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I. Introduction

In 1955 the Supreme Court of the United States, in implementing the landmark decision *Brown v. The Board of Education*,[1] claimed without comment the general equitable powers of federal courts to cure constitutional ills.[2] The Court noted, "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies. . . . These cases call for the exercise of these traditional attributes of equity power."[3] In the quarter-century following *Brown* federal courts have become increasingly enmeshed in public law cases, that is, cases in which the object of litigation is the vindi-

* "Equity is a roguish thing. For Law wee have a measure know what to trust too. Equity is according to ye conscience of him yt is Chancellor, and as yt is larger or narrower soe is equity. Its all one as if they should make ye Standard for ye measure wee call a foot, to be ye Chancellors foot; what an uncertain measure would this be; one Chancellor ha's a long foot another a short foot a third an indifferent foot; tis ye same thing in ye Chancellors Conscience." *Table Talk of John Selden* 43 (edited by Sir Frederick Pollock for the Selden Society, London: Quaritch, 1927).

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1. 347 U.S. 483 (1954) (*Brown* I). Following the momentous decision on the merits, the Court set the cases specially for argument concerning the remedy.

2. Since general equitable powers were always available to federal courts under article III of the United States Constitution, *Brown* did not actually "create new equitable remedies; it highlighted the desirability of expanding traditional equity powers to accommodate new circumstances." Comment, *Equitable Remedies: An Analysis of Judicial Utilization of Neoreceiverships to Implement Large Scale Institutional Change*, 1976 WIS. L. REV. 1161, 1178 [hereinafter cited as Comment, *Utilization of Neoreceiverships*].

3. Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955) (*Brown II*). Before deciding the difficult issues concerning remedies the Court took the most unusual step of inviting briefs and arguments on that issue from the Attorneys General of the United States and of all states then practicing segregation of races in public education.

cation of statutory or constitutional policies rather than individual rights.[4] In the process, the courts have enormously expanded their influence and their function. Racial discrimination,[5] government benefits programs,[6] housing,[7] conditions of confinement and treatment in state institutions,[8] land use,[9] environment,[10] quality of public education,[11] and legislative apportionment[12] typify, but by no means exhaust, the comprehensive range of problems amenable to judicial intervention under modern interpretations of the fourteenth amendment[13] and ever increasing legislative programs.[14]

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4. Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1284 (1976). The term "public law litigation" as defined by Chayes encompasses that portion of modern litigation that departs substantially from the classic concept of bipolar disputes between private parties about past completed events resulting in a judgment granting or denying damages. *Id.* at 1282-83. Rather,

> [t]he party structure is sprawling and amorphous, subject to change over the course of the litigation. The traditional adversary relationship is suffused and intermixed with negotiating and mediating processes at every point. The judge is the dominant figure in organizing and guiding the case, and he draws for support not only on the parties and their counsel, but on a wide range of outsiders—masters, experts, and oversight personnel.

Id. at 1284. *See also* Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791 (1976).

Statistics from Chayes, *supra*, at 1303, n.93, reflect the dramatic increase in public law cases.

5. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Milliken v. Bradley, 418 U.S. 717 (1974); Brown v. Bd. of Educ., 349 U.S. 294 (1955); Alabama v. United States, 304 F.2d 583 (5th Cir. 1962). *See generally* Read, *Judicial Evolution of the Law of School Integration*, 39 LAW & CONT. PROBS. 7 (1975).

6. *See* Edelman v. Jordan, 415 U.S. 651 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969); Goldberg v. Kelly, 397 U.S. 254 (1970); Rosado v. Wyman, 397 U.S. 397 (1970); Perez v. Lavine, 412 F. Supp. 1340 (S.D.N.Y. 1976).

7. *See* Hills v. Gautreaux, 425 U.S. 284 (1976); Cole v. Housing Auth. of Newport, 312 F. Supp. 692 (D.R.I.), *aff'd*, 435 F.2d 807 (1st Cir. 1970).

8. *See* Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom*, Wyatt v. Anderholt, 503 F.2d 1305 (5th Cir. 1974); Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974); Nelson v. Hyne, 491 F.2d 352 (7th Cir. 1974); Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973);Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974); Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972).

9. *See* Hills v. Gautreaux, 425 U.S. 284 (1976); Southern Burlington County NAACP v. Township of Mt. Laurel, 119 N.J. Super. 164, 290 A.2d 465 (1972), *aff'd*, 67 N.J. 151, 336 A.2d 713 (1975); Pascak Ass'n, Ltd. v. Mayor & Council, 131 N.J. Super. 195, 329 A.2d 89 (1974).

10. *See* Brown v. EPA, 521 F.2d 827 (9th Cir. 1975); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *consolidated de sub nom*, EPA v. Brown, 431 U.S. 99 (1977) *per curiam* (reversed and remanded to consider motions in light of EPA's concession that modifications in their regulations were needed) (Court avoided for the moment the issue whether Congress can order a state to draft an implementation plan or to enforce an EPA promulgated plan).

11. *See* Keyes v. School Dist., 380 F. Supp. 673 (D. Colo. 1974), *cert. denied*, 423 U.S. 1066 (1974); Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2nd Cir.1975); Robinson v. Cahill, — N.J. —, — A.2d — (1978).

12. *See* Reynolds v. Sims, 377 U.S. 533 (1964); Lucas v. Forty-Fourth Gen. Assembly of Colorado, 377 U.S. 713 (1964); Baker v. Carr, 369 U.S. 186 (1962); Karpral v. Jepson, 271 F. Supp. 74 (D. Conn. 1967).

13. *See generally* R. BERGER, GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 283-300 (1977).

14. Justice Burger, noting this increase, has called for a "judicial impact statement" to accompany all new legislation. Address by Chief Justice Burger, ABA Annual Convention (1977), (reprinted in 63 ABA J. 504, 505 (1977)).

And yet, the involvement of American courts in all areas of public concern is scarcely novel. Our peculiar federal constitutional system, with courts the final arbiters, has long made judicial consideration of varied social policy issues a commonplace.[15] What *has* changed and has drawn public attention—and increasingly anger—[16] is the courts' provision of comprehensive and ongoing remedies in the growing number of public law cases. The judiciary has not fashioned these remedies uniformly; rather, they have simply evolved ad hoc remedial approaches that, although substantively correct, are procedurally fraught with many potentials for abuse.

This article seeks to evaluate the process and methodology adopted by courts in the remedial phase of public law cases. It is argued that the current level of judicial involvement has neither a historical nor a functional basis and cannot be justified merely by a passing obligatory reference to "inherent equitable powers."[17] Courts must understand and adapt to their changing social role by developing codified procedures for receiving and acting upon information germane to the remedial phase. To this end it is suggested that methods that have historically served to instill public confidence in the integrity and justice of the judicial process should be utilized. Only in this way can the many salutory developments of the public law era be maintained without undermining traditional public expectations of a neutral and orderly judiciary.

II. Scope of the Problem

A. Early Equity Power

As it has been used by American jurists the term "equity" is fundamentally ambiguous.[18] On one hand, the term has a primarily historical referent, amounting more or less to Maitland's glib formula, "Equity is that body of rules which is administered . . . by . . . Courts of Equity."[19] On the other hand, there is a more complex, normative connotation by which "equity" refers to the need in individual cases to disregard admittedly sound rules to serve better

15. deTocqueville's insight led him to conclude in 1830 that "Scarcely a political question arises in the United States that is not resolved, sooner or later, into a judicial question." 1 A. TOCQUEVILLE, DEMOCRACY IN AMERICA, 280 (P. Bradley ed. 1945).

16. *See, e.g.*, Newsweek Jan. 1, 1977, at 42; U.S. News & World Report, Jun. 19, 1976, at 29; Time Nov. 13, 1977, at 1.

17. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971): "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. *Id.* at 15.

18. *See, e.g.*, text accompanying note 3 *supra.*

19. A. MAITLAND, EQUITY, ALSO THE FORMS OF ACTION TO COMMON LAW (1929). *See also* W. WALSH, WALSH ON EQUITY 1, 2 (1930).

the ultimate goal of justice.[20] In this context, the courts have used terms like "inherent" equitable powers as a vague blanket covering both the historical and the functionl justifications for a proposed course of action. Although this use may serve well enough to resolve doubts about the *general* power to act, it is simply not acceptable, either logically, legally, or popularly, when dealing with the methods and procedures that ought to be employed in fashioning novel remedies. Equitable relief is becoming so increasingly important in modern litigation that equitable remedies can no longer be accurately called extraordinary,[21] particularly in public law cases. Moreover, while the Constitution expressly provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution [and] the Laws of the United States,"[22] little in the history of English Chancery[23] can buttress a claim that courts have inherent power to fashion complex and ongoing remedies in cases involving the operations of government. Indeed, the notion that courts have inherent equitable power to fashion complex institutional remedies is without specific historical foundation and has been applied in a manner that threatens unprincipled application of the courts' power to imprison for contempt.[24]

Antecedents of the English Court of Chancery have been identified as early as the twelfth century. At that time the office of Chancellor was administrative, the King himself being the direct source of its authority and the arbiter of its actions. Cases were given individualized treatment, and rules were largely lacking.[25] This was natural in view of the unquestioned supremacy of the Royal authority; there was, quite literally, no separation of powers problem.[26] Later, from 1461 until 1603, the Office of Chancery functioned for the first time

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20. *See generally* R. NEWMAN, EQUITY AND LAW: A COMPARATIVE STUDY, 11, 12 (1961); J. POMEROY, EQUITY JURISPRUDENCE §§ 48-51 (5th ed. 1941).

21. Chayes, *supra* note 4, at 1292.

22. U.S. CONST. Art. III, sec. 2.

23. For clarity, the English court will be uniformly referred to in this article as the Court of Chancery. This is not intended to imply that the court's administrative origins outweighed its equitable functions, but is designed to minimize duplication of the term in multiple contexts.

24. *See* notes 40-45 and accompanying text *infra.*

Historically, the court's civil contempt power to imprison those who disobeyed its orders was confined to the Court of Chancery. It is generally held that Lord Coke's quarrel with the Chancery in 1616 was "lost" because the latter courts, utilizing the contempt power, could effectively block enforcement of common-law judgments in difficult cases. For an interesting and largely differing opinion, see Gray, *The Boundaries of the Equitable Function,* 20 AMER. J. OF LEGAL HISTORY 192 (1976).

25. The office of Chancellor and his role in court reform during the twelfth century are recounted in Green, *The Centralization of Norman Justice under Henry II,* (reprinted in *AALS, Select Essays in Anglo-American History,* 121 (1907)). Maitland traces the origin of Chancery Courts at least to the Thirteenth Century, A. MAITLAND, *supra* note 19, at 2.

26. "The Justices of the Eyre were in a very special sense impersonations of the King who had received authority . . . to hearken to give amends for any complaint. . . ." Bolland, 27 Selden Society, Eyre of Kent II, 28-29.

Apparently, during this early period the Chancellor might be said to have provided an

as a court, with little direct oversight from the king; the chancellors were men of the Church, and their rule of decision was their conscience.[27] As the volume of cases increased with the development of modern systems of commerce and industry, the need for orderly adjudication and predictable decisionmaking became the primary social need, and the Court of Chancery came under increasing criticism.[28] Finally, during the seventeenth century judges schooled in structure of the common-law systematically reformed the Chancery Courts, and molded as their rules of decision a cluster of substantive principles, known familiarly today as the maxims of equity.[29] Case precedent became not only relevant, but controlling, and the English Chancery courts soon evolved coherent and consistent rules governing their decisions.[30]

Thus, although the Chancery system existed in England for seven centuries, for half that time the chancellor acted as an administrative official responsible to the king. Furthermore, the Chancery Court operated as an independent judicial body under a rule of conscience *i.e.*, individualized decisionmaking, only from about 1461 to 1603. Thereafter, Chancery utilized rules and principles in the same manner as had the common-law courts and in fact drew on the great common-law practitioners to develop these rules. Moreover, following the Chancery Court's evolution into a true judicial institution, the remedies it actually afforded were confined to matters concerning specific performance, trusts and mortgages, and even these were used only sparingly with due regard for the capability of the court to carry out its mandate.[31] More importantly, though relief against the sovereign himself was afforded in some cases (notably those involving royal seizure of land[32]), the relief depended directly upon the consent of the king to submit himself to the decision of the court in each case. For much of its history, an application to the Chancellor was, in effect, an application to the king himself and not a judicial pro-

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administrative remedy to those aggrieved by the judicial process, though the Chancellor himself was not part of that process. Green, *supra* note 25, at 122-23.

27. Because the men who occupied the office during this time were, for the most part, men of integrity and ability, the Court of Chancery was generally respected as an honest and just institution. Severns, *Nineteenth Century Equity*, 12 CHI.-KENT L. REV. 81, 100 (1934).

28. Even as Ellesmere was championing the cause of the Court of Chancery to establish parity, if not primacy, in its competition with Coke and the common-law courts, he recognized the fundamental defects in a wholly discretionary system. *See* Severns, *supra* note 27, at 105-06.

29. These maxims were developed chiefly in the period 1675-1756 by two great lawyers of common-law background, Finch and Hardwicke. Severns, *Nineteenth Century Equity part 2*, 13 CHI.-KENT L. REV. 305, 305-06 (1935).

30. Procedural reforms lacked far behind, however. Chancery procedures were to become progressively more cumbersome until the efforts of Bentham and the stinging criticism of Dickens aroused sufficient public clamor to compel reform in the nineteenth century. *See* Severns, *supra*, note 29, at 314-325.

31. D. DOBBS, REMEDIES, 105 (1973).

32. A. MAITLAND, *supra* note 19, at 4.

ceeding.[33]

It has often been assumed that the well known formula *ubi jus ibi remedium*[34] manifests inherent comprehensive power in early English courts to devise remedies in any situation. In Dicey's words, "[T]here runs through the English constitution that inseparable connection between the means of enforcing a right and the right to be enforced which is the strength of judicial legislation."[35] One must understand, however, that the admirable connection that Dicey described was made in *legislation* such as the Habeas Corpus Acts and in no way stemmed from inherent judicial power to expand jurisdiction to confer remedies. Indeed, any judicial initiatives into these areas were readily subject to control under much more limited deference accorded judicial review in British "constitutional" cases.[36]

Hence, the historical development of Chancery in England has been such that it was subject at all times to the control of either the king or parliament. Chancery never operated with the total independence that characterizes American courts interpreting a written constitution.[37] Understanding this difference is fundamental to an evaluation of modern court procedures, particularly when federal court interpretation of a written constitution directly infringes upon governmental functions of state and local governments in an extensive and ongoing fashion.

B. Federal Court Application of its Inherent Power to Fashion Remedies

Although the English court system did not anticipate modern public law remedies, judicial references to "inherent equitable powers"[38] express a functional commitment to a system that permits individual judges to avoid the restrictiveness of judge-made rules and to devise flexible new approaches to achieve a "just" or "fair" result. The admission that law and morality have an intrinsic symbiotic relationship is no longer thought troublesome, and judges are given wide latitude in exercising individual judgment for the general welfare.[39] The role of coercion in this context, though recognized by

33. Adams, *The Origin of English Equity*, 16 COL. L. REV. 87, 90-92 (1916). The shift of some of the Royal prerogative to the Chancellor is described in I. HOLDSWORTH, HISTORY OF ENGLISH LAW,401-04 (7th ed. 1956).

34. "Where there is a right, there is a remedy."

35. A. DICEY, CONSTITUTIONAL LAW, 198 (1959).

36. *Id.* at 199.

37. In the words of one noted commentator, "[N]o United Kingdom court is competent to question the validity of an Act of Parliament." S.A. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 67 (1971).

38. *See* note 5 and accompanying text *supra.*

39. *See generally* R. NEWMAN, EQUITY & LAW: A COMPARATIVE STUDY 11-12, 36-37 (1961).

scholars[40] and commentators[41] as having crucial import to the chancellor's remedial efficacy, is less openly addressed by the courts than is the issue of flexibility. Typical is the subtly sinister language in *Swann v. Charlotte-Mecklenburg Board of Education*,[42] a school desegregation case: "If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad. . . ."[43] Although the language in *Swann* is quite circumspect, the breadth of the power is more fully expressed in the federal contempt statute: "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority . . . as . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command."[44]

The enormous impact that even potential contempt proceedings have upon parties to judicial proceedings cannot be completely understood by one who has not been directly involved. The sense is accurately conveyed by one commentator discussing implementation of the remedial decree in a well known public law case:

> When the administration began to refuse the [court-appointed oversight committee] access to staff members and files, the committee obtained an order from the court instructing the defendants to cooperate. This order was supported by the same power of contempt that would be used to enforce a subpoena issued by a traditional master or receiver. Toward the end of the two year implementation period the court issued an order requiring the defendants to show cause why they had not complied with the [committee] recommendations, *even though some of these recommendations were not explicitly covered by the original decree.*[45]

In most instances, the confluence of flexibility and coercion in injunctive proceedings is inherently controlled by the traditional limitation on injunctive orders to be negative, specific restraints directed at particular individuals. In the newer cases, courts have disregarded these restraints as inadequate and have exerted authority over a comprehensive pattern of activity for a protracted period

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40. *See* J. POMEROY, A TREATISE OF EQUITY JURISPRUDENCE — (1941). *See generally* D. DOBBS, REMEDIES, 93 (1973).

41. *See, e.g.*, Comment, *Utilization of Neoreceiverships*, *supra* note 2.

42. 402 U.S. 1 (1974).

43. *Id.* at 15.

44. 18 U.S.C. § 401 (1977).

In Griffin v. County School Bd., 363 F.2d 206 (4th Cir. 1966), the court affirmed a contempt order under 18 U.S.C. § 401 based upon acts committed *before* any order was issued. The court reasoned thus: "Although this court had not issued an injunction . . . the Board knew that if the plaintiffs succeeded this would be its ultimate decree. . . . That potential decree was thus then within the statute." *Id.* at 210. *See also* Faubus v. United States, 254 F.2d 797 (8th Cir. 1958) Kasper v. Brittain, 245 F.2d 92 (6th Cir. 1957).

45. Comment, *The Wyatt Case: Implementation* of a *Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338, 1363-64 (1975) (discussing Wyatt v. Stickney, 325 F. Supp. 781 (*M.D. Ala.* 1971)) (emphasis added) [hereinafter cited as Comment, *The Wyatt Case*].

of time. Before the remedies arising in federal litigation that challenges the operation of state and local government institutions can be coalesced into a satisfactory conceptual framework, the Court must reconcile two lines of cases.

In *Ex Parte Young*,[46] decided in 1908, the Supreme Court upheld federal court power to issue negative injunctions against state officials who were violating federal constitutional rights. In *Edelman v. Jordan*,[47] decided in 1974, the Court refused to grant direct monetary relief in the form of damages for violation of federal constitutional rights, although it re-affirmed the power to enjoin future action by state officials in the same circumstances. Finally, in *Fitzpatrick v. Bitzer*,[48] decided in 1976, the Court upheld congressional power to legislate a damages remedy in implementing fourteenth amendment rights. Under these cases federal courts can *prevent* actions by state officials, including the expenditure of funds, to protect constitutional rights, but may *not* require *affirmative* expenditure of state funds absent congressional authorization.[49]

Yet, in the second line of cases, the public law cases, federal judges have had great latitude in devising and enforcing remedies based upon their individual judgments concerning public policy and administrative implementation.[50] More importantly, in effecting these remedies they have often required state and local governments to institute changes costing millions of dollars, a result that is clearly

46. 209 U.S. 123 (1908) (state attorney general was enjoined from pursuing a state court remedy to enforce improper rate regulations).

47. 415 U.S. 651 (1974). The Court upheld federal court power requiring state officials to conform to federal requirements for processing public assistance applications, but refused to allow monetary awards to welfare applicants denied benefits under invalid procedures. The Court found no important distinction between damages and 'retroactive benefits' as a quasi-injunctive remedy: It was the impact upon the public treasury that was crucial. New limits upon congressional power to require expenditure or reallocation of state funds in nonconstitutional areas were announced in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

48. 427 U.S. 445 (1976). Decided the same day as *National League of Cities*, *Fitzpatrick* continues the development of a judicial deference to congressional initiative in fourteenth amendment cases. *Compare* Washington v. Davis, 426 U.S. 229 (1976) *with* Griggs v. Duke Power Co., 401 U.S. 424 (1971), which is perhaps indicative of a general posture of deference in public interest cases, *compare* United States v. SCRAP, 412 U.S. 669 (1973) *with* Warth v. Seldin, 422 U.S. 490 (1975). *See* note 73 and accompanying text *infra*.

49. Tribe has suggested that *National League of Cities* can be understood logically to preclude federal interference with state government functions when services to individuals would be hampered. Tribe, *Unravelling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1102 (1977). It appears, however, that the present decisions cannot be reconciled without reference to some more general principle that will perforce require at least one of the decisions to be overruled. The most likely approach would be to recognize that the race discrimination cases are sui generis in American jurisprudence, and that in all other areas federalism limits federal court oversight of state financial expenditures, including judicial supervision of operating state programs.

50. Commenting on the recent conversion of constitutional adjudication into a weapon of reform, Archibald Cox stated, "A judge who believes in progress and in special judicial responsibility for values and groups not adequately represented in the political process will find it natural, if not obligatory, to require the revision of old laws and settled government practices inconsistent with what he believes to be national ideals." Cox, *supra* note 4, at 802.

incompatible with the broad principle laid down in *Young, Edelman* and *Fitzpatrick.*[51] A striking example of a judge mandating comprehensive reform in the ongoing activity of a large institution is *Wyatt v. Stickney.*[52]

The action in *Wyatt* was originally instituted by mental health workers at Bryce Hospital, an Alabama mental health care facility, but was converted at the judge's suggestion to a class action on behalf of the mentally ill in state institutions.[53] The representatives of the class sought comprehensive reorganization and improvement of the health services, which the court mandated and supervised. The decree was long and covered many areas, involving the court in decisions ranging from the operation of the physical facilities to appropriate psychological treatment. When the court encountered resistence to the reforms, it called in both the United States Attorney and the Federal Bureau of Investigation. In all, the proceeding was pending for over three years and cost the parties millions of dollars,[54] though no overall estimate of judicial time and effort expended is available.

Although *Wyatt* has been cited often as a prime example of court initiated institutional reform,[55] it does not stand alone. Other courts have undertaken similar reforms of which the most prominent examples are the school desegregation cases.[56] Given the increase in these cases, one must ask whether the judiciary can properly order

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51. The principle underlying the eventual synthesis of these two lines of cases may be in the process of development in light of the decision last term in Monell v. Department of Social Services of New York, 436 U.S. 658 (1978). In overruling portions of Monroe v. Pape, 365 U.S. 167 (1961), the Court held that local government entities were proper party defendants to federal law suits based upon constitutional claims. The Court further refined the model, however, by limiting the liability of the entity to wrongful actions or policies undertaken by high level officials with broad administrative responsibilities, such as the mayor or heads of major departments. Id. at 694. By adding this carefully balanced principle to the conceptual 'mix' of the earlier decisions discussed in the text, one can speculate that the Court would find it expedient in future cases to re-draw the lines of immunity along functional paths such as the expenditure of substantial sums of money, or of monies not presently allocated by the legislature. This approcah has been implicity recognized by some members of the Supreme Court. *See, e.g.*, Edelman v. Jordon 415 U.S. 651, 680-82 (1976) (Douglas, J., dissenting). In the interim however, courts are faced with an unresolved conflict of principles that has resulted in the ratification of injunctions having major direct affects upon the nature and amount of funds expended by state and local governments in performing government services.

52. 325 F. Supp. 781 (M.D. Ala. 1971) *hearings on standards ordered*, 334 F. Supp. 1341, (M.D. Ala.) *enforced* 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd. sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

53. The theory of the action was that the conditions in the hospitals violated the patients' constitutional rights.

54. One commentator, who carefully traces the history of the remedial phase in *Wyatt*, notes that one institution alone spent over a million dollars on capital improvements related to the decree. Comment, *The Wyatt Case, supra*, note 45, at 1372 n.200. For a similar, but even more detailed, study and evaluation of the remedial phase in Prison reform cases, see Harris and Spiller, *After Decision: Implementation of Decrees In Correctional Settings* (Law Enforcement Assistance Administration 1977).

55. *See, e.g.*, Cox, *supra* note 4, at 817; Time, Jan 22, 1979, at 91.

56. "The court determines which students will be assigned to each school, how teachers shall be selected, what security measures shall be adopted, and where new schools shall be

the expenditure of state funds and the detailed reorganization of state institutions on a regular basis with no check other than the instincts of its judges and the ad hoc review of appellate tribunals. The consequences of these remedial experiments are enormous. At minimum, there exists great potential for mischief when a court becomes involved over long periods of time in the ongoing operation of state and local government institutions. Either the resources of the judiciary will have to be dramatically increased[57] or, and perhaps most disturbing, it will have to enforce constitutional guarantees selectively, even haphazardly.

C. Peculiar Nature of the Judge's Involvement

Before proposing the procedural reforms that are necessary to give order to an extremely complex process, it is best to begin with a catalogue of characteristics common to institutional reform cases. Although the courts have formulated public law remedies mostly on an ad hoc basis, many aspects of the problems and the courts' efforts to solve them fall into discernable patterns. Familiarity with the following outline of common elements will facilitate understanding of the proposed procedural innovations, which are essentially intended to alleviate uncertainity and confusion for the court and the parties:[58]

(1) The initial finding by the court entails a constitutional deprivation that can, in the court's view, be corrected best through extensive affirmative measures by an agency of state government.[59]

(2) The court is unable to identify specifically those actions that will prevent the deprivation from continuing in the future.[60]

(3) The implementation of the judicial decision will affect

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built. When transportation is required, the court directs the expenditure of hundreds of thousands of dollars." Cox, *supra*, note 4, at 814 (footnotes omitted).

For other examples of judicial social reform, *see, e.g.,* Gates v. Collier, 390 F. Supp. 482 (N.D. Miss. 1975), *aff'd*, 525 F.2d 965 (5th Cir. 1976) (court ordered rewriting of prison rules and rebuilding of prison facilities); Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974) (court specified, *inter alia*, the workload of staff social workers, the training possessed by prison psychologists, and a coeducational living environment).

57. R. BERGER *supra* note 14, at 506 (calling for 132 additional federal judges). The enormous growth of litigation and the inability of the courts to dispose of pending cases with dispatch call forth uncomfortable comparison with the state of the English Chancery Courts of 1800 to 1850. *See* note 30 *supra.*

58. For a similar morphology of public law litigation, see Chayes, *supra* note 4, at 1302. *See also* Hinkle, *Appellate Supervision of Remedies in Public Law Adjudication*, 4 FLA. ST. U. L. REV. 411 (1976).

59. *See, e.g.*, Hawkins v. Town of Shaw, 303 F. Supp. 1162 (N.D. Miss. 1969), *rev'd and rem'd*, 437 F.2d 1286 (5th Cir. 1971); Hart v. Community School Bd., 383 F. Supp. 699, 758-69 (E.D.N.Y. 1974).

60. *See, e.g.*, Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972).

large numbers of persons, most of whom are not parties to the litigation.[61]

(4) Costs of implementation are unknown, but are substantial.[62]

(5) The government agency is resistant to the court's findings.[63]

(6) The matters in issue require analysis by experts or specialists before implementation can be effected.[64]

(7) The long-range success potential is problematic or doubtful.[65]

Furthermore, certain general aspects of the remedial phase tend to characterize these cases:

(1) The court initially formulates a general, tentative goal, usually phrased in terms of the constitutional values to be protected but with little specific content.[66]

(2) Actual implementation is delegated to the defendants or to a court-appointed official who has factfinding and advisory functions.[67]

(3) The court receives informal periodic reports, often making many "fine-tuning" adjustments in the remedy over time.[68]

(4) Court involvement continues over a lengthy period.[69]

(5) Parties operate under the aura of judicial coercion, contempt of court being an overt or barely concealed method of controlling behavior.[70]

(6) Costs are substantial, but are rarely considered directly by the court.[71]

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61. *See* notes 7 and 9 *supra.*

62. *See, e.g.*, Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972); note 54 *supra.*

63. This occurs in almost all public law cases.

64. *See, e.g.*, Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y. 1974); Turner v. Goolsby, 255 F. Supp. 724 (S.D. Ga. 1965). The issue has been well stated by the Hon. John J. Degnan, Attorney General for New Jersey, in an address to the New Jersey Bar Association: "When the courts find violations of constitutional rights which necessitate the power of the purse, they should allow other branches of government sufficient flexibility to devise an accommodation of such needs and defer to 'good faith' attempts to meet those obligations." Reported in the Newark Star Ledger, Nov. 10, 1978, at 10.

65. *See* Comment, *The Wyatt Case, supra* note 45; *see also* Note *Monitors - A New Equitable Remedy?* 70 YALE L.J. 103, 112-15 (1960).

66. *See* note 59 *supra.*

67. *See, e.g.*, Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y. 1974); Knight v. Board of Educ., 48 F.R.D. 115 (E.D.N.Y. 1969).

68. *See, e.g.*, Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972).

69. *See, e.g.*, Louisiana v. United States, 380 U.S. 145, 156 (1965) (approving "indefinite" retention of jurisdiction to "enter such order as justice from time to time might require").

70. *See* note 61 and accompanying text *supra.*

71. Courts generally dismiss the cost element by holding that fiscal impact is not relevant in cases of constitutional violation. *See, e.g.*, Finney v. Arkansas Bd. of Corrections, 505 F.2d 194 (8th Cir. 1974).

D. *Objections to the Remedial Phase in Public Law Cases Examined*

As the preceding list indicates, when a trial judge fashions a remedy in a public law case, he may, indeed must, proceed tentatively and intuitively over a long period of time to gather factual data, policy recommendations, and projections of future events, and to apply that information and devise or approve remedial measures to alter institutional conditions affecting large numbers of people. For the most part the legitimating factor is not the concurrence of the defendants, but the 'inherent equitable power' of contempt held over those who resist the judicial mandate. Three major objections to this species of judicial activity must be answered if courts are to continue exercising these powers.

The first objection is based upon the principle of federalism, long recognized as fundamental to our form of government and recently and vigorously reaffirmed in *National League of Cities v. Usery.*[72] Although the Court in *National League of Cities* obviously reasserted the broad principle that a division of powers between the central government and those of the states is desirable, the court did *not* retreat from the comprehensive interpretation of the Commerce Clause that it recently adopted in *Heart of Atlanta Motel v. United States.*[73] Rather, the Court actually left open for the moment the question of inter-governmental immunity in cases involving Congress' civil rights powers under section five of the fourteenth amendment. That question was decided in favor of congressional authority in *Fitzpatrick v. Bitzer*,[74] in which the Court distinguished *Edelman v. Jordan*,[75] while explicitly declining to question its validity. Indeed, the Court said, "Our analysis begins where *Edelman* left off, for in this Title VII case the threshold fact of congressional authorization to sue the State as employer is clearly present."[76] Thus, as noted earlier, the Court has determined that Congress, but not the courts, can impose direct fiscal sanctions upon state and local governments in

72. 426 U.S. 833 (1976). The Court held that blanket extension of federal wage and hour provisions to state and local government employees violated state immunities under the tenth amendment.

Tribe points out that while *National League of Cities* is ostensibly a decision about states' rights, it can also be considered a decision about individual rights, since a "focus on individual rights is hardly inconsistent with a concern for federalism." Tribe, *supra* note 49, at 1078.

73. 379 U.S. 241 (1964).

74. 427 U.S. 445 (1976).

75. 415 U.S. 651 (1974). In *Edelman* the Supreme Court had refused to recognize retroactive welfare benefits as an appropriate equitable remedy even though the lower court had explicitly found that recalcitrance and deliberate evasion were part and parcel of the welfare officials' pattern of activity prior to and during the litigation. The ground for the decision was that the eleventh amendment as applied under *Ex Parte Young* continued to preclude monetary relief that was a direct drain upon the state treasury, no matter what nominal label the relief bore.

76. 427 U.S. at 452.

cases arising under the fourteenth amendment. Since the remedies, as well as the litigation, in public law cases in the federal courts characteristically have a significant fiscal impact upon the state treasury,[77] when the remedies in those cases involve budgetary adjustments not within the present capabilities of the particular agency involved in the litigation, the federal courts must exercise their judicial authority cautiously if they are to remain consistent with the underlying principles of the Federalism cases.

The second objection is that the courts in public law cases have improperly departed from their traditional passive, arbitral role, altering the separation of powers doctrine.[78] Chayes recognizes this shift, but does not find it troublesome.[79] Other commentators have contended that though the shift is occurring, the courts are forced to act in an unorthodox fashion because the other branches of government have defaulted in their obligations.[80] Even if the latter contention is true, it is relevant only when examining the question of the court's *involvement* in troublesome areas of constitutional law,[81] not the *methods* they use to implement their decisions. The courts should, whenever possible, use these methods consistent with the judicial model of careful, analytical, and critical fact finding, utilizing the procedural safeguards of the rules of evidence and cross-examination to evaluate the information proffered to the court. The remedial phase of public law cases entails ongoing and complex fact finding and, often fact prediction.[82] It is striking that courts frequently abandon the rules of evidence throughout this phase and even delegate the crucial fact finding function to special masters, monitors, observers, or other deputies.[83] Furthermore, the court is often involved in the administration of the agency in an active and comprehensive capacity. Finally, the time frame is extended and sometimes indefinite. All of these departures from traditional judicial functions obscure, or even remove, the distinction between

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77. *See* note 62 and accompanying text *supra.*

78. This criticism is elaborated in Note, *Monitors, A New Equitable Remedy?* 70 YALE L.J. 103, 117 (1960).

It has been aptly said that "[j]ustifying the federal role is nowhere more difficult than with regard to public law remedies, and the relationship between district and appellate courts may greatly affect *both the perception and the fact of judicial integrity.*" Hinkle, *supra* note 58, at 413 (emphasis added). Former United States Attorney General Archibold Cox has observed that "[t]he Court becomes less of a court in the old fashioned sense and more of a roving commission charged with deciding whether other branches of government are observing constitutional limitations." Cox, *supra* note 4, at 808.

79. Chayes, *supra* note 4, at 1314-15.

80. *See* Comment, *Utilization of Neoreceiverships, supra* note 2, at 1199-1200.

81. The distinction between involvement and choice of remedy is clearly drawn. *See* Cox, *supra* note 4, at 812-13.

82. *See* notes 59-68 and accompanying text *supra*; Cox, *supra* note 4, at 815.

83. There is no reason to delegate the judge's fact finding function to an appointee merely because predictions and estimates are entailed, for the process still is grounded upon concrete, present evidence that forms the basis for inferences, usually aided by expert opinion.

courts and administrative tribunals. Only the judge's contempt power remains in force.

Public acceptance of judicial intervention in these cases is conditioned upon judicial acceptance of the responsibility to retain the mechanism of judicious fact finding as protection against capricious actions. In other words, although courts cannot, and probably should not, withdraw from these controversies merely because separation of powers is said to be *substantively* threatened,[84] courts should, to the extent possible, continue to behave *procedurally* as courts in notifying affected parties, ascertaining facts, selecting remedies, and verbalizing the bases for their decisions.[85]

The third major objection to judicial activism in public law cases is that the courts are behaving contrary to basic principles of democracy. Essentially, this argument, which forms the basis for the most vocal popular criticism,[86] posits that since judges are not subject to popular election, they are not appropriate spokesmen in areas of social policy.[87]

The substantive objections to this criticism can be met by the assertion that it is precisely because judges are not elected by the popular will that they are well-suited to this type of reform.[88] They are not subject to constituent pressure and, therefore, can more freely be neutral on questions that arouse irrational prejudice and popular sentiment. Nevertheless, negative public impressions are reinforced by the secrecy of the remedial phase, the informality of the proceedings, and the lack of notification to many of the persons directly affected by the court's decrees. Hence, in the long run the *appearance* of unfairness may fatally undermine public respect for the judiciary even in the absence of actual impropriety.

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84. In Baker v. Carr, 369 U.S. 186 (1962), the Court refined the political question issue and distinguished the functioning of a coordinate branch from the manner of selecting the members of that branch. The question of remedy, however, has proven far more difficult. *See, e.g.*, Connor v. Finch, 431 U.S. 407 (1977) (multimember districts are ordinarily permissible in plans drawn under court order by the defendants, but not ordinarily permissible in plans drawn by the court itself).

85. *See* Hinkle, *supra* note 58, at 426.

86. *See* notes 13 & 16 *supra*.

87. *See* T. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962).

88. Chayes notes that "the judiciary may have some important institutional advantages for the tasks it is assuming." Chayes, *supra* note 4, at 1307. These advantages include the following:

> [a] professional tradition that insulates [the federal judge] from narrow political pressures . . . , some experience of the political process; and acquaintance with a fairly broad range of public policy problems. Moreover, he is governed by a professional ideal of reflective and dispassionate analysis of the problem before him and is likely to have had some experience in putting this ideal into practice.

Id. at 1307-08. Two other advantages that Chayes recognizes are that the judiciary is nonbureaucratic and that the adversarial structure provides a strong incentive for the parties to furnish information. *Id.* at 1308.

III. Evaluation and Proposals for Reform

Judicial independence, efficacy, and integrity may be said to depend fundamentally upon a neutral and deliberative decision-making process. The English Chancery courts evolved both substantive and procedural rules to insure consistency and predictability in their decisions. This evolution was essential even though the British judiciary was uniformly subject to direct control by the Crown and by Parliament.[89] In the United States, courts enjoy substantially greater independence from the other two branches of the federal government and have broad powers over many aspects of State and local governments through the Federal Constitution.[90] Although some have argued that this expansive power over other branches is institutionally unsound, and that the only viable solution is to divest the federal courts of substantial segments of its present jurisdiction over these governmental entities,[91] two reasons support the judicial role in policing the other branches of government.

First, the enormous growth of government in modernized societies carries the direct threat of oppression. The courts have provided, and must continue to provide, a valuable check upon the excesses of governmental activity. Indeed, much of the need for judicial activism arises from the inaction of the other branches.[92]Although rejected by the strict constructionists,[93] this argument is generally accepted by the vast majority of those involved in, or affected by, government action.

Second, few have seriously criticized the motivation or integrity of any of the literally hundreds of judges who have been involved in institutional reform. Thus far the judiciary has uniformly acted with restraint and caution, perhaps in some instances to the detriment of those seeking reform.[94] The decisions and the literature suggest that courts may well have shown far more honesty, fairness, and insight

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89. Initially the Chancellor was an administrative deputy of the King. *See* note 25 *supra.* In modern times British courts have been subject to legislative override in all cases, including those involving constitutional issues. *See generally* deSmith, *supra* note 37, at 67.

90. Berger critically discusses the development of federal power over state governments through the Constitution as interpreted by the federal courts. His historical analysis of the background of the fourteenth amendment leads him to the conclusion that

> the framers chose words which aptly expressed, and throughout were wedded to, their limited purposes . . . . [T]here is virtually no evidence that the framers meant to resort to those words [due process and equal protection] to open goals beyond those specified in the Civil Rights Act. . . . If the terms of the amendment are vague, it is because the Court made them so in order to shield the expanding free enterprise system from regulation.

R. BERGER, *supra* note 13, at 167-68. For a surprising speculation on the logical progression of these developments, see Tribe, *supra* note 49.

91. *See, e.g.*, R. BERGER,, *supra* note 13, at 407-08.

92. *See* Comment, *Utilization of NeoReceiverships*, *supra* note 2, at 1199; *see also* Cox, *supra* note 4, at 802.

93. *See, e.g.*, R. BERGER, *supra* note 13.

94. *See* Comment, *The Wyatt Case, supra* note 45, at 1376-77.

in identifying major social issues and in dealing with them than have the other branches of government.

Considering these arguments together, one can conclude that the federal courts have justifiably, but nevertheless very clearly, departed from traditional judicial methods for devising remedies in institutional reform cases. These departures have raised questions among the general public about the propriety of judicial conduct, have sacrificed at least the appearance of consistency and predictability, and have hampered appellate control of the process.[95] These criticisms will continue, and will grow, unless the courts undertake affirmative procedural reforms designed to restore the integrity of the decision-making process as perceived by those within and without that process. Six major aspects of the remedial phase in public law cases require attention and reform.

A. Notice and Parties

One of the most frequently noted aspects of public law litigation is the impact the remedies have on individuals who are not before the court during the trial stage.[96] In some instances parties may be added, as plaintiffs or defendants, in the remedial phase as the court perceives indirect causes of the central problem.[97] In other cases members of the affected group may be excluded from the law suit,[98] or members of the general public may be directly injured by judicial action.[99] Finally, state government agencies or officials who are in the best position to analyze and present information concerning the fiscal impact of proposed remedies, or information concerning state financial resources and budgetary processes, may be left out of the litigation entirely.[100]

Moreover, to further deprive parties of any meaningful participation, several courts and commentators have asserted that the re-

95. *See generally* Hinkle, *supra* note 58.

96. *See generally* Chayes, *supra* note 4 at 189-92; Hinkle, *supra* note 58, at 412.

97. In *Wyatt* the action was commenced by mental health workers at one Alabama institution. At the suggestion of the trial judge, patients were added as plaintiffs and became the major focus of the law suit. Ironically, many of the workers originally involved as plaintiffs came to resent and to resist the court's decrees, which called for reforms in the system of patient management. *See* Comment, *The Wyatt Case, supra* note 45, at 1354.

98. Apparently the defendants in *Wyatt* began to discharge patients at a much higher rate than usual, which brought claims that they were being 'dumped' to meet court mandated staff-patient ratios. Nevertheless, Judge Johnson declined to hear these claims on the ground that discharged patients were no longer part of the litigation, even though discharged patients were committing bizarre and, in some cases, threatening acts that alarmed and angered local residents. *See id.*, at 1374, n.208.

99. In Milliken v. Bradley, 433 U.S. 267 (1977), for example, the Supreme Court affirmed court-ordered expenditure of general state education funds for compensatory education programs targeted at Blacks in the Detroit school system.

100. This occurs because of the complex procedural rules involved in federal court jurisdiction over states, state action, and state officials in cases concerning federal constitutional rights.

medial phase of litigation should be under the direct control and discretion of the court, with a minimum of influence from the parties.[101] Although this approach may be justified when the parties cooperate in the formulation of the remedial decree, this sort of consensus seldom exists. Indeed, it is resistence to the court-ordered reforms that most often necessitates continued judicial involvement, with its coercive implications.[102] Thus, all of the parties should be involved in traditional adversary roles to guarantee that the information the court receives and the decisions based thereon are tested in the crucible of an adversary proceeding.[103]

Reform in these two interrelated areas of procedure entails two fundamental changes. First, the class of persons notified of the finding of the trial court and of the proposed scope of the remedies under consideration should be broadened to include all those potentially affected, regardless whether they meet traditional tests of necessary parties to the litigation.[104] And when the decree may have direct impact upon members of the general public,[105] notice requirements should include publication in newspapers of general circulation, apart from notice to the named parties.

Second, the chief executive officer and the chief fiscal officer of a State should be notified routinely of all pending proceedings in which proposed injunctive remedies may require substantial expenditures of public funds.[106] In addition, these officials should be authorized by court rule[107] to intervene in any such proceeding for the purpose of presenting evidence concerning the projected fiscal impact of the remedies under consideration without waiving any immunity that exists under the tenth or eleventh amendment.[108] The

101. *See generally* Chayes, *supra* note 4, at 1300-01; *see* Comment, *The Wyatt Case, supra* note 45, at 1366. In *Wyatt* the court directed the plaintiff's attorneys to refrain from active participation in the remedial phase, arrogating sole responsibility for that portion of the proceeding to the court itself. *Id.* at n.177.

102. *See* Comment, *Utilization of Neoreceiverships, supra* note 2, at 1178-79.

103. Oral testimony under oath subject to cross-examination before a court that has the opportunity to observe the demeanor of the witness is at the heart of the American system of judicial procedure and should not be displaced, absent unique or extraordinary circumstances.

104. FED. R. CIV. P. 19 has evolved a concept of necessary parties that is based upon realistic considerations of practicality, rather than antiquated notions of strict necessity. *See* Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).

105. This impact may be based upon projections of substantial fiscal consequences or upon possible direct physical consequences, *e.g.*, the revision of a local zoning code.

106. FED. R. CIV. P. 4(d)(6) presently authorizes, but does not require, service upon the chief executive officer of the state, municipal organization, or other governmental organization subject to suit. Judicial doctrine that balances the tension between governmental immunity and constitutional rights, however, has unnecessarily introduced fictitious and artificial designation of parties. Rule 4 should require service upon a designated official, which could be done by state option under the borrowing provision of 4(d)(7).

107. FED. R. CIV. P. 24 is presently designed to deal primarily with private litigation and contains a mandatory and a permissive provision. Rule 24(a) should be amended to reflect the right of state officials to intervene in public law cases.

108. The Supreme Court has held that waiver of immunity in these situations is not to be lightly inferred absent a clear showing of knowing and intentional conduct. Edelman v. Jor-

value of the budgetary information that would be supplied is significant compared to the risk that state immunity would be broadened by this approach. To date, the courts have given only minimal consideration to claims of fiscal impact in these cases, reasoning that constitutional rights cannot be measured in dollars.[109] This reasoning is not persuasive, however, when the court is engaged in weighing alternative remedies, for each of several possible choices might 'vindicate' the right, so that cost factors may inform the discretion of the court in selecting the best result. At a time when the cost of government has produced a significant tax burden at the federal, state, and local levels, no branch of government can afford the luxury of ignoring monetary considerations. In *National League of Cities*, for example, the Supreme Court carefully reviewed state claims of projected adverse financial impact from the extension of federal wage provisions to state government workers and accepted those claims notwithstanding express congressional findings that such projections were inaccurate.[110]

By improving the notice provisions and by broadening the right to participate in the remedial phase, the courts will enhance the quality of their factual inquiry and, at the same time, will enhance public perceptions of the integrity of the judicial process. The public has a right to know the extent of judicially mandated public expenditures.[111]

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dan, 415 U.S. 651, 671-74 (1974). This should not be confused with waiver of immunity based upon the proprietary or non-governmental nature of the underlying conduct. *See, e.g.*, Parden v. Terminal Railway, 377 U.S. 184 (1964).

109. Finney v. Arkansas Bd. of Corrections, 505 F.2d 194 (8th Cir. 1974). Fiscal impact was held to be of minimal relevance in evaluating constitutional issues in Shapiro v. Thompson, 394 U.S. 618 (1969) and Goldberg v. Kelly, 397 U.S. 254 (1970).

110. In an amicus brief filed on behalf of Senator Williams (D-NJ) and others, there was presented to the Court a detailed account of the lengthy process of analysis undertaken by Congress in estimating fiscal impact of the measures, which resulted in a congressional finding that the impact would be relatively slight [brief on file at Seton Hall Law Center].

111. In some cases it appears that legislators' and administrators' reluctance to implement needed fiscal reform stems from unfounded fear of public resistance. For example, in Robinson v. Cahill, 303 A.2d 273, 67 N.J. 473 (1973), a case concerning the New Jersey school finance crisis, the judiciary demonstrated that its perception of public opinion was more detached and more accurate than that of the legislature. *Robinson* involved a direct and acrimonious confrontation between the state judiciary and the legislature concerning the financing of public education in New Jersey. The court mandated statewide comparability for education under a state constitutional provision requiring a 'thorough and efficient' education for all children in the state. It soon became clear that a state income tax was the only feasible method of implementing the decision. Not until several years had passed and the court threatened to close all the schools in the state, however, did the legislature reluctantly enact the tax. The reaction at the polls in the following general election was by all accounts nil.

Nevertheless, following the conclusion of the long controversary, Chief Justice Hughes reflected, "Despite our judicial and enormous administrative powers given us by the Constitution, I think we realized we couldn't change everything and make everything perfect in the social scheme. These experiences taught me a new respect for the parameters of the court's potential." Interview with Chief Justice Hughes, Newark Star Ledger, May 30, 1977, at 1.

B. Evidentiary Hearings in the Remedial Phase

The integrity of the judicial process depends directly upon the method by which the court receives and evaluates the information that underlies its decisions. Although the primary mode is still oral testimony by witnesses in open court subject to the critical scrutiny of cross-examination, courts have departed from these safeguards in recent years, particularly in cases tried without a jury.[112] Moreover, the remedial phase of public law cases often entails far more negotiation, informal reporting, and conferencing,[113] than is normally identified with judicial proceedings.[114] The disconcerting similarity to the early nineteenth century Chancery Courts in England is striking. Following the reform of Chancery by the adoption of consistently applied substantive rules for decision,[115] that court was severely and correctly criticized for its major procedural failures, the informality of evidentiary proceedings, and particularly the routine reference of factual issues to masters who were both corrupt and incompetent. In the modern context Judge Kaufman has accurately described the use of masters and referees in federal courts as posing two major dangers:

> [First, d]eterminations by a master are made without all of the legal and institutional safeguards intended to assure the selection of a competent judiciary. American policy, stated quite simply, upholds the right of a litigant to have his suit tried before a judge and jury if he so requests. [Second, a]nother major limitation on the employment of masters is the likelihood that a reference will add appreciably to the cost and length of litigation.[116]

Even when the master's findings are only advisory, the court has little basis to critically evaluate and refine them. In public law cases *any* interested party should be permitted to present evidence in the remedial phase, subject to the traditional requirement—competent testimony exposed to cross-examination. Anecdotal reports, oversight commissions, special masters, and omsbudsmen are not appro-

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112. *See generally* C. WRIGHT, FEDERAL COURTS 428 (3d ed. 1976). The right to a jury trial does not exist in most public law cases, absent congressional authorization. *See generally* Lorillard v. Pons, 46 U.S.L.W. 4150 (Feb. 21, 1978).

113. *See* note 8 *supra.* Courts have frequently appointed individuals or boards to study the general problem and prepare reports and recommendations. *See, e.g.*, Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

114. In *Wyatt v. Stickney*, the court derived its information from a 'human rights committee' that was appointed by the court and contained no mental health professionals. The committee invited workers and patients to appear before it, but had the court's authority to coerce cooperation if necessary. When patient mistreatment in retaliation for complaints became an issue, the judge did not hesitate to bring in FBI officials to investigate and report. Comment, *The Wyatt Case, supra*, note 45, at 1362-65. *See also* Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) (affirming use of monitor to report on implementation).

115. *See* notes 27-29 and accompanying text *supra.*

116. Kaufman, *The Use of Masters in Federal Courts,* 58 COL. L. REV. 452, 458 (1958). This excellent article is primarily concerned with the stringent limitations upon the use of masters under FED. R. CIV. P. 53, although Judge Kaufman notes the inherent power of federal courts to appoint masters in aid of equity decrees.

priate in judicial proceedings and should not be utilized.[117] The parties should maintain an active and primary role in the presentation and evaluation of information.[118]

C. Formulation and Scope of the Injunction

At the present time courts approach the actual decree with considerable variation and experimentation. Generally, the court first permits the defendant to formulate its own plan for reform, which is successful in relatively few cases[119] and entails substantial delay.[120] Next, the court may direct negotiations between the parties, sometimes under the guidance of 'experts' from several disciplines relevant to the problem at hand.[121] Finally, the court will formulate an injunction to be obeyed under penalty of contempt.

In some instances, the court is concerned with altering specific conduct by the defendants; for example, by prohibiting the use of drugs for patient control rather than for treatment.[122] When this is the court's goal, the decree meets the requirements of Federal Rule of Civil Procedure 65(d): "Every order granting an injunction . . . shall be specific in terms; shall describe in reasonable detail, and not by reference to . . . other document[s], the act or acts sought to be restrained."[123] More often, however, the court is concerned with more general reform, undertaking to mandate 'adequate' treatment, 'thorough and efficient education,' or other similar institutional

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117. The reasons against the use of such informal information sources by courts are set forth more fully in Note, *Masters and Magistrates in the Federal Courts*, 88 HARV. L. REV. 779, 787 (1975). *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO, H. WECSLER, HART AND WECSLERS'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 396 (2d ed. 1973).

118. One noted authority put it thus:

> American lawyers' fondness for the adversary system and for restricting the role of the judge rests upon . . . the . . . premise that courts ought not to function as self-propelled vehicles of justice and right. . . . Judges are not expected to go about looking for law suits; or compelling persons to sue who do not desire to do so; or insisting that a person sue for every grievance he has once he does desire to bring an action.

M. ROSENBERG, J. WEINSTEIN, et al, ELEMENTS OF CIVIL PROCEDURE 3 (3d ed. 1976).

119. *See Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1067 (1965). *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). Chayes, *supra* note 4, at 1299 suggests that negotiation is the norm in this situation and that it generally produces satisfactory results. Nevertheless, it is especially clear from the desegregation cases that state and local government officials have few qualms about avoiding implementation of a judicial decision that they feel is unfair or unwarranted.

120. *See* Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971); Karpral v. Jepson, 271 F. Supp. 74 (D. Conn. 1967).

121. *See, e.g.*, Keyes v. School Dist., 380 F. Supp. 673 (D. Colo. 1974), *aff'd*, 413 U.S. 189 (1973); Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972).

122. *See, e.g.*, Nelson v. Heyne, 491 F.2d 352 (7th Cir.1974), *cert. denied*, 417 U.S. 976 (1974) (court promulgated specific guidelines for dispensing behavior-modification drugs to inmates, but did not police implementation or become involved in overall therapeutic treatment plan).

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

goals.[124] In those cases, the court is forced to supervise actively the implementation of the decree and to 'fine tune' its orders in light of further experience.[125] This in turn leads to a series of progress reports by which the parties or a master informs the court as to the success of implementation, which is followed by a stern warning from the court that the defendants must do better on pain of contempt.

There are several reasons why courts adopt a nonspecific approach. The court may be unwilling to choose between two conflicting schools of expertise in the area,[126] electing instead to experiment with various approaches. Or the court may 'legislate' general goals, with the details to be fleshed out by the experts. Finally, the court actually may be masking efforts to force nonparties to provide assistance such as a substantially increased legislative appropriation of funds for the program under supervision. Whatever the motivation, however, the result generally has been confusion, uncertainty, expense, and substantial delay. Notwithstanding the integrity, ability, and dedication of the judges involved in these cases, it is increasingly clear that the courts have neither the resources nor the actual power[127] to achieve significant successes by formulating broad decrees.[128]

To correct this problem, appellate courts should require that injunctions literally meet the specificity requirements of rule 65(d). In those cases involving a general failure to discharge a duty to provide services in violation of the Federal Constitution, the appropriate

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124. In *Wyatt*, 344 F. Supp. 373 (M.D. Ala. 1972), the court devised a standard for implementing the right to treatment that included the following three elements: adequate staff numbers, a humane physical and psychological environment, and individualized treatment planning for each patient. The court's actual decree enjoined the defendants from failing to implement fully and with dispatch each of the elements. *Id.* at 394. *See* Comment, *The Wyatt Case, supra*, note 45, at 1343.

"Thorough and efficient education" has been adopted by the New Jersey court as part of the state constitution in Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973). In cases involving mental institutions and correctional facilities (particularly for juvenile offenders, sex psychopaths, etc.) the courts have elevated to a constitutional level the philosophy that each inmate/patient should be the subject of individualized treatment planning. This theory of treatment is currently in vogue, but is far from accepted doctrine. One difficulty with it as a complete theory of treatment is that it leaves no room for those cases that are, given current scientific and financial limits, not amenable to *any* meaningful treatment, or that can be treated only at enormous cost.

125. *See* Note, *Monitors, a New Equitable Remedy*, 70 YALE L.J. 103 (1960).

126. The decree [in *Wyatt*] embodied potentially conflicting goals which represent two divergent mental health philosophies. One favors . . . the 'least restrictive alternative' . . . . The other proposes . . . maintenance of the basic institutional framework. . . . Neither the court, the parties nor the amici directly addressed the question of whether the choice between the two approaches was a constitutional one, appropriately made by the court, or a professional one, properly left to the discretion of the state officials.

Comment, *The Wyatt Case, supra* note 45, at 1371.

127. *See* note 111 *supra.*

128. *See* Comment, *The Wyatt Case, supra* note 45, at 1379; *see also* Note, *Monitors, A New Equitable Remedy?*, 70 YALE L.J. 103, 118-20 (1960).

remedy should be damages[129] or declaratory relief. In addition, the further requirement of rule 65(d) that judges give reasons for the issuance of an injunction[130] should be construed or amended to require detailed findings of fact and conclusions of law meeting the standards of Federal Rule of Civil Procedure 52 for the judge's decision after a non-jury trial.[131]

D. Fiscal Impact of the Decree

Courts have consistently held that fiscal considerations are of little moment when balanced against constitutional rights.[132] In cases concerning desegregation,[133] public benefits programs,[134] and inmate rehabilitation[135] the courts have generally ignored both the cost of the mandated relief and the cost of the proceeding by which the court reached its decision.[136] With the dramatic growth of judicial oversight of government programs, through both constitutional adjudication and direct legislative authorization, the increasingly costly process of civil litigation and its results have become a major part of state and local government budgets.[137] Given this increase, courts would be irresponsible to totally ignore cost factors in evaluating policy alternatives. They could assess the costs and determine that the constitutional interests involved outweigh them, but it is unrealistic and unfair to disregard financial considerations completely. Justice Burger has called upon legislators explicitly to assess "judicial impact" of all legislation by projecting the extent and expense of litigation generated by each new law.[138] Rather than endeavor to achieve a perfect or ideal solution to the general problem, courts

129. *See* Tribe, *supra* note 49, at 1102. It is entirely likely that damages awarded even to classes of plaintiffs would be less expensive than litigation and compliance with complex institutional injunctions.

130. *See* note 123 and accompanying text *supra*.

131. At present Rule 52(a) requires findings in every case granting or refusing interlocutory injunctions. The provision is frequently ignored or loosely met, however, by a statement at the end of the court's decision reading substantially as follows: "This decision shall constitute the court's findings."

132. *See* Griffin v. County School Bd., 377 U.S. 218, 231 (1964); *see also* cases cited at note 105 *supra*.

133. *See* Milliken v. Bradley, 433 U.S. 267 (1977).

134. *See* Edelman v. Jordan, 415 U.S. 651 (1974).

135. For a listing of typical cases, see Comment *The Wyatt Case supra* note 45, at 1341, n.14.

136. Courts have never seriously attempted to do a cost analysis of the litigation process by measuring the hours of time needed by the judge and supporting court personnel, the physical facilities utilized, the cost of, stenographic services, etc., in the conduct of a major case. Even attorneys and expert witnesses frequently bill litigation time in terms of days in court rather than actual time spent.

137. Actions against state and local government bodies have mushroomed in the last decade. Many municipalities are unable to obtain liability insurance at any reasonable rate, and increasingly require litigation counsel on a retainer basis. Professor Francis McQuade of Seton Hall Law Center has suggested that a legislative limit be placed on damage awards against municipalities. Newark Star Ledger, Feb. 22, 1979, at 40.

138. *See* note 14 *supra*. *See*, remarks of Attorney General Degnan, *supra* note 64.

must consider more openly the cost of various remedies and must strive to devise a specific remedy in a particular case that will be effective to redress the constitutional violation. This proposal is meant to encourage refinement, not rejection, of the principle that constitutional rights generally outweigh fiscal considerations.

E. The Scope of Appellate Review

The approach to appellate review of the trial courts' selection of remedies in public law cases varies considerably.[139] Traditional concepts developed in bipolar private proceedings are inadequate to deal with orders that have broad effects upon the general public and that are chosen from an almost infinite variety of possible solutions.[140] The problem is not solved, however, by converting trial judges into fact finding 'masters' to prepare detailed records that would be subject to de novo appellate review.[141] The volume of appellate litigation in the federal courts[142] and the inefficacy of the trial court's orders during the substantial period of time pending appellate review[143] militate strongly against direct reliance upon appellate courts in this area. Furthermore, most trial attorneys agree that even modern, sophisticated appellate records are at best a substitute for the intense involvement of the trial judge in the factual and legal contours of the controversy.

In the twenty years or so that courts have been engaged in complex institutional remedies, some substantive principles have emerged to guide trial courts in devising appropriate decrees. Some of these principles, such as "the scope of the remedy is limited by the scope of the constitutional violation,"[144] appear to be of general application despite their origin in a particular context, *i.e.*, the desegregation cases. Others are more specific, such as the presumptive preference for single-member districts in some types of legislative reapportionment decrees.[145] Even the more specific principles, however, provide guidance for a significant number of future trial court

139. *See generally* Hinkle, *supra* note 58 for a thoughtful catalogue of the range of appellate review and suggestions for reform.

140. *See* Green v. County School Bd., 391 U.S. 430, 439 (1968).

141. *Contra* Hinkle, *supra* note 58, at 430. Hinkle has suggested that, given a sufficient record and adequate trial findings, appellate courts are equipped to conduct de novo review of the remedy in each case. *Id.*. This suggestion ignores the need to review each record to insure that the findings have a basis. Moreover, the suggestion is based on the premise that appeals in these types of cases are certain, a premise that has merit only as long as the current chaotic procedures are retained. Furthermore, this type of approach must necessarily exacerbate the already serious problem of delay encountered in public law cases.

142. *See* R. BERGER, *supra* note 13, at 506.

143. *See* Comment, *The Wyatt Case, supra* note 45, at 1378.

144. Milliken v. Bradley, 418 U.S. 717 (1974). "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation." *Id.* at 744.

145. *See* Connor v. Finch, 431 U.S. 407 (1977).

decisions. Appellate review is most effective when it is confined to these sorts of substantive law considerations and to ensuring that trial courts have adhered to the procedural requirements outlined above. Beyond that, orderly disposition of controversies in a reasonable time and at a reasonable cost dictates that the trial court have the ability to formulate and enforce its decrees within a time frame that does not include routine de novo appellate review.

F. Duration of the Remedial Phase

Courts are frequently faulted for the glacial slowness of proceedings during both trials and appeals, even though the criticism is inaccurate in many instances[146] and overdrawn when courts are compared to other branches of government.[147] Nevertheless, protracted judicial involvement in the ongoing administration of institutions has been one of the more persistent sources of public criticism and mistrust. Moreover, this sort of continued oversight is beyond the practical capabilities of a busy trial judge and uniformly results in delegation of important functions to masters, oversight committees, or other representatives. It often appears that the termination of proceedings is precipitated not by a decision that the remedy has succeeded, but rather by an admission of limited capability or by the press of other business. Adherence to time limits would discourage courts from formulating vague, general decrees[148] and would ease public concern that arises when public institutions are being administered for long periods by non-elected officials.

In general, courts should be required to terminate the remedial phase of public law cases within one year, unless it appears, and is found after an evidentiary hearing, that continued judicial involvement is necessary *and* efficacious. Courts serve a major social function by identifying constitutional violations and declaring rights. The inability to implement completely such decisions by injunctive remedies in every case is by no means a measure of failure or an admission that those rights do not exist.

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146. The efficiency with which certain courts, notably the United States Court of Appeals for the Second Circuit, are able to dispose of heavy calendars is remarkable. For some years the Second Circuit courts have been able to hear appeals on the merits within about four months after the notice of appeal has been filed, and requires the parties to proceed on such a schedule absent unusual circumstances. Individual trial judges have accomplished the same or similar results. Nevertheless, delay continues to be a major perceived weakness in judicial function. *See* Report of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 74 F.R.D. 159 (1977).

147. *See e.g.*, White v. Mathews, 559 F.2d 852 (2d. Cir. 1977) (delays in social security decisions under 42 U.S.C. § 405).

148. *See* notes 119-31 and accompanying text *supra.*

IV. Conclusion

Federal court involvement in public law cases with concomitant growth in the breadth and complexity of injunctive remedies presents substantial procedural problems. Neither a historical nor a functional analysis supports an ad hoc individualized approach to the remedial phase without structure or formality. Indeed, the absence of traditional judicial procedures in formulating remedies raises serious and legitimate questions about the propriety of the remedies, even when the actual results are salutory. Much of the public unease and judicial confusion can be resolved by imposing greater structure upon the process by which courts arrive at remedial decrees in complex public law cases. Without limiting the substantive remedial powers of federal courts, procedures can be adopted that will require courts to hold evidentiary hearings to resolve issues of fact pertinent to the remedial phase, to issue findings of fact and conclusions of law, to give adequate notice and an opportunity to participate to non-parties who may be affected by the decree, and to limit the duration of judicial experiments in complex institutional reform cases. These changes in procedure will facilitate appellate review, heighten public confidence in the judiciary, and improve the integrity of the remedial phase.