opinion conceded that Louisiana had breached its contract with the bondholders. 107 U.S. at 721. In passing, the Court stated that the eleventh amendment would prohibit suit directly against the state by out-of-state bondholders. 107 U.S. at 720. It held that the mandamus against the Board would have the same effect, largely because the money available to pay the bonds was state property commingled in the state treasury. 107 U.S. at 722-27. The opinion concluded:

> The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. . . . When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has . . . allowed to be done; and if the law permits coercion of the public

to protect the state's political discretion to tax or appropriate against a federal judicial decision that the state's past conduct has created a fixed monetary claim against it.[219] Under the law as it stood before the era of structural litigation, the "state," for eleventh amendment purposes, was its treasury.

Therefore, one obvious reaction of state defendants to the fiscal burdens imposed by structural decrees was to contend that the financial effect of the action made the suit, despite its form under *Young,* in substance one which the eleventh amendment had removed from

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officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State.

107 U.S. at 727-28. While Chief Justice Waite's opinion is a bit prolix, it states the issue plainly enough. Justice Harlan's dissent, attempting to untangle the Chief Justice's thoughts, assumes that the majority based its decision on the eleventh amendment and argues that the amendment does not apply to a federal constitutional claim against a state officer. 107 U.S. at 752-61 (Harlan, J., dissenting).

Jumel was followed by Hagood v. Southern, 117 U.S. 52 (1886), a case presenting a less direct assault on the state treasury. South Carolina's Reconstruction government had in March 1872 made certain "revenue bond scrip" receivable in payment of taxes; in December 1873 the new regime enacted a statute forbidding any state officer to accept the scrip in payment of taxes. 117 U.S. at 54-56. Bondholders who had unsuccessfully tendered scrip for taxes brought suit for a declaratory judgment that the authorizing statute was a binding contract and that the repealing statute violated the contract clause; they also requested "proper process" to compel the comptroller-general to accept the scrip. The circuit court granted such a decree. 117 U.S. at 57-61. The Supreme Court reversed, holding that the decree was in essence one for specific performance by the state of its contract to accept the scrip in payment of taxes and was therefore barred by the eleventh amendment as applied in *Jumel.* 117 U.S. at 67-68. It characterized the decree as an attempt to "enforce the judgment of the court against the State through its officers, in a suit to which it is not a party." 117 U.S. at 71.

Jumel was again followed in *In re* Ayers, 123 U.S. 443 (1887), which also involved bond coupons receivable for taxes. Here, however, the Supreme Court had previously held that Virginia's repudiation violated the contract clause and that a state tax collector who refused to accept coupons and then distrained on the bondholder for nonpayment of taxes was personally liable for conversion. *See* Poindexter v. Greenhow, 114 U.S. 270 (1885). The state responded with a statute requiring its Attorney General to institute what amounted to unusually burdensome litigation against anyone who tendered coupons: the case would be heard in Richmond and the defendant had the burden of proving the genuineness of the coupons. The harassing effect of the litigation effectively destroyed the after-market for the coupons among Virginia taxpayers, and out-of-state bondholders who had purchased the bonds for resale to Virginia taxpayers obtained a temporary restraining order against enforcement. *In re* Ayers, 123 U.S. at 446-55. Attorney General Ayers was held in contempt for violating the temporary restraining order, but the Supreme Court reversed. Citing *Hagood* and *Jumel,* it concluded that the restraining order was an attempt to compel Virginia to accept coupons on the terms provided when they were issued, and therefore a suit against the treasury for specific performance forbidden by the eleventh amendment. 123 U.S. at 490-92, 502-04.

These three cases stand for the proposition that injunctive relief that requires "payment" from the state treasury, either by way of direct disbursement of funds or by cancellation of debts owing to the state, is within the proscription of the eleventh amendment and so beyond the power of a federal court.

219. *See* Great N. Life Ins. Co. v. Read, 322 U.S. 47, 49-51 (1944); Smith v. Reeves, 178 U.S. 436, 439-40 (1900); Louisiana v. Jumel, 107 U.S. 711, 727-28 (1883).

the jurisdiction of the federal courts.[220] In response, the Supreme Court has taken two conflicting approaches. The first, in *Edelman v. Jordan*,[221] *Milliken v. Bradley*,[222] and *Hutto v. Finney*,[223] denies eleventh amendment immunity from decrees against state executive officers that impose *prospective* financial commitments on their agencies. The second, in *Alabama v. Pugh*[224] and *Quern v. Jordan*,[225] emphasizes the immunity of the state, as opposed to its officers, from direct judicial relief. The power of the federal courts to fund structural decrees by direct proceedings against a state treasury turns upon where the boundary is drawn between these two lines of authority.

Edelman was a suit against Illinois officials administering a federally funded welfare program which had systematically failed to meet the federal time limits for processing benefit claims, with the result that eligible applicants never received benefits due them for the period between mandated and actual approval. The district court enjoined the defendants to comply with the federal regulations in the future and to "release and remit . . . benefits wrongfully withheld" in the past.[226] The defendants asserted on appeal that the award of past-due benefits was a judgment against the state in violation of the eleventh amendment. The court of appeals affirmed the district court, arguing that this provision of the order was equitable restitution permitted under *Young*.[227]

The Supreme Court reversed on this point, stating that regardless of the equitable form of the relief, payment of the past-due benefits was "in practical effect indistinguishable in many aspects from an award of damages against the State."[228] The opinion identifies four such "aspects":

1. The payment is "compensation" for past violations of the law.
2. The defendants were, at the time of the violation, "under no court-imposed obligation" to conform to the correct legal standard.

220. *E.g.*, Jordan v. Weaver, 472 F.2d 985, 989-90 (7th Cir. 1971), *revd. sub nom.* Edelman v. Jordan, 415 U.S. 651 (1974); Rothstein v. Wyman, 467 F.2d 226, 236 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973).

221. 415 U.S. 651, 664 (1974).

222. 433 U.S. 267, 289-90 (1977).

223. 437 U.S. 678, 690 (1978).

224. 438 U.S. 781 (1978).

225. 440 U.S. 332, 345 n.17 (1979).

226. *Edelman*, 415 U.S. at 656.

227. Jordan v. Weaver, 472 F.2d 985, 993-94 (7th Cir. 1973), *revd. sub nom.* Edelman v. Jordan, 415 U.S. 651 (1974).

228. *Edelman*, 415 U.S. at 668.

3. The award will be paid from state funds "to a virtual certainty" and not by the defendant state officials individually;
4. The award is "measured in terms of monetary loss resulting from a past breach of a legal duty" by the defendant state officials.[229]

Therefore, the opinion concludes, the order to pay past-due benefits was not within the *Young* doctrine and was barred by the eleventh amendment.

The opinion carefully distinguishes the retroactive award from the financial consequences of the order to comply with federal law in the future. It notes that in *Goldberg v. Kelly*[230] and *Graham v. Richardson,*[231] the Court had ordered procedural and substantive changes in state welfare administration under which "[s]tate officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous conduct."[232] The *Edelman* opinion justified this effect virtually without explanation on the ground that the "ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Young.*"[233] It should be noted, however, that the decrees in *Goldberg* and *Graham,* while controlling the eligibility of individuals for benefits, did not direct the state to maintain any specific aggregate level of benefits.[234]

The Court elaborated the distinction between retrospective and prospective payments in *Milliken v. Bradley* (*Milliken II*).[235] In *Milliken I,* the Supreme Court had limited the reach of the busing remedy to the City of Detroit and rejected the lower court's attempt to extend the remedy beyond those school districts where constitutional violations had been found.[236] On remand, the district court had ordered the Detroit school board to implement programs of reading instruction, teacher training, testing and student counselling, both to assist effective desegregation and to remedy the adverse effects of the

229. 415 U.S. at 668.

230. 397 U.S. 254 (1970).

231. 403 U.S. 365 (1971).

232. *Edelman,* 415 U.S. at 668.

233. 415 U.S. at 668.

234. *See* Graham v. Richardson, 403 U.S. 365 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970). Justice Black's dissent in *Goldberg* assumes that the benefit pool will remain constant. 397 U.S. at 278-79 (Black, J., dissenting).

235. 433 U.S. 267 (1977), *affg.* 540 F.2d 229 (6th Cir. 1976), *affg.* 402 F. Supp. 1096 (E.D. Mich. 1975).

236. Milliken v. Bradley, 418 U.S. 717, 744-45 (1974) (*Milliken I*), *revg.* 484 F.2d 215 (6th Cir. 1973), *modifying* 345 F. Supp. 914 (E.D. Mich. 1972).

former segregated system on pupils and teachers.[237] From the beginning of the litigation, the Governor of Michigan and the state's education officials were joined as defendants,[238] and subsequently the State of Michigan, through its officials, was found guilty of fostering the segregation of Detroit's schools.[239] The decree therefore ordered the State to pay one half the costs of the court-ordered desegregation plan.[240] Since this had largely been proposed by the Detroit Board with plaintiff's acquiescence, Justice Powell's concurring opinion in *Milliken II* aptly characterized the decree as a combined attack by the plaintiffs and the Detroit school board on the state's treasury.[241]

The state defendants, among other objections, claimed that their obligation to pay for the remedial progress was " 'in practical effect, indistinguishable from an award of money damages against the state based upon the asserted prior misconduct of state officials' "[242] and therefore barred under the eleventh amendment as interpreted in *Edelman*.[243] The Court rejected this argument, stating that the expenditures, despite their "direct and substantial" effect on the treasury, were to be applied prospectively to bring about the benefits of a desegregated school system by curing the past effects of segregation.[244] Even though the court-mandated programs would admittedly have a compensatory effect, the Court viewed this as subordinate to the plan's prospective role in the continuing operation of the school system.[245] Moreover, unlike the invalid award in *Edelman,* the state did not pay "an accrued monetary liability" to individual citizens.[246] Therefore, the opinion concludes, the funding order fell within the prospective relief permitted under *Young*.[247]

In *Edelman* and *Milliken* the Court indicated that the distinction

237. Bradley v. Milliken, 402 F. Supp. 1096, 1118-19, 1138-45 (E.D. Mich. 1975), *aff'd.,* 540 F.2d 229 (6th Cir. 1976), *aff'd.* 433 U.S. 267 (1977).

238. The original defendants in the suit were the Board of Education of the City of Detroit, its members and its former superintendent of schools, the Governor, the Attorney General, the State Board of Education and the State Superintendent of Public Instruction of Michigan. On an appeal of the district court's denial of a preliminary injunction, the Court of Appeals reversed that portion of the order which dismissed the Governor and Attorney General as defendants. Bradley v. Milliken, 433 F.2d 897, 905 (6th Cir. 1970).

239. Bradley v. Milliken, 338 F. Supp. 582, 592 (E.D. Mich. 1971), *aff'd.,* 484 F.2d 215 (6th Cir. 1973), *revd. on other grounds,* 418 U.S. 717 (1974).

240. Bradley v. Milliken, 540 F.2d 229, 246 (6th Cir. 1976), *aff'd.,* 433 U.S. 267 (1977).

241. *Milliken II,* 433 U.S. at 293 (Powell, J., concurring).

242. *Milliken II,* 433 U.S. at 289 (quoting Brief for Petitioner at 34).

243. *Milliken II,* 433 U.S. at 289 (citing Edelman v. Jordan, 415 U.S. at 651).

244. *Milliken II,* 433 U.S. at 289-90.

245. *Milliken II,* 433 U.S. at 290.

246. *Milliken II,* 433 U.S. at 290 n.22 (distinguishing *Edelman v. Jordan*).

247. *Milliken II,* 433 U.S. at 288-91.

between forbidden relief against the state and permissible relief against state officials was not clear cut.[248] The predominant factor leading the Court to conclude that a certain type of relief is impermissible appears to be the payment of specific, ascertainable funds to identifiable individuals; this is forbidden, at least in the absence of violation of a prior court order.[249] In contrast, when the "compensatory" elements of permissible prospective relief run to a class whose members are the unspecified future clients of the institution, relief is permissible because class members are not necessarily the victims of past wrongful conduct and will not be "compensated" except by participating in the class in the future.[250] In other words, individual financial relief, complete when paid, is analogous to damages; relief in kind as a side effect of a properly functioning institution is not, cost what it may. From the state's point of view the result appears paradoxical: the eleventh amendment protects it from a perfected, specific liability but leaves it open to potentially unlimited inchoate financial obligation. It should be noted, however, that both cases involve primary decrees against executive branch defendants; neither purports to direct the legislature to provide the funds or to continue the operation and neither deals with a refusal of the legislature to do so.[251] The opinions therefore do not consider the extent to which financial obligations of executive officers may be enforced against the state treasury.

The Supreme Court did face this difficulty in *Hutto v. Finney*.[252] In one aspect of a continuing structural suit over the Arkansas prison system, the district court awarded attorneys' fees to the plaintiffs as compensation for the state defendants' litigation in bad faith, directing that the award be paid from the Department of Corrections funds.[253] The Supreme Court emphatically rejected the state's eleventh amendment plea.[254] Stating that, under *Edelman,* the cost of

248. *Milliken II,* 433 U.S. 289-90; *Edelman,* 415 U.S. at 666-67.

249. *See Milliken II,* 433 U.S. at 290 n.22; *Edelman,* 415 U.S. at 668-69.

250. *See Milliken II,* 433 U.S. at 290 & n.21. This type of compensation is the very essence of structural relief. *See* O. Fiss, *supra* note 12, at 10-11; Chayes, *supra* note 10, at 1298; Fiss, *supra* note 10, at 21-22.

251. *Edelman* was brought against the incumbent state and county welfare officials. *See* Jordan v. Weaver, 472 F.2d 985, 987 (7th Cir. 1973), *revd. sub nom.* Edelman v. Jordan, 415 U.S. 651 (1974). The State of Michigan was not a party in *Milliken,* and the funding order ran against the executive branch defendants. *See* Bradley v. Milliken, 540 F.2d 229, 245-46 (6th Cir. 1976), *affd.,* 433 U.S. 267 (1977) (*Milliken II*); Bradley v. Milliken, 484 F.2d 215, 215, 220 (6th Cir. 1973), *revd.,* 418 U.S. 717 (1974) (*Milliken I*).

252. 437 U.S. 678 (1978).

253. Finney v. Hutto, 410 F. Supp. 251, 285 (E.D. Ark. 1976), *affd.,* 548 F.2d 740 (8th Cir. 1977), *affd.,* 437 U.S. 678 (1978).

254. *Hutto,* 437 U.S. at 689-92.

compliance is "ancillary" to prospective relief, Justice Stevens' opinion includes in that cost any civil contempt fine required to coerce defendants to comply. Payment of attorneys' fees in compensation for defendants' bad faith delay fell within this broad class. The fact that it provided direct pecuniary benefit to plaintiffs (or, more accurately, their counsel) was less important than the power of the court to give effective prospective relief by enforcing its decree.[255] Though the opinion in *Hutto* does not make note of the point, this may be seen as the converse of the *Edelman* proviso that the state defendants there "were under no court-imposed obligation" not to harm the plaintiff class.[256] On its face, *Hutto* would seem to exclude all coercive civil contempt fines from eleventh amendment immunity.[257]

It can be argued from this line of cases that the eleventh amendment would pose no obstacle to a civil contempt order directly compelling the state to make whatever payments were needed to fund compliance with a structural injunction. Structural relief is, by definition, prospective: it benefits the present and future members of the plaintiff class by changing the institution's behavior toward that class as clients of the institution. This change may require a considerable amount of money; for example, the *Milliken* decree ordered the State of Michigan to pay almost six million dollars to fund the Detroit school board's compliance.[258] What the chancellor may order, he may enforce; equity has never taken a modest view of its coercive power. The Court's language in *Hutto* is broad enough to include any civil contempt fine that has a coercive purpose, despite any "compensatory" side effects. When the object of the contempt fine is to fund compliance by the institution, rather than to compensate individuals, it is plainly within *Hutto.* If the executive defendants are unable to comply because of the state's refusal to appropriate funds, effective coercion requires that the source of funds be brought before the court and made to disgorge.[259] Therefore, the argument runs, the authority to make the primary decree, under *Ex parte Young,*

255. 437 U.S. at 691 n.17.

256. *See Edelman,* 415 U.S. at 668.

257. At least two courts appear to have so understood it. *See* Fortin v. Commissioner, 692 F.2d 790, 797-98 (1st Cir. 1982); Halderman v. Pennhurst State School & Hosp., 533 F. Supp. 631, 639 (E.D. Pa. 1981), *aff'd.,* 673 F.2d 628 (3d Cir. 1982), *cert. denied,* 104 S. Ct. 1315 (1984).

258. *See Milliken II,* 433 U.S. at 293 (Powell, J., concurring).

259. In several cases involving local government defaults on municipal bonds, the Supreme Court approved mandatory injunctions requiring the municipality to levy taxes to pay the bonds. *See* notes 324-38 *infra* and accompanying text; *cf.* Griffin v. County School Bd., 377 U.S. 218, 233 (1964) (district court may require the county supervisors to levy taxes to raise funds for the nondiscriminatory operation of the county school system).

includes the authority to prevent the state from rendering it nugatory by refusing to fund it.

There is an argument to the contrary, however. The payment of attorneys' fees is distinguishable from the direct funding of compliance. Attorneys' fees in structural litigation are collateral to compliance and may be expected to be less costly than the direct burdens of the decree. Historically, awards of attorneys' fees, when granted at all, were treated as similar to court costs. The eleventh amendment does not provide immunity against taxing costs when the state is otherwise properly a party,[260] and there was substantial, though not unanimous, pre-*Hutto* authority to the effect that attorneys' fees were also not within the immunity.[261]

More importantly, the form and substance of the order in *Hutto* merely directed an official defendant to allocate funds already within his control to the required payment.[262] The court did not consider joining the state's taxing and appropriating authority as a party to circumvent executive branch defendants who lacked the resources to obey completely.[263] *Alabama v. Pugh*,[264] decided the same term as *Hutto*, indicated that the Supreme Court might not take that additional step. The case originated in three structural suits involving the Alabama prison system and culminated in a consolidated decree affirmed after modification by the Fifth Circuit.[265] During the litigation the State of Alabama was named defendant along with the Governor and other state executives.[266] The Supreme Court granted certiorari to consider whether the decree entered against the state

260. *See* Hutto v. Finney, 437 U.S. 678, 695-96 nn.24-26 (1978); Fairmont Creamery Co. v. Minnesota, 275 U.S. 70, 73-77 (1927).

261. The conflicting cases are collected at Huecker v. Milburn, 538 F.2d 1241, 1244 n.5 (6th Cir. 1976), and Finney v. Hutto, 410 F. Supp. 251, 283 (E.D. Ark. 1976), *aff'd.*, 548 F.2d 740 (8th Cir. 1977), *aff'd.*, 437 U.S. 678 (1978). *See also* Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875, 1888-96 (1975). The issue has been resolved against state immunity by Hutto v. Finney, 437 U.S. 678, 691-92, 697-98 (1978).

262. *See* Finney v. Hutto, 410 F. Supp. 251, 285 (E.D. Ark. 1976), *aff'd.*, 548 F.2d 740 (8th Cir. 1977), *aff'd.*, 437 U.S. 678 (1978); *accord* Halderman v. Pennhurst State School & Hosp., 533 F. Supp. 631, 637 (E.D. Pa. 1981), *aff'd.*, 673 F.2d 628 (3d Cir. 1982), *cert. denied*, 104 S. Ct. 1315 (1984).

263. *But cf.* Welsch v. Likins, 550 F.2d 1122, 1129 (8th Cir. 1977) (district court state disbursing officers not to enforce state law that would prevent them from drawing unappropriated funds from treasury); Halderman v. Pennhurst State School & Hosp., 533 F. Supp. 631, 640 (E.D. Pa. 1981) (state treasurer to be joined if executive defendants do not pay $10,000 per day civil contempt fine), *aff'd.*, 673 F.2d 628 (3d Cir. 1982), *cert. denied*, 104 S. Ct. 1315 (1984).

264. 438 U.S. 781 (1978).

265. *See* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd. and modified sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915, *revd. in part by companion case*, Alabama v. Pugh, 438 U.S. 781 (1978).

266. Alabama v. Pugh, 438 U.S. at 782 (1978).

violated the eleventh amendment, and, in a terse *per curiam* opinion, held that it did.[267] The Court held that the State of Alabama could not be sued in its own name without its consent, which was concededly absent.[268] In response to Justice Stevens' dissent,[269] the Court argued that its decision was "not merely academic," because "Alabama has an interest in being dismissed from this action in order to eliminate the danger of being held in contempt if it should fail to comply with the mandatory injunction."[270]

This short, cryptic statement must mean something, and precisely what it means may be crucial to enforcing a structural injunction. The *Hutto* opinion, in sweeping language, had just said that the eleventh amendment posed no obstacle to civil contempt proceedings against the executive branch defendants in a *Young* suit.[271] The Alabama litigation had placed all relevant executive officers, from the Governor on down, within the decree and therefore subject to the civil contempt power. One doubts that the Supreme Court would take the trouble to correct a mere technical error of form in a complex decree. Therefore, although it did not articulate it, the Court in *Pugh* apparently believed that contempt proceedings against the state itself would infringe the interest protected by the eleventh amendment in a way that contempt proceedings against the executive branch defendants would not. Given the very broad power to reallocate funds and displace management which the courts could exert over the executive branch defendants, the only additional relief that joining the state could bring is an obligation to provide the necessary funds.[272]

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267. 438 U.S. at 782.

268. 438 U.S. at 782.

269. 438 U.S. at 782, 783 (Stevens, J., dissenting).

270. 438 U.S. at 782 (footnote omitted).

271. *See* text at notes 255-57 *supra.*

272. Judge Gibbons of the Third Circuit has taken the position that where a state has either waived eleventh amendment immunity, *see* Vecchione v. Wohlgemuth, 558 F.2d 150, 158-59 (3d Cir.), *cert. denied,* 434 U.S. 943 (1977), or has been sued by the United States and is thus not protected by the eleventh amendment, *see* Delaware Valley Citizens' Council v. Pennsylvania, 678 F.2d 470, 475 (3d Cir.), *cert. denied,* 459 U.S. 969 (1982), compliance with a structural decree is not impossible as long as there are unappropriated funds in a solvent state treasury. *See Delaware Valley,* 678 F.2d at 475-76. *But cf.* Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900 (1984) (when United States sues a state, the state's eleventh amendment immunity is unaffected as to state law claims of third parties). Add to this Justice Stevens' remark in Hutto v. Finney, 437 U.S. 678, 699 (1978) that a *Young* action is "for all practical purposes, brought against the State;" *accord* Vecchione v. Wohlgemuth, 558 F.2d at 156, and the route to the treasury is clear. *See also* Spain v. Mountanos, 690 F.2d 742, 744 (9th Cir. 1982) (court quotes Justice Stevens' language approvingly); Gates v. Collier, 616 F.2d 1268, 1271 (5th Cir.) (federal district court has authority to order that attorneys' fees be paid out of state treasury), *rehg. granted,* 636 F.2d 942 (5th Cir. 1980); La Raza Unida v. Volpe, 545

If it ever considers the question, I believe the Court will conclude that an inescapable obligation of the taxing and appropriating authority to provide funds is the infringement avoided by *Pugh.* A majority of the court has intimated as much in two subsequent decisions. *Quern v. Jordan,*[273] which reiterates the "prospective/retrospective" distinction of *Edelman,* holds that an injunction requiring state authorities to notify welfare claimants that they can apply to the state for wrongly withheld benefits is not "retroactive." The critical distinction, according to Justice Rehnquist's majority opinion, is that the payment of retroactive benefits will depend on the assent of the state authorities, including the appropriation of funds by the legislature.[274] The majority opinion in *Pennhurst State School & Hospital v. Halderman*[275] discussed in dictum the proper remedy for the state's failure to comply with federal statutory conditions for the receipt of federal funds. The Court noted that it had, in some cases, enjoined enforcement of state law that conflicted with federal standards and, in others, given a state the choice of complying or losing federal funds:[276] *"In no case, however, have we required a state to provide money to plaintiffs,* much less required a State to take on such open-ended and potentially burdensome obligations" as the structural relief in this case.[277] These two opinions thrust toward the conclusion that a state must be left the option to stop pro-

F. Supp. 36, 39 (N.D. Cal. 1983) (court enforces award of attorneys' fees against the state); text at notes 195-200 *supra.*

273. 440 U.S. 332 (1979).

274. 440 U.S. at 347-48 & n.20.

275. 451 U.S. 1 (1981).

276. 451 U.S. at 29. *See, e.g.,* Carleson v. Remillard, 406 U.S. 598 (1972); Rosado v. Wyman, 397 U.S. 397 (1970).

277. *Pennhurst,* 451 U.S. at 29 (emphasis added).

The rights asserted by the *Pennhurst* plaintiffs arose from the Developmentally Disabled Assistance and Bill of Rights Act 42 U.S.C. § 6010 (1976 and Supp. III 1979), a grant-in-aid statute enacted under the spending power. The Court held that Congress had not intended to create by that statute an enforceable private right to treatment. 451 U.S. at 15-27. Justice White's dissent disagreed on congressional intent, 451 U.S. at 36-47 (White, J., dissenting), but agreed that when the statute conditioned receipt by the state of federal funds on meeting its standards, the appropriate remedy was to give the state a choice between meeting the conditions and losing the funds. 451 U.S. at 53-55. He specifically disapproved the use of an unconditional decree to enforce the statute. 451 U.S. at 53-55. Justices Brennan and Marshall joined the dissent.

On remand, the Third Circuit reaffirmed the decree on the basis of state statutory obligations to the retarded. Halderman v. Pennhurst State School & Hosp., 673 F.2d 647 (3d Cir. 1982), *revd.,* 104 S. Ct. 900 (1984). The Supreme Court vacated this decision on the ground that the eleventh amendment precluded federal injunctive relief against state officers for violation of state law. The Court remanded for consideration of relief based on any remaining federal grounds, but warned that any structural relief imposing prospective financial obligations must be "constrained by principles of comity and federalism," 104 S. Ct. at 910 n.13. In the same footnote it explicitly declined to discuss the eleventh amendment constraints on such an injunction. On the whole, the future of the *Pennhurst* decree appears extremely bleak.

viding a program if it chooses not to meet federal legal requirements for engaging in the activity.

This approach would provide an escape from the apparent paradox of *Edelman* that seems to protect the state against definite, matured financial burdens while exposing it to continuing, indefinite costs. If the state is allowed to end its involvement, its prospective obligations cease because there are no more members of the class of clients of the institution. While the federal decree may place a higher price on the decision whether to tax or appropriate, *i.e.,* voluntary or compelled shutdown, the decision would remain within the legislature's hands. The impact on the state's treasury of the structural decree becomes avoidable because it is prospective.

Nor would this view of eleventh amendment immunity make the structural decree futile.[278] The right of the plaintiff clients or, conversely, the obligation of the state is not that services be rendered but that, if rendered, they meet federal constitutional standards. Rather than meet them, the state may choose not to provide the service.[279]

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278. The argument that it would do so derives from Justice Stevens' statements in *Hutto v. Finney*:

> The line between retroactive and prospective relief cannot be so rigid that it defeats the effective enforcement of prospective relief . . . . Many of the court's most effective enforcement weapons involve financial penalties . . . . If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance. The principles of federalism that inform Eleventh Amendment doctrine surely do not require federal courts to enforce their decrees only by sending high state officials to jail.

437 U.S. 678, 690-91 (1978). *See also* Fortin v. Commissioner, 692 F.2d 790, 797-98 (1st Cir. 1982). This argument, however, begs the question of what the state agency's duties may be under the substantive law.

279. In Palmer v. Thompson, 403 U.S. 217 (1971), the Supreme Court permitted the City of Jackson, Mississippi to close its municipal swimming pools rather than obey a court order to desegregate them. Justice Black's majority opinion noted that there was no "affirmative duty" for the state to provide the facilities and that the closing equally deprived black and white residents of public recreational facilities. 403 U.S. at 225-26. *Accord* Evans v. Abney, 396 U.S. 435, 445-46 (1970).

These two cases may be distinguished from Griffin v. County School Bd., 377 U.S. 218 (1964), the one Supreme Court decision compelling a local government to reopen closed facilities. In *Griffin*, the county, acting pursuant to a state statute, had resisted a desegregation decree by closing its public schools and paying state and local school funds as tuition grants and property tax credits for white children attending segregated private schools. 377 U.S. at 222-24. The Supreme Court directed the district court to enjoin the tuition-grant system and command the county to reopen a desegregated public school system. 377 U.S. at 232-34. Justice Black's opinion for the Court further stated that, if necessary, the district court could order the county to levy and collect sufficient taxes to finance the system. 377 U.S. at 233. In *Palmer,* Justice Black distinguished *Griffin* as having involved not a true shutdown but the disguised continuance of the segregated school system, 403 U.S. at 221-22; *accord* Evans v. Abney, 396 U.S. at 445. Moreover, he noted, Virginia state law required every other county to provide some form of public education. *See Palmer v. Thompson,* 403 U.S. at 221; *Griffin v. County School Bd.,* 377 U.S. at 229-32.

For a critical assessment of *Palmer,* emphasizing the city's invidious racial motives and the stigmatizing effect of the closing, see L. TRIBE, *supra* note 212, §§ 16-17, at 1027-28. *See also* Palmer v. Thompson, 403 U.S. at 266-71 (White, J., dissenting).

Griffin has, to the extent of this writer's knowledge, never been applied as authority for an

Beyond the duties not to discriminate on the basis of suspect classification[280] and not to confine more stringently than warranted,[281] the present Supreme Court has declined to impose on the states a substantive constitutional duty to tax and spend for the benefit of those in apparent need.[282] Moreover, to protect the states' ability to make informed fiscal choices, the Court has declared that Congress will be presumed not to have imposed substantive obligations on the states simply by providing federal funds unless it clearly states the conditions for receiving them.[283] Underlying the absence of positive state obligation is the policy of preserving the state's political control over the transfer of wealth through taxation and the allocation of public funds.[284]

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affirmative duty to provide services in the absence of discriminatory provision to other members of the public. The option not to provide services is even more clear when the substantive right at issue derives not from the Constitution or substantive federal statute, but from the state's acceptance of federal funds subject to conditions. *See* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 53-55 (1981) (White, J., dissenting); 451 U.S. at 29-30 (majority opinion).

280. *See, e.g.,* Plyler v. Doe, 457 U.S. 202, 216-18 (1982); Graham v. Richardson, 403 U.S. 365 (1971).

281. *See, e.g.,* Youngberg v. Romeo, 457 U.S. 307, 318-19 (1982); Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

282. *See* Harris v. McRae, 448 U.S. 297, 316-18 (1980); Maher v. Roe, 432 U.S. 464, 469-70 (1977); Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. 471, 489-91 (1977); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 18-40 (1973); Jefferson v. Hackney, 406 U.S. 535, 549-51 (1972).

283. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the states to exercise their choice knowingly, cognizant of the consequences of their participation.

Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (citations omitted).

The state option not to participate may, for some programs, be a real one. In Batterton v. Francis, 432 U.S. 416, 420 (1977), the majority opinion pointed out that only about one-half the states had chosen to participate in the federally-funded Aid to Families with Dependent Children — Unemployed Father (AFDC - UF) program. The Court took this lack of participation into account in construing the federal regulations in a manner attractive to the states. 432 U.S. at 432.

284. Justice Powell, in particular, has expounded the position that a constitutional duty to subsidize or facilitate the exercise of liberties with public funds would result in unacceptable judicial control of basic taxing decisions. *See* Maher v. Roe, 432 U.S. 464, 475-77 (1977); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 36-37, 40-44 (1973). The same conclusion has been reached by a different analysis through the proposition that there is no "property" interest in the continued existence of the legislation that establishes an entitlement. *See* O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 798-99 (1980) (Blackmun, J., concurring); Richardson v. Belcher, 404 U.S. 78, 80-81 (1971); Kizas v. Webster, 707 F.2d 524, 538-40 (D.C. Cir. 1983), *cert. denied,* 104 S. Ct. 709 (1984).

The Supreme Court's decisions on equal protection in the allocation of welfare benefits and due process in benefit determinations have been pervaded by the assumption that the pool of available money is beyond the judiciary's power to enlarge and that gains by one class of recipients will therefore result in losses to others. *See, e.g.,* Ohio Bureau of Employment Servs. v. Horody, 431 U.S. 471, 490-91 (1977); Mathews v. Eldridge, 424 U.S. 319, 348 (1976); Dan-

If this limited view of the substantive rights and duties involved in structural decrees continues, it is likely that the Supreme Court will preserve the separation between the state as an entity and its executive officers, postulated in *Young,* and refuse to permit the contempt power to be exerted against a state treasury to increase the total funds available to comply with the decree.[285] If, on the contrary, the view ultimately prevails that the Constitution establishes substantive rights to dignity and equality that can only be satisfied by the transfer of wealth by government action,[286] the Court will have to recognize that the state is the "real party in interest,"[287] discard the fiction of *Young,* and accept the judicial control of the public fisc as a means to implement these rights.[288] Unless and until the Supreme Court reaches that point, it can and probably will use eleventh amendment immunity to preserve the ultimate political control of the decision to tax and spend.

There are nevertheless four classes of cases in which the state treasury may be directly attacked because eleventh amendment immunity is unavailable. First, the eleventh amendment does not apply to suits by the United States against a state.[289]

Second, Congress may divest the states of eleventh amendment immunity, without their consent, by statute enacted under the en-

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dridge v. Williams, 397 U.S. 471, 487 (1970); Goldberg v. Kelly, 397 U.S. 254, 278-79 (1970) (Black, J., dissenting).

285. From this perspective, both an order directed against the disbursing authorities and an order directing the legislature to appropriate would be in substance against the state, a party distinct from the executive defendants. *See* Hagood v. Southern, 115 U.S. 52 (1886); Louisiana v. Jumel, 107 U.S. 711, 727-28 (1882).

286. *See* Clune, *The Supreme Court's Treatment of Wealth Discriminations Under the Fourteenth Amendment,* 1975 SUP. CT. REV. 289, 327-43; Karst, *The Supreme Court, 1976 Term - Foreword: Equal Citizenship Under the Fourteenth Amendment,* 91 HARV. L. REV. 1, 5-8, 59-64 (1977); Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice,* 121 U. PA. L. REV. 962, 997-1019 (1973); Michelman, *The Supreme Court, 1968 Term - Foreword: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7, 9-33 (1969); *cf.* L. TRIBE, *supra* note 212, § 16-57, at 1135.

Professor Tribe has also proposed that *existing* statutory entitlement programs which transfer wealth to those who become dependent on them should be regarded as vested rights for the purpose of the contract clause, U.S. CONST. art. 1, § 10, cl. 1, or the just compensation clause, U.S. CONST. amend. V, in order to protect the recipients' expectations of continued support. L. TRIBE, *supra* note 212, § 9-2, at 459 & n.11, § 9-7, at 471 & n.8; *cf. id.* at § 10-10, at 525-26 (limits on due process protection for "entitlement" programs).

287. Spicer v. Hilton, 618 F.2d 232, 236 (3d Cir. 1980); *accord* Hutto v. Finney, 437 U.S. 678, 699 (1978).

288. *See* Quern v. Jordan, 440 U.S. 332, 357-66 (1979) (Brennan, J., concurring in the judgment); Edelman v. Jordan 415 U.S. 651, 680-84 (1974) (Douglas, J., dissenting); Palmer v. Thompson, 403 U.S. 217, 233-39 (1971) (Douglas, J., dissenting).

289. *See* Principality of Monaco v. Mississippi, 292 U.S. 313, 328-30 (1934), and cases cited therein.

forcement clause of the fourteenth amendment.[290] The Supreme Court has held that Congress did so with respect to back pay liability under Title VII of the 1964 Civil Rights Act[291] and with respect to attorneys' fees in civil rights actions.[292] The Court's position, however, is that such a divestiture requires either explicit statutory language or clear legislative intent. These it has not been eager to find.[293] In particular, the Court has concluded that the 1871 enactment of 42 U.S.C. section 1983, under which structural litigation is often brought, did not abrogate the states' eleventh amendment immunity.[294]

Third, the eleventh amendment does not bar the award of court costs against a state.[295] While the lower federal courts were divided on the issue before 1979, a substantial number had concluded that the states were not immune from attorneys' fees taxed along with costs, particularly when imposed as a penalty for litigation in bad

290. It should be noted in passing that any restriction on Congress' legislative powers in the tenth amendment does not apply to remedial legislation enacted under its power to enforce the fourteenth amendment. Love v. Waukesha Joint School Dist. No. 1 Bd. of Educ., 560 F.2d 285, 287 (7th Cir. 1977); EEOC v. County of Los Angeles, 526 F. Supp. 1135, 1137-38 (C.D. Cal. 1981), *affd.*, 706 F.2d 1039 (9th Cir. 1983), *cert. denied,* 104 S. Ct. 984 (1984); Guardians Assn. of the New York City Police Dept. v. Civil Serv. Commn. of New York, 630 F.2d 79, 88 (2d Cir. 1980), *cert. denied,* 452 U.S. 940 (1981); *see also* Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 291 (1977) (tenth amendment does not bar a federal court judgment enforcing the fourteenth amendment); Fitzpatrick v. Bitzer, 427 U.S. 445, 451-56 (1976) (fourteenth amendment effects an alteration in the state-federal relationship and congressional power under § 5 is not limited by aspects of state sovereignty); Bradley v. School Bd. of Richmond, Virginia, 462 F.2d 1058, 1068-69 (4th Cir. 1972) (when the tenth amendment conflicts with the fourteenth, the latter prevails), *affd. by equally divided court,* 412 U.S. 92 (1974). *See generally* National League of Cities v. Usery, 426 U.S. 833 (1976). Whether those restrictions would apply to the creation of private rights under the spending power is more problematic. *See National League of Cities,* 426 U.S. at 852 n.17; L. TRIBE, *supra* note 212, § 5-22, at 315-16.

291. Fitzpatrick v. Bitzer, 427 U.S. 445, 451-57 (1976); *see* Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701(a), (f), *as amended at* 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. §§ 2000e(a), (f) (1976 & Supp. IV 1980)).

292. Hutto v. Finney, 437 U.S. 678, 693-98 (1978); *see* 42 U.S.C. § 1988 (1976 & Supp. IV 1980).

293. *See* Quern v. Jordan, 440 U.S. 332, 343-45 (1979); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States,* 126 U. PA. L. REV. 1203, 1240-52 (1978); Note, *Civil Rights Suits Against State and Local Governmental Entities and Officials: Rights of Action, Immunities, and Federalism,* 53 S. CAL. L. REV. 945, 1068-87 (1980).

294. Quern v. Jordan, 440 U.S. 332, 338-45 (1979). Since the relief at issue in *Quern* was prospective and thus not subject to the eleventh amendment at all, Justice Brennan's concurrence in the judgment correctly states that the Court's discussion of this point was dictum. 440 U.S. at 350 (Brennan, J., concurring); *cf.* Milliken v. Bradley (*Milliken* II), 433 U.S. 267, 290-91 n. 23 (1977) (explicitly reserving the question of whether the fourteenth amendment, by itself, works a partial repeal of the eleventh amendment). *Quern* nevertheless appears to be a deliberate statement of the current majority's view of the subject.

295. Hutto v. Finney, 437 U.S. 678, 696 n.26 (1978); Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927).

faith.[296] Other ancillary expenses in structural litigation, such as the compensation and expenses of masters and receivers, fall within the traditional sphere of taxable costs,[297] and the logic of *Hutto* appears to allow them. One lower federal court has accordingly rejected eleventh amendment defenses to their payment.[298]

Finally, a state may waive its eleventh amendment immunity in particular cases by consenting to the jurisdiction of the federal court.[299] However, a state's counsel may appear and defend an action on the merits that would fall within the eleventh amendment without automatically waiving immunity. State executive officers may waive immunity only when authorized by state law, which is to be construed narrowly against that authority.[300] Where a state constitutional or statutory provision retains immunity, general statutory power to appear and defend or compromise litigation does not authorize state counsel to waive immunity by entering a consent decree or proceeding on the merits.[301] Moreover, since eleventh amendment immunity is akin to lack of subject matter jurisdiction, it may be first raised by the state at any point in the litigation, at least until a decision is final for *res judicata* purposes.[302] While the point ulti-

296. *See* note 261 *supra* and accompanying text.

297. *See* Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 743-46 (6th Cir. 1979); Newman v. Alabama, 559 F.2d 283, 290 (5th Cir. 1977), *cert. denied,* 438 U.S. 915, *revd. in part by companion case,* Alabama v. Pugh, 438 U.S. 781 (1978); Hart v. Booklyn Community School Bd., 383 F. Supp. 699, 767 (E.D.N.Y. 1974), *affd.,* 512 F.2d 37 (2d Cir. 1975).

298. Halderman v. Pennhurst State School & Hosp., 533 F. Supp. 631, 639 (E.D. Pa. 1981), *affd.,* 673 F.2d 628 (3d Cir. 1982), *cert. denied,* 104 S. Ct. 1315 (1984).

If this case is correct, it appears that the eleventh amendment would not have barred relief against the state in New York State Assn. for Retarded Children v. Carey, 631 F.2d 162 (2d Cir. 1980), if the consent decree had obliged the state to fund the monitoring panel. *See also* notes 126-28 *supra* and accompanying text.

299. This waiver must be distinguished from a constructive waiver in a class of cases by participating in a federally regulated activity. *See generally* Field, *supra* note 293, at 1209-18.

300. *See* Mills Music, Inc. v. Arizona, 591 F.2d 1278, 1282-84 (9th Cir. 1979); Taylor v. Perini, 503 F.2d 899, 902 (6th Cir. 1974), *vacated,* 421 U.S. 982 (1975); Richins v. Industrial Constr., Inc., 502 F.2d 1051, 1055-56 (10th Cir. 1974).

301. *Compare* Gallagher v. Continental Ins. Co., 502 F.2d 827, 830 (10th Cir. 1974) (appearance by Colorado Attorney General with general authority to represent state is waiver) *with* Richins v. Industrial Constr., Inc., 502 F.2d 1051, 1055-56 (10th Cir. 1974) (appearance by Utah Attorney General is not waiver when Utah has retained eleventh amendment immunity by statute); Taylor v. Perini, 503 F.2d 899, 902 (6th Cir. 1974) (consent decree for payment of attorneys' fees entered into by Ohio Attorney General who was not authorized to enter into such a decree does not waive eleventh amendment immunity), *vacated,* 421 U.S. 982 (1975), *with* Jordan v. Fusari, 496 F.2d 646, 651 (2d Cir. 1974) (consent decree settling a claim is a waiver of any eleventh amendment defense as to that claim).

302. *See* Edelman v. Jordan, 415 U.S. 651, 677-78 (1974). On effect of *res judicata,* compare Vecchione v. Wohlgemuth, 558 F.2d 150, 159 & n.7 (3d Cir.) (waiver precludes claim of immunity on collateral attack), *cert. denied,* 434 U.S. 943 (1977), with Jordon v. Gilligan, 500 F.2d 701, 710 (6th Cir. 1974) (dictum saying the state may raise the issue of immunity at any time since it goes to subject matter jurisdiction), *cert. denied,* 421 U.S. 991 (1975).

mately turns on the federal court's construction of state law,[303] reasonably explicit state language should preclude unauthorized executive branch waiver in contested litigation. Asserting that a waiver was unauthorized with respect to a consent decree is a more difficult procedural problem because the legislature may not become aware of the executive's action until after the time for appeal has long passed. However, the state's claim to vacate the decree for lack of jurisdiction may be raised "within a reasonable time" on a motion under the Federal Rules.[304]

C. *Beyond Immunity: an Illustration*

There are thus five current situations in which a federal court will be able to exert its contempt power directly against the governmental source of funds without eleventh amendment restriction: when the United States obtains relief,[305] when Congress has specifically exempted the activity from eleventh amendment immunity,[306] when collateral expenses are involved,[307] when the state has waived its immunity,[308] and when the government in question is not a state or state agency but a local government.[309] The last is probably the most significant. Since *Monell v. Department of Social Services of the City of New York*,[310] it has been possible to sue a local government in its

303. In Vecchione v. Wohlgemuth, 558 F.2d 150, 156-57 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977), for example, Judge Gibbons inferred from the Attorney General's general statutory power to conduct and settle litigation, PA. STAT. ANN. tit. 71, § 292(b) (Purdon 1962) (repealed 1980), that Assistant Attorneys General had authority to waive eleventh amendment immunity by consent decree. *Accord* Delaware Valley Citizens' Council v. Pennsylvania, 678 F.2d 470, 475 (3d Cir.), *cert. denied*, 459 U.S. 969 (1982). At that time, there was no legislative provision of sovereign immunity in Pennsylvania; it was a common law doctrine developed under a permissive constitutional provision. *See* Mayle v. Pennsylvania Dept. of Highways, 479 Pa. 384, 402-04, 388 A.2d 709, 718-19 (1978); *see also* PA. CONST. art. 1, § 11.

Since that time, Pennsylvania has expressly asserted eleventh amendment immunity by statute. PA. STAT. ANN. tit. 42, § 8521 (Purdon Supp. 1982). It has also denied any of its counsel authority to enter any consent decree without the approval of the Governor and notice to the Legislature. PA. STAT. ANN. tit. 71, § 732-204(e) (Purdon Supp. 1982). Moreover, the Supreme Court has disapproved Judge Gibbons' reading of the Pennsylvania law with respect to a case begun before the enactment of these statutes. *See* Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900, 909 n.12 (1984).

304. FED. R. CIV. P. 60(b); *see* note 302 *supra* and accompanying text; Jordon v. Gilligan, 500 F.2d 701, 710 (6th Cir. 1974) (Rule 60(b)(4) motion to vacate based on voidness may be raised at any time), *cert. denied*, 421 U.S. 991 (1975); *but see* Vecchione v. Wohlgemuth, 558 F.2d 150, 159 (3d Cir.) (because of waiver, final judgment is not void and Rule 60(b)(4) relief is inappropriate), *cert. denied*, 434 U.S. 943 (1977).

305. *See* note 289 *supra* and accompanying text.

306. *See* notes 290-94 *supra* and accompanying text.

307. *See* notes 295-96 *supra* and accompanying text.

308. *See* notes 299-304 *supra* and accompanying text.

309. *See* notes 201-03 *supra* and accompanying text.

310. 436 U.S. 658 (1978).

own name under 42 U.S.C. section 1983 over policies that deny constitutional rights. As the operators of school systems, jails, and the like, local governments will frequently be the defendants in structural cases, and they are, as a class, outside the eleventh amendment.[311]

Where there is no obstruction from eleventh amendment immunity, it is possible to dispense with the *Young* fiction that the officer or his agency are acting distinctly from the government and to proceed against the body politic itself. A plaintiff who could do so would be unwise not to. When seeking an injunction, it is always the better practice to make the highest possible level of authority a defendant in order to bind clearly the broadest number of subordinates by the decree.[312] A decree against a corporation runs against all its employees in their official capacity,[313] and, by the same principle, a decree against a government as such binds all its officers.[314]

Once a government is subject to the court's powers, the next question the court must address is whether these powers should be exercised differently from those against a private corporate body. The arguments for and against self-restraint in the exercise of the federal courts' equity powers in structural cases are well known, and I do not propose to restate them here.[315] As Professors Eisenberg and Yeazell[316] and Professor Chayes[317] have said, they are inextrica-

311. The consequences of their exclusion appear clearly in Arthur v. Nyquist, 547 F. Supp. 468, 478-79 (W.D.N.Y. 1982), *aff'd.*, 712 F.2d 809 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 1907 (1984), in which the district court ordered the taxing and appropriating authorities of Buffalo, N.Y., parties to the case from the outset, to appropriate an additional $7.4 million needed to comply with the desegregation decree. The court reviewed in some detail the city's budget practices and priorities as they related to the decree. 547 F. Supp. at 478-82.

312. *See* Rendleman, *Beyond Contempt: Obligors to Injunctions,* 53 TEX. L. REV. 873, 896-97 (1975).

This avoids the difficulties of the plaintiffs in Thaxton v. Vaughan, 321 F.2d 474, 477-78 (4th Cir. 1963), who had brought suit against the Mayor of Lynchburg to desegregate the city armory, only to find that the members of the city council would not be bound by a decree because they were not acting in collusion with the Mayor or as his "agents, servants [or] employees" under FED. R. CIV. P. 65(d). Whether or not the court's reading of the rule was correct, the whole imbroglio could now be prevented by suing the municipality directly and as a whole under *Monell.* That course was not available in 1963. *See* Monroe v. Pape, 365 U.S. 167, 187, 191 (1961).

313. *See* Wilson v. United States, 221 U.S. 361, 376-77 (1911); *In re* Lennon, 166 U.S. 548, 554-56 (1897); Le Trouneau Co. v. N.L.R.B., 150 F.2d 1012 (5th Cir. 1945).

314. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658, 692 n.32, 695-96 (1979); Commissioners v. Sellew, 99 U.S. 624, 627 (1879); Delaware Valley Citizens' Council v. Pennsylvania, 678 F.2d 470, 478 & n.17 (3d Cir.), *cert. denied,* 459 U.S. 969 (1982).

315. The arguments for judicial restraint are treated in detail in Fiss, *supra* note 10, at 28-44, and summarized in Eisenberg & Yeazell, *supra* note 58, at 472-73. *See also* D. HOROWITZ, *supra* note 2, at 255-74, 293-99.

316. Eisenberg & Yeazell, *supra* note 58, at 510-16.

bly entangled with one's views on the substantive rights implemented through structural litigation, a matter beyond the scope of this Article. Instead, I am going to present, as an example of what can be done by a court indifferent to comity,[318] an historical episode in which the Supreme Court sanctioned the broadest sort of intrusion into local government autonomy on behalf of substantive claims that it took very seriously.

In the decade before the Civil War, towns and counties throughout the Midwest had been persuaded to finance railroad construction by issuing municipal bonds to purchase stock in the railroad. Though popular with voters at the time, these bond issues became less so when the railroads, through the bad economic judgment, incompetence or the plain fraud and knavery of their promoters, did not get built. In the eyes of the voters, no railroad meant no obligation to pay the bonds, and the localities defaulted. In suits by creditors, state courts frequently held that the bonds had been unlawfully issued and were void. Where the bonds were held valid, municipalities obtained the repeal of their statutory authority to tax in order to pay them.[319] In a series of decisions between 1864 and the 1880's, the Supreme Court upheld the validity of the bonds by making its own interpretation of state law,[320] and it held the repeals of taxing statutes to be impairments of the obligation of contracts in violation of article I, section 10, of the Constitution.[321] These decisions were vehemently opposed in the indebted communities, and there was

317. Chayes, *supra* note 10, at 1314-16.

318. The current majority of the Supreme Court is hardly indifferent. It has expressed extreme disquiet, to say the least, at the detailed reordering of state and local government functions unless intentional racial discrimination or systematic cruelty to prisoners is involved. *Compare* Los Angeles v. Lyons, 103 S. Ct. 1660 (1983) (refusing to restrict policemen's use of chokeholds on suspects), *and* Rizzo v. Goode, 423 U.S. 362 (1976) (reversing the district court's order that city officials draft a comprehensive program for dealing with civilian complaints against the police department), *with* Hutto v. Finney, 437 U.S. 678 (1978) (affirming district court's detailed remedial orders to correct systematic abuses in the state prison system) *and* Milliken v. Bradley (*Milliken II*), 433 U.S. 267 (1977) (affirming district court's broad decree—albeit narrower than an earlier plan—to remedy *de jure* school segregation).

319. The background and the cases are described in great detail by Professor Fairman. 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES — RECONSTRUCTION AND REUNION 1864-88, Pt. I, 918-1116 (1971). The Court's substantive doctrine is analyzed in Powe, *Rehearsal for Substantive Due Process: The Municipal Bond Cases,* 53 TEX. L. REV. 738, 738-48 (1975).

320. *See* Township at Pine Grove v. Talcott, 86 U.S. (19 Wall.) 666 (1874); Olcott v. Supervisors of Fond du Lac, 83 U.S. (16 Wall.) 678 (1873); Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1864). *See generally* Powe, *supra* note 319, at 741-45.

321. *See* Butz v. City of Muscatine, 75 U.S. (8 Wall.) 575 (1869); Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535 (1867). *See generally* 6 C. FAIRMAN, *supra* note 319, at 979, 1000-01.

widespread resistance to paying the judgments.[322] The response of the lower federal courts[323] and the Supreme Court[324] was a line of decisions holding that the taxing officers of the local governments could be ordered, by process enforceable through criminal contempt,[325] to assess and collect the taxes required to pay judgments on the defaulted bonds.

In one case, *Supervisors of Lee County v. Rogers*,[326] the Supreme Court went further. The supervisors of Lee County, Iowa, had refused to comply with a mandamus to collect taxes to meet a judgment, and the Court held that the federal circuit court had authority to appoint the U.S. Marshal as receiver to collect them.[327] At that time, a federal court's authority to issue process was governed by a statute[328] which gave a federal court the same authority as a court of the state where it sat would have. An Iowa statute provided that if a mandamus was disobeyed the court could direct that the action required of the defendant be done by a court-appointed third party at defendant's expense.[329] Since the mandamus had been disobeyed, the Supreme Court concluded that the circuit court should direct its marshal to collect the taxes.[330] However, *Lee County* was a high water mark. In subsequent cases, the Court consistently refused to find that it had a general equity power, in the absence of such a state statute, to give plaintiffs an adequate remedy by appointing a receiver to collect taxes.[331] It noted, however, that an order enforceable by contempt proceedings against the responsible local officials was the appropriate relief.[332] The result was usually that the munici-

322. *See* 6 C. FAIRMAN, *supra* note 319, at 947-51, 959-66, 980-89, 1038-43. Resistance reached the point that President Grant felt compelled to warn that he would support collection of the judgments with troops. *Id.* at 984-85.

323. *See* Durant v. Supervisors of Washington County, 8 F. Cas. 128 (C.C.D. Iowa 1869) (No. 4191); United States *ex rel.* Thompson v. Lee County, 26 F. Cas. 911 (C.C.N.D. Ill. 1869) (No. 15,589).

324. Supervisors of Washington County v. Durant, 76 U.S. (9 Wall.) 415 (1870); Riggs v. Johnson County, 73 U.S. (6 Wall.) 166 (1868).

325. *See* Durant v. Supervisors of Washington County, 8 F. Cas. 128, 129 (C.C.D. Iowa 1869) (No. 4191).

326. 74 U.S. (7 Wall.) 175 (1869).

327. 74 U.S. (7 Wall.) at 180-81.

328. Act of May 19, 1828, ch. 68, § 1, 4 Stat. 278 (1846).

329. *See Lee County*, 74 U.S. at 177; *cf.* IOWA CODE ANN. § 661.15 (West Supp. 1984) (current version of this provision). Professor Fairman finds no cases applying the statute except *Lee County*. 6 C. FAIRMAN, *supra* note 319, at 965 n.162, 1039.

330. 74 U.S. (7 Wall.) at 177.

331. The leading case is Rees v. City of Watertown, 86 U.S. (19 Wall.) 107 (1874). Cases following *Rees* include Thompson v. Allen County, 115 U.S. 550 (1885), and Barkley v. Levee Commissioners, 93 U.S. 258 (1876).

332. *See* Commissioners v. Sellew, 99 U.S. 624 (1879).

palities settled with their creditors for what they could get.[333]

If these cases were applied in the modern context, at the very least, they would stand for the proposition that the members of the taxing and appropriating body of a government properly before the court[334] could be ordered to raise the funds needed to comply with a structural decree and held personally responsible if they did not.[335] This power would extend, *a fortiori,* to the less intrusive device of ordering a disbursing officer to release funds already on hand.[336] Moreover, the type of direct relief provided in *Lee County* no longer depends on state law governing available remedies. The powers of a federal district court to enforce its judgments are controlled by the Federal Rules of Civil Procedure. Rule 70 provides for substituted performance by a court-created replacement for the defendant in terms substantially identical to the Iowa statute involved in *Lee County.*[337] Such an intervention into the local taxing power would be far beyond anything that the district courts have attempted in modern times,[338] but the mechanism can be derived from prior exer-

333. *See* 6 C. FAIRMAN, *supra* note 319, at 983-84, 986, 1094-95. *But cf. id.* at 1038-40, 1043-47 (two instances of municipalities evading the courts with the result that settlement was never reached or was substantially delayed). Litigation in this area ultimately died out with the development of the modern system of pre-issue approval by bond counsel and credit rating services. *See id.* at 920-23, 1101.

334. "Properly" is here used in the sense of having no eleventh amendment immunity.

335. Such an order to appropriate was issued in Arthur v. Nyquist, 547 F. Supp. 468 (W.D.N.Y. 1982), *aff'd.,* 712 F.2d 809 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 1907 (1984), but the question of sanctions did not arise in that case.

It should be noted that the absolute immunity of state legislators from suit under 42 U.S.C. § 1983 is limited to damages. *See* Lake County Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); Tenney v. Brandhove, 341 U.S. 367 (1951); Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980). Immunity does not extend to injunctive relief. *See* Kucinich v. Forbes, 432 F. Supp. 1101, 1108 n.8 (N.D. Ohio 1977).

It should also be noted that the Supreme Court has recently held that neither the speech and debate clause, U.S. CONST. art. 1, § 6, cl. 1, the tenth amendment, U.S. CONST. amend. X, nor general principles of federalism preclude the conviction of a state legislator for a federal crime based on his legislative acts and statements. United States v. Gillock, 445 U.S. 360 (1980). *Gillock* reiterates the immunity provided in *Tenney v. Brandhove, supra,* against private damage claims, but it is unclear whether it would permit civil contempt proceedings in an action properly brought against legislators. 445 U.S. at 371-73, quoting *Tenney,* 341 U.S. at 372, 376; *cf.* Hutto v. Finney, 437 U.S. 678, 690-92 (1978) (discussed at notes 252-63 *supra* and accompanying text). Since criminal contempt proceedings are a federal criminal prosecution under a statute, however, they would apparently be permissible under *Gillock.* 445 U.S. at 372-73; *see* 18 U.S.C. § 401; note 83 *supra.*

336. It should also be noted that when the local government is properly sued in its own name, its disbursing officer would be bound, in his official capacity, by any decree against it. *See* note 314 *supra* and accompanying text.

337. *See* notes 66-71 *supra* and accompanying text.

338. The most pronounced intrusion into local fiscal management known to this writer is Judge Battisti's attempt to compel the Cleveland school authorities to default on short-term debt, despite a state court judgment to the contrary, in order to free funds for current operations of the Cleveland schools, which were under a desegregation order. *See* National City Bank v. Battisti, 581 F.2d 565 (6th Cir. 1977).

cises of the traditional equity power of the federal courts.

CONCLUSION

The parallel drawn in the preceding section is obviously not exact. The municipal bond cases involved a public authority's contractual duties to repay specific sums, an interest on the part of the bondholders which the Supreme Court had no difficulty in treating as akin to a vested right.[339] Modern structural litigation, on the other hand, involves statutorily-based payments, in cash or in kind, on which the recipients to some degree are dependent. Under current Supreme Court doctrine, there is apparently no constitutional duty to begin such payments and the right to receive them is not "vested" against a subsequent legislative decision not to tax or spend for that purpose.[340] When faced with a state or local government that does not provide the money needed to operate an institution at federal standards, one might argue that respect for democratic control of taxing and spending decisions therefore requires the federal court to respond to the refusal by closing the institution rather than bypassing the defendants' taxing and appropriating system to finance it. Shutdown, however unwelcome to plaintiffs, is not an inadequate remedy if their substantive right is only to have the institution meet constitutional or federal statutory standards so long as it operates at all. The respective opinions in *Pennhurst* show that a majority of the Court appears to agree, at least when the federal standards derive only from the spending power.[341]

The Court's approach, however, is in my view too quick to find an irrevocable political decision not to provide adequate funds. Without going so far as to give dependent plaintiffs a vested right to receive continued benefits, a district court should be able to presume, first, that the program's existence shows that, at some point, the political authorities had decided that the public interest required them to provide the services in question and, second, that that assessment of the public interest remains valid until the political authorities clearly state that they would rather see the plaintiff class have nothing than meet the cost of federal standards. A clear statement in this context means the explicit abolition of the activity involved: it does not mean the normal temporizing of elected bodies in the hope

339. *See* Powe, *supra* note 319, at 741-47, 753-54.

340. *See* notes 280-84 *supra* and accompanying text.

341. *See* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 29 (1981), and at 53-55 (White, J., dissenting).

that the difficult choice will not have to be made.[342] In particular, it does not mean an attempt to continue the activity while not appropriating adequate funds to meet federal standards, for by doing that the appropriating body has merely indicated that it is unwilling to make the required choice between shutdown and compliance with the decree. If the political authorities want to continue the activity at all, the full resources of equity ought to be available to assure that it is only continued in compliance with the decree's obligations.

This approach is clearly biased toward continuing the institutional services on which plaintiff classes depend. It assumes that in most cases the political authorities, if compelled to decide, will find the money rather than terminate the institution. In those cases where shutdown is out of the question, such as prisons, it will prevent them from passively obstructing compliance with the decree. In the case of so-called benevolent activities, where shutdown is politically conceivable, it would place the onus of the decision squarely where it belongs — on the elected authorities and ultimately on the voters, who must decide how much of the community's wealth will be transferred by taxation. If the political will, when faced with a clear choice, would rather abolish a program than pay to provide it at constitutional standards, current Supreme Court doctrine appears to require that the choice be honored by the federal courts.[343] The courts need hardly rush to conclude, however, that the political will has made that difficult and unpleasant choice; much less should they take the choice upon themselves.[344]

"Principle aside," Judge Weinstein has said, "we recognize that even the once-powerful King of England had to bow to Parliament's fund-raising powers; no judge will ignore the central reality that it is the legislature and the public, not the courts, which raise funds and

342. In affirming the district court's order to close the Charles Street Jail after the Boston City Council had refused for five years to build the required replacement, the First Circuit characterized the Council's most recent activity as "an ostrich-like wish that the necessity to settle on a site and make available adequate funds would disappear." Inmates of the Suffolk County Jail v. Kearney, 573 F.2d 98, 100 (1st Cir. 1978). Requiring a clear statement that the legislature wants to terminate an activity is consistent with the doctrine that substantive statutes should not be repealed by implication, particularly implication based on appropriations measures. *See, e.g.,* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 189-90 (1978).

343. *See* notes 175-80 *supra* and accompanying text.

344. In other contexts, Justice Rehnquist, for one, has strongly favored structuring principles of decision to prevent political authorities from foisting difficult political choices on non-elected decision makers. *See* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting); Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 671-76, 685-88 (1980) (Rehnquist, J., concurring). That he would agree to this application of the principle is doubtful.

decide how they are to be spent."[345] As long as the Supreme Court continues to decide that neither the fourteenth amendment nor legislation under the spending clause create absolute rights to a minimum level of government services, the taxing and appropriating authorities will have the last word on whether their institutions will meet minimum legal standards or cease to operate altogether. Until that last word is spoken, however, the federal courts have substantial power to insure that resources are available to comply with their decrees to maintain the constitutional minimum for such operation. Within the defendant institution itself, reprogramming and displacement of management answer repeated claims of financial impossibility by directing the most efficient use of available funds and staff. Where the political authorities depend on federal funds to carry on activities they consider important, withholding the outside contribution should make them reconsider the advantages of cooperating with the court. In the absence of eleventh amendment immunity, the court may proceed directly against those in charge of the treasury and the taxing decision. These powers long antedate the rise of structural litigation. Whether their actual or threatened use against public officials will be found appropriate depends, in the last analysis, on how committed the courts are to the substantive rights that can only be implemented through the structural decree.

345. Weinstein, *The Effect of Austerity on Institutional Litigation,* 6 LAW & HUM. BEHAV. 145, 146 (1982).