

10-1-2003

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### Recommended Citation

Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. Miami L. Rev. 143 (2003)

Available at: <https://repository.law.miami.edu/umlr/vol58/iss1/13>

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# An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!

MYRIAM GILLES\*

In 1978, Owen Fiss wrote that the structural reform injunction “represents the most visible and perhaps the most ambitious exercise of judicial power — at times it tries to reconstruct the world.”<sup>1</sup> Professor Fiss was writing of a legal revolution that began in the 1950s, when federal courts began to hear cases challenging the deprivation of rights to large groups of people by state and local institutions, such as schools and prisons.<sup>2</sup> In response to findings of constitutional deprivations, courts were asked to restructure these public institutions in accordance with the commands of the Constitution. The plaintiffs in these cases sought remedies that went well beyond traditional damages. Arguing that the violations of their rights could not be cured with mere monetary penalties, these plaintiffs sought judicial decrees mandating the reformation of various institutions to bring them into conformity with constitutional requirements.<sup>3</sup>

“Public law litigation,”<sup>4</sup> as these suits soon came to be called,

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\* Associate Professor, Cardozo School of Law. My thanks to Gary Friedman, Risa Goluboff, Judith Resnik, Stewart Sterk and members of the Cardozo Junior Faculty Workshop for thoughtfully reading and discussing this paper. To Irwin Stotsky, who convened the conference that produced this volume: thank you so much for inviting me to participate in this wonderful event. Thanks also to the other participants, whose papers and presentations were insightful, provocative and, for me, a reminder of why we do what we do. And, of course, many thanks are owed to Owen Fiss, whose scholarship and teaching continues to inspire.

1. OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 18 (1978).

2. The birth of the modern structural reform injunction can be traced to *Brown v. Bd. of Educ.* (*Brown II*), 349 U.S. 294 (1955), which directed the district courts to implement the right to a non-segregated education. As Fiss has written, the structural reform injunction “received its most authoritative formulation in civil rights cases, specifically those involving school desegregation, and has been legitimated in terms of those cases. Required to defend structural relief, reference will always be made to *Brown v. Board of Education* and the duty it imposed on the courts of the nation to transform dual school systems into constitutionally acceptable forms.” Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965 (1993).

3. See Fiss, *supra* note 1, at 87 (“The inadequacy [of cash payments as compensation] stemmed from considerations much deeper than difficulties in measurement. [It] stemmed from the group nature of the underlying claim and a belief that only in-kind benefits would effect a change in the *status* of the group.”) (emphasis in original).

4. This term has been used to refer to a class of cases involving public institutions, such as school desegregation, environmental hazards, housing discrimination, prison and mental hospital conditions, and legislative reapportionment. See generally *id.*

resulted in “structural reform injunctions,”<sup>5</sup> which, in addition to enjoining the defendant institution from acting in a particular unconstitutional fashion, ordered forward-looking, affirmative steps to prevent future deprivations.<sup>6</sup> In this remedial regime, the trial judge became the central figure of the entire litigation process by both determining liability and then fashioning a decree that would achieve the constitutional or regulatory purpose.<sup>7</sup> In this way, courts and plaintiffs were “cast in an affirmative, political — activist, if you must — role.”<sup>8</sup>

And for a time, the structural reform injunction loomed large as a powerful tool for the transformation of social institutions; as Fiss himself boldly proclaimed in the early 1970s, the structural reform injunction “in the years ahead promises to become a central — maybe *the* central — mode of constitutional adjudication.”<sup>9</sup> But today, while courts continue to supervise a handful of decades-old decrees in areas such as school desegregation and prison reform, judicially mandated structural reform injunctions appear to be vestiges of a bygone era.<sup>10</sup> Even as early as 1978, Owen Fiss recognized that the “axiomatic status of *Brown*” was losing currency and that the country seemed poised for a

5. Owen Fiss introduced the term “structural injunction” as the category of injunction “which seeks to effectuate the reorganization of an ongoing social institution.” *Id.*, at 7. According to Fiss, the structural injunction is: “The formal medium through which the judiciary seeks to reorganize ongoing bureaucratic organizations so as to bring them into conformity with the Constitution.” Fiss, *supra* note 2, at 965.

6. DONALD HOROWITZ, *THE COURTS AND SOCIAL POLICY* 6 (1977) (a contemporaneous and critical observer of structural reform litigation, Professor Horowitz noted in the late 1970s that “[i]t is no longer even approximately accurate to say that courts exercise only a veto. What is asked and what is awarded is often the doing of something, not just the stopping of something.”).

7. Abram Chayes, *The Role of the Judge in Public Law* Litigation, 89 HARV. L. REV. 1281, 1284 (1976) (noting that prohibitory injunctive orders proved an inadequate remedy to eliminate wrongful conduct or conditions, making it necessary for courts to formulate comprehensive, forward-looking orders for reforming the defendant institution).

8. Abram Chayes, *The Supreme Court, 1981 Term, Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

9. Fiss, *supra* note 1, at 2 (italics in original).

10. Evidence of the end is everywhere to be seen: On September 25, 2003, *Missouri v. Jenkins*, 515 U.S. 70 (1995) — a 26-year old, \$2 billion case seeking to desegregate Kansas City public schools that reached the Supreme Court three times — finally ended. The case was closed when plaintiffs voluntarily dismissed their appeal of the district court’s ruling that the 35,000-student district had met its final goal of closing the achievement gap between black and white students. Ann Bradley, *Kansas City Marks End of Desegregation Case*, 10/8/03 EDUC. WK. 4 (available at 2003 WL 9607526). Although lawyers for the plaintiffs in *Missouri v. Jenkins* would not comment on their reasons for dropping the appeal, many observers believe that the appeal was sure to lose, especially given that both the Eight Circuit and the Supreme Court had expressed exasperation that the case had dragged on for so long. See also Tresa Baldas, *As Large School Districts Leave Court Supervision, Critics See Resegregation*, NAT. L.J., June 16, 2003, at 4. (reporting that school districts across the nation are seeking to be released from federal supervision under decades-old decrees ordering actions taken to desegregate and provide a “unitary,” equal education to all students).

“period of reconstitution.”<sup>11</sup> And he was right: There are no contemporary examples of bold, *Brown*-like reformist judicial enterprises.<sup>12</sup> There are no more “hero judges,” to use Fiss’s term,<sup>13</sup> at work crafting decrees that will bring recalcitrant state and local institutions to constitutional heel. The question this article asks is: To what shall we attribute the apparent death of the structural reform injunction?

One view, an optimistic one, would be that there are no longer any problems that demand this radical form of relief; that as the paradigmatic *de jure* civil rights violations of *Brown* went by the wayside, so too did the propriety of this most powerful tool of enforcing constitutional norms. Fiss wondered as much in the 1970s, when he remarked on “the frail quality of our substantive vision,” and wondered whether we “have lost our confidence in the existence of the values that underlie the litigation of the 1960’s?”<sup>14</sup>

Upon reflection, however, I see no reason the structural reform injunction should wither and die from the lack of raw material: There continue to exist sufficiently egregious, systemic constitutional issues that inspire (or could inspire) the requisite breadth of support and depth of reformist zeal to motor the machinery of the structural reform injunction.<sup>15</sup> Among the examples I discuss are racial profiling and affirma-

11. Fiss, *supra* note 1, at 5. Professor Abram Chayes, a contemporary and cohort of Fiss, similarly acknowledged in 1981 that “[t]he long summer of social reform that occupied the middle third of the century was drawing to a close” by the mid-1970s. Chayes, *supra* note 8, at 7.

12. This point is distinct from the more remarked-upon “absence of a contrary voice [on the current Court], the kind that would once have been raised – if usually in dissent – by William J. Brennan, Jr. or Thurgood Marshall, both of whom retired in the early 1990s.” Linda Greenhouse, *The Nation; Will the Court Move to the Right? It Already Has*, N.Y. TIMES, June 22, 2003, at D3. Greenhouse quotes Stephen J. Wermiel as saying that “Brennan and Marshall would have been indignant” about the lack of compassion on the Court today, though Wermiel himself views the problem as “not so much the lack of compassion, but the fact that the court gave no sign that this was a place that might have been appropriate for compassion.” *Id.*

13. Fiss, *supra* note 1, at 90. Fiss writes, “It was not reasonable to expect the judges to be heroes, but the truth of the matter is that many lived up to these unreasonable expectations — they fought the popular pressures at great personal sacrifice and discomfort. The average judge turned out to be more heroic than the average legislator (or juror). And it was just this hope that led civil rights litigators to cast their suits in injunctive form.” See also Judith Resnik, *For Owen Fiss: Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173, 193 (2003) (noting that while some describe “judging as a heroic activity,” judges themselves have become discontent with the role of hero, particularly in the workaday cases – as distinct from the “big case” – that make up much of their docket).

14. Fiss, *supra* note 1, at 17.

15. I was struck by this thought as I sat at the oral argument of the Michigan affirmative action cases before the Supreme Court on April 1, 2003 – cases in which plaintiffs asked the Court to strike down the University of Michigan’s admissions programs as unconstitutional and restructure these programs to conform to constitutional minima. Inside the courthouse, the breadth of judicial consensus on affirmative action was being put to the test. Outside, on New Jersey Avenue, the shouts of the crowds revealed the depth of emotion that this issue inspires. See Tony Mauro, *O’Connor Seen As Key in Race Case Debate*, 229 N.Y. L.J. 1 (2003) (discussing the

tive action. I conclude that the structural reform injunction did not die from a dearth of substantive values.

Moving on, I consider the constitutional objections of federalism and separation of powers, which have been posed by conservative scholars. I rule them out as causes of death. The Supreme Court has simply never bought these arguments against structural reform injunctions; even the Rehnquist Court is (mostly) unfazed by the injunction's incursions on arguably legislative and state-controlled turf. Constitutionally, doctrinally and legally, the structural reform injunction remains viable. Thus, we must look elsewhere

The answer, I believe, lies in a sort of sub-constitutional, extra-legal discomfort with the role of judges in institutional reform litigation.<sup>16</sup> Only twenty years ago, Abram Chayes was delighting in the dynamism of judges in structural reform cases, applauding their "affirmative, political. . . activist" role.<sup>17</sup> But the mood has changed: For a generation now, candidates for the federal bench have been expected to ritualistically disavow liberal activism. As a job criterion, anti-activism is right up there with "objectivity" in the minds of the public, Congress and, now, the judiciary itself.<sup>18</sup>

As a bulwark against activism, I conclude, courts have erected barriers, principally in the form of standing requirements, to the institution of suits aimed at structural reform injunctions. These barriers, nonetheless, are themselves porous; they are not so much bars to injunctive actions as they are tools that courts may use to bar injunctive actions they do not wish to entertain. They are, in a conservative climate, bulwarks against *liberal* activism.

And that raises the final question: Is structural reform litigation really dead? In this connection, I conclude that a conservative-led effort to engage in structural reform litigation might be under way right now,

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"thousands of students and civil rights leaders demonstrat[ing] outside the Court" during the oral argument).

16. This discomfort with the role of the judge is most evident in legislation that aims to limit the ability of litigants to bring claims seeking structural relief. For example, the Prison Litigation Reform Act of 1995 requires exhaustion of a prisoner's administrative remedies before judicial relief can be sought, and, as such, has led to a sharp drop in suits seeking reform of prison conditions. See 18 U.S.C. § 3626 (2000); 28 U.S.C. § 1346 (2000); 28 U.S.C. § 1915 (2000); 42 U.S.C. § 1997e (2000). See also Ricardo Solano, Jr., Note, *Is Congress Handcuffing Our Courts?*, 28 SETON HALL L. REV. (1997) (providing a detailed analysis of the provisions of the Prison Litigation Reform Act). But efforts to limit judicial discretion reach further than structural reform litigation. See *Rehnquist Criticizes Sentencing Restrictions*, L.A. TIMES, Jan. 2, 2004, at A26 (reporting that the Chief Justice was angry with a bill that limits the ability of judges to impose lighter sentences than specified in the Federal Sentencing Guidelines).

17. Chayes, *supra* note 8, at 4.

18. See generally DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES (1999).

epitomized by lawsuits seeking judicial decrees governing the admissions criteria of state-run educational institutions. Over the past decade, lawsuits brought to challenge affirmative action programs in Maryland,<sup>19</sup> Texas,<sup>20</sup> Georgia<sup>21</sup> and Michigan<sup>22</sup> have asked courts to use their injunctive power to halt the defendant schools' use of race as a factor in admissions<sup>23</sup> and to reconstruct those policies in light of the constitutional requirement of equal protection. In form and substance, these cases bear an ironic resemblance to *Brown* and the desegregation movement. So while calls for injunctive relief to restructure public institutions may come from the unlikely quarters of conservative think tanks and institutes, these cases reveal that the structural reform injunction is not only alive and well, but may serve an important role in the modern litigation and political landscape.

### I. SUBSTANTIVE PRECONDITIONS FOR STRUCTURAL REFORM: BREADTH AND DEPTH

History tells us that judicially mandated structural reform occurs only when two conditions are met, which I refer to as breadth and depth. First, there must be a broad consensus among members of the elite, thinking class and like-minded folk<sup>24</sup> that some institutionalized practice is systematically depriving individuals of constitutional rights.<sup>25</sup> In

19. *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

20. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

21. *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001).

22. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 123 S. Ct. 2325 (2003).

23. These cases must be distinguished from legislation, referenda, or executive actions aimed at achieving similar results. For example, in 1998, Washington state voters passed Initiative I-200 banning the use of race as a factor in public employment. See Robert H. Kelley, *The Washington Civil Rights Initiative: The Need for a Meaningful Dialogue*, 34 GONZ. L. REV. 81 (1998-99). Similarly, California voters said yes to Proposition 209, which states: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting." CAL. CONST. art. I, § 31. Governor Jeb Bush's One Florida Plan, adopted in November 1999 by executive order, discontinues race-conscious affirmative action within Florida's 10-campus public university system and resembles the plans used by Texas and California by guaranteeing all applicants in the top twenty percent of Florida's high school graduates, regardless of standardized test scores, a place in a public university. While these examples are clearly important, they do not involve private litigants using the federal courts to restructure public institutions.

24. I mean to suggest that when legal issues have ripened to the point that individuals in the media, in academia, in law, and in community groups are talking about these issues and seem to speak with some singularity – it is at that point that the issues have achieved a breadth that makes them likely candidates for judicial intervention. Justice Thomas had this group in mind when he wrote: "The majority upholds the Law School's racial discrimination not by interpreting the people's constitution, but by responding to a faddish slogan of the cognoscenti." *Grutter*, 123 S. Ct. at 2350 (Thomas, J., dissenting).

25. Many scholars have recognized that courts are responsive to broad-based consensus and

other words, for judges to engage in structural reform, the problem has to be palpable, and support for the remedy has to be broad in the relevant legal/political community.<sup>26</sup>

The second condition is that this group of people — judges, lawyers, intellectuals — must view the constitutional violations as intolerable in a just society. To mobilize the judicial machinery of structural reform, the passion invoked must be deep. Toward those ends, in a sort of constitutional Powell Doctrine,<sup>27</sup> the constitutional values at stake must be clear, and the objectives must be, if not easily attainable, then at least clearly imaginable.

These principles are rooted in the recognition that courts, as Justice

are selectively sensitive to political issues. See Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 2008 (1990) (“The institutional characteristics of the Court suggest that it will be receptive to two types of political preferences. It will be receptive to durable preferences that command sustained majoritarian support, and to broad-based transitory preferences that command intense levels of majoritarian support. *Brown v. Board of Education*, the case typically offered as establishing the viability of the traditional model, is better understood as an illustration of the Supreme Court’s selective political sensitivity.”); Susan J. Krueger, *In Defense of a Political Court*, 9 B.U. PUB. INT. L.J. 507, 510 (2000) (book review) (“The *Brown* decision required broad-based political support and translation of that support by other government officials into highly effective compliance mechanisms.”); Colin Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 44-46 (1979) (asserting that judicial power depends on public legitimacy).

26. Support must be broad, at least in part to ensure that judicial orders for relief are carried out. In this regard, *Brown* and the desegregation movement reveal that support for desegregation was lacking in the communities charged with making appropriate changes: Ten years after the *Brown* decision, only 1.2% of black school children attended school with whites in the South. TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* (1999). New York Senator Daniel Patrick Moynihan noted that the Court’s order in *Brown* was not obeyed for the next 16 years. See *To Authorize Special Assistance for Desegregation Activities: Hearings on S. 1256 Before the Subcomm. on Educ., Arts & Humanities of the Senate Comm. on Labor & Human Res.*, 98th Congress 7-9 (1983) (statement of Sen. Daniel Patrick Moynihan on S. 1256, The Emergency School Aid Act). Desegregation occurred rapidly, however, after Congress and the Executive became involved by threatening school districts not in compliance with *Brown* with a loss of federal education funds. By the end of 1967, 16.9% of black children attended Southern schools with whites; by the end of 1969, 32% of black children attended Southern schools with whites; and by 1972, 91.3% of black children attended Southern schools with whites. PERETTI at 58. See also CHARLES A. JOHNSON & BRADLEY C. CANON, *JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT* (1984) (noting that judicial declarations are not self-effectuating because judges rely on lower courts, executive branch officials, and members of the public to interpret and carry out judicial decisions obediently and properly).

27. In the aftermath of his military experience in Vietnam, Colin Powell decided that his country should never again be caught in a military quagmire. While Powell was chairman of the Joint Chiefs of Staff, his “Powell Doctrine” shaped the rationale, planning and execution of the 1991 Persian Gulf War: Enter a conflict only when U.S. vital interests are at stake. Use overwhelming force to ensure swift victory with minimal casualties. Ensure the support of the American people and the international community. Set specific objectives. And prepare a clear exit strategy.

Though engaging in structural reform is not necessarily analogous to engaging in war, some of the same points bear reiteration: ensure the support of the relevant community (breadth) and set specific objectives so as to maintain that support.

O'Connor has noted, are "mainly reactive institutions" where "change comes principally from attitudinal shifts in the population at large" and in which "rare indeed is the legal victory — in court or legislature — that is not a careful byproduct of an emerging social consensus."<sup>28</sup> A broad consensus, supported by a depth of emotion, supplies the necessary preconditions of meaningful structural reform litigation.

*Brown v. Board of Education*<sup>29</sup> and its progeny<sup>30</sup> exemplify the breadth and depth requirements. First, there was broad recognition amongst the relevant, opinion-shaping community that racial segregation in public schools was a clear violation of 14th Amendment rights. This was not a majoritarian movement: The man on the street in segregated districts wasn't rushing the statehouse to get legislation enacted to remedy the problem of segregation;<sup>31</sup> indeed, many believed segregation to be appropriate. Rather, scholars, commentators, journalists and lawyers recognized a pervasive problem that called for aggressive action.<sup>32</sup> It is not so much that the problem was in the air, but that it was in the air that judges breathe.

Second, the problem of racial segregation inspired passion. The images of black children entering public school under protection of the National Guard were stark and compelling. Coupled with the unapologetic visages of Southern governors<sup>33</sup> and legislators — at both the

28. SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* (Craig Joyce ed., 2003).

29. 347 U.S. 483, 493 (1954) (segregation of public schools according to race violates the Equal Protection Clause of the Fourteenth Amendment). A year later in *Brown II*, 349 U.S. 294 (1955), the Court directed district courts to take whatever actions were "necessary and proper" to achieve nondiscriminatory school systems. A decade ago, Michael Klarman pointed out that the practical impact of *Brown* is overstated, and that the real hero of the revolution was the spate of civil rights legislation enacted a decade later. Michael Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 U. VA. L. REV. 7 (1994). While I agree with Klarman that the impact of *Brown* may be more symbolic than actual, for purposes of this paper, I use *Brown* as shorthand for describing a series of escalating moments of judicial intervention in state and local institutions for the purpose of rooting out race-based discrimination.

30. See, e.g., *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973).

31. If the man on the street was rushing to the statehouse, it was more likely to try to get legislation enacted that would curb the authority of the federal courts in areas such as desegregation and criminal procedure. However, Congress — part of the relevant community whose recognition of the problem of racial inequality was necessary for the courts to act in the first place — did not bend to the will of the populace. Despite vehement public passion and over fifty court-curbing bills introduced in Congress in the 1950s, only one very modest measure was passed, which codified and limited the holding in *Jencks v. United States*, 353 U.S. 657 (1957), involving access to government files in a criminal prosecution.

32. See, e.g., J. Skelly Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, in *DE FACTO SEGREGATION AND CIVIL RIGHTS: STRUGGLE FOR LEGAL AND SOCIAL EQUALITY* 24 (Oliver Schroeder, Jr. & David T. Smith eds., 1965).

33. Most notably, Governors Orval Faubus of Arkansas and George Wallace of Alabama



state and federal level<sup>34</sup> — the entire affair took on the classical overtones of great drama: There were heroes and villains, problems and solutions.<sup>35</sup>

Fiss perceived all this in 1978 when he asked whether we have not “lost our confidence in the existence of . . . any public values.”<sup>36</sup> Fiss was right to question our nation’s commitment to judicial involvement in the restructuring of public institutions. Without a robust “substantive vision” of constitutional norms — without breadth and depth of passion and concern for the reformation of constitutionally suspect institutions — structural reform litigation will be swallowed up by “doubts about the role of courts.”<sup>37</sup> The procedural is a function of the substantive.

For the purposes of our autopsy, before we can examine the various procedural stakes that have been driven through the body of structural reform litigation, we must ask whether the patient died from a lack of substantive values. Have the constitutional crises that inspire the breadth and depth of passion required to support structural reform injunctions disappeared?

#### A. *Contemporary Constitutional Crises: Racial Profiling and Affirmative Action*

Clearly, there are (and may always be) institutional practices that violate individuals’ constitutional rights.<sup>38</sup> The question, however, is

opposed a unitary school system with all the force they had at their disposal. On June 11, 1963, Governor Wallace assembled a force of 700 state troopers and National Guardsmen to prevent two black students from enrolling at the University of Alabama. Governor Faubus called out the Arkansas National Guard to prevent black students from entering the school because if they did, he said, “[b]lood will run in the streets.” JACK GREENBERG, *CRUSADERS IN THE COURTS* 229 (1994).

34. Although state governors and legislators are better remembered for their opposition to desegregation, members of the U.S. Congress also were resistant. For example: Richard Russell of Georgia, Harry F. Byrd of Virginia, and Strom Thurmond of South Carolina drafted the “Southern Manifesto,” which argued that *Brown* was “a clear abuse of judicial power” that encroached on the authority of the states to regulate education. 102 CONG. REC. H4515-16 (daily ed. Mar. 12, 1956). The Manifesto was signed by 101 of the 128 men representing the states of the Old Confederacy in Congress, and its signors “pledge[d] [themselves] to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution.” *Id.*

35. Resistance to desegregation was intense. Some Southern school districts completely closed their schools to avoid compliance with *Brown*. Virginia adopted the most extreme measures, requiring its governor to close any school where school desegregation was contemplated. See ALEXANDER LEIDHOLDT, *STANDING BEFORE THE SHOUTING MOB: LENOIR CHAMBERS AND VIRGINIA’S MASSIVE RESISTANCE TO PUBLIC-SCHOOL INTEGRATION* (1997).

36. Fiss, *supra* note 1, at 16-17.

37. *Id.* at 16.

38. Indeed, to continue with the example of *Brown* and desegregation, many commentators argue that vestiges of *de jure* segregation still exist and are still felt by minority children. While school districts have eliminated the most obvious racial disparities such as the assignment of students to separate schools on the basis of race, problems that are more difficult to identify

whether any contemporary practice inspires the breadth and depth of passion necessary to support structural reform.

Racial profiling,<sup>39</sup> for example, is a law enforcement practice that in its purest form is widely viewed as a violation of constitutional rights that ought to be regulated, if not banned (to the extent that's possible).<sup>40</sup> Putting aside for the moment the security concerns that have developed in the wake of September 11,<sup>41</sup> it is fair to say that there exists a broad consensus that a purely race-based traffic stop, for example, is simply wrong. Politicians have derided the practice of racial profiling for years,<sup>42</sup> and the current administration issued a directive banning racial profiling in federal law enforcement agencies.<sup>43</sup> The breadth require-

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remain, such as disparate academic achievement. Many scholars have argued that these desegregation decrees issued under *Brown* cannot address more modern problems. See, e.g., Dora W. Klein, *Beyond Brown v. Board of Education: The Need to Remedy the Achievement Gap*, 31 J.L. & EDUC. 431 (2002).

39. Definitions abound. See *Whren v. United States*, 517 U.S. 806, 813 (1996) (forbidding "selective enforcement of the law based on considerations such as race"); Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1411 (2000) ("Racial profiling, [is the] use of race as a factor in determining which offender to prosecute."); Eric Lacy, *Michigan State U.: Michigan State U. Report Examines Racial Profiling*, THE STATE NEWS, Aug. 7, 2000, available at 2000 WL 24489055 ("Racial profiling is defined by the Michigan State Police as 'any action taken by a police officer prior to or during a traffic stop that is based upon racial or ethnic stereotypes and that has the effect of treating minority motorists differently than non-minority motorists.'").

40. See David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 276 (1999); Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1410 nn.1-4 (2000).

41. For a criticism of ethnic and religious profiling, even after the September 11 attacks, see Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002).

42. For example, during the three 2000 presidential debates, Vice President Al Gore promised that if elected, his first act as President would be to issue an executive order banning racial profiling. See Richard L. Berke, *This Time, More Accord Than Discord*, N.Y. TIMES, Oct. 12, 2000, at A1. More surprisingly, then Texas Governor George W. Bush responded that while he did not want to "federalize" the local police, he did agree that something needed to be done about racial profiling. *Id.*

43. See Press Release, U. S. Dep't of Justice, Justice Department Issues Policy Guidance to Ban Racial Profiling, (June 17, 2003) (available at 2003 WL 21391467). In February 2001 — notably, before September 11 — President Bush directed Attorney General John Ashcroft to review the use of race by federal law enforcement agents and to "develop specific recommendations to end racial profiling." The Department then undertook a study of the policies and practices of federal law enforcement agencies to determine the nature and extent of racial profiling. Two years later, the President issued a ban on racial profiling by federal law enforcement agencies — including the FBI, the Secret Service, the Drug Enforcement Administration and the Department of Homeland Security — but included exceptions permitting use of race and ethnicity to combat potential terrorist attacks. The new policy prohibits the use of "generalized stereotypes" based on race or ethnicity, and allows officers to consider them only as part of a specific description or tip from an informant. See Mike Allen, *Bush Issues Ban On Racial Profiling; Policy Makes Exceptions for Security*, WASH. POST, June 19, 2003, at A14.

ment appears satisfied.

Depth is another matter. Even in the pre-September 11 world, it was not clear whether the level of passion generated by the issue of racial profiling was sufficient to support structural reform. It could be that many people believed racial profiling to be a problem, but not one that merited dramatic action.<sup>44</sup> There also seems to be a sense of fatalism (or realism) afoot here: Calls for reform are tempered by the view that "mild" racial profiling is endemic to law enforcement.<sup>45</sup> Perhaps there simply weren't enough incidents of extreme forms of racial profiling to engender the depth of passion necessary for more radical reform through a structural injunction.<sup>46</sup>

In any event, since 9/11 the passions on this issue have certainly cooled.<sup>47</sup> Today, even those on the left acknowledge that racial profiling

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44. There was one attempt at structural reform litigation that gained some traction on this issue. In 1999, New Jersey released a study showing that its state troopers engaged in racial profiling by stopping disparate numbers of minority drivers on the New Jersey Turnpike. See OFF. OF THE ATT'Y GEN. OF N.J., INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING (Apr. 20, 1999), available at [http://www.state.nj.us/lps/intm\\_419.pdf](http://www.state.nj.us/lps/intm_419.pdf). Ensuing litigation resulted in a consent decree in which troopers agreed to record the race of stopped motorists, and submit to training, among other things. *Id.*; see also Abraham Abramovsky & Jonathan I. Edelman, *Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared*, 63 ALB. L. REV. 725, 744 (2000) (discussing how African-Americans were "disproportionately targeted" by New Jersey state troopers for traffic enforcement).

45. Again, while the Bush Administration deserves some credit for issuing the ban on racial profiling, the directive is riddled with exceptions that make clear the administration's view that some form of racial profiling is necessary, and will happen anyway. For example, according to the Justice Department's policy directives to federal agencies on how to institute the ban, law enforcement officials "may continue to rely upon specific descriptions of the physical appearance of criminal suspects, if a specific suspect description exists in that particular case," and "may use race or ethnicity only in extremely narrow circumstances — when there is trustworthy information, relevant to the locality or time frame at issue, that links persons of a particular race or ethnicity to an identified criminal incident, scheme or organization." Furthermore, in light of the events of September 11, federal law enforcement officers may "include consideration of factors such as travel patterns, visits to countries known to harbor or support terrorist operations, suspicious identity documents, the country that issued the person a passport, sources of support, and other probative factors" in investigating terrorist threats. See Press Release, *supra* note 43.

46. The Justice Department, in a recent survey of federal operations, concluded that racial profiling did not appear to be "a systemic problem," and that a federal ban on the practice was almost metaphorical. According to a White House spokesman, "this is about stopping the abuses of a few, and the action . . . should only strengthen the public's confidence that the vast majority of law enforcement officials have earned and deserve credit for the job they do in protecting Americans." Eric Lichtblau, *Bush Guidelines Bar Use of Racial Profiling*, SAN DIEGO UNION-TRIB., June 18, 2003, at A1. Critics of the ban agree that it is mainly symbolic: According to the ACLU, "This policy acknowledges racial profiling as a national concern, but it does nothing to stop it . . . It's largely a rhetorical statement. The administration is trying to soften its image, but it's smoke and mirrors." *Id.*

47. See, e.g., Susan Sachs, *In the Search for Suspects, Sensitivities About Profiling*, N.Y. TIMES, Sept. 26, 2001, at D7; Henry Weinstein et al., *After the Attack: Law Enforcement Racial Profiling Gains Support as Search Tactic*, L.A. TIMES, Sept. 24, 2001, at A1; Sam Howe

may serve some legitimate law enforcement goals, and the country is surely in no mood to force reformist changes on police departments.<sup>48</sup>

Affirmative action, by contrast, is a context in which the requisite depth of emotion abounds, but breadth of support for institutional transformation may be lacking. Conservatives believe that affirmative action in admissions, as it is practiced by state educational institutions, is an unconstitutional practice, much as the plaintiffs alleged in *Brown*. And, like the civil rights leaders in *Brown*, the leaders of the anti-affirmative action brigade look to the courts to establish a regime that will ensure constitutional equity. There is a great deal of passion here (not to mention irony), as those who oppose affirmative action are an inspired lot, full of emotional arguments.<sup>49</sup>

But here, in contrast to the racial profiling example, what may be lacking is a broad-based acknowledgment in the relevant community that there is any constitutional problem with the practice of affirmative

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Verhovek, *Americans Give In to Race Profiling*, N.Y. TIMES, Sept. 23, 2001, at 1A; Michael Kinsley, *When is Racial Profiling Okay?*, WASH. POST, Sept. 30, 2001, at B07; Vikram David Amar, *Security When Racial Profiling Is Appropriate*, L.A. TIMES, Sept. 30, 2001, at M2; Jason L. Riley, *'Racial Profiling' and Terrorism*, WALL ST. J., Oct. 24, 2001, at A22; Kay Lazar, *Terrorism Ushers in New Racial Perspectives*, BOSTON HERALD, Oct. 28, 2001, at 8.

48. Since September 11, the federal government has adopted a broad strategy of targeting non-citizens residing in the United States for special scrutiny if they come from Middle Eastern nations where anti-American terrorist organizations have been known to operate. While some commentators criticize this policy, many more seem to believe these tactics are necessary in the wake of the terrorist attack. See, e.g., Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002); Liam Braber, Comment, *Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL. L. REV. 451 (2002); Huang Vu, Note, *Us Against Them: The Path to National Security Is Paved by Racism*, 50 DRAKE L. REV. 661 (2002).

49. California businessman Ward Connerly, for example, has championed initiatives and litigation to dismantle state-run programs that taken account of race in hiring or admissions. Connerly gained national attention for his successful campaigns to stop the use of racial and gender preferences at the University of California and, later, statewide with Proposition 209. More recently, Connerly stumped for the "Racial Privacy Initiative," a.k.a. Proposition 54, which would have prohibited public agencies from collecting racial data about Californians; the measure failed, but Connerly's quest for a "color-blind" society continues. Another passionate voice against affirmative action has been Justice Clarence Thomas, whose dissenting opinion in *Grutter v. Bollinger* argued that affirmative action creates more harm than good: "The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition." 123 S.Ct. 2325, 2359 (2003). He then cited two articles from education journals as "growing evidence" that integrated schools "actually impair learning among black students." *Id.* Justice Thomas's critique of affirmative action is part of his broader attack on the reasoning that underlies the Court's decision in *Brown* and its progeny. See Clarence Thomas, *An Afro-American Perspective: Toward a "Plain Reading" of the Constitution – The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 991 (1987) (arguing that *Brown's* rationale that blacks were psychologically harmed by *de jure* segregation was the "great flaw" in a decision that was correct in its result, making the case a "missed opportunity," like all its "progeny, whether they involve busing, affirmative action, or redistricting").

action. Take *Grutter v. Bollinger*<sup>50</sup> and *Gratz v. Bollinger*,<sup>51</sup> the recent cases challenging the use of race as a factor in admissions to the University of Michigan Law School and undergraduate program, respectively. Every aspect of the twin cases, from the district court proceedings to the disparate rulings by the Supreme Court, reflects the lack of broad consensus concerning affirmative action programs in school admissions.

The district court in *Grutter* heard fifteen days of testimony on such matters as the value of diversity in education and the need for a “critical mass” of minority students on campus.<sup>52</sup> Based on this “evidence,” the district court found the law school’s admissions policy unconstitutional.<sup>53</sup>

In *Gratz*, another district court judge in Michigan reached the contrary conclusion, holding that a racially and ethnically diverse student body produces significant educational benefits and that the University of Michigan’s undergraduate admissions program was a narrowly tailored means of achieving the university’s interest.<sup>54</sup> The Sixth Circuit in *Grutter* was likewise sharply divided, as four judges dissented from a nine-judge *en banc* opinion reversing the district court.<sup>55</sup> And the Supreme Court betrayed its own ambivalence by splitting the affirmative action baby – upholding the law school’s admissions policy, while striking down the admissions policy in the undergraduate case.<sup>56</sup>

The diversity of views represented by these judicial decisions reflects the diversity of views in society more broadly. As one test, take the ninety amicus briefs filed in the Supreme Court in the Michigan cases — seventy-four in support of the constitutionality of affirmative action, fifteen against, and five taking neither side. The number of briefs, the range of institutions represented, and breadth of interests said

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50. 123 S. Ct. 2325 (2003).

51. 123 S. Ct. 2144 (2003)

52. *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001).

53. Specifically, the district court held that achieving a diverse student body is not a compelling state interest because (1) it was not bound by Justice Powell’s conclusion in *Bakke*, and (2) achieving a diverse student body cannot be a compelling state interest because the Supreme Court has suggested that the only such interest is remedying specific instances of discrimination. *Id.* at 847-48.

54. *See* 122 F. Supp. 2d 811, 824, 827 (E.D. Mich. 2000).

55. 288 F.3d 732 (2002). Chief Judge Martin delivered the opinion of the court, in which Judges Daughtrey, Moore, Cole, and Clay joined. Judge Moore wrote a separate concurring opinion, in which Judges Daughtrey, Cole and Clay joined. Judge Clay wrote a separate concurring opinion in which Daughtrey, Moore and Cole joined. Judge Boggs wrote a dissent in which Judge Siler joined in part, and which Judge Batchelder joined in whole. Judges Batchelder and Gilman also wrote separate dissenting opinions.

56. *See Grutter*, 123 S. Ct. 2325 (finding the law school admissions policy constitutional), and *Gratz*, 123 S. Ct. 2144 (finding the undergraduate admissions policy unconstitutional).

to be at stake — all of these factors reveal that affirmative action policies remain deeply controversial.

There is simply no broad agreement among judges, lawyers, academics or politicians about the propriety of affirmative action programs.<sup>57</sup> So this issue, which inspires great passion among supporters and detractors and is arguably one of the most important domestic issues facing Americans,<sup>58</sup> fails the breadth test because, in the end, there is no clear consensus about whether affirmative action in admissions is a constitutional violation.

The lesson to be gleaned is that there is nothing endemic to our times that prevents a problem of constitutional dimension from attaining the breadth of recognition or inspiring the depth of commitment to engage the machinery of structural reform litigation. Whether the depth seems lacking on racial profiling, or the breadth seems lacking on affirmative action, there is no reason to believe that contemporary public values are somehow too frail to support structural reform litigation. Both these contemporary issues have engendered serious attempts at structural reform. And while none of these efforts have produced wholesale judicial reformation of local institutions, one can easily imagine police departments and college admissions boards operating under complex rules established and imposed through federal injunctive orders.

As coroners conducting an autopsy, then, we have deduced that the lack of substantive values could not have caused the demise of the structural reform injunction. We must therefore look elsewhere to divine the cause of death. In particular, we must consider whether constitutional principles are to blame.

## II. CONSTITUTIONAL CAUSES: SEPARATION OF POWERS AND FEDERALISM

Constitutional principles tell us that, juristically, the structural reform injunction remains viable. The state of the law today is that the

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57. Compare WILLIAM G. BOWEN & DEREK CURTIS BOK, *THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998) (asserting that race-sensitive admission policies for colleges and universities are successful and benefit society as a whole) with Robert M. Berdahl, *Policies of Opportunity: Fairness and Affirmative Action in the Twenty-First Century*, 51 CASE W. RES. L. REV. 115, 118 (2000) (criticizing universities' use of race because it distracts from merit).

58. Indeed, by granting certiorari in *Gratz v. Bollinger* while the case was still pending in the Sixth Circuit, the Supreme Court implicitly acknowledged that the issue of affirmative action satisfied the requirements of Supreme Court Rule 11 requiring that for a petition for writ of certiorari to be granted prior to judgment, the case must be "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." See SUP. CT. R. 11.

sweeping and detailed judicial decrees at issue in the major school bus-ing, prison reform and death penalty administration cases, among other areas, do not violate separation of powers principles, or principles of federalism.

Not only do structural reform injunctions remain legally viable, but there are longstanding structural reform litigations that are ongoing. The typical ongoing school desegregation case commenced twenty or more years ago and concerns the continuing efforts of a local school district to comply with the complex decrees of a federal court, which are aimed at implementing the broad 14th Amendment-based dictates of *Brown II* and its progeny.<sup>59</sup> The typical ongoing prison case is no younger, concerning adherence to 1970s decrees establishing constitutional minima in prison conditions.<sup>60</sup>

### A. *The Federalism Objection*

Far from pulling the plug on the complicated machinery of these structural reform injunctions, contemporary courts — including the Rehnquist Court — have rolled up their sleeves and assessed the propriety of specific remedial measures on a decidedly case-by-case basis.<sup>61</sup> Indeed, the Supreme Court has not sustained any broadside constitutional challenges to structural reform injunctions; challenges mounted on federalism and separation of powers grounds have succeeded only in causing the Court to warn lower court judges to be mindful of state and congressional prerogatives.<sup>62</sup> As one critic of the Court's desegregation

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59. It is difficult to determine how many school districts are currently under court-supervised desegregation orders, in part because many school districts have recently sought to have such orders vacated. See *supra* note 10. See also Wendy Parker, *The Supreme Court and Public Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 480 n.16 (citing statistics from the Department of Justice indicating that approximately 100 school districts operate under "general" orders to desegregate); DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* 166 (1995) (estimating that 695 school districts operate under formal school desegregation plans).

60. See MALCOLM M. FEELEY & ROGER A. HANSON, *THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS: A FRAMEWORK FOR ANALYSIS AND A REVIEW OF THE LITERATURE* 12, 13-17 (John J. DiJulio ed., 1990) (discussing court orders that have resulted in a restructuring of prison life).

61. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (discussing the limits on federal courts' remedial power, and noting that "one vehicle can carry only a limited amount of baggage"); *Milliken v. Bradley I*, 418 U.S. 717, 745 (1974) (finding that a district court had exceeded its authority in fashioning inter-district relief where surrounding school districts had not been guilty of any constitutional violation); and *Milliken v. Bradley II*, 433 U.S. 267, 280-81 (1977) (articulating a three-part framework to guide courts in the exercise of their remedial authority).

62. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 562 (1979) (warning federal judges against "wad[ing] into this complex arena" of prison management); *Rhodes v. Chapman*, 452 U.S. 337, 351 (1981) (again warning federal courts to "bear in mind that their inquiries 'spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a

jurisprudence has complained, “this concern about federalism appears to be nothing more than that — a concern . . . [T]he Court does not appear to have ever invalidated a structural remedy on the ground that it improperly intruded upon the proper authority of state and local institutions.”<sup>63</sup>

A case in point is *Missouri v. Jenkins III*,<sup>64</sup> where a 5-4 Court reversed a provision in a district court order that would have required across-the-board salary increases for teachers and staff.<sup>65</sup> The rejection of this particular remedial provision was based on the majority’s view that the purpose of the ordered salary increase — to stave off white flight — was insufficiently related to the constitutional violation.<sup>66</sup> Chief Justice Rehnquist’s majority in *Jenkins III* declined to heed the exhortation of Justice Thomas to “put the genie back in the bottle”<sup>67</sup> and announce that the Constitution simply precludes structural reform injunctions.<sup>68</sup>

Specifically, Justice Thomas would have stricken on constitutional grounds the complex set of interlocking decrees developed over eighteen years that governed the Kansas City schools.<sup>69</sup> Relying on principles of federalism, he argued that education is quintessentially a matter for local

court’s idea of how best to operate’” the defendant institution); *Block v. Rutherford*, 468 U.S. 576, 584 (1984) (reaffirming “the very limited role that courts should play in the administration of detention facilities.”). See also *Milliken II*, 433 U.S. at 280-81 (district courts “must take into account the interests of state and local authorities in managing their own affairs, consistent with the constitution.”).

63. John Choon Yoo, *Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of Federal Courts*, 84 CAL. L. REV. 1121, 1133 n.83 (1996) (citing *Jenkins III* and *Milliken I* as cases invalidating certain elements of a desegregation remedy on non-constitutional grounds).

64. *Missouri v. Jenkins (Jenkins III)*, 515 U.S. 70 (1995).

65. *Id.*

66. *Id.* at 91-96. Specifically, the Court found that the salary increase — whose stated remedy was to increase the desegregative attractiveness of the district (i.e., to stave white flight) — was an interdistrict remedy, where no inter-district violation had been found. *Id.*

67. *Id.* at 123 (Thomas, J., concurring).

68. In urging a limitation on court intervention, Justice Thomas stated, “[m]otivated by our worthy desire to eradicate segregation, however, we have disregarded [the principle of limited judicial authority] and given the courts unprecedented authority to shape a remedy in equity.” *Id.* at 124. As examples of the ever-expanding equitable authority of the courts in this area, Justice Thomas cited orders to desegregate faculty and staff according to specific mathematical ratios, ordering busing, setting racial targets for school populations, altering attendance zones, and the use of compensatory education programs paid for by the state. *Id.* Characterizing these as examples of “judicial overreaching,” Justice Thomas argued that neither history nor constitutional structure can support such broad remedial authority. *Id.* at 125.

69. Interestingly, Justice Thomas raises the Eleventh Amendment only in a footnote. *Id.* at 132 n.5. He notes that the order for salary increases, as well as the entire desegregation plan, come “perilously close to abrogating the State’s Eleventh Amendment immunity from federal money damages awards.” *Id.*



authorities,<sup>70</sup> and as such, “a structural reform decree eviscerates a State’s discretionary authority over its own program and budgets and forces state officials to reallocate state resources and funds to the desegregation plan at the expense of other citizens.”<sup>71</sup>

While Justice Thomas was curiously alone on the Court in 1995 in seeking to eliminate structural reform injunctions on federalism grounds,<sup>72</sup> he has much company in conservative academia. The basic federalism argument is that court-ordered structural reform injunctions irrevocably alter the relationship between the federal and state governments. Specifically, when a federal court issues a structural reform injunction ordering a state or local institution to undergo affirmative, reformative changes, the court displaces the state or local officials and bodies responsible for managing these institutions in a manner that offends federalism principles<sup>73</sup>

Professor Fiss was fairly dismissive of these federalism arguments, which were first leveled against structural reform injunctions by scholars in the 1960s and 1970s. While acknowledging that “the federalism issue has haunted the Supreme Court throughout its history,”<sup>74</sup> Fiss nonetheless believed that objections to structural reform injunctions rooted in federalism reflect nothing more than “a desire to insulate the status quo from judicial interference,” whereas the real critique, he wrote, was directed “toward the activism of judges.”<sup>75</sup> While Fiss recognized that

70. *Id.* at 131, *citing* Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406, 410 (1977) (pointing out that “local autonomy of school districts is a vital national tradition.”).

71. *Id.*

72. Justice Thomas received some unconvincing support from Justice O’Connor, who concurred in the majority opinion, but in doing so noted that school desegregation cases are “concerned with the ‘elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds.’” *Id.* at 112, *citing* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22 (1971). These “myriad factors,” she wrote, “are not readily corrected by judicial intervention, but are best addressed by the representative branches.” *Id.* Justice O’Connor further opined that legislatures are better-suited because there are constitutional limits on “the judiciary’s institutional capacity to prescribe palliatives for social ills,” and that the “unfortunate fact of racial imbalance and bias in our society, however pervasive or invidious, does not admit of judicial intervention absent a constitutional violation.” *Id.* So while it seems that Justices O’Connor and Thomas are in agreement that there are remedies that the federal courts cannot order because of the “limited judicial role” envisioned by Article III, Justice O’Connor’s concurrence does not go so far as to argue that structural reform remedies as a whole violate federalism or separation of powers principles.

73. *See, e.g.,* Yoo, *supra* note 63; Colin Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 63 (1979) (critiquing the capacity of judges to manage structural reform cases, particularly where competent state and local agencies have been established to deal with the issue).

74. OWEN FISS, *THE TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910*, at 257 (1993).

75. Owen Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1159-60 (1977) (referring to the Supreme

some members of the Court believed “a vital principle of federalism was threatened by the injunctive suit,”<sup>76</sup> he was reluctant to accept that state interests in these cases were “in any sense vital.”<sup>77</sup> To Fiss, it was simple: “[T]he states are bound by federal law, including the Bill of Rights, and the ultimate power to determine the consistency of the state laws with these superior federal norms is allocated to a federal court, the Supreme Court of the United States.”<sup>78</sup>

### B. *Separation of Powers Objections*

Conservative scholars have also argued that separation of powers principles are violated when federal courts engage in the structural reform of local institutions. The argument is that when countermajoritarian courts perform tasks better left to the political branches, they threaten to circumvent democratic decision-making processes.<sup>79</sup> Professor John Choon Yoo has argued that the “essential flaw” of structural reform litigation is seen when the remedy needed to correct a constitutional violation lies outside a court’s traditional remedial power.<sup>80</sup> At that point, according to Yoo, “separation of powers principles require that the answer come from the political branches” rather than the courts.<sup>81</sup>

These separation of powers objections are echoed in Justice Thomas’s opinion in *Missouri v. Jenkins III*.<sup>82</sup> While conceding that the district court’s order requiring salary increases was “not a case of one branch of Government encroaching on the prerogatives of another,”<sup>83</sup> Justice Thomas nonetheless contended that the district court engaged in functions that involved a legislative or executive power in violation of basic constitutional principles. Specifically, the district court had exer-

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Court’s decision in *Rizzo v. Goode*); see also *infra* text accompanying note 109 (discussing the equitable standing doctrine as applied in *Rizzo v. Goode*).

76. Fiss, *supra* note 2, at 63.

77. *Id.*

78. *Id.*

79. See, e.g., RAOUL BERGER GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 273, 408 (1977) (arguing that when courts issue structural injunctions, they essentially “substitute their own views for those of legislative bodies”); Paul Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 958 (1978) (arguing that structural reform injunctions “can be used essentially to bypass majoritarian political controls”); Robert Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 664 (1978) (arguing that separation of powers limits the ability of the judiciary to undertake executive or legislative functions when ordering relief against state officials).

80. Yoo, *supra* note 63, at 1123.

81. *Id.* at 1123-24.

82. 515 U.S. 70 (1994).

83. *Id.* at 132 (Thomas, J. concurring) (“There is no difference between courts running school systems or prisons and courts running Executive Branch agencies.”).

cised “the legislative power to tax, . . . budget[ ], staff[ ], [make] educational decisions, in judgments about the location and esthetic quality of the schools, and [had engaged] in administrative oversight and monitoring.”<sup>84</sup> According to Justice Thomas, these were “fundamentally political decisions”<sup>85</sup> properly left to the legislative branch.

Here again, Professor Fiss has taken up and rejected the separation of powers arguments leveled against structural reform litigation. Observing that critics of structural reform see adjudication in essentially private terms<sup>86</sup> — viewing the purpose of civil lawsuits as the resolution of discrete private disputes — Fiss has consistently advocated a more public vision of adjudication. According to Fiss, civil litigation is “an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals.”<sup>87</sup> We turn to courts not only to resolve private, binary problems, but also to help us sort through and begin the hard work of solving broader, multi-dimensional problems. For Fiss, then, courts are the proper branch to engage in the reformist enterprise envisioned by structural reform litigation because this form of “adjudication is the social process by which judges give meaning to our public values.”<sup>88</sup> Federal courts on the Fiss model must play a central role in articulating public and constitutional values. To the extent that this role also requires broad remedies to give meaning to those values, Fiss saw no separation of powers problem.

On the public law vision that Fiss advocates, separation of powers concerns are misplaced: Litigation is just one of many paths to structural reform. And courts are certainly, pursuant to this model, the preferred source of the constitutional values that underlie efforts to reform state and local institutions. After all, these values are often countermajoritarian, particularly in the arena of civil rights. In the Fissian view, there is a fox-guarding-the-chicken-coop problem when the political branches assume responsibility for the constitutional operation of state and local institutions:

If nothing more is at stake than the formulation of “public policy,” . . . then it is fair to assume that the nonrepresentative character of the judiciary is a vice. But if the focus shifts to the civil rights injunction, and either the minority-group orientation or the constitutional basis of the substantive right, then the nonrepresentative character of the judiciary becomes a virtue rather than a vice. Constitutional rights are supposed to be countermajoritarian, and those emanating

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84. *Id.* at 133.

85. *Id.*

86. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

87. Fiss, *supra* note 1, at 56.

88. *Id.*

from the Equal Protection Clause particularly so.<sup>89</sup>

In the end, whatever the merits of the constitutional attacks by critics such as Justice Thomas or Professor Yoo, or the constitutional defenses proffered by Owen Fiss and others, the fact is that neither federalism nor separation of powers challenges have yet to topple a structural reform injunction. We press forward, therefore, in our search for the cause of death.

### III. DISCOMFORT WITH THE ROLE OF JUDGES IN STRUCTURAL REFORM LITIGATION

The structural reform injunction did not die from lack of substantive values or from constitutional attack. Rather, I attribute the injunction's demise to extra-legal, subconstitutional causes; in other words, political reasons. In particular, the structural reform injunction has disappeared from the contemporary sociolegal landscape because of the essentially political fear of judicial activism.<sup>90</sup> The concern is that judges engaged in structural reform improperly substitute their own views for those of officials and citizens within the offending institution or community.

Neither the top-down concern expressed by the neo-federalists, nor the functional concerns of separation of powers jurisprudence captures the core, and very deep, critique that judges exercising broad, long-term remedial authority over local institutions are playing God: making rules and issuing orders based solely or largely on their own personal moral views. As one scholar writes, “[B]y assuming such powers, courts threaten to transform themselves into roving commissions whose aim is to do the right thing, rather than to interpret and enforce the law.”<sup>91</sup>

Fiss foresaw more than two decades ago that popular criticism of structural reform litigation would come to focus less on the civil rights and other substantive issues that were the subject of complex injunctions, and would increasingly be directed “toward the activism of judges.”<sup>92</sup> And indeed, the issue of judicial activism has gained

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89. *Id.* at 60.

90. As Judith Resnik points out, judges themselves have become increasingly anti-activist. Resnik points to such examples as the “anti-adjudication elements” of the Federal Rules of Civil Procedure (which are promulgated by judges), the “devolution of judicial power” to thousands of non-Article III decision makers, and the increased lobbying by the federal judiciary against the creation of legal rights in federal courts to remedy injuries to consumers, veterans and victims of gender-based violence. See Resnik, *supra* note 13; see also Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 949-99 (2003).

91. Yoo, *supra* note 63, at 1140-41.

92. Fiss, *supra* note 1, at 1159-60.

extraordinary political traction in the ensuing quarter-century. The term “judicial activism” itself suggests unelected demigods driven by political positions on such hot-button issues as abortion, school prayer, gay marriage and affirmative action.<sup>93</sup> The popular conception posits battalions of activist judges, unmoored by the “text, structure or logic of the Constitution,”<sup>94</sup> waving their injunctive wands to recast state and local institutions according to their whim.

The *zeitgeist* of our times is anti-activism. So fearful have we become of a powerful judiciary that we now vet candidates for the federal bench based primarily on their disavowal of views associated with activism.<sup>95</sup> Our current President has stated bluntly that his nominees to the federal bench will be conservatives who “clearly understand[ ] [that] the role of a judge is to interpret the law, not to legislate from the bench . . . [that] the courts exist to exercise not the will of men, but the judgment of law.”<sup>96</sup> Indeed, the political appeal of the anti-activism position is so great that it has been adopted by liberal politicians who, in any other era, could be expected to appreciate the Fissian vision of a dynamic and constructive judiciary.<sup>97</sup>

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93. Of course, while these are some of the hot-button issues of our generation, each era has had its own. The Marshall Court, the *Lochner* Court and the Warren Court — the most “activist” of the prior Courts — were also accused of having “enacted the agenda of identifiable political constituencies and, usually, of a political party” in deciding cases involving civil rights, criminal procedure, property rights and due process. See Michael S. Greve, *The Judiciary: A Conservative View of the Court*, NAT’L REV., June 16, 2003, available at <http://www.nationalreview.com/comment/comment-greve060603.asp>.

94. Michael Paulsen, *Book Review: Straightening Out the Confirmation Mess*, 105 YALE L.J. 549, 552 (1995).

95. See, e.g., Sheldon Goldman, *Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation*, 36 U.C. DAVIS L. REV. 695, 701-02 (2003) (discussing Bush Sr.’s evaluation of then-District Court Judge Jose A. Cabranes’ record as a potential Second Circuit nominee). A memo on Cabranes conceded that his “judicial writings are scholarly, reflecting a lucid style and careful attention to detail. He is seldom reversed.” Nevertheless, the memo maintained that “Judge Cabranes’ academic writings and judicial opinions mark him as a judicial activist with deeply held views regarding the power of the courts to bring about social change.” *Id.* at 701 (quoting Lee Liberman, Subject Name Files, Box 40964, Cabranes, Jose A. [CF OA/ID 02081], George Bush Library, College Station, Texas). Not surprisingly, Cabranes was not promoted by George Bush, but by Bill Clinton in 1994. *Id.* at 702.

96. President George W. Bush, *Remarks by the President During Federal Judicial Appointees Announcement* (May 9, 2001), at <http://www.whitehouse.gov/news/releases/2001/05/print/20010509-3.html>. In his state of the union address on January 20, 2004, the President warned that “activist judges have begun redefining marriage by court order, without regard for the will of the people and their elected representatives. On an issue of such great consequence, the people’s voice must be heard. If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage.” Many would argue that the position taken by the Massachusetts court is not a feat of activism, but an exercise in statutory and constitutional interpretation.

97. For example, Patrick Leahy, as chairman of the Senate Judiciary Committee, has accused the Rehnquist Court of “judicial activism of the most dangerous, anti-democratic kind.” Greve, *supra* note 93.

Anti-activism is an attitude. Beginning in the late 1970s, courts gave vent to this attitude by erecting procedural barriers to the commencement of suits aimed at structural reform injunctions. These procedural barriers, over time, have all but denied litigants the ability to bring claims in federal court that challenge widespread and systemic practices that violate individual rights and constitutional guarantees.

A. *Procedural Barriers to Liberal Activism: The Equitable Standing Doctrine*

The Supreme Court has decided, on procedural grounds, a number of cases that restrict the availability of private equitable remedies for constitutional violations. Of particular importance, the Court has denied standing to plaintiffs who, it claimed, failed to meet the requirements of causation, redressability and injury-in-fact.<sup>98</sup> The Rehnquist Court in particular has relied heavily on Article III standing doctrine to limit plaintiffs' ability to adjudicate broad constitutional and statutory claims.<sup>99</sup> Among the restrictive devices employed by the Court is the "equitable standing doctrine."

Under the equitable standing doctrine, a private plaintiff has standing to seek injunctive relief against unconstitutional practices only if he can show to a "virtual certainty" that he will suffer similar injury in the future. The Court first began to articulate this new standard for injunctive relief in the mid-1970s in a pair of cases challenging police practices. *O'Shea v. Littleton*<sup>100</sup> was a class action brought on behalf of the citizens of Cairo, Illinois, against the state lower-court judges, alleging willful discrimination in sentencing determinations and other practices, including the imposition of excessive bail and jury fee practices.<sup>101</sup>

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98. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 504 (1975) (denying standing to plaintiffs challenging exclusionary zoning ordinance for failure to show a "substantial probability" that, absent the zoning, they could afford housing in the area); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 43 (1976) (denying standing to poor people challenging IRS regulations for failure to prove that enjoining the regulations would cause hospitals to restore the amount of care to previous levels); *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) (finding plaintiffs challenging government conveyance of property to religious college lacked standing because unable to show injury-in-fact); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (finding group of mentally retarded citizens could not seek redress against state officials in federal courts because of 11th Amendment prohibition); *Allen v. Wright*, 468 U.S. 737, 760 (1984) (denying standing to parents of African-American public school students who alleged that tax-exempt status granted to private schools resulted in race discrimination affirming that the "federal court . . . is not the proper forum to press general complaints about the way in which government goes about its business") (internal quotations omitted).

99. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

100. 414 U.S. 488 (1974).

101. Specifically, "[t]hese judges allegedly set bond in criminal cases without regard to the facts of individual cases and as punishment, and not merely to assure the appearance of defendants

According to the complaint, these illegal practices were deliberately applied to black citizens — more disturbingly, to those black citizens engaged in an economic boycott of businesses that refused to serve blacks.<sup>102</sup>

The *O'Shea* plaintiffs sought no damages, but requested the unconstitutional practices be enjoined. While the lower courts were in disagreement over the question of whether defendants were protected from suit by judicial immunity,<sup>103</sup> the Supreme Court took a different approach,<sup>104</sup> finding that plaintiffs lacked standing to seek federal equitable relief because they had failed to allege injury — either actual or threatened — sufficient to warrant judicial intrusion into the state criminal justice system.<sup>105</sup> The Court held that even if plaintiffs had suffered past injury as a result of these alleged practices, “[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.”<sup>106</sup> Justices Douglas, Brennan and Marshall dissented,

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at trial; impose[d] higher sentences and harsher conditions of sentencing on black than on white citizens; and require[d] respondents and members of their class, when charged with violations of city ordinances which carry fines and possible jail penalties, to pay for a trial by jury if the fine [could not] be paid.” *Id.* at 506 (Douglas, J., dissenting).

102. *Id.* at 491. These minorities also “encouraged others to participate in an economic boycott of city merchants who [they] consider[ed] have engaged in racial discrimination.” *Id.* This economic boycott had created “a great deal of tension and antagonism among the white citizens and officials of Cairo.” *Id.* Justice Douglas remarked in his dissent that “Cairo, Illinois, is boiling with racial conflicts.” *Id.* at 506 (Douglas, J., dissenting). These tensions were the alleged motive behind the discriminatory practices in *O'Shea*.

103. The District Court dismissed based on immunity doctrine, but the Court of Appeals reversed, finding that immunity “did not forbid the issuance of injunctions against judicial officers if it is alleged and proved that they have knowingly engaged in conduct intended to discriminate against a cognizable class of persons on the basis of race.” *Id.* at 492. Furthermore, the Court of Appeals noted that any practical difficulties with issuing an injunction were overblown; in this regard, the Court suggested that injunctive relief “might include a requirement of periodic reports of various types of aggregate data on actions on bail and sentencing.” *Id.* at 493 n.1. The lone Court of Appeals dissenter argued:

[A] federal district court has no power to supervise and regulate by mandatory injunction the discretion which state court judges may exercise within the limits of the powers vested in them by law, and that any relief contemplated by the majority holding which might be applicable to the pattern and practice alleged, if proven, would subject the petitioners to the continuing supervision of the District Court, the necessity of defending their motivations in each instance when the fixing of bail or sentence was challenged by a Negro defendant as inconsistent with the equitable relief granted, and the possibility of a contempt citation for failure to comply with the relief awarded.

*Id.*

104. “This Court now decides for the first time in the course of this litigation that the complaint is deficient because it does not state a ‘case or controversy’ within the meaning of Art. III.” *Id.* at 506 (Douglas, J., dissenting).

105. *Id.* at 493.

106. *Id.* at 495-96. While the Court acknowledged that past wrongs could be vital in

arguing both that the complaint did allege past and continuing injury sufficient to state a “case or controversy,”<sup>107</sup> and perhaps more frankly, that the allegations in the complaint were such that, if true, future injury was near certain.<sup>108</sup>

And so, the equitable standing doctrine was born.

Two years later, the Supreme Court added some muscle to the doctrine, using it to strike down an injunction aimed at reforming a municipal police department. In *Rizzo v. Goode*,<sup>109</sup> a class of plaintiffs<sup>110</sup> that had at trial proved that systemic constitutional violations by Philadelphia police officers went undisciplined and unchecked obtained a district court injunctive order requiring the department to create “a comprehensive program for improving the handling of citizen complaints alleging police misconduct.”<sup>111</sup> This injunctive order was affirmed by the Third

determining whether the plaintiff has suffered “a real and immediate threat of repeated injury,” it found that in this case, “the prospect of future injury rests on the likelihood that respondents will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing before petitioners.” *Id.* at 496. The Court was unwilling to assume that such injury would occur: “it seems to us that attempting 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.” *Id.* at 497.

107. *Id.* at 506-09. The complaint alleged that “[defendants] continue to engage in a pattern and practice which has deprived and continues to deprive the named plaintiffs and members of their class of their constitutional rights.” *Id.* at 508. These allegations and allegations that the Cairo police commissioner continually denied constitutional rights to the plaintiffs “support the likelihood that the named plaintiffs as well as members of their class will be arrested in the future and therefore will be brought before [the defendants] and be subjected to the alleged discriminatory practices in the administration of justice.” *Id.* at 509.

108. *See id.* at 509 (Douglas, J., dissenting).

What has been alleged here is not only wrongs done to named plaintiffs, but a recurring pattern of wrongs which establishes, if proved, that the legal regime under control of the whites in Cairo, Illinois, is used over and over again to keep the blacks from exercising First Amendment rights, to discriminate against them, to keep from the blacks the protection of the law in their lawful activities, to weight the scales of justice repeatedly on the side of white prejudices and against black protests, fears, and suffering. This is a more pervasive scheme for suppression of blacks and their civil rights than I have ever seen. It may not survive a trial. But if this case does not present a ‘case or controversy’ involving the named plaintiffs, then that concept has been so watered down as to be no longer recognizable.

*Id.*

109. 423 U.S. 362 (1976).

110. As in *O’Shea*, the complaint alleged a “pervasive pattern of illegal and unconstitutional mistreatment by police officers . . . directed against minority citizens in particular and against all Philadelphia residents in general.” *Id.* at 366-67.

111. *Id.* at 365. The District Court made detailed findings of fact. First, the Court determined that there had been sixteen incidents in Philadelphia over a one-year period in which police officers violated citizens’ constitutional rights, and citizen complaints had been filed in seven of those sixteen. *Id.* at 368. In four of these cases, the police department received the complaints but took no action against the offending officers. *Id.* The District Court also found evidence of a departmental “tendency to discourage the filing of civilian complaints and to minimize the consequences of police misconduct.” *Id.* at 368-69.



Circuit, which agreed with the district court that the existing procedures for handling citizen complaints were “inadequate,” so that the ordered revisions “appeared to have the potential for prevention of future police misconduct.”<sup>112</sup>

Relying on its decision in *O’Shea*, the Supreme Court found that plaintiffs in *Rizzo* lacked standing to seek injunctive relief because they had not proved that the injuries they suffered in the past were likely to recur; rather, plaintiffs’ only claim was that “a small, unnamed minority of policemen might” in the future cause them harm because these officers would perceive that departmental disciplinary procedures were so lax that their actions would go unchecked.<sup>113</sup> According to Justice Rehnquist, “This hypothesis is even more attenuated than those allegations of future injury found insufficient in *O’Shea* to warrant invocation of federal jurisdiction.”<sup>114</sup> Concluding that there had been no showing that “the behavior of the Philadelphia police was different in kind or degree from that which exists elsewhere . . .” because “. . . the problems disclosed by the record . . . are fairly typical of [those] afflicting police departments in [most] major urban areas,” the Court reversed and vacated the injunctive order.<sup>115</sup> In dissent, once again, Justices Blackmun, Brennan and Marshall argued that the plaintiffs had alleged (and proved) that they were “injured by past unconstitutional conduct [of defendant police officers] and fear[ed future] injury . . . regardless of

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Having made these findings, the court concluded that while only a small percentage of officers commit violations of constitutional dimension, these simply “cannot be dismissed as rare, isolated instances.” *COPPAR v. Rizzo*, 357 F. Supp. 1289, 1319 (E.D. Pa. 1973). As such, the court determined that some judicial intervention was necessary, though a wholesale take-over of the Department — as was urged by the plaintiffs — was a “drastic remedy” not called for, “at least initially, in the present cases.” *Id.* at 1320.

The court’s injunctive order set out guidelines for the department that were “consistent with generally recognized minimal standards,” and, in the court’s view, “impose[d] no substantial burdens on the Police Department.” *Id.* at 1321. Specifically, the court asked the department to (1) revise the police manual and rules of procedure to spell out in detail the “dos and don’ts” of permissible conduct in dealing with civilians; (2) make available forms for civilian complaints; (3) establish a screening procedure for eliminating frivolous complaints; (4) establish a procedure for prompt and adequate investigation of complaints; and (5) provide for 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.” *Id.* This order was light, or, in the words of the District Court, “more nearly in accord with the defendants’ position than with the plaintiffs position” and “did not go beyond what the defendants had always been willing to accept.” *Rizzo*, 423 U.S. 362, 381 (quoting District Court’s memorandum of December 18, 1973).

112. 506 F.2d 542, 548 (3d Cir. 1974).

113. I have argued that this allegation should make out a cognizable claim under 42 U.S.C. § 1983. See Myriam Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17 (2000).

114. *Rizzo*, 423 U.S. at 372.

115. *Id.* at 375.

whether they . . . violated a valid law.”<sup>116</sup>

Finally, in *City of Los Angeles v. Lyons*,<sup>117</sup> the equitable standing doctrine became a recognized theory of Article III jurisprudence. In *Lyons*, the complaint alleged that police officers had unreasonably applied a chokehold to a black motorist on a routine traffic stop,<sup>118</sup> and that LAPD officers routinely used the chokehold in nondangerous situations, often resulting in death or injury to the detainee.<sup>119</sup> In addition to monetary damages, Lyons sought equitable relief to enjoin the LAPD from employing chokeholds where there is no threat of deadly force, and obtained an order from the district court that resembled the structural reform injunctions of times past.<sup>120</sup>

Leaving intact Lyons’s claim for monetary damages, the Supreme Court reversed the grant of injunctive relief, finding plaintiff had “failed to demonstrate a case or controversy with the City that would justify the equitable relief sought.”<sup>121</sup> Lyons’s standing to seek such relief, the Court held, depended on whether *he himself* is “realistically threatened by a repetition of his experience”<sup>122</sup> with the LAPD. To show actual threat of future injury, Lyons “would have had not only to allege that he would have another encounter with the police, but also to make the incredible assertion . . . that *all* police officers in Los Angeles *always*

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116. *Id.* at 383 (Blackmun, J., dissenting).

117. 461 U.S. 95 (1983).

118. *Id.* at 97-98. When the plaintiff, Adolph Lyons, exited his car after being pulled over for a burned-out taillight, he encountered two LAPD officers with drawn revolvers who directed him to face the vehicle, place his hands behind his head and spread his legs. Their pat-down search revealed no weapons, but when Lyons began to lower his arms, one of the officers applied a chokehold that rendered Lyons unconscious and permanently damaged his larynx. When Lyons regained consciousness, he was on the ground spitting up blood and had urinated and defecated. He could not speak, because of the damage to his larynx. The officers then gave him a ticket for the burned-out taillight and let him go. *Id.* at 114-15.

119. When Lyons filed his original complaint, there had been at least two deaths resulting from the application of chokeholds by the police. When he filed his first amended complaint a few months later, at least 10 chokehold-related deaths had occurred. By May 1982, there had been five more such deaths. *Id.* at 100. Of the sixteen known chokehold-related deaths, 75% were black males, although only nine percent of the city’s population consisted of black males. *Id.* at 116 n.3. Furthermore, the LAPD applied the chokehold more often than any other “control” procedure over a period of five years: “[B]etween February 1975 and July 1980, LAPD officers applied chokeholds on at least 975 occasions, which represented more than three-quarters of the reported altercations” between citizens and police. *Id.*

120. *Id.* at 98-99. The district court found for plaintiff and enjoined use of the chokehold; the court also ordered an improved police training program on the proper use of the chokehold, with regular reporting and status hearings before the judge. The Ninth Circuit affirmed, finding that there was a sufficient likelihood that Lyons would again be stopped and subjected to the unlawful use of force to confer standing and to warrant the issuance of an injunction. 656 F.2d 417 (9th Cir. 1981).

121. *Lyons*, 461 U.S. at 105.

122. *Id.* at 109.

choke any citizen with whom they happen to have an encounter.”<sup>123</sup> This test requires a “virtual certainty” of personal, future injury to ensure remedial effectiveness, and since Lyons could not show that an injunction barring future use of the chokehold would provide relief to him personally, he had no standing to seek that remedy.<sup>124</sup>

The Court’s application of the “equitable standing” bar has ensured that victims of police brutality will rarely, if ever, be allowed to enjoin injurious police practices. But its effects are much broader: The Court’s equitable standing doctrine will doom many efforts to seek the type of forward-looking, reformative injunctive relief that had been the hallmark of the structural reform revolution.<sup>125</sup>

The equitable standing doctrine, however, is not an impenetrable barrier. Rather, it is a tool that courts may use to bar injunctive actions that they do not wish to entertain. It is, in a conservative climate, a barrier against *liberal* activism. To illustrate this point, I return to the Supreme Court’s decision in *Gratz v. Bollinger*, striking down the University of Michigan’s undergraduate admissions program.<sup>126</sup>

123. *Id.* at 105-06 (emphasis in original).

124. *Id.* The “virtual certainty” requirement of Lyons has drawn tremendous scholarly criticism. See, e.g., LAURENCE TRIBE, CONSTITUTIONAL CHOICES 110, 117 (1985) (casting Lyons as “anomalous,” “extreme and unprecedented”); Richard Fallon, *Of Justiciability, Remedies and Public Law Litigation: Notes on The Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 29 (1988) (arguing that the fundamental flaw in the Lyons majority’s reasoning lies in its failure to analyze the case under ordinary mootness principles); Linda E. Fisher, *Caging Lyons: The Availability of Injunctive Relief in § 1983 Actions*, 18 LOY. U. CHI. L.J. 1085, 1118 (1987) (concluding that “Lyons unnecessarily limits the remedies available to those subjected to unconstitutional conduct”); *The Supreme Court - 1982 Term: II. Federal Jurisdiction and Procedure*, 97 HARV. L. REV. 208, 219 (1983) (noting that Lyons was a “marked extension of the restrictive principles of standing”).

125. See, e.g., *Knox v. McGinnis*, 998 F.2d 1405, 1413 (7th Cir. 1993) (denying prisoner’s claim for injunctive relief to prohibit use of a restraining device called “the Black Box” because prisoner could not show to a “virtual certainty” that he would again be restrained by prison officials); *Stewart v. Lubbock County*, 767 F.2d 153, 155 (5th Cir. 1985) (questioning *sua sponte* the standing of plaintiffs challenging sheriff department strip search policy on grounds that plaintiffs “may not be able to show that they would again be arrested and therefore be again subject to the unconstitutional strip search policy”); *Curtis v. City of New Haven*, 726 F.2d 65 (2d Cir. 1984) (finding that plaintiffs lacked standing to seek injunction against use of mace by city police department where there was no showing that plaintiffs were likely to again suffer mace assault). See also Laura L. Little, *It’s About Time: Unravelling Standing and Equitable Ripeness*, 41 BUFF. L. REV. 933, 942 (1993) (discussing cases denying plaintiffs injunctive relief against unconstitutional police practices under Lyons).

126. 123 S. Ct. 2411 (2003); see also *supra* text accompanying notes 50-58. While I focus on the Supreme Court’s recent decisions in the Michigan affirmative action cases, other lower federal court decisions striking down admissions policies that employ race as a factor are also susceptible to this critique. See, e.g., *Podberesky v. Kirwan*, 38 F.3d 147, 154-55 (4th Cir. 1994), *Hopwood v. Texas*, 78 F.3d 932, 952-53 (5th Cir. 1996); *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001).

### B. *Conservative Efforts To Engage in Structural Reform*

Justice Rehnquist's opinion for the Court in *Gratz* begins by addressing the argument that the petitioners lacked standing to bring the action. Specifically, the petitioners had already enrolled at other schools before they filed the case, and neither petitioner was in the process of reapplying to Michigan through the freshman admissions process (the admission policy at issue) at the time this suit was filed or at any time thereafter. Based on these facts, it seemed that the equitable standing doctrine should bar the claim for injunctive relief because petitioners had not shown to a "virtual certainty" that they would suffer similar injury — rejection from the Michigan undergraduate program — in the future;<sup>127</sup> indeed, they were virtually certain *never* to suffer similar harm given that college graduates rarely reapply to college.<sup>128</sup>

As Justice Stevens pointed out in dissent, the record contained "not a scintilla of evidence that the freshman admissions program now being administered by respondents will ever have any impact on either [Petitioner] Hamacher or Gratz."<sup>129</sup> One of the petitioners, Hamacher, thus sought to base his claim for injunctive relief on an intent to reapply to the university as a transfer student.<sup>130</sup> As Justice Stevens observed through tracking the language of the Court's equitable standing jurisprudence, Hamacher's "claim of future injury is at best 'conjectural or hypothetical' rather than 'real and immediate.'"<sup>131</sup>

Justice Rehnquist disagreed, finding that petitioners clearly had standing to seek injunctive relief. In a striking departure from the Court's equitable standing jurisprudence, Rehnquist found that "whether

127. This stands in stark contrast to the claim of Barbara Grutter, who, in challenging the use of race in admissions at Michigan's law school, alleged that she "has not attended any other law school" and that she "still desires to attend the [Michigan] Law School and become a lawyer." *Gratz v. Bollinger*, 123 S. Ct. 2411, 2434 (2003) (Stevens, J., dissenting). It may also be distinguishable from "Allan Bakke's single-minded pursuit of a medical education from the University of California at Davis." *Id.* at 2435.

128. Similarly, under a literal interpretation of *Lyons*, the *Bakke* case would not have been justiciable because the plaintiff, a white male who had been denied admission to medical school because of a policy requiring that a set number of minority applicants be admitted, would not have been able to demonstrate with certainty that he would be admitted to a future class but for the admission policy. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 3-14, at 116-17 (2d ed. 1988). See also Michael Rosman, *The Error of Hopwood's Error*, 29 J.L. & EDUC. 355, 357 (2000) (noting that Justice Powell "never quite explains why Allan Bakke was the appropriate individual to seek a systemic injunction.").

129. *Gratz*, 123 S. Ct. at 2435 (Stevens, J., dissenting).

130. One commentator raised a similar point concerning the *Bakke* decision, "[i]f Allan Bakke was never going to apply to Davis Medical School again (because he was going to be admitted if the system was illegal), what standing did he have to seek an injunction?" Rosman, *supra* note 124, at 357.

131. *Gratz*, 123 S. Ct. at 2436 (Stevens, J., dissenting), citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

Hamacher ‘actually applied’ for admission as a transfer student is not determinative of his ability to seek injunctive relief in this case,” rather, all he need allege is “an intent to apply again in order to seek prospective relief.”<sup>132</sup> Because the complaint alleges that Hamacher “intends to transfer to the University of Michigan when defendants cease the use of race as an admission preference,” he has standing to seek injunctive relief to force defendants to do so.<sup>133</sup>

In the caustic words of a dissenting Judge Souter in *Gratz*, only the majority’s “new gloss on the law of standing” allowed it to reach the merits of the case.<sup>134</sup> Having reached the merits in *Gratz* and *Grutter*, moreover, the Court essentially announced a set of rules by which state institutions must conduct their business so as to adhere to constitutional norms.

Not unlike the judicial prescriptions and proscriptions that governed crowded prisons and segregated schools, the Court has now addressed the manner in which admissions committees may, or may not, handle “soft variables,” “point systems,” “plus-factors” and “critical masses of underrepresented minorities,” among other things (not to mention the multi-factor “Harvard Plan,” which the Court has now endorsed, notwithstanding that it has never been before the Court for review<sup>135</sup>).

To be sure, the Court stopped well short of attaching federal monitors to state collegiate admissions committees. Nor did the Court purport to effect the wholesale reformation of higher educational admissions. This does not suggest, however, that conservative ideologues lack the requisite fire in the belly to overhaul state admissions procedures. The conservatives’ willingness to abandon standing and federalism concerns reflects an impressive level of commitment; depth of passion is not lacking here. Instead, the would-be overhaulers were hindered by the Court’s internal ideological battles. What is lacking is breadth of consensus.

Still, the Court’s actions in *Gratz* and *Grutter* are oddly redolent of the golden age of *Brown*. Gone, for the moment, are the restrictive standing doctrines designed to keep reformist litigants from the courthouse. Gone, for now, is the archetype of the judicial antihero (the anti-Fiss?), devoid of substantive social opinions and resolutely opposed to meddling in the operation of state and local institutions. And back, for

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132. *Id.* at 2422.

133. *Id.* Rehnquist buttresses this with Hamacher’s second request for relief: that the District Court “[r]equir[e] the [College] to offer [him] admission as a transfer student.” *Id.* at 2418.

134. *Id.* at 2438 (Souter, J., dissenting).

135. *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1262 (11th Cir. 2001) (noting that Powell’s discussion of the Harvard Plan in *Bakke* was entirely dicta).

today, are the passions that inspire crowds to gather on New Jersey Avenue, outside the front entrance of the Supreme Court.

It's almost enough to make Owen Fiss proud.

