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PANEL IV: THE LIMITS ON JUDICIAL POWER IN ORDERING REMEDIES*

CIVIL RIGHTS AND REMEDIES

FRANK H. EASTERBROOK**

I want to make a point so simple it's simple-minded: Most disputes over remedies in civil rights cases have nothing to do with remedies and everything to do with substantive entitlements. Remedies are designed to track entitlements, to give people their due. When we hear an objection to the remedy, it is almost always a disguised objection to the definition of what is due, and not to the methods used to apply the balm. To define appropriate remedies, then, we must examine our understanding of rights.

Because this point is *so* obvious that almost everyone will deny it, I will proceed by example through some contemporary remedial questions. In thinking about each subject, it will help to consider three questions. First, who holds the "rights": individual persons or groups of persons? Second, what does "equality" mean: equal treatment or equal outcomes? Third, what do we expect the government to teach us: the importance of disregarding the characteristics that often are chosen as a basis of private discrimination, or the worth of a society in which persons of diverse backgrounds appear side by side? The principle that race is irrelevant to public favor is exceedingly powerful and important, and it has sound constitutional footing, but many persons of good will who accept this principle believe that for now we must "rise above principle" to provide redress.

There are systematic differences in emphasis between those who think on the one hand that rights are personal, that the government should assure equal treatment, and that it should teach people the irrelevance of race (for example), and, on the other, those who believe that rights belong to groups, that equality of outcomes is most important, and that the govern-

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ment should assure diversity in many walks of life. I shall call the former set the individual-rights cluster and the latter the group-rights cluster. My purpose is not to discuss which set of substantive norms is correct—or whether, given the nature of public choice, it will be possible to restore the principle of color-blindness in the long run if we disregard it systematically in what has become an extended "short run"[1]—but to show that the conclusions we reach on these questions govern the choice of remedy.

1. Termination of school desegregation decrees. The objective of desegregation decrees is a unitary school system. Once that has been achieved, management is returned to political control. Agreement on this formula does not yield much agreement on concrete practices. What makes a school district "unitary"? Does the prospect of "resegregation" after the termination of a decree mean that the court should keep the injunction in force? Is a desegregation order a temporary expedient to blur the racial identity of schools, or is it a permanent revision of the way students are assigned, to be modified only to prevent some new wrong? These are among the most pressing problems in school cases, and they have divided the courts of appeals as they have divided the profession.[2]

Everything depends on distinguishing "discrimination" from "segregation." The latter is a multi-purpose term that includes (a) ongoing official discrimination, (b) the contemporary effects of yesterday's official discrimination, and (c) the outcome of private residential choices. Such a range of meanings makes the term useful in rhetoric but less useful in analysis. The only *constitutionally* objectionable kind of "segregation" is the kind the government creates, because the Constitution applies only to official action. Decisions that leave the private kind in place do not offend the Constitution even though they may offend ideas of equality.

To persons who hold the individual-rights cluster of views, a change in the ratio of student populations is irrelevant; the government's obligation is to ignore race rather than to achieve

1. Jennifer Roback's paper in this volume discusses this question insightfully. *See* Roback, *The Separation of Race and State*, 14 HARV. J.L. & PUB. POL'Y 58 (1991).

2. *Compare* Riddick v. Norfolk School Bd., 784 F.2d 521 (4th Cir. 1986) *with* Dowell v. Oklahoma Bd. of Educ., 890 F.2d 1483 (10th Cir. 1989), *cert. granted*, 110 S. Ct. 1521 (1990) *and* Brown v. Board of Educ., 892 F.2d 851 (10th Cir. 1989). *Cf.* Pitts v. Freeman, 887 F.2d 1438 (11th Cir. 1989).

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a particular outcome. People who hold this constellation of substantive views will see nothing wrong with large changes in racial balance of particular schools when a decree is lifted, because none of the change may be attributed to official discrimination. Persons who hold the group-rights constellation of substantive views will try to prevent the lifting of decrees when racial imbalance would follow. There is nothing distinctly "remedial" about either position.

This debate is related to questions concerning the kinds of errors a court should accept in formulating plans in the first place. It is difficult to tell the genesis of racial imbalance in a school system. Was it discrimination over the years? Private choices unrelated to governmental action? Some mixture? Persons who define rights from the perspective of groups and emphasize results almost uniformly believe that courts should resolve against the government all debatable questions of causation. This means assuming that all racial imbalance needs extirpation. To a degree the assumption of causation by official acts has been embraced by all—when discrimination produces "racial identity" of schools that must be destroyed, fine questions of causation cannot be answered—but the question is of course to *what* degree?[3] Inevitable and desirable overbreadth in the initial remedy does not imply that the Constitution itself compels the government to create a school system that is "desegregated" in the secular as opposed to the legal sense.

2. "Tipping points" in school and housing desegregation. The mirror image is that holders of the individual-rights cluster conclude that claims about "tipping points" in school or housing discrimination should not affect a court's remedial choice. The judge's job is to get rid of governmental discrimination and its effects. If in a world without governmental discrimination, private choice (including bigoted choice) produces racial separation, or lower funding for schools as well-to-do flee the jurisdiction, this is not an objection to the remedy. Private discrimination neither increases nor reduces the entitlement: to have *the government* act without regard to race.[4]

The consent decree governing desegregation of the Chicago

3. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); Keyes v. Denver School Dist. No. 1, 413 U.S. 189 (1973).

4. *See* Palmore v. Sidoti, 466 U.S. 429 (1984).

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public schools posed a question of this sort. It was negotiated by litigants committed to the group-rights cluster of views, and it included provisions barring deviation in any direction from an approved racial mix. Black, Filipino, and Native American children who were turned down for admission to a magnet school on the ground that their admission would produce "too many" members of their race—perhaps lead to "tipping"—sought judicial relief. The decree said to persons who had heard this refrain too often: "We have enough of your kind." A majority of our court was unsympathetic to these claims; a minority argued, on individual-rights grounds, that the students were entitled to admission without regard to their race.[5] Nothing even remotely "remedial" underlay this dispute.

One thing that should trouble everyone is the interaction between racial-balance remedies and the willingness of the public to pay for education. Strong requirements of balance deny to residential communities—black and white—the option of increasing their own taxes to pay for better education. Many ethnic groups have poured extra resources into the education of their children. When judicial decrees break the link between residence and school, when no one has a "local" school (one overlapping the taxing jurisdiction), then no one has a strong reason to tax himself for education. Racial-balance remedies lead to pressure for equal statewide funding. Gains from "equal" funding are likely to be counterbalanced by a lower aggregate level, as local school districts lose the incentive (and sometimes lose the legal right) to enrich their schools. Neither the individual-rights cluster nor the group-rights cluster has much to say about this, one of the few distinctly "remedial" questions. Perhaps it is not surprising that this link has received correspondingly little attention. Disregard of "remedial" issues that are *not* driven by one's view of the merits is a telling sign of how little there is to the law of "remedies."

3. Judicially-imposed taxes. Whether a judge may order school officials to levy taxes depends on whether the Constitution creates a right to "quality" education. It is similar in spirit to the tipping-point dispute (is there a right to integrated education?). If the constitutional right is only to *e*quality, then courts

5. *See* Samayoa v. Chicago Bd. of Educ., 798 F.2d 1046 (7th Cir. 1986), *reh'g denied*, 807 F.2d 643, 647 (dissenting from denial of rehearing en banc), *cert. granted, vacated, and remanded*, 485 U.S. 951 (1988).

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cannot justify directing school districts to raise more money. Available money, however little, can be shared equally; quality may diminish without federal objection based on equality. But if there is a right to quality education, perhaps on a "freezing" rationale,[6] then the judge must have the power to direct the raising of the necessary revenue. Whether he specifies the taxes or just directs that the money appear, leaving others to figure out how (perhaps by reducing expenses on roads), is the only "remedial" question.

The dispute about taxation to pay for the remedy in Kansas City illustrates the point.[7] The judge first required the school district to implement a very expensive remedial package, including more than $260 million in capital improvements: new schools, plus such improvements as swimming pools and air conditioning at existing schools. When a statute requiring voters' approval for capital expenditures blocked access to financing, the court ordered the state and local governments to raise taxes to supply the necessary money. The Supreme Court held that the direct imposition of taxes was an improper remedy, but it concluded that the court nonetheless could direct the school district to come up with the money, and to facilitate this could enjoin the application of the rule requiring the voters' approval. The upshot was that school officials obtained a taxing power that state law denied them, and they were obliged to use this power to fund the decree.

If the decree was proper—if indeed the Constitution *required* $260 million in capital improvements plus other expensive steps—then it follows almost inevitably that the court may override local laws blocking access to the money. If the Constitution requires states to pay for property they take, then a local law forbidding the levying of taxes for this purpose could not stand; the definition of the federal right implies an obligation to raise money. So, too, with desegregation, or the building of adequate prisons, or any of a hundred other subjects. But was the decree proper? The majority refused to consider the question, and Justice Kennedy's separate opinion, although nominally about the taxation, was directed squarely to the decree's specification of rights. The four justices for whom Justice Ken-

6. "Freezing" remedies give minorities the same benefits the majority provided for itself at an earlier time.

7. *See* Missouri v. Jenkins, 110 S. Ct. 1651 (1990).

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nedy spoke did not believe that equal protection requires swimming pools and air conditioning, as opposed to equal sharing of existing schools.

What shines through about this case is that the school board chafed under the requirement of voters' approval; it believed that the voters were too stingy, and that it could not provide the quality of education that children ought to receive. The litigation offered it an opportunity to enlarge its powers. Recall that the school board *favored* the district court's remedy. This is frequent in litigation against local governments, and decrees of this kind simultaneously provide benefits for the plaintiffs and liberate public officials from constraints on their own power.[8] Should federal courts cooperate in this transfer of power? If so, does the Constitution compel new construction in Kansas City? Everything about this dispute turned on the identification of the federal right; debating the "remedy" was a distraction impeding accurate analysis.

4. Quotas in employment. It is possible to step quickly through other "remedial" questions, which pose variations on the themes I have discussed. Consider employment goals and quotas. Holders of the group-rights cluster uniformly support taking race into account when hiring or promoting workers, even if the beneficiaries of this relief have never been victims of discrimination. Holders of the individual-rights cluster regularly would limit consideration of race to identifying and compensating the victims of racial discrimination. Again, views about substance determine views about remedies.

The debate among the Justices in the case involving the Federal Communications Commission's preference for minorities when handing out broadcast licenses made this exceedingly clear.[9] Justice Brennan's opinion for five justices spoke approvingly of the value of a racially diverse group of broadcasters; the preference for minorities followed directly. Justice O'Connor's opinion for four justices emphasized the individual basis of rights and the fact that the beneficiaries of the preference were not victims of discrimination; the impropriety of the

8. *See* Bates v. Johnson, 901 F.2d 1424, 1426 (7th Cir. 1990); Dunn v. Carey, 808 F.2d 555 (7th Cir. 1986); Easterbrook, *Justice and Contract in Consent Decrees*, 1987 U. CHI. LEGAL F. 19, 30-41.

9. *See* Metro Broadcasting, Inc. v. Federal Communications Comm'n, 110 S. Ct. 2997 (1990).

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preference followed directly. Nothing had to do with remedies from either perspective.

Only *Franks v. Bowman Transportation*,[10] and a few similar cases, present genuine remedial questions. At issue in *Franks* was the question whether Title VII of the Civil Rights Act of 1964 authorizes "rightful-place" or super-seniority remedies for identified victims of discrimination. The Court held that it does. Although employees displaced by such remedies did not themselves violate anyone else's rights, the question from an individual-rights perspective is what is necessary to honor the entitlements of the persons protected by Title VII. If providing this relief would violate contractual entitlements of other employees, then the employer must make them whole as well.[11] That there may be more than one victim of a violation, or the efforts to undo it, does not imply leaving the principal victim without effective redress.

5. Jail administration. Huge disputes have followed efforts by the judiciary to require state and local governments to provide humane conditions of confinement. Usually these take the form of claims that the judges are being "too intrusive" and should defer more to local authorities. This dispute has both a substantive and a remedial component, with the former dominating.

If the Cruel and Unusual Punishments Clause of the Eighth Amendment *really* requires prison cells to have 100 square feet, or *really* regulates the ratio of starch to protein in the prisoners' diet, then there is no "remedial" objection to an order requiring prisons to comply. The more detailed the constitutional command, the more detailed the order for its implementation. Most objections to "overly intrusive" decrees are claims that the Constitution cannot possibly impose such a level of detail—that it is silly to find in such generalities as "cruel and unusual punishments" a complete architectural and nutritional code. This is a substantive objection to the decree, masquerading as a claim about remedies.

The remedial question arises when the court's initial decree is general (in line with the level of specificity in the Constitution itself), and the defendants use the lack of precision to avoid its purport. They drag their heels; they resolve all ambi-

10. 424 U.S. 747 (1976).

11. *See* W.R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757 (1983).

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guities against the plaintiffs; when the judge directs them to improve one aspect of the prison (say, overcrowding), they retaliate by creating new problems ("The court says you must have sixty square feet all to yourself; very well, but now you will be all *by* yourself, because we are cutting out all recreation."). Recalcitrance presents the judge with a truly remedial question: How much control over detail must be sucked into federal court, even on the assumption that the Constitution has nothing to do with detail? By and large, it is best to deal with determined resistance not by ever-increasing levels of regulation, but by finding some other organ of government that will cooperate. Take control of the prisons from the Sheriff and transfer it to the County Board; in extreme cases, create a new institution and give it the responsibility of administration. If no branch of government will carry out the order in good faith, transfer responsibility to a master as an adjunct of the court, with the understanding that the master's decisions are not constitutional commands but are practical accommodations. Once the local government shows that it is willing to live by the rules, the court should return control to it, without requiring it to adhere to any picayune rules developed by the court in its role as administrator. Separating the substantive from remedial issues in this manner gives the best prospect for effective return to political governance of public institutions.

6. Judicially-directed voting. This leads straight to the sort of question (a genuine *remedial* question) that the Yonkers case[12] presented. The court ordered the construction of public housing in white neighborhoods. The city council refused to cooperate. The district judge then ordered the council members to vote favorably on implementation—as if the remedy depended on their votes rather than on the judge's earlier conclusion that the city's siting decisions violated the Constitution.

In the Yonkers case, the rights had been established, and the remedy had been decreed. Only putting the remedy into force remained. A majority of the Court concluded that a district judge ought not force the defendants to act as if they agreed with the remedy. They may choose to have the remedy carried out over protest. Rather than requiring the defendants to give public signs of assent, the court should direct their conduct

12. *See* Spallone v. United States, 110 S. Ct. 625 (1990).

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substantively—and name others to act in their places if they will not.

So there are a few cases in which the goals are agreed and prudential questions of remedy dominate. By and large, however, the choice of remedy follows from the choice of objective. That choice is substantive, and the pretense that there is a distinct "remedial" question obscures the nature of the real question.

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