The Rise and Decline of Structural Remedies

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TABLE OF CONTENTS

I. INTRODUCTION 1617
II. THE RISE AND DEVELOPMENT OF THE STRUCTURAL REMEDY 1619
III. THE DECLINE OF STRUCTURALISM 1623
IV. REFLECTIONS ON STRUCTURALISM 1628
V. CONCLUSION 1631

I. INTRODUCTION

One of the more significant remedial developments during the twentieth century was the rise and (partial) decline of the structural injunction in which courts, usually federal courts, restructure or reshape legislative or administrative agencies such as schools or prisons. Conceptually, structural remedies appear to be inconsistent with the judicial function. Indeed, well established rules of equity suggest that courts should be reluctant to issue injunctions in cases that present continuing supervision problems.[2] Supplementing these general equitable principles

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2. *See, e.g.*, Grossman v. Wegman's Food Mkts., Inc., 350 N.Y.S.2d 484, 485 (App. Div. 1973) ("[C]ourts of equity are reluctant to grant specific performance in situations where such performance would require judicial supervision over a long period of time."); *see also* DAN B. DOBBS, 2 DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-

are the notions that the federal government should show comity towards the actions of state officials[3] and that judicial power should be separate from legislative and executive power.[4]

Despite these concerns, federal courts have entered structural relief in an extraordinary array of cases that have dramatically reshaped society, directly regulated state governments, and routinely involved courts in issuing orders that involve continuing supervision problems.[5] Indeed, courts have restructured school districts,[6] and regulated the running of prisons,[7] jails,[8] and institutions for the sick[9] and the mentally disabled.[10]

RESTITUTION 348–53 (2d ed. 1993).

3. *See* Younger v. Harris, 401 U.S. 37, 43–44 (1971) (explaining notion of comity as traditional respect for state functions); Colegrove v. Green, 328 U.S. 549, 551–56 (1946) (refusing to grant requested relief because the issue was a political question for the state).

4. *In re* Sawyer, 124 U.S. 200, 210 (1888) (stating that courts of equity should not "invade the domain . . . of the executive and administrative department[s] of the government").

5. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 99 (1995) (holding that while there are no limits to the duration of a court's supervision of a school district, a district court must return the school district to local control as soon as the constitutional violation is remedied); Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 380–81 (1992) (containing a discussion of the importance of district courts being able to modify decrees to account for changes in circumstances between the parties); Freeman v. Pitts, 503 U.S. 467, 471 (1992) (holding that a district court may discontinue supervision over some discrete aspects of school administration); Bd. of Educ. v. Dowell, 498 U.S. 237, 248–49 (1991) (describing the constitutional concerns regarding the continuation or termination of injunctive relief in desegregation cases).

6. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534–35, 542 (1979) (upholding an appellate decision requiring desegregation and reversing the district court's opinion); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 453–55, 468 (1979) (affirming a district court's enjoining a school district from discriminatory practices and ordering a systemwide desegregation plan); Milliken v. Bradley, 418 U.S. 717, 744–45, 753 (1974) (reversing and remanding to the district court with instructions to hold that all segregation found in Detroit schools be eliminated), *aff'd*, 433 U.S. 267 (1977); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 21 (1971) (explaining, *inter alia*, that district courts should continue to observe school districts to ensure that desegregation orders are followed); Morgan v. McDonough, 540 F.2d 527, 529, 535 (1st Cir. 1976) (affirming a district court's ruling changing a school's leadership in conjunction with a desegregation plan).

7. *See, e.g.*, French v. Owens, 538 F. Supp. 910, 927–28 (S.D. Ind. 1982) (issuing an order that had twenty-two specific provisions regarding the day-to-day management of a prison), *rev'd on other grounds sub nom.* Miller v. French, 530 U.S. 327 (2000); Holt v. Sarver, 309 F. Supp. 362, 383 (E.D. Ark. 1970) (holding that the penitentiary will not be allowed to confine convicts in the future unless conditions improve), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

8. *See, e.g.*, Morgan v. Sproat, 432 F. Supp. 1130, 1140, 1152–54 (S.D. Miss. 1977) (ordering, *inter alia*, that a state institution for delinquent boys was enjoined from a number of specific methods of behavioral control and requiring the institution to submit proposed remedies for a number of deficiencies in its various programs); Rhem v. Malcolm, 432 F. Supp. 769, 770, 788–89 (S.D.N.Y. 1977) (holding that the Manhattan House of Detention may not resume operation until previous court orders are sufficiently complied with).

Courts have even mandated state apportionment schemes[11] and reorganized city governments.[12] Understandably, these decrees have generated much controversy.[13]

This Article examines the structural remedy and offers some reflections on its appropriate use.

II. THE RISE AND DEVELOPMENT OF THE STRUCTURAL REMEDY

The development of structural remedies is generally attributed to the United States Supreme Court's holding in *Brown v. Board of Education* (*Brown I*).[14] In that litigation, although the Court held that the Topeka, Kansas school district was illegally segregated, the Court was unwilling to order immediate desegregation. Instead, the Court adopted a slow moving approach and deferred a remedy until its decision in *Brown II*.[15] The Court ordered the district to end segregation with "all deliberate speed."[16] As a result, the immediate effect of the decision was to leave black students in the same classrooms as before with no change in conditions.

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9. *See, e.g.*, Levy v. Urbach, 651 F.2d 1278, 1283–84 (9th Cir. 1981) (reinstating the plaintiffs' claims for hazard pay after working with persons afflicted with leprosy).

10. *See, e.g.*, N.Y. State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 758, 768–70 (E.D.N.Y. 1973) (requiring a school for the mentally retarded to implement a number of institutional changes immediately and submit periodic reports regarding the school's progress); Welsch v. Likins, 373 F. Supp. 487, 499 (D. Minn. 1974) (holding that the district court may use a flexible concept of due process to determine the plaintiffs' rights and set the baseline of minimally adequate treatment), *aff'd*, 525 F.2d 987 (8th Cir. 1975); Pa. Ass'n for Retarded Children v. Commonwealth, 334 F. Supp. 1257, 1258, 1266–67 (E.D. Pa. 1971) (issuing a series of preliminary orders designed to ensure an adequate education was provided to all mentally retarded children), *adopted*, 343 F. Supp. 279 (E.D. Pa. 1972).

11. *See* White v. Weiser, 412 U.S. 783, 796–97 (1973) (deciding which congressional reapportionment plan should be used for state elections); 67th Minn. State Senate v. Beens, 406 U.S. 187, 195 (1972) (holding explicitly that judges possess the power to reapportion state legislature districting when the legislature's statutory decisions are unconstitutional); Whitcomb v. Chavis, 403 U.S. 124, 161–63 (1971) (reversing the district court's reapportionment based on inappropriate grounds, but affirming the principle that courts may order redistricting when appropriate).

12. Bolden v. City of Mobile, 423 F. Supp. 384, 402–03 (S.D. Ala. 1976) (creating a new city government plan that provided a realistic opportunity "to elect blacks to the city governing body"), *rev'd*, 446 U.S. 55 (1980).

13. *See* Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978).

14. 347 U.S. 483 (1954).

15. Brown v. Bd. of Educ., 349 U.S. 294 (1955) [hereinafter *Brown II*].

16. *Id.* at 301.

Many believe that the Court had no choice but to go slow in *Brown*. Had the Court ordered an immediate end to segregation, it would have encountered massive resistance[17] and might have encouraged white flight, leading to the closing of public schools throughout the South.[18] For an institution like the United States Supreme Court, dependent as it is on public respect as well as on the willingness of public officials to follow its decisions, such consequences might have been devastating. Accordingly, in *Brown II*, the Court played for time and did nothing to enforce *Brown II*'s "all deliberate speed" mandates for many years. Even as late as the mid-1960s, many black children were still attending segregated schools.[19]

Swann v. Charlotte-Mecklenburg Board of Education[20] signaled an end to the Court's go slow approach. In *Swann*, although the trial court allowed school officials to submit three separate and distinct desegregation plans, the trial court rejected all three plans as constitutionally inadequate. In frustration, the trial court decided to desegregate the school system itself, based on the advice of an outside consultant. In the decade that followed, the federal courts entered structural orders in a number of school desegregation cases.[21] Some of the orders were sweeping in

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17. *See* MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 29–30 (1998):

> The Supreme Court's decision in *Brown* II reflected the justices' understanding that they were initiating a social revolution. The Court feared that because deeply entrenched Southern attitudes and institutions were completely unprepared for immediate desegregation, anything more than a gradualist approach would inevitably lead to violence. As it turned out, [the Court's approach] probably encouraged violence by allowing enough time for opposition to desegregation to build while holding out hope that the decision could be reversed. . . .
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> . . . [The decision] also encouraged Southern public officials to claim that they were performing their legal duties whenever they refused to integrate facilities because there was a threat of violence.

18. See Lino A. Graglia, *The* Brown *Cases Revisited: Where Are They Now?*, 1 BENCHMARK 23, 27 (Mar.–Apr. 1984):

> There can be little doubt that if the Court had ordered the end of segregation in 1954 or 1955 the result would have been the closing of public schools in much of the South, about which the Court could have done nothing. The principal impact would have been on poor blacks, and *Brown* could have come to be seen as a blunder and symbol of judicial impotence.

19. *See* JESSE H. CHOPER ET AL., CONSTITUTIONAL RIGHTS AND LIBERTIES 1124 (9th ed. 2001) ("[O]nly 2.14% of black students in the eleven 'southern states' attended schools in which they were not the racial majority.").

20. 402 U.S. 1 (1971).

21. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 78–80 (1995) (explaining the district court's complex remedial plan's considerable expenses and difficult goals); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 453, 455 (1979) (enjoining the school district from continued discriminatory practices); Milliken v. Bradley, 418 U.S. 717, 739 (1974) (explaining the district court's order designed to include areas of predominantly white population within the school district to end substantial racial segregation), *aff'd*,

scope. As one commentator noted, the school desegregation decrees fundamentally remade American schools in virtually every way:

> *Brown* was said to require nothing less than the transformation of "dual school systems" into "unitary, nonracial school systems," and that entailed thoroughgoing organizational reform. It required new procedures for the assignment of students; new criteria for the construction of schools; reassignment of faculty; revision of the transportation systems to accommodate new routes and new distances; reallocation of resources among schools and among new activities; curriculum modification; increased appropriations; revision of interscholastic sports schedules; new information systems for monitoring the performance of the organization; and more. In time it was understood that desegregation was a total transformational process in which the judge undertook the reconstruction of an ongoing social institution.[22]

Following *Brown* and the other school desegregation cases, orders of similar scope were entered in the prison cases. For example, in *Hutto v. Finney*,[23] the federal courts were confronted by an Arkansas prison system that they described as "a dark and evil world completely alien to the free world."[24] Although many of the system's facilities were overcrowded, the prison system continued to receive large numbers of prisoners (one facility was deemed to be overcrowded with 1000 prisoners, but was gradually allowed to increase to 1500 prisoners). Prisoners were often subjected to punishments, including "punitive isolation," that the Court described as "cruel, unusual, and unpredictable."[25] The prison's punitive isolation system placed four to eleven inmates per cell in 8' x 10' cells containing only water and a toilet that could only be flushed from outside the cell. At night, the prisoners were given mattresses to place on the floor. However, even though some prisoners had infectious diseases (e.g., hepatitis and venereal disease), the mattresses were stored together in piles during the day and returned randomly to prisoners at night. Punitive isolation prisoners received only 1000 calories a day consisting of "grue" which the Court described as "a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a

433 U.S. 267 (1977); Keyes v. Sch. Dist., 413 U.S. 189, 194 (1973) (explaining the district court's enforcement of a remedial plan to end segregation in the school district).

22. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2–3 (1979).

23. 437 U.S. 678 (1978).

24. *Id.* at 681 (quoting Holt v. Sarver, 309 F. Supp. 362, 381 (E.D. Ark. 1970)).

25. *Id.* at 682.

pan."[26] Because punitive isolation prisoners were the most antisocial, jail guards frequently used nightsticks and mace to maintain control.[27] Some prisoners remained in isolation for months on end.[28]

In response to these conditions, the trial court imposed a number of restrictions on the Arkansas system: it limited the number of inmates who could be confined in each cell, required that each prisoner be given a bunk, discontinued the grue diet, and limited isolation sentences to thirty days.[29] The United States Supreme Court upheld the trial court order noting that Arkansas had been repeatedly notified of the constitutional violations, but failed to remedy them. In addition, the Court concluded that the trial court restrictions were directly designed to remedy the problems that the trial court identified.[30]

If *Swann* can be regarded as the beginning of the structural remedy, the decision in *Missouri v. Jenkins*[31] represents the remedy's zenith. In *Jenkins*, the trial court found that the Kansas City, Missouri school district was segregated. However, since the school district was more than 68% black, it was difficult to reassign students in ways that would create integration. Unable to sweep suburban school districts into its decree, the court decided against additional intradistrict reassignments because it feared that such transfers would drive nonminority students away and decrease stability. Instead, the court decided to improve the district's educational programs in the hope that the improvements would make the district attractive to nonminority students and thereby create "desegregative attractiveness." To this end, the Court allowed district officials to "dream" about how to improve their system, and the court then granted their dream by ordering the state to spend of vast sums of money on the district. These sums included $220 million on quality

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26. *Id.* at 683.
27. *Id.* at 684.
28. *Id.*
29. *Id.* at 685–88.
30. The order is supported by the interdependence of the conditions producing the violation. The vandalized cells and the atmosphere of violence were attributable, in part, to overcrowding and to deep-seated enmities growing out of months of constant daily friction. The 30-day limit will help to correct these conditions. Moreover, the limit presents little danger of interference with prison administration, for the Commissioner of Correction himself stated that prisoners should not ordinarily be held in punitive isolation for more than 14 days. Finally, the exercise of discretion in this case is entitled to special deference because of the trial judge's years of experience with the problem at hand and his recognition of the limits on a federal court's authority in a case of this kind. Like the Court of Appeals, we find no error in the inclusion of a 30-day limitation on sentences to punitive isolation as a part of the District Court's comprehensive remedy.

Id. at 688.
31. 515 U.S. 70 (1995).

education programs, $260 million on capital improvements, and nearly $448 million on magnet schools.[32]

The United States Supreme Court ultimately held that the trial court had exceeded its authority in focusing on the principle of desegregative attractiveness, as well as in requiring the state to finance the program of attractiveness. The Court noted:

> The purpose of desegregative attractiveness has been not only to remedy the systemwide reduction in student achievement, but also to attract nonminority students not presently enrolled in the KCMSD. . . .
> . . . .
> . . . But this interdistrict goal is beyond the scope of the intradistrict violation identified by the District Court. . . . [T]he District Court has devised a remedy to accomplish indirectly what it admittedly lacks the remedial authority to mandate directly: the interdistrict transfer of students. . . .
> . . . .
> The District Court's pursuit of "desegregative attractiveness" cannot be reconciled with our cases placing limitations on a district court's remedial authority. . . . [T]his rationale is not susceptible to any objective limitation. . . .
> Nor are there limits to the duration of District Court's involvement. . . .[33]

III. THE DECLINE OF STRUCTURALISM

Just as the school desegregation cases led to the rise in structuralism, they have also led to some decline in the use of that remedy. In many parts of the country, the courts have started terminating their control over local school districts and returning those districts to the control of local officials. For example, in *Oklahoma City Board of Education v. Dowell*,[34] the Court held that the Oklahoma City school district should be released from a desegregation decree. Likewise, in *Freeman v. Pitts*, the Court granted a Georgia school district local control.[35]

In terminating the school desegregation decrees, the Court has emphasized the importance of returning control over school districts to local officials and the need for judicial intervention to be of limited duration. As the Court stated in *Jenkins*, "local autonomy of school districts is a vital national tradition, . . . [and] a district court must strive to restore state and local authorities to the control of a school system

32. *Id.* at 76–78.
33. *Id.* at 91–100.
34. 498 U.S. 237 (1991).
35. 503 U.S. 467, 471 (1992).

operating in compliance with the Constitution."[36] The Court sounded similar themes in *Freeman v. Pitts*,[37] noting that once desegregation has been implemented, the impetus and need for structural decrees diminishes.

In addition, the Court has begun to place limits on the availability of structural remedies in the first place. The need for limitations became quickly evident after *Swann* as plaintiffs began seeking structural remedies in a diverse array of cases. In *O'Shea v. Littleton*, respondents—black citizens who had been advocating for equality in employment, housing, education, and participation in governmental decisionmaking—began an economic boycott of local merchants opposed to equality.[38] Respondents claimed that the county magistrate and judge had singled them out for harsh treatment because of their advocacy as well as because of the boycott. Specifically, respondents alleged that the judge and magistrate discriminated against petitioners by setting higher bond requirements and jury fees in criminal cases, and by imposing higher criminal sentences. Respondents sought an injunction prohibiting the discrimination.[39]

In *O'Shea*, the Court concluded that respondents were not entitled to relief. *Inter alia*, the Court held that none of the respondents could satisfy the Article III case or controversy requirement. The Court concluded that those who had been subjected to the alleged practices in the past could not show a case or controversy because "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects."[40] The Court found no continuing effects because none of the petitioners were then serving an allegedly illegal sentence or awaiting trial. As to those who had been unlawfully convicted and were serving illegal sentences, the Court concluded that judicial intervention was inappropriate because "the complaint would inappropriately be seeking relief from or modification of current, existing custody."[41] As to those that were then subject to criminal proceedings, the Court found that federal intervention was inappropriate under the Court's prior decision in *Younger v. Harris*.[42] *Younger* announced federalism principles which suggested that federal courts should not enjoin pending state court criminal proceedings because

36. 515 U.S. 70, 99 (1995).
37. 503 U.S. at 489.
38. O'Shea v. Littleton, 414 U.S. 488, 490–91 (1974).
39. *Id.* at 491–92.
40. *Id.* at 495–96.
41. *Id.* at 496.
42. *Id.* at 496–97.

plaintiffs have an adequate remedy at law under state law (they can raise their constitutional claims in the state proceedings), and federal courts should show respect for state officials and state proceedings.[43]

The *O'Shea* Court did recognize that respondents might be arrested again, and therefore might be again subject to the illegal practices. However, the Court found this possibility insufficient to justify judicial intervention, noting that there was no allegation that any Illinois law was unconstitutional on its face. As a result, the Court found that the alleged injury was not sufficiently real and immediate since the Court was unwilling to "anticipate whether and when these respondents will be charged with crime and will be made to appear before either petitioner takes us into the area of speculation and conjecture."[44] Moreover, the Court emphasized that federalism principles militated against judicial intervention,[45] and that respondents would have numerous judicial remedies available to them.[46]

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43. Younger v. Harris, 401 U.S. 37, 44–45 (1971).

44. *O'Shea*, 414 U.S. at 497.

45. The Court has recently reaffirmed the "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." [Younger v. Harris, 401 U.S. 37, 43–44 (1971).] Additionally, recognition of the need for a proper balance in the concurrent operation of federal and state courts counsels restraint against the issuance of injunctions against state officers engaged in the administration of the State's criminal laws in the absence of a showing of irreparable injury which is "'both great and immediate.'" [*Id.* at 46.]

> . . . Apparently the order would contemplate interruption of state proceedings to adjudicate assertions of noncompliance by petitioners. This seems to us nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris* . . . and related cases sought to prevent. . . .
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> . . . An injunction of the type contemplated by respondents and the Court of Appeals would disrupt the normal course of proceedings in the state courts via resort to the federal suit for determination of the claim *ab initio*, just as would the request for injunctive relief from an ongoing state prosecution against the federal plaintiff which was found to be unwarranted in *Younger*.

Id. at 499–501.

46. And if any of the respondents are ever prosecuted and face trial, or if they are illegally sentenced, there are available state and federal procedures which could provide relief from the wrongful conduct alleged. Open to a victim of the discriminatory practices asserted under state law are the right to a substitution of judge or a change of venue, Ill. Rev. Stat., c. 38, §§ 114–5, 114–6 (1971), review on direct appeal or on postconviction collateral review, and the opportunity to demonstrate that the conduct of these judicial officers is so prejudicial to the administration of justice that available disciplinary proceedings, including the possibility of suspension or removal, are warranted.

O'Shea was followed by the holding in *Rizzo v. Goode*.[47] In *Rizzo*, respondents sued a city, its mayor, and other police officials claiming civil rights violations and seeking sweeping relief, including the appointment of a receiver to supervise the police department and civilian review of police activity. The trial court entered an extensive order imposing procedures for the handling of complaints against the police (requiring ready availability of complaint forms, a screening procedure for eliminating frivolous complaints, prompt and adequate investigation of complaints, adjudication of nonfrivolous complaints by an impartial individual or body using fair procedures, and prompt notification to the parties regarding the outcome), mandating the revision of police recruit manuals and rules of procedure, and requiring the maintenance of statistical records and summaries designed to allow the court to determine how the revised complaint process was working.[48]

In entering the order, the trial court recognized that respondents had no constitutional right to improved police procedures for handling civilian complaints, but the court imposed the order nonetheless because violations of constitutional rights had occurred in "unacceptably high" numbers and were likely to continue to occur absent judicial intervention.[49] The trial court found that, in the absence of changed disciplinary procedures, unconstitutional incidents were likely to continue to occur, not necessarily with respect to the respondents, but as to other members of the classes they represented.[50]

Ill. Const., Art. VI, § 15(e). In appropriate circumstances, moreover, federal habeas relief would undoubtedly be available.

Id. at 502.

47. 423 U.S. 362, 372 (1976).

48. (1) Appropriate revision of police manuals and rules of procedure spelling out in some detail, in simple language, the 'dos and don'ts' of permissible conduct in dealing with civilians (for example, manifestations of racial bias, derogatory remarks, offensive language, etc.; unnecessary damage to property and other unreasonable conduct in executing search warrants; limitations on pursuit of persons charged only with summary offenses; recording and processing civilian complaints, etc.). (2) Revision of procedures for processing complaints against police, including (a) ready availability of forms for use by civilians in lodging complaints against police officers; (b) a screening procedure for eliminating frivolous complaints; (c) prompt and adequate investigation of complaints; (d) adjudication of nonfrivolous complaints by an impartial individual or body, insulated so far as practicable from chain of command pressures, with a fair opportunity afforded the complainant to present his complaint, and to the police officer to present his defense; and (3) prompt notification to the concerned parties, informing them of the outcome.

Id. at 365, 369–70 (quoting the district court opinion).

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

50. *Id.*

In striking down the trial court's order, the United States Supreme Court invoked justiciability concepts and federalism principles. Relying on *O'Shea*, the Court questioned whether respondents could show a "real and immediate" injury because the claim depended "not upon what the named petitioners might do to them in the future[,] . . . but upon what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures."[51] The Court found the connection too speculative.

The Court also rejected the trial court's conclusion that relief was appropriate based on the United States Supreme Court's prior holdings in *Brown* and *Swann*.[52] The trial court placed great weight on the fact that plaintiffs (respondents) showed that there was an "unacceptably high" number of incidents of constitutional dimension (around twenty listed incidents in a city of three million inhabitants, with 7500 policemen).[53] The Court rejected the analogy to *Swann* noting that the segregation imposed by law in that case had been implemented by state authorities for varying periods of time, and the administrators and school board members, against whom relief was sought, had been found by their own conduct in the administration of the school system to have violated constitutional rights. In *Rizzo*, the Court found that those defendants against whom injunctive relief was directed had not deprived the respondent classes of any rights secured under the Constitution. Having found that the officials had committed no constitutional violation, the Court concluded that equitable relief was inappropriate.[54]

In *Rizzo*, respondents also argued that the people have the "'right' to be protected from unconstitutional exercises of police power," which justifies equitable intervention.[55] In other words, or so they argued, the courts should fashion "prophylactic procedures" that would minimize police misconduct.[56] The Court disagreed, noting that "the nature of the violation determines the scope of the remedy," and that federalism principles militate against structural relief.[57] "Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be

51. *Rizzo*, 423 U.S. at 372–73.
52. *Id.* at 377.
53. *Id.* at 373.
54. *Id.* at 377.
55. *Id.* at 377–78.
56. *Id.* at 378.
57. *Id.*

preserved between federal equitable power and State administration of its own law.'"[58] The Court concluded that a state should be "granted the widest latitude in the 'dispatch of its own internal affairs.'"[59] The Court also concluded that the trial court's decision to revamp the department's internal procedures "was indisputably a sharp limitation on the department's 'latitude in the 'dispatch of its own internal affairs.''"[60] In addition, federal courts are required to be sensitive to the functioning of state and local agencies.[61]

IV. REFLECTIONS ON STRUCTURALISM

In a short paper such as this, it is difficult to provide a comprehensive evaluation of the structural remedy. For a more thorough evaluation, the reader is referred to the many articles on the subject.[62] However, a number of observations are in order regarding the availability and use of structural remedies over the last five decades.

First, courts can and should be reluctant to enter structural injunctions. Structural remedies inevitably involve judges in performing nonjudicial functions beyond the scope of their expertise and, sometimes, beyond their assigned role.[63] Courts have involved themselves to a staggering degree, especially in the desegregation cases. As one commentator noted, under structural decrees, courts have "exercised traditionally

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58. *Id.* (quoting Stefanelli v. Minard, 342 U.S. 117, 120 (1951)).

59. *Id.* at 378–79 (quoting Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 896 (1961)).

60. *Id.* at 379 (citations omitted).

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

Id. at 380.

62. *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Fiss, *supra* note 22; Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Robert D. Goldstein, *A* Swann *Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1 (1978); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265; Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978); Nagel, *supra* note 13; David Rudenstine, *Institutional Injunctions*, 4 CARDOZO L. REV. 611 (1983).

63. *See* Nagel, *supra* note 13, at 662.

executive functions by appointing executive and quasi-executive officers responsible to the judiciary and by determining administrative processes in elaborately detailed decrees."[64] In addition, courts "have exercised legislative functions by setting policy standards for the operation of state and federal programs, including the setting of budgetary requirements."[65]

Many scholars believe that judges are no better suited to exercise multiple powers (i.e., legislative, executive, and judicial) than any other branch. Indeed, as James Madison argued, "if the judicial power were joined with the legislative and executive powers, judges 'might behave with all the violence of an *oppressor*.'"[66] There is much wisdom in these arguments.

Second, as a general rule, structural remedies should be used only as a last resort. At the federal level, the United States Constitution divides powers between three separate and relatively distinct branches of government. The Constitution also provides for an allocation of powers between the federal government and state governments, and gives the states a legitimate and important role. As one commentator noted, "the language of the 10th amendment strongly implies that the states are protected from the judicial exercise of legislative or executive powers."[67] As a result, local school officials, rather than courts, are charged with responsibility for running local schools. Likewise, prison officials are charged with running prisons. Courts are obligated to respect this allocation of responsibilities.

Third, even if the federal courts show restraint, structural remedies will sometimes be necessary and appropriate. In both *Swann* and *Hutto*, although the courts found serious constitutional violations, state and local officials did nothing to correct them. *Brown* and the school desegregation cases arose during a period of hostility to school desegregation. Had the courts not imposed structural remedies, it is unlikely that desegregation would have occurred. Indeed, although

64. *Id*.
65. *Id.*
66. *Id.* at 663 (quoting THE FEDERALIST NO. 47, at 326 (James Madison) (J. Cooke ed., 1961)).
67. Nagel, *supra* note 13, at 667. Nagel went on to state that the need for restraint is especially appropriate when the federal judiciary acts against state governments: "The substitution of government by the federal judiciary for local self-government involves dangerous disproportionality; it sacrifices fundamental democratic values in order to vindicate particular constitutional rights. Specific rights of specific plaintiffs are secured by autocratic mechanisms of broad impact." *Id.* at 664.

Brown II ordered schools to desegregate "with all deliberate speed," most school districts did little or nothing to desegregate. In *Swann*, which was decided sixteen years after *Brown II*, the Court still found significant resistance to desegregation. The trial judge gave the Charlotte-Mecklenburg school district three different opportunities to submit desegregation plans, but it never submitted an acceptable plan. In frustration, the trial court appointed an outside expert to create the plan. Ultimately, the United States Supreme Court upheld this approach, noting that "[i]f school authorities fail in their affirmative obligations [to desegregate,] judicial authority may be invoked."[68]

The prison cases involved similar recalcitrance. In *Hutto*, the trial court began by directing the Department of Correction to "make a substantial start" toward improving conditions, and to file reports on its progress.[69] In addition, the trial court repeatedly gave prison administrators the opportunity to cure unconstitutional conditions.[70] Only after repeated failures did the trial court impose guidelines. Those guidelines focused on four major issues: "improving conditions in the isolation cells, increasing inmate safety, eliminating the barracks sleeping arrangements, and putting an end to the trusty system."[71] When even these guidelines did not work, the trial court entered more specific orders discontinuing the grue diet, limiting the number of men who could be confined in a single cell, requiring that each prisoner be given a bunk, and limiting isolation to a maximum of thirty days.[72] Absent such specific intervention, the prison system might never have changed.

Fourth, some structural cases involve complicated questions about when courts should defer to the decisions of local governmental officials, and the courts must be respectful of all aspects of government affected by their decisions. For example, in *Jenkins*, the trial court gave local officials (a school board) the chance to develop the desegregation plan, but still showed little respect for state and local officials.[73] The trial court admitted that it allowed the local school board to "dream" about the type of school district that it desired to have, and the types of changes that would be needed to implement that dream.[74] The trial court judge then granted the dream even though the district did not have the money to pay for the dream, and ordered state officials to come up with

68. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).
69. Hutto v. Finney, 437 U.S. 678, 683 (1978).
70. *Id.*
71. *Id.*
72. *Id.* at 684.
73. Missouri v. Jenkins, 515 U.S. 70 (1995).
74. *Id.* at 79.

the money.[75] The net effect was that the Kansas City, Missouri school district received a very large infusion of funds, but many other schools that depended on state funding received budget cuts and suffered mightily to finance the dreams of Kansas City officials.[76] In addition, the legislature was deprived, in significant measure, of its right to decide how state funds should be allocated. The trial court's decision showed a lack of sensitivity to state budgets as well as to the need for state officials to determine how state money should be spent.

Fifth, structural remedies should be limited to correcting the constitutional violation. A court should make every effort to avoid a *Jenkins* type effort to completely rebuild a school system at another party's (the State of Missouri's) expense in pursuit of goals (e.g., "desegregative attractiveness") that bear little relationship to the constitutional injury.

Sixth, and finally, structural remedies should last no longer than necessary. As soon as they can rectify the constitutional violation, courts should return executive and legislative functions to those officials responsible for exercising them. When power rightfully rests in state and local officials, it should be returned to them as soon as possible.

V. CONCLUSION

During the last half century, the structural remedy has had a major impact on U.S. society and has been used to effectuate sweeping changes in schools, prisons, and other institutions. But society, courts, and commentators have never been entirely comfortable with the structural remedy. Structural injunctions frequently involve courts entering decrees that involve continuing supervision problems and supervising how state and local officials (and sometimes federal officials) do their jobs. Many of these decrees were a necessary response to difficult societal problems, particularly segregation.

Even though the school desegregation cases appear to be waning, there are other areas where structural remedies remain appropriate. One of those areas is with regard to prison litigation. In general, inmates constitute a despised minority, many of whom have no say in the political process because felons are deprived of their right to vote. Moreover, taxpayers and voters often rebel against spending money on

75. *Id.* at 79–80.
76. *Id.* at 99.

inmates or prisons, and some even feel that punitive prison conditions are justified retribution against criminals. As a result, few politicians are willing to spend money on prisons or inmates, especially in difficult economic times (like now). Absent judicial intervention to ensure prisoners humane conditions, prisoners are likely to be left in intolerable conditions. Similar considerations might dictate relief for the mentally or physically handicapped, and other groups who are less able to advocate for their rights.