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Suing Government

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Judicial Relief and Public Tort Law

Suing Government: Citizen Remedies for Official Wrongs. By Peter Schuck. *New Haven: Yale University Press, 1983.* Pp. x, 255. \$25.00.

Cass R. Sunstein†

The last few years have seen a resurgence of academic interest in what might be called structural questions—those of procedure and remedy. While the 1960's and early 1970's produced an outpouring of writing on substantive problems, most prominently free speech and equal protection, more recent writers have shifted the focus. The interest in structural questions is evident in essays on hearings for those deprived of government benefits,¹ on separation of powers,² on equitable relief,³ and on judicial remedies for misconduct by administrative agencies.⁴

One might attribute this renewed interest in remedial problems to the notion that substantive problems present questions of politics or taste, on which little remains to be said. But at a deeper level, I think, the emphasis on structural questions reflects an interest in three problems that turn out to be substantive after all.

The first is the problem of promoting the participation of those affected by administrative and judicial decisions. In particular, the structural injunction appears to furnish a mechanism by which a variety of affected persons may participate, or at least be represented,⁵ when basic social

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1. See, e.g., Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85; Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885 (1981); Michelman, *Formal and Associational Aims in Procedural Due Process*, in 18 NOMOS 126 (1977); Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

2. See, e.g., Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979); Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193 (1981).

3. See, e.g., O. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

4. See, e.g., J. FREEDMAN, *CRISIS AND LEGITIMACY* (1978); Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981).

5. See Note, *Institutional Reform Litigation: Representation in the Remedial Process*, 91 YALE L.J. 1474, 1478-80 (1982).

choices are made. In this respect, the structural injunction may operate as a kind of surrogate for the legislative process.⁶

The second is the strain put on conventional doctrines by efforts to protect the wide range of statutory benefits provided by modern government. Traditional judicial remedies allow for the protection of common law liberty and property—rights against governmental intrusion into the realm of private autonomy.⁷ By contrast, structural remedies are designed to protect the new rights created by the administrative state: rights to welfare benefits, to freedom from discrimination, to government employment. Purely negative decrees—the sort of remedy commonly associated with the courts—inadequately implement those positive guarantees. Considerable creativity seems necessary to devise and perfect judicial tools to enforce regulatory programs.

The third factor relates to recent attacks on the notion that adjudication generates outcomes that are in some sense objective and distinct from the power struggle of politics.⁸ In the face of those attacks, there has been a renewed effort to see whether structure or process may discipline social decisions.⁹ Process has, in this sense, been treated once again both as an important legitimating device and as an end in itself.

Peter Schuck's *Suing Government*¹⁰ is an ambitious effort to set forth a general theory of judicial remedies for official wrongs. Schuck attempts to discuss together two remedies typically treated separately in the literature: liability for damages and injunctive relief. There is much that is valuable and illuminating in the analysis, and the book is, I think, an important contribution to the current debate. At the same time, it is incomplete, for it fails to treat adequately the three sources of the renewed interest in remedial problems. Before elaborating these criticisms, however, it is useful to explore Schuck's argument in some detail.

I.

There are three parts to that argument. The first sets forth a conceptual framework for analyzing remedial questions, the second proposes an over-

6. See Fiss, *The Supreme Court—1978 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6-7 (1979).

7. See J. VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 14-20* (1978); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1669-70 (1975).

8. See, e.g., Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

9. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 17-1 to 17-3 (1978); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

10. P. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983) [hereinafter cited by page number only].

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haul of the current system of damage remedies, and the third deals with the problem of injunctive relief.

A.

The conceptual framework arises out of Schuck's analysis of the different reasons for governmental illegality, the various remedial tools available to the courts for remedying such illegality, and the purposes judicial remedies might serve. Schuck begins by observing that a government official may violate the law for a number of reasons.¹¹ Officials may not know what the law requires. They may be unable, because of a lack of resources, to comply with the law. They may have improper motivations. Or they may be merely careless. The reasons for official illegality may in turn have an important bearing on the usefulness of a particular remedy.

The courts have at their disposal a number of tools to remedy official illegality: declaratory judgment; damages; and various forms of injunctive relief, including the structural injunction. These tools vary substantially in terms of their intrusiveness and the demands they place on courts. A declaratory judgment, for example, requires only a conclusion of law; it does not by its own force require any change in the defendant's conduct. A structural injunction, by contrast, enables the court to seize control of another institution and to monitor its functions through continuing supervision.

These remedies, Schuck suggests, might promote one or more of the goals of the public law. Following the conventional catalogue, Schuck lists six such goals: deterrence, promotion of vigorous decisionmaking, compensation of victims, exemplification of moral norms, achievement of institutional competence and legitimacy, and systemic efficiency through the integration of the primary goals.¹²

B.

This conceptual framework serves as background for the second part of the book, an attack on the reliance of the current remedial system on damage remedies against government officials. According to Schuck, that system not only fails to promote any of the six remedial goals but also creates perverse incentives for government officials.

In general, public officials, unlike their counterparts in the private sector, do not retain any of the benefits that flow from their decisions.¹³ Although the status and income of government employees may be improved by successfully taking chances, "the returns for accepting risk are far more intangible and remote than the potential returns that motivate private

11. Pp. 3-4.

12. Pp. 16-25.

13. Pp. 68-71.

risk-taking."¹⁴ The predominant remedial tool of damages makes officials personally liable for violations of the law; indemnification from the governmental employer is "neither certain nor universal."¹⁵ As a result, when the prospect of damage liability is added to the official's calculus, decision-making is skewed toward risk aversion. Action has significant personal costs without corresponding personal benefits; inaction may have few benefits—personal or social—but little cost as well. The possibility of personal liability for unlawful action tends to generate inaction, delay, or an unproductive formalism that produces little but documents to defend officials in lawsuits.

Schuck thus suggests that the official decisionmaker, trapped by the fear of personal liability, is inclined to avoid courses of action that might turn out to be beneficial. At the same time, Schuck rejects one obvious remedy—to reestablish the balance by allowing damages for unlawful inaction as well—on the ground that it would have unpredictable effects on official recruitment, vigorous decisionmaking, and civil service morale.¹⁶

Because of the skewing effect of damages liability, Schuck argues, the courts have developed immunity doctrines to shield officials and thereby promote more vigorous decisionmaking. Such doctrines, however, have disadvantages of their own, for they undermine deterrence and defeat compensation. In addition, the need to ascertain "good faith," a conventional basis for immunity, produces enormous administrative costs. The current system emerges as a kind of crazy-quilt: damages remedies that skew incentives in an undesirable fashion and immunity doctrines that, in a crude effort to counteract those incentives, undermine the goals of public tort law.

Schuck's proposed remedy is simple—transfer liability from individual officials to the government as a whole.¹⁷ Such a system, he contends, would avoid nearly all the hazards associated with official liability. First, it would strengthen deterrence. Except in the atypical cases of intentional wrongdoing, placing liability on the official may not deter at all. The agency, by contrast, is "well equipped to deter," since at the agency level

a number of crucial ingredients converge: a comprehension of the full range of social values affected by the misconduct and by efforts to control it; an understanding of the technology of how particular

14. P. 68.

15. P. 85.

16. Pp. 77-79; cf. *National Black Police Ass'n v. Velde*, 631 F.2d 784, 787 (D.C. Cir. 1980) (federal officials not absolutely immune from monetary liabilities for failure to act), *vacated and remanded*, 102 S. Ct. 3503 (1982), *modified on other grounds*, No. 77-1273, slip op. (D.C. Cir. June 30 (1982)).

17. Pp. 106-21.

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misconduct can be deterred; the incentive to optimize not only deterrence but also competing values, notably vigorous decisionmaking; and the resources to ensure that this knowledge and incentive is used at street level.¹⁸

At the same time, government liability would, in Schuck's view, promote compensation, since he would make the government liable for every tortious act or omission committed by its agents within the scope of their employment.¹⁹ The other purposes of the public tort law would also be promoted. There would be no adverse effect on vigorous decisionmaking, and moral norms exemplified in statutory and constitutional provisions would be realized more readily.²⁰

C.

The third part of the book discusses the problem of injunctive relief. Schuck believes that the problem is worth addressing because government liability will sometimes fail to vindicate the various goals of public tort law.²¹ First, when social valuations of the costs and benefits of legality diverge from the government's valuations, monetary damages that allow the government to choose between legality and compensated illegality will inadequately deter government officials. Furthermore, some of the costs of official illegality—such as those resulting from unlawful school segregation—are not easily monetizable. And in some cases—especially those involving judicial or prosecutorial behavior—it may be worthwhile to preserve governmental immunity while fashioning an injunctive remedy to guard against unlawful conduct. Finally, damages relief may not provide an effective “signal” to the bureaucracy; its effects may be felt too slowly, and low-level bureaucrats may ultimately not comply.

When any of these factors is present, the cornerstone of Schuck's system—governmental liability—may be insufficient to deter illegal official conduct. Schuck suggests that some form of injunctive relief may be appropriate in such circumstances.²² He acknowledges that such relief has considerable costs and that it taxes the institutional capacity of judges by forcing them to assume managerial and supervisory roles for which they are ill-suited. But he argues that a structural decree can sometimes be “legitimated” through a particular conception of its function.

Schuck discusses three possible legitimating conceptions. The first, the

18. P. 104.

19. P. 111.

20. P. 101.

21. Pp. 145-50.

22. P. 150.

“pure rights” conception,²³ focuses on the courts’ role in identifying individual rights and downplays or ignores implementation problems. Schuck rejects this conception because it is unrealistic and naive. The second conception, which Schuck attributes to Owen Fiss, is called “judicial interpretivism.”²⁴ That approach recognizes that structural remedies are not logical deductions from substantive rights, but nonetheless treats the courts as the best institutions for identifying public values to guide the remedial enterprise. According to Schuck, this understanding is “juridocentric” because it disregards the process by which values are “actualized . . . and absorbed into the life and practice of the society.”²⁵

Schuck prefers an “institutional competition” conception that recognizes the important role of nonjudicial institutions in the remedial process.²⁶ Under this approach, “conflicting goals, limited resources, political and ideological struggle, and human and institutional imperfections transform partial meanings into social reality.”²⁷ The distinguishing feature of this conception is its emphasis on the fact that governmental actors other than the courts play a substantial role in implementing constitutional or statutory rights, especially when implementation involves managerial or allocational decisions whose consequences are not easily grasped by the courts. Schuck believes that this conclusion does not deprecate the rule of law, but instead removes an unwarranted emphasis on the judiciary.

Schuck concludes by sketching “a remedial system for the future.”²⁸ Such a system would expand governmental liability for damages as the basic element of public tort law, thereby displacing the current patchwork of official liability and immunity. Injunctive relief would be available only in those rare cases in which damage liability would not do the job. In such cases, courts should be sensitive to their own limitations and their dependence on other branches of government. When injunctive relief is required, courts should always fashion the least restrictive remedy. The most intrusive remedies would be available only as a last resort and upon a showing of recalcitrance. In sum, courts should adopt a graduated response to social problems demanding injunctive relief. Schuck concludes with a suggestion that other branches of government ought to assume a greater role in the remedial process.²⁹

23. Pp. 171-73.

24. Pp. 174-78.

25. P. 176.

26. Pp. 178-81.

27. P. 178.

28. Pp. 182-98.

29. Pp. 197-98. In the same vein, Professor Mashaw has recently suggested that a focus on judicial remedies may deflect attention from the more important mechanisms for transforming administrative performance. See J. MASHAW, *BUREAUCRATIC JUSTICE* 6 (1983). For recent efforts to exercise executive and legislative control, see Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981) (guidelines

II.

Two characteristics of *Suing Government* are especially impressive. The first is the effort to distinguish considerations usually mixed together in discussions of remedial problems. Schuck neatly sorts out the purposes of remedial doctrines, identifies the various reasons for judicial inability to afford effective structural relief, catalogues the reasons for government illegality, and analyzes the several factors that may make damage remedies inadequate.

The second impressive feature of the book is its examination of the weaknesses of the current system of personal liability and of the advantages of governmental liability. The point is not new,³⁰ but it is made exceptionally well. Schuck argues that the current scheme, with its patchwork of official liability and immunity rules, could be substantially improved, at least in some contexts, by a system of governmental liability. The basic proposal has much to recommend it.

A.

The book, however, is incomplete. The effort to set forth a conceptual framework is, I think, only partly successful. Schuck provides a useful catalogue of relevant factors: the reasons for official illegality, the various remedial tools, and the purposes of the public tort law. Like most such catalogues, however, his list is of limited usefulness. One needs a method for relating the three to one another and a way to develop some hierarchy of reasons, tools, and purposes. What does one do when compensation conflicts with deterrence? How does one know what the role of "exemplification of moral goals" should be? When does negligence rather than lack of resources account for official illegality? What difference does it make if one knows? Precisely when should a damage remedy be found inadequate? On such questions, Schuck provides little help.

There are, moreover, weaknesses in Schuck's argument for a system of governmental liability. Take, for example, the discussion of the subversive effects of official liability. Schuck contends that liability inclines officials toward delay, inaction, and needless formality. That claim, however plausible, is highly speculative. We do not really know whether and to what

to increase agency accountability for regulatory actions); S. 1080, 97th Cong., 2d Sess., 128 CONG. REC. S2713 (daily ed. Mar. 24, 1982) (Regulatory Reform Act to facilitate judicial and congressional review of regulatory actions).

30. See, e.g., Epstein, *Private-Law Models for Official Immunity*, 42 LAW & CONTEMP. PROBS. 53, 55-59 (1978) (official immunity); Mashaw, *Civil Liability of Government Officials: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROBS. 8, 26-33 (1978) (suggesting reordering of civil liability rules applicable to government officials); Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 53-71 (proposing that tort remedies replace exclusionary rule as deterrent for unlawful searches).

extent the specter of liability interferes with the judgment of lower-level officials in state and federal hierarchies. In view of the enormous costs—psychological and monetary—of instituting litigation, the assumption that the interference is substantial requires a considerable leap of faith. Indeed, the assumption is to some degree undermined by Schuck's own claim that the current system provides significant disincentives for victims seeking redress. If the existing system in fact discourages lawsuits, one might think that official liability is necessary to achieve optimal deterrence.³¹

Moreover, I am not entirely persuaded by Schuck's effort to distinguish between public and private employees in terms of the incentive for risk-taking. The distinction has been made before,³² and undoubtedly there is something to it. But surely there are low-level employees in private industry who do not capture the benefits of aggressive action, and surely there are bureaucrats in government whose willingness to assume risks is rewarded. Moreover, in a bureaucratized and heavily unionized private sector, it is hard to believe that good or bad performance is automatically reflected in the salary of the individual employee. The difference between the public and private sectors is one of degree rather than of kind.

Schuck's use of economic analysis fails, moreover, to recognize or answer a standard economic argument. If officials risk personal liability, and if that risk skews incentives or discourages federal employment, presumably the government will increase salaries to provide ex ante compensation for the risk. I do not mean to suggest that it does not matter whether liability is placed on the government or on the official. But Schuck's failure to deal squarely with the economic argument is unfortunate.

Finally, Schuck does not adequately take account of the taxing power and the resulting danger that a system of governmental liability will have little deterrent effect on official misconduct. Because it has the power to tax, the government is fundamentally different from the private enterprises on which Schuck bases his proposal. To be sure, private industry can pass on to consumers the costs of tort liability; the market, however, furnishes at least some check on price increases. The government faces much weaker constraints. It can hardly be said that the taxpayers' lobby is sufficiently powerful to resist the likely minimal increases that might be required by governmental tort liability of the sort Schuck proposes.

Schuck does recognize the related problem of locating liability at some point between the treasury as a whole and the particular work detail

31. See Landes & Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975).

32. See Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1164 (1981) (governmental enterprises less likely than private institutions to respond appropriately when their employees are subject to overdeterrent liability constraint).

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whose unlawful conduct is at issue. Moreover, it should be possible to structure a liability scheme so that the fear that damages might cut into an agency's budget would affect the extent of illegal conduct. But in view of the taxing power, there are severe practical difficulties in promoting the goal of deterrence with a system of governmental liability.

B.

All of these are relatively minor objections to what is, on the whole, a lucid and persuasive presentation. My more fundamental concern is with that part of the book that deals with the problem of injunctive relief, a problem that has received considerable attention in recent years.³³ As I have suggested, this interest stems from the potential of the injunction to promote participation in the remedial process, to ensure direct and immediate enforcement of the positive guarantees of the regulatory state, and to help legitimate social choices.

Schuck's principal purpose is to undermine the "pure rights" and "judicial interpretivist" approaches on the ground that they are insufficiently sensitive to the role institutions other than the courts play in translating rights into remedies. To some extent, Schuck is attacking a straw man. I doubt that anyone denies the courts' ultimate dependence on other institutions of government. Moreover, Schuck's own "institutional competition" model is itself indeterminate. It is of course true that courts depend on other institutions and that regulatory provisions and the Constitution permit or require some flexibility in the implementation process. In the end, however, recognition of those points does little other than to suggest the familiar point that institutional reform litigation often entails a bifurcation of right and remedy.

To be sure, courts should be sensitive to the sometimes loose relationship between right and remedy and to the need for deference to implementation strategies designed by the executive. Although it suggests a "mood,"³⁴ however, such sensitivity does not solve the fundamental problems. In a hard case, should structural relief be granted? How does a court promote compliance? How does a court inform itself of the consequences of alternative remedies for persons not before the court?³⁵ What should a court do when the defendant is unable or unwilling to comply?

33. See, e.g., Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791 (1976); Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1 (1978); sources cited *supra* note 3.

34. In the sense used by the Court in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (legislative history of the Labor Relations Act expresses Congressional mood with regard to standards for judicial review of Labor Board decisions).

35. See D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 33-67, 255-98 (1977); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 391-92 (1978).

In my view, the increasing availability of structural remedies signals a more dramatic development than Schuck acknowledges. The development is, in brief, a shift from private to public law. Schuck tries to derive public law from private law; the latter is seen as the paradigm, and the effort is to build public law upon the best of private law. That posture has a lengthy and honorable tradition in American administrative and constitutional law.³⁶ Most of our public law—both substantive and procedural—grows quite directly out of private law and corresponding efforts to treat the government as a defendant in a private lawsuit. But that model is breaking down.³⁷ And it is the breakdown of that model that accounts for the special appeal of structural remedies.

American administrative law was originally founded on a notion that governmental intrusions into common law liberty and property interests were presumptively illegitimate; rights to a hearing and judicial review were available to test the question of authorization of what would otherwise be a common law wrong.³⁸ That simple notion explains much of administrative law until the last quarter century. But in that period, common law interests have been supplemented, sometimes supplanted, by a wide range of opportunities—the right to welfare benefits, to government employment, even to redress of harms inflicted by third parties, like discrimination and pollution. Such opportunities are frequently given out by agencies and officials who enjoy broad discretion. Many observers—including courts and agencies themselves—have thought it critical to promote participation by regulatory beneficiaries as that discretion is exercised. The challenge of a genuinely public tort law is to accommodate these interests—the protection of new rights and the promotion of participation—in a regulatory era.

Schuck's discussion is largely insensitive to this challenge. Hence the preference for monetary damages, the inconclusive catalogue of the goals of public tort law, the useful but indeterminate discussion of competing conceptions of the role of the court in structural reform litigation. I want here to sketch the elements of a truly public, public tort law³⁹ and to suggest some of the implications for lawsuits against the government.

The first step is to abandon the idea that private tort law, with its emphasis on protection of private autonomy, is a useful model on which to

36. See Stewart, *supra* note 7, at 1717-18.

37. See J. VINING, *supra* note 7, at 22-27 (discussing breakdown in context of standing to review administrative action); see also Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. (forthcoming) (discussing breakdown in administrative law generally).

38. See Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1202-03 (1982).

39. Cf. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849 (1980) (arguing against anticompetitive regulation).

base public tort law. Many of the actions of which we are speaking cannot be properly understood as efforts to promote private autonomy. Attempts to reform mental institutions, to eliminate the effects of racial discrimination, or to require administrative agencies to enforce regulatory statutes resemble conventional private law tort suits only vaguely, if at all. Their aim is not to carve out a realm for private autonomy, but to enlist the government in implementing public values embodied in regulatory statutes or constitutional provisions. Most important, both the courts and the regulations tend not to take existing private preferences and social norms for granted, but treat them as subject to public scrutiny and review.⁴⁰ The rejection of the autonomy of private preferences—the hallmark of a public rather than private tort law—has a number of consequences for the general problem of judicial remedies for official wrongs.

1. *The Inadequacy of a Rights-Based Approach to Regulatory Problems*

One consequence of rejecting the autonomy of private preferences is that an entitlement-based conception of law becomes ill-suited to many, perhaps most regulatory programs.⁴¹ As Professor Jaffe emphasized long ago,⁴² regulatory programs are frequently couched in terms of relevant factors rather than of rights and duties. A person may have an interest that an administrator must consider; it is rare, however, for a regulatory scheme to grant an entitlement of the common law form to a particular person or group of persons.

Moreover, regulatory programs frequently involve benefits that are collective in character. The right to clean air is an example. In light of differing individual preferences for benefits that are inescapably joint, it is difficult to speak the language of private rights. Finally, regulatory policies must often shift with rapidly changing economic conditions. In such circumstances, statutory benefits are not easily understood as static entitlements.

2. *The Open-Ended Character of Public Law Norms*

The private law of tort is built on reasonably determinate standards of conduct. By contrast, public law torts frequently involve standards that

40. The recent fascination of American law professors with the work of Habermas and his predecessors in the Frankfurt School stems from a common interest in this problem. For general discussion, see R. GEUSS, *THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* 65-70 (1981); D. HELD, *INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS* 332-39 (1980).

41. See Stewart & Sunstein, *supra* note 38, at 1271-75.

42. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 508 (1965).

are abstract and open-ended.⁴³ In constitutional litigation and in many cases involving regulatory provisions, it is often hard to speak in terms of the rule of law at all. The courts' role is not to apply rules laid down in advance, but to give content to public norms.⁴⁴

3. *The Need to Promote Participation*

Under private tort law, litigation is treated as bipolar, and third-party effects are discounted or ignored. As a result, the problem of participation is usually ignored.⁴⁵ By contrast, in public tort law—especially in cases involving the structural injunction—participation often operates as a kind of surrogate for the rule of law. The decree will necessarily affect large numbers of persons. Because their interests may conflict, it is important to ensure that they are represented as the decision is framed.⁴⁶ In short, as governing norms become increasingly open-ended, decisions are disciplined (or so it is hoped) by allowing those affected to receive a hearing.

4. *The Preference for Injunctive Relief*

Damages remedies, the traditional form of relief in private law, are most appropriate when it is desirable to base decisions on the traditional economic criterion of "willingness to pay." In regulatory programs, however, this criterion becomes much less coherent. Such programs often amount to a deliberate rejection of the willingness-to-pay criterion as a basis for social choice. They do not take the existing distribution of income and the existing set of entitlements for granted, but subject them to public scrutiny and review. Indeed, such programs sometimes depend on the notion that it is irrelevant whether the purported beneficiaries would choose the right at issue or how much they would be willing to pay for it. A person's right to freedom from desegregation or from unlawful treatment in a mental institution is not to be measured by seeing how much that person is willing to pay for the benefit. In such circumstances, it is hardly surprising that courts have rejected the traditional preference for damages relief.

43. The nature and extent of the differences between common law courts deciding damage actions under standards of reasonableness and regulatory agencies and courts filling in open-ended regulatory provisions is a difficult subject that I cannot discuss here.

44. It is of course unclear to what extent it was ever plausible to attempt to understand adjudication in terms of rule-application. See Kennedy, *supra* note 8.

45. See Chayes, *supra* note 3; Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976 (1982).

46. This premise is central to political pluralism. See T. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 52-84 (1975); J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 15-18, 237-40 (1980).

5. *The Advantages of Continuing Supervision*

Finally, structural decrees may be favored precisely because of what is regarded as a cost under an entitlement approach: The parties and the courts will continuously monitor and control the conduct of the governmental defendant by means of the structural injunction. The aim, in short, is to ensure that decisions are subject to public scrutiny and review. It is in this sense that the structural injunction can act as a surrogate for legislative control.

III.

These factors point to the need for a new conception of the remedial process—for an evaluation of the underlying premises of structural remedies and for a comparison of these premises with those of private tort law. It should come as no surprise if such a comparison tends to show that private tort law depends on a distinctive if familiar conception of the function of law—one that sees governmental activity as primarily facilitative, that treats preferences as private and exogenous, and that regards judicial supervision as at best a necessary evil. The competing conception tends to treat judicial supervision not as a cost, but as an indispensable element in self-government. Whether this conception will ultimately prove coherent or workable is a large and difficult question. In the end, however, an approach that attempts to derive public law remedies from the private law model may miss an important point and thus provide an incomplete perspective on the problems raised by suits against the government.