A FULL AND FAIR CAPACITY
Federal Courts Managing State Programs

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Federal courts play a significant role in the management and execution of public programs. Judicial intervention is evident in examples ranging from prisons to mental hospitals to schools. To clarify the appropriateness of federal judicial intervention, the authors construct a so-called full and fair judicial and administrative capacity standard. Where state judicial and administrative capacities are evident, federal courts do well to refrain from exercising jurisdiction. The analysis of the authors also reflects consideration of the capacity of the federal judiciary to manage a state administrative scheme.

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More than two decades ago, Justice Sandra Day O'Conner (1981) identified an increasing trend of federal courts granting state courts responsibility for determining federal constitutional questions in criminal cases. Concerning civil cases, however, O'Connor made a contrasting observation noting that in "cases of great public concern," federal jurisdiction is far less restricted than in criminal cases. A similar and possibly related trend is equally remarkable: Federal courts are playing an increasing role in the management and execution of public programs. This increased presence is evident in examples ranging from prisons to mental hospitals to schools, among other public programs (Friedman, 1992; O'Leary &

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Wise, 1991; C. R. Wise & O'Leary, 2003). The question arises whether federal courts are always the best equipped institution to regulate and manage state and local programs, even when individual rights protection is involved, or whether the federal system provides alternative institutions that can share the responsibility.

Regarding constitutional adjudication, O'Conner (1997) articulated that state courts are often well equipped to hear both criminal and civil federal constitutional questions and that federal courts should defer jurisdiction to state courts that provide a "a *full* and *fair* adjudication" (p. 249).[1] Regarding the terrain of the management and execution of public programs, parallel arguments are relatively underdeveloped. Although no full and fair legal canon exists to signal a federal court when judicial intervention is warranted and necessary in the execution of state public programs, the U.S. Supreme Court has introduced a doctrine articulating various circumstances that would signal federal courts that they should abstain from considering a federal question in favor of state court consideration. It is in the articulation of this doctrine that a more effective division of labor for individual rights protection may be found.

The abstention doctrine permits federal judges, at their discretion and under certain circumstances, to decline to decide cases otherwise properly before the federal courts (C. R. Wise & Christensen, 2001). It is based on the notion that federal courts should not intrude into sensitive political and judicial controversies unless absolutely necessary, favoring instead resolution in state courts.

Three specific articulations of the general abstention doctrine are the Younger, Pullman, and Burford abstentions (for a more thorough review of abstention doctrines, see C. R. Wise & Christensen, 2001). Younger abstention applies to state criminal trials and calls for federal court abstention in cases where litigation involving parallel issues of law and fact are simultaneously going on in both state and federal courts (Brody, 2001, p. 556). Pullman abstention allows federal courts to abstain so that state courts can settle an underlying issue of state law and in so doing avert the need for a federal court to solve the federal constitutional question. In this regard, the Supreme Court has noted the tradition of federal courts avoiding constitutional adjudication if the controversy could be resolved by ruling on a state issue. More in keeping with the focus of this article is Burford abstention, which calls for a dismissal of the federal case when the federal court determines that timely and adequate review of a challenged state regulatory action is available in state court and when there are difficult questions of state law bearing on policy problems of substantial

public import or where the "exercise of federal review of the question in the case would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern" (*Colorado River Water Conservation Dist. v. United States*, 1976, p. 814).

This article argues that on consideration of federalism issues, where full and fair (to borrow O'Connor's [1997] phrase) state judicial and administrative capacities are evident, federal courts do well to refrain from exercising jurisdiction. Abstention can provide the means to accomplish this. Unfortunately, to this point, the development of abstention doctrine has not been clear and robust, and ambiguities regarding when it is appropriate may be found in federal litigation and pronouncements of the Supreme Court (for a discussion of these, see C. R. Wise & Christensen, 2001, pp. 394-397). To resolve and clarify the existing ambiguities, this article proposes that the federal courts employ a balancing test that incorporates the major factors bearing on the likelihood of providing effective consideration of asserted claims and successful remedies. This balancing test must include an assessment of the capacity of the federal judiciary to play the role of manager of a state administrative scheme. In the end, a federal court's decision to intervene or abstain should be the result of balancing three major factors: federalism concerns, assessments of judicial capacity, and assessments of administrative capacity.

FEDERALISM

Institutional reform litigation is heavily populated with instances of federal judicial intervention. Bertelli and Lynn (2001) note the dilemma:

> Plaintiffs routinely accuse public officials of violating their constitutional rights. Federal judges order officials to make sweeping changes to their agencies. Of course, sometimes, as with the school desegregation cases, federal courts have had no choice but to be heavy-handed with public officials. Yet court directives often contradict the duties and responsibilities of public managers. The argument for judicial intervention is rarely straightforward. (p. 317)

Considering the federal judicial role in ensuring administrative accountability such as citizens' rights protections, Judith Resnik (1995) observes that the issue of judicial intervention, or the exercise of federalism jurisdiction, finds a broader conceptual home in the familiar tensions of the federalism context.

> The issue of federal court jurisdiction is a subset of the general question of federalism, and whatever overall picture of federalism is chosen is then reflected in the tasks permitted the federal courts. The federal judiciary's long range planners remain loyal to . . . state court judicial authority [as] the baseline, and the burden of proof is placed on Congress to explain why to give federal courts jurisdiction. The judiciary also remains loyal to the premise of dichotomous choices, of state *or* federal court action rather than forms of collaboration, parallel to those ascribed by political scientists to other branches of United States government. (p. 238)

Thus, when considering suits such as those arising under institutional reform litigation, federal courts essentially face two alternatives. The federal court may choose to exercise jurisdiction based on the federal constitutional nature of the question, or it may abstain in accordance with abstention doctrine. To reiterate, abstention is grounded in principles of comity and federalism and is based on the notion that federal courts should not intrude in sensitive state political and judicial controversies unless absolutely necessary. Proponents of abstention feel such controversies should instead be settled by state courts (C. R. Wise & Christensen, 2001, pp. 389-390).

Significantly, the U.S. Supreme Court has recently expanded the recognition of the role of federalism in federal jurisprudence. C. R. Wise (2001) argues that decisions made by the Supreme Court since the early 1990s constitute a pattern of new judicial federalism. This reinforcement has important implications for Burford abstention (C. R. Wise & Christensen, 2001). In filling out its federalism doctrine, the Court has stressed the fundamental importance of maintaining a balance of power between the federal government and the states. The Court has also repeatedly stressed the importance of preserving the notion of states as sovereign political communities with governmental institutions responsive to its people. In *Printz v. United States* (1997), the Court stated, "The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens" (p. 920). In *New York v. United States* (1992), the Court pointed out that federal direction of state action incurs diminished accountability to the public in that federal officials directing the action remain insulated from the electoral ramifications of their decisions, whereas state officials bear the brunt of public disapproval (pp. 168-169). In *Alden v. Maine* (1999), the Court stated that "when the Federal Government asserts its authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government" (p. 751).

In the common law tradition, the highest court sets the tone for this context of federalism. Most observers (McGinnis, 2002; C. R. Wise, 2001) agree that the Supreme Court is recommending that courts adhere to a path of revived judicial federalism, an overt preference "to have a market for governance in which states compete in laying out public policy responses rather than to have single solutions imposed from the center" (McGinnis, 2002, pp. 491-492).

Federalism was also a primary concern of the majority in *Burford v. Sun Oil Co*. (1943), where the Court considered, among state and federal adjudicatory bodies, who should hear appeals from the state's designated administrative adjudicator, the Texas Railroad Commission, which granted certain oil rights. Justice Black, writing for the *Burford* majority, viewed the primary issue as follows: "While many other questions are argued, we find it necessary to decide only one: assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here" (p. 318). Answering the question in the affirmative while highlighting a theme of federalism, the *Burford* Court noted that

> the very "confusion" which the Texas Legislature and Supreme Court feared might result from review by many state courts of the Railroad Commission's orders has resulted from the exercise of federal equity jurisdiction. As a practical matter, the federal courts can make small contribution to the well organized system of regulation and review which the Texas statutes provide. (p. 327)

Subsequently affirming Burford abstention, the Supreme Court put particular emphasis on the priority federalism concerns play in the doctrine.

> Equitable relief may be granted *only* when the District Court, in its sound discretion exercised with the "scrupulous regard for the rightful independence of state governments which should at all time actuate the federal courts" is convinced that the asserted federal right cannot be preserved except by granting the "extraordinary relief of an injunction in the federal courts." Considering that "few public interests have higher claim upon the discretion of a federal chancellor than avoidance of needless friction with state policies," the usual rule of comity *must govern* the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts. (*Ala. Pub. Service Comm'n v. S. Ry. Co*., 1951, pp. 349-350)

The Supreme Court is thus clearly emphasizing that the basis for abstention rests heavily on principles of federalism and that district courts should assign a high priority to those principles in weighing the case for abstention. In *New Orleans v. New Orleans Pub. Serv., Inc.* (1989), the Supreme Court emphasized the broad interpretation of the state's interest and the primacy it should receive in the district court's assessment of the case for abstention. In *New Orleans*, the Court directed lower courts to examine the importance of the generic proceedings to the state.[2] The Court's emphasis on the importance of generic proceedings being mandated to the state clearly comports with the belief that state courts constitute an independent system of adjudication with sovereignty over matters of particular concern to them (Davies, 1986, p. 24). It is also consistent with the recognition that state courts are responsible for upholding the Constitution and its guarantees. Thus, it is appropriate for state courts to adjudicate cases raising constitutional claims when they have a strong interest in adjudicating a particular type of dispute (see *Moore v. Sims*, 1979, pp. 423-435; *Steffel v. Thompson*, 1974, pp. 460-463). This implies a reduction of the role of the federal trial courts as adjudicators of federal constitutional rights in certain instances (Davies, 1986, p. 25; Koury, 1979, p. 660).

Such a potential reduction in federal court involvement may raise concerns suggesting that protection of individual rights may be inevitably diminished. However, several factors counsel against such inevitability. In the first place, state courts regularly uphold claims of individual rights against state and local officials that are based in the U.S. Constitution. In several instances, the rights-based rulings based on the U.S. Constitution have been broader than those of the federal courts (e.g., Kramer, 2002). Second, rulings of state courts that do not fully vindicate individual rights may be considered and overturned by the U.S. Supreme Court on a writ of certiorari (Massey, 1991).

Third, no less a defender of individual rights on the U.S. Supreme Court than William J. Brennan (1977) himself pointed out, "State constitutions too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law" (p. 491). The U.S. Supreme Court has long made it clear that state courts are free to interpret their own constitutions, even when the provision is identical in language to a provision of the U.S. Constitution, to impose greater restrictions on state officials than those the Supreme Court has imposed interpreting the U.S. Constitution (*Cooper v. Califor-*

nia, 1967, p. 62; *Oregon v. Haas*, 1975, p. 719). In fact, the practice has spread to the point that supreme courts of almost every state have issued decisions based on the rights guarantees of their state constitutions (see Collins, Galie, & Kincaid, 1986, p. 141).[3] State supreme courts have undertaken major initiatives involving, among others, school finance, the rights of defendants, and the right to privacy.[4] One estimate revealed that state judges have announced more than 700 rulings invalidating state statutes based on state declarations of rights (Tarr, 1997, p. 7). During 1990, state supreme courts decided more than 140 civil liberties cases based either exclusively on state protection of rights or on a combination of federal and state protections ("Developments," 1992, p. 1105). In sum, such reliance on state constitutional rights has served to complement and even remedy federal pronouncements protecting individual rights (Tarr, 1998, p. 169).

In deciding abstention, one of the factors that the Supreme Court has directed that lower courts should consider is when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar" (*New Orleans v. New Orleans Pub. Serv., Inc.*, 1989, p. 361). This provides a useful point of balance that addresses federalism principles. If the state law question at issue bears on policy problems of substantial public import and that importance extends to situations beyond the result decided in the immediate case, then deference to state courts is signaled. The most obvious example is state educational funding. First and DeLuca (2003) note the following: "Education is not mentioned in the United States Constitution. Thus, education and its funding are primarily state, rather than federal responsibilities, and state constitutions have recognized this positive duty of state government to provide resources for public schools" (p. 186). Founded on the positive protections provided by state constitutions, many state courts have declared their state's school funding unconstitutional and have begun extensive dialogues (embodied in institutional reform litigation) with their state's executive and legislative branches in an effort to bring public education funding up to constitutional muster. The *DeRolph v. State* (1997) saga illustrates this dialogue. Within the last decade, the Ohio Supreme Court has three times declared the state's educational funding to be in violation of Ohio's constitution (First & DeLuca, 2003). Allowing Ohio's state courts to focus on an iterative and often integrated treatment of school funding challenges, without parallel challenges in federal courts, comports with the notion that our

federal system is strengthened by respecting the states as sovereign political communities.[5]

On the other hand, if the state law question is missing, the notion that state sovereignty is undermined by federal court action is diminished. *Cedar Rapids Community School District v. Garret F.* (1999) illustrates such an instance. The *Cedar Rapids* Court considered whether the Individuals with Disabilities Education Act (IDEA) requires a public school district receiving federal assistance under IDEA to assist Garret F., a ventilator-dependent student, by providing various nursing services during the school day. Because Congress has spoken, to some extent in IDEA, to providing education for disabled students in public schools, the court properly focused on interpreting existing federal statutory law. With respect to abstention, the question of state law was missing in *Cedar Rapids*, and the case centered on federal statutory interpretation.

Another of the factors that the Supreme Court has recommended to lower courts deciding questions of abstention is where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern" (*New Orleans v. New Orleans Pub. Serv., Inc*., 1989, p. 361). The issue of whether federal review would disrupt state efforts to establish a coherent policy with respect to a matter of substantial public concern comports with federalism principles. What would happen to the state regulatory scheme as a result of federal judicial intervention? Because federal courts lack intimate, if not current, knowledge of state regulatory schemes and controlling state law, it can be problematic for them to make such projections. As a result of such unfamiliarity, federal judges may not foresee the effect on the state scheme of regulation. Deference to state courts allows such effects to be more precisely weighed in the course of litigation.

CAPACITY

We suggest that if the actual goal of court intervention into some state or local regulatory scheme, administrative process, or service program is effecting actual change that improves the condition of some deprived group, then the capacity of the various institutional actors involved should receive major consideration. Too often, tasks or functions for program administration are assumed or assigned without an adequate understand-

ing of what it will take to implement significant change or whether a particular institutional actor possesses the requisite skills and resources to affect the key factors that make societal change possible. Intent to effect positive change constitutes an insufficient ground to assume management responsibility. The capacity to manage and effect change is also required.

Beth Honadle (1981, 1986) conceptualizes capacity as the ability to influence and foresee change, exercise informed decision making concerning policy, implement policy decision through program development, wisely obtain and manage resources, and conduct meaningful evaluation as a guide for future behavior. Although Honadle's framework is generally applied to developing capacity in local and community governments, it is used here as a device to unpack what is contemplated by the term *capacity* in a general sense.

We find capacity to be helpful in at least three respects pertaining to the question of federal judicial intervention. The first concerns the capacity of federal courts to intervene in the execution of state policy programs. The second is in relation to the capacity of state courts with the responsibility to oversee the statutorily and constitutionally lawful execution of state policy programs. The final conceptual application of capacity is in its more traditional sense: The capacity of state administration to execute public programs.

In the following sections, we will deal with each consideration of capacity in turn, beginning with federal judicial capacity. It is important to note that in addition to those (e.g., Garvey, 1995; Wilson, 1887) who conceptualize the essential challenge of democratic administration to be the two-part tension between administrative capacity (ensuring competence and action) and administrative control (ensuring accountability and responsiveness), our analysis introduces the interplay of federalism, judicial capacity, and administrative capacity that is resolved in a balancing test. This focus recognizes the reality of courts as institutions influencing administrative accountability.

FEDERAL JUDICIAL CAPACITY

A concern about the capacity of federal courts to improve state administrative schemes permeates the original *Burford* (1943) decision and should be a factor when considering judicial intervention. There has been considerable debate in the scholarly literature over the capacity of federal courts to handle complex state administrative schemes. Although there is

no clear consensus, this literature is instructive for the issue of judicial intervention.

Gerald N. Rosenberg's (1991) study identifies three ways the American political system prevents federal courts from effecting significant social reform: (a) the limited nature of constitutional rights; (b) the lack of judicial independence; and (c) the judiciary's lack of powers of implementation. Many social reform goals, such as rights to decent housing or clean air, cannot be plausibly presented in the name of federal constitutional rights. In addition, federal procedural doctrines (e.g., judicial standing) deter participation by knowledgeable reform groups. Politicians, through judicial appointments and legislative action, can also constrain the judiciary from pursuing unpopular social reform on a sustained basis. Furthermore, courts depend on other bodies to implement their decisions, and their decisions cannot alienate the public and the politicians. Rosenberg also identifies four conditions conducive to helping overcome these constraints that contribute to court effectiveness: (a) the availability of incentives for compliance with court mandates; (b) the availability of sanctions for resistance to those mandates; (c) the relevance of markets to implementing the decisions; and (d) the degree to which institutional actors are ready to proceed with reform and can use courts to cover their intent (pp. 33-35). Rosenberg's analysis of the effect of these conditions on the litigation of school desegregation, abortion rights, and the environment leads him to conclude courts are generally in a weak position to effect change (p. 338). When the three constraints are overcome, however, and one of the four conditions is present, courts can produce significant social reform. Accordingly, court-induced change is effected when institutional, structural, and ideological barriers to change are weak.

Critics of Rosenberg's (1991) analysis point to the fact that his analysis assumes social and economic forces cause changes in society that institutions cannot affect. In so doing, critics claim Rosenberg misses the possible role of courts as regulators of social change (J. Simon, 1992). Nonetheless, even Rosenberg's critics acknowledge that his analysis nicely demonstrates the subtleties of the relationship between court effectiveness and contingent political and social conditions (p. 933). This relationship strongly suggests federal judges are unwise to assume that the remedies they order are certain, or even likely, to change governmental institutions given the extant political, institutional, and social conditions. What is needed is a clear-headed analysis of the constraints and specific conditions in any particular case that would foster or restrict judicial effectiveness.

Other scholars have pointed to constraints arising from the traditional role of a judge and the difficulties judges face when deciding on and implementing remedies in institutional reform cases. For example, William A. Fletcher (1982) observes that, in a suit against an institution, a federal judge manages the reconstruction of an ongoing social institution. In doing so, a judge moves far beyond the normal competence and authority of a judicial officer into an arena where legal aspirations, bureaucratic possibilities, and political constraints converge, an arena where ordinary legal rules are frequently inapplicable. Federal judges often, for example, confront decisions about the administration of transportation services, construction and equipping of buildings, and personnel requirements in school reform cases. As one commentator observed,

> Once one comprehends that the court is displacing the [school] board . . . the occasionally circus-like quality of the hearing becomes more explicable, if not more orderly. It doesn't, as the judge has remarked upon occasion, look much like a court, and for good reason: it really isn't one. (Yeazell, 1977, p. 259)

The task is complicated by the polycentric nature of the problems involved. Polycentricity is the property of a complex problem with a number of problem centers, and each is related to the others such that the solution to each depends on the solution to all the others (see Fletcher, 1982, p. 645). In these sorts of cases, judges must consider legal and nonlegal elements (p. 646). Institutional suits often involve nonlegal polycentric problems resolvable only by reference to nonlegal criteria. For example, what constitutes remedial treatment in a mental health facility cannot be resolved by reference to legal doctrines; it implicates multiple issues including medical, scientific, and psychological theory. These questions require confronting questions of tactical and political judgment in implementing the remedies. Furthermore, there are no federal legal norms to guide the judge internally, and the traditional means of appellate control through these legal norms are of little use (p. 660). Decision makers seeking to solve polycentric problems confront a number of difficulties in that they are continually required to perceive which facts are objective, determine what factors are interrelated, and repeatedly solve the same problems (p. 648). These difficulties are only accentuated in institutional suits.

First, courts are less able than the political branches to apprise themselves of the legislative facts necessary to understand questions of public policy. Second, because courts normally enforce their judgments by a

compulsory process without a significant opportunity for reversal or modification by private parties affected by these judgments, they are less likely than are other governmental decision makers to solve and re-solve a polycentric problem until an optimum solution is found. Third, because institutional decrees necessarily entail a great deal of discretion in their formulation, and because discretionary behavior is largely beyond the power of an appellate body to control, the primary means of external control over trial court behavior is virtually useless. Finally, and most important, courts have no institutional authority to normatively assess the ends of possible solutions to nonlegal polycentric problems (Fletcher, 1982, p. 641).

These institutional difficulties or constraints will be confronted by a federal judge regardless of the policy area involved. As Fletcher (1982) concludes,

> The formulation of the remedial decree thus depends to an extraordinary extent on the moral and political intuitions of one person acting not only without effective external control over his or her actions, but also without even the internal control of legal norms. (p. 641)

On a related issue, Lon Fuller (1978) concludes that when an attempt is made to deal with a polycentric problem, three things can happen at once. First, the adjudicative solution may fail. Second, the judge may ignore judicial properties, experimenting with various solutions in posthearing conferences, consulting parties not represented at the hearings, guessing at facts not proved, and disregarding a need for judicial notice. Third, instead of altering judicial procedures to fit the problem being confronted, a judge may reformulate the problem to make it amenable to adjudicative procedures. Although it may be possible to specify the legal rules being implicated to ensure that the issues of the case fit adjudication, such an approach is not likely to solve the real world problems the institution is facing.

Federal courts may be tempted to redefine the issues because courts are structurally worse at developing an intellectually coherent solution to social problems than are other arms of government (Yoo, 1996). Courts are experienced in determining historical facts and causation. However, in designing structural remedies, they must also predict how the remedies will affect and be affected by the political, economic, and social context within which the remedy is implemented. When, for instance, a court puts a magnet school plan into effect, it is making a prediction about how thousands of budgeting, administrative, and educational processes will

interact with the perceptions of a diverse community and, ultimately, how enrollment will be affected. Courts are not well suited for these tasks because they have little experience in administering complex institutions and social programs (Schuck, 1983, pp. 156-161). Institutional reform also requires the allocation and reallocation of resources, a role that courts are often ill-equipped to undertake.[6]

Formulating and administering institutional reform remedies greatly strains the adjudicative model of decision making because it defies the usual logic of the judiciary. Institutions are multipolar and have shifting relationships requiring the continual adjustment of interests (Diver, 1979, p. 63). The judiciary, in contrast, usually confronts a static and precisely defined conflict, bound to specific facts, in which it looks for an optimal, comprehensive, and final solution. Consequently, to be effective in institutional reform cases, judges must abandon their adjudicative role and become brokers among several diverse groups. Strategically, this alternative approach is predicated on a belief that the reform process is a series of continuing bargaining games (p. 64). These bargaining games afford the judge a broad range of choices in defining a proper judicial role, but the judge's capacity to manipulate the political effect exceeds all other actors in the game, and he or she is in a position to mold the political context of the case before him or her (pp. 77-79). This so-called political bargaining model of litigation implies a redefinition of the appropriate standard of efficacy of the litigation process with the underlying objective essentially becoming a political goal (p. 92).

To accomplish this goal, a number of capacity issues, including whether the judge has sufficient information, must be considered. Federal judges need access not only to social facts but also to political facts—information about the principal players and their agendas, power, and bargaining skills (Diver, 1979, p. 95). Federal judges coming in contact with a state or local program for the first time are unlikely to be familiar with such variables. In addition, many important political actors may be beyond the reach of a federal court's formal powers (p. 96). Federal courts also often lack resources for marshaling political and public support for their decrees, without which their efforts will likely fail (Schuck, 1983, p. 167; Yoo, 1996, p. 1138). By taking over supervision of a state or local institution or program, a federal district court judge runs the risk that he or she will be perceived as an alien outside force imposing his or her individual will according to his or her personal predilections, which makes obtaining relevant information even more difficult to obtain.

Another capacity issue is whether the federal judge has sufficient time to continuously administer the decree. A federal judge can, to a limited extent, delegate (Diver, 1979, p. 97). But, the judge must maintain a fairly intensive, continuing, and personal involvement in the case. Consideration should be given to whether the federal judge can effectively communicate the substance and intent of the remedial orders to ensure effective action by others. Federal courts possess imperfect tools for communicating their decrees (Yoo, 1996, p. 1138). Often, they must rely on the state institutional defendant to disseminate and implement their orders (Schuck, 1983, p. 162). This begs the inquiry into whether the federal judge has enough power to change behavior. Given that institutional reform requires cooperation among many actors, a successful reform must be flexible, targeted, and potent enough to influence a wide range of behavior (Diver, 1979, p. 99). Most of the direct inducements a federal judge has are negative: citing someone for contempt, closing an institution, or transferring authority to another official (pp. 99-102). These inducements are often not feasible in politicized litigation because their use can actually retard implementation. Federal courts have fewer direct resources for guaranteeing compliance or creating positive incentives to encourage adherence to their orders than do federal bureaucracies or Congress (Yoo, 1996, p. 1138). Judges must rely heavily on the moral persuasiveness of their judgments to acquire legitimacy. Furthermore, the exercise of the political role runs the risk of undermining the court's legitimacy and its effectiveness in reforming the institution. The adoption of a political perspective can blur the distinction between right and remedy on which adjudicative legitimacy rests (Diver, 1979, p. 104). As time goes on, the federal judge can draw "less and less on the reserve of authority that the revered position of neutral lawgiver confers" (p. 106).

Those who argue against the import of limited federal judicial capacity point to steps courts can take to overcome their limitations. For example, federal courts can appoint a special master to assist the judge (Aronow, 1980; Cavanaugh & Sarat, 1980; Wasby, 1981). Such masters can be chosen by the judge for their substantive expertise and knowledge of the bureaucracy in question. The master, it is claimed, can enter into negotiations with the parties and fulfill the political role while shielding the judge from direct involvement. The problem with this argument is the lack of evidence linking the use of masters to the effectiveness of institutional remedies. Indeed, federal masters have seldom, if ever, been effective in finding solutions that are both acceptable and constitutional (Kalodner &

Fishman, 1978). One study of the use of masters in school desegregation cases found that masters were least suited to deal with institutions that needed the most help and best able to work at a distance with institutions that needed the least help (Kirp & Babcock, 1981, p. 378).

Diver (1979) cautions against having the master act as a political broker to whom a judge can delegate his or her authority (Kirp & Babcock, 1979, p. 97). Authority can be delegated only to a limited extent, and a judge must still maintain a fairly intensive personal involvement with the case. An independent monitor such as a master becomes a new actor in the equation whose position the judge must figure in the political calculus: "Because the monitor can disrupt operations or alienate potential allies, the court must exercise extreme caution in using this device to extend the reach of its physical capacity" (Diver, 1979, p. 99). In other words, the crucial question of under which conditions special masters will be effective has not been answered (Rosenberg, 1991).

Another mechanism purported to extend court capacity is the retention of federal jurisdiction. In theory, if an institution experiences difficulties, the parties can return to court if the decree requires modification or is not being implemented (Chayes, 1976; Wasby, 1981). Nonetheless, a federal judge is not in any better position to sort through conflicting claims or assess the technical, bureaucratic, and political facts on an ongoing basis than he or she was at designing the initial remedy. If anything, experience has shown that conflicts among multiple parties become magnified as the implementation difficulties mount (O'Leary & Wise, 1991; C. R. Wise & O'Leary, 2003). Furthermore, actors who were not involved in the original litigation are affected during the course of reform and react. Significant social reform requires long-term planning and serious consideration of costs. It is unclear how piecemeal decisions over implementation conflicts accomplish the desired ends.

Attempts to effect fundamental social change through public judicial institutions can also take years. Multiple implementation difficulties, coupled with the often intractable nature of social, economic, and political conditions, prolong this process. In 1994, federal judicial orders regulated 244 prisons in 34 different jurisdictions (Yoo, 1996, p. 1124; see also *Enhancing the Effectiveness*, 1995). They also set the level of inmate populations in 24 prisons. A federal court must also consider the termination point of judicial supervision. The Supreme Court has made it clear that federal court supervision of state and local institutions was intended to be temporary (*Board of Ed. of Okla. City v. Dowell*, 1991, p. 238). This principle is in conflict with the demonstrated fact that a district court will

usually exercise jurisdiction over a case until the constitutional violation has been cured.

As Yoo (1996) states,

> If the court defines its remedial goal in terms of reversing social trends and patterns, such as white flight, or in terms of compensating for irreversible losses, such as years spent in poor prison conditions, then there may be no foreseeable termination of the court's supervision of the state institution. (p. 1128)

Thus, there is a fundamental tension between the open-ended nature of many social problems that are at the root of the federal judicial intervention and the desirability of limiting long periods of federal judicial supervision over state and local institutions to the exclusion of state and local political and administrative processes.

The Supreme Court's rule regarding the lower courts' use of their equitable powers to define the scope of a remedy provides little guidance to district courts. Accordingly, courts often fall into the trap of interminably pursuing a final remedy. The basic principle articulated by the Supreme Court is that "the nature of the violation determines the scope of the remedy" (*Swann v. Charlotte-Mecklenberg Bd. of Ed.*, 1971, p. 16). The Court says this simply means federal court decrees must directly address the constitutional violation itself (*Milliken v. Bradley*, 1977, pp. 281-282). Whether a remedy directly addresses a violation often rests in the eye of the beholder, and only in the rarest of cases will an appellate court overturn a trial court's decree for exceeding the scope of the violation (Yoo, 1996, p. 1132). An expansive remedy designed to alter the social, institutional, economic, and political landscape runs the risk of involving federal courts in the perpetual supervision of state and local institutions. If that is the only option, a federal court might well decide the wiser course of action is to leave the supervision to a state court. State institutions will likely confront state judges more familiar with the substance of what they do (in that state courts interact with them continuously over a wide range of matters). In addition, state judges are more conversant with the political facts that condition institutional response than are federal judges. This solution also obviates the important federalism concerns elaborated on earlier in this article.

So far we have raised several questions federal courts could consider in assessing their capacity to provide a remedy for the sought petition. First, can the court fulfill the informational requirements, both technical and political, that would enable it to effect a successful remedy? Second, will

the court have sufficient time to frame and reformulate the remedy and conduct as it supervises the institutions involved? Third, are the communication tools available to the court effective? Fourth, are the powers available to the court sufficient to gain cooperation among the multiple actors? Fifth, is there an identifiable goal for the remedy and a foreseeable end to judicial supervision of the institution?

Evidence suggests that some federal courts consider such capacity questions in their determination of abstention. For example, three homeless women asked a federal district court to issue an injunction requiring the Commissioner of New York City's Human Resource Administration to provide lawful emergency housing to meet their needs (*Canaday v. Koch*, 1985). The court granted abstention, declaring

> Allocation of resources for welfare programs is a task uniquely within the sphere of local control. Placing that task under the supervision of this court is a course fraught with dangers. This court has no particular expertise in structuring welfare programs, or allocating scarce resources among competing needs. Nor is it on familiar terms with the state and local political and procedural apparatus which could come under its receivership were it to proceed with deciding this case. (p. 1470)

This is an accurate assessment of the court's capacity in terms of the issue and context of the service involved.

STATE JUDICIAL CAPACITY

Our framework suggests that before intervening in the execution of a state policy program, federal courts assess the capacity of the judicial system within that state to handle litigants' claims.

Legal scholars contend that state courts, unlike federal courts (Kaye, 1995), are entrenched within the "generative tradition of the common law" (Hershkoff, 1999, p. 1405). Such entrenchment significantly augments state courts' institutional capacity to resolve complex economic- and social-policy problems. The U.S. Constitution, the foundational point of departure for a would-be court of federal intervention, is one of negative liberties, as opposed to the positive liberties often delineated within a state's constitution, the recommended point of departure for state courts. In the case of welfare, Hershkoff (1999) illustrates that

> state constitutional welfare rights could provide a significant source of protection for the poor, but only if state courts develop an independent

> methodological approach that recognizes the significant differences between state constitutions and the Federal Constitution. (pp. 1432-1433)

In reviewing the capacity of state courts, federal courts should consider that state judiciaries operate within a broader common law context of positive as well as negative social and economic rights. Indications that state judiciaries understand their own contexts might include whether state courts have evidenced "an independent methodological approach" that displays an understanding of the positive constitutional rights articulated in state constitutions. State courts often follow much broader doctrines of justiciability than federal courts can under federal rules of justiciability. In some states, courts issue advisory opinions that legislators and governors consider integral to state policy making.[7] In some states, courts issue public statements on constitutional rights, even after parties no longer need relief, which would not be permitted under federal mootness doctrine. Nonetheless, such pronouncements afford elected and appointed officials and citizens guidance on important questions of shared interest. Also, in many states, courts perform administrative functions that in the federal system are assigned to non–Article III decision makers (Hershkoff, 2001, pp. 1841-1876).

Researchers have offered evidence that would affirm state courts' understanding of their broadened, compared to federal courts, capacity. For example, the United States Supreme Court, in *San Antonio Independent School District v. Rodriguez* (1973), essentially provided a natural experiment to verify states' capacity to handle questions of school finance. *Rodriguez* severely limited the ability of parties to resolve questions of state education finance by ruling that the federal constitutional guarantee of equal protection did not apply to disparities caused by state educational finance statutes, forcing litigants to rely on state avenues (Kramer, 2002). Since the era of *Rodriguez* (1973), "lawsuits have been brought in at least 43 states challenging the constitutionality of the states' funding system, and 19 state courts have declared their respective schemes unconstitutional" (Kramer, 2002, p. 6). In many states, litigants have challenged disparities in educational funding based in part on state constitution equal protection and education clauses with increasing emphasis on the state education clauses alleging constitutionally inadequate schooling (Cover, 2002; Enrich, 1995; Heise, 1995; *Pauley v. Kelly*, 1989; *Robinson v. Cahill*, 1973). An empirical study of California, Texas, and Kentucky demonstrated that state courts entertained a host of claims with the result of reducing the disparity in per-student spending and

improving their respective state's education funding structure (Kramer, 2002).

In contrast, other researchers have shown that where federal judicial intervention has not been carefully circumscribed, public programs have lost adaptive capabilities. Although the research in this area focuses on federal agencies rather than state programs, O'Leary (1990) and Melnick (1985) find that federal judicial intervention often leads to the diminished ability of agencies to adapt and implement their own programs, to respond fiscally to change, and to implement legislatively mandated policy. Ironically, the diminution of these capabilities decreases a program's capacity as defined by Honadle (1981, 1986). *Burford* (1943) implicitly recognizes the capacity of state courts to vindicate individual rights. In *Burford* abstention, the federal claim is dismissed. This is distinct from Pullman abstention, which calls for a postponement of federal jurisdiction. Given that state courts are constitutionally obligated to protect federal constitutional rights, there is no apparent need to retain federal trial jurisdiction (Massey, 1991). Any errors in interpreting the U.S. Constitution may be corrected by certiorari to the U.S. Supreme Court. Yet the emphasis on deference to state courts is not unbounded. The Supreme Court has directed district courts to assess several factors to ensure deference is warranted, as demonstrated in this reiteration of *New Orleans v. New Orleans Pub. Serv., Inc*. (1989):

> Where timely and adequate state court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." (p. 365)

The first requirement is that both timely and adequate state court review is available to the plaintiff. The mere existence of an administrative process or a potential conflict between a federal law and a state regulation is not sufficient to warrant *Burford* (1943, p. 362) abstention. The discretion vested in state courts makes them working partners in the development and administration of state regulatory policy. State courts develop expertise and become competent partners of state agencies through the repeated exercise of their own discretion. Federal courts do not have the

opportunity to develop such expertise and are thus not institutionally qualified for the enterprise (Yelin, 1999, p. 1882).

The second requirement for federal court abstention is that the federal suit must be limited to suits brought in equity. By confining the use of the abstention doctrine to these cases, the court is able to comply with statutory grants of jurisdiction to the federal courts and their ensuing obligation to hear such cases. Cases in equity require more discretionary judicial decision making, so it is reasonable to emphasize federalism principles in the use of such discretion.

In addition, in the absence of "difficult state law questions bearing on public policy problems whose importance transcends the result of the case at bar" (*New Orleans v. New Orleans Pub. Serv., Inc*., 1989, p. 361; see also Yelin, 1999, p. 1892), federalism principles direct that because federal questions predominate, there is little rationale to defer to state courts. Presumably, it is not enough for the case to merely involve some difficult matter of state law interpretation. More is required: The state law questions must bear on policy problems of substantial public import, and the importance must extend beyond the result of the immediate case. The potential for interference with a state regulatory scheme would, under the principles of federalism, compel deference to state courts. The absence of a significant effect on a state regulatory scheme removes the critical state interest and, it follows, leads to retention of federal jurisdiction.

Taken as a whole, these abstention factors are a useful starting point for federal courts. In *Quackenbush, Cal. Ins. Comm'r, et al. v. Allstate Ins. Co*. (1996, p. 728), the Supreme Court specified that federal courts should conduct balancing tests based on a careful consideration of the federal interests in retaining jurisdiction and the competing concern for the importance of state's interest and the appropriateness of a state forum as the place to adjudicate the issue. The most reasonable course of action for federal district courts is to focus on the specific factors, to weigh them, and then to use discretion. If the factors clearly weigh in favor of abstention, then the court can assume the balance favors abstention. We acknowledge that increased federal judicial deference to state courts would place more responsibility on state courts to enforce federal rights and integrate them under state legal rights.

We submit that federal courts are equipped to determine whether a state law bears on important public policy issues based, in part, on state legislative and judicial activity. This is often an inquiry into whether state legislatures or state publics, through initiative, have addressed a public problem

and have at least begun to put a regulatory scheme into place that addressed the problem. Also, state courts may have begun to issue rulings interpreting the state legislation and state constitutional provisions bearing on the issues. The most reasonable stance is the presumption that state courts are in a position to interpret the regulatory scheme. Federal courts do not have to discern exactly how such potential interpretations will affect those petitioning for judicial action. Deference to state courts may be indicated by the existence of state-provided avenues of redress of which those who feel their rights have been violated can take advantage.

ADMINISTRATIVE CAPACITY

The work of O'Leary (1990) and Melnick (1985) reminds that judicial intervention should ultimately consider capacity as it relates to the agency or administration in question. Failure to do so might result in an undue interruption of the state's administrative scheme—the primary concern at the root of Burford abstention (C. R. Wise & Christensen, 2001).

As mentioned previously, a uniform definition of capacity is not likely to emerge in the near future. Much has been written about the capacity of government units, but within highly circumscribed realms (e.g., rural or specific local government capacity). Early work in this area debated whether capacity should be defined in management terms or favor an inductive approach to define capacity, "the ability of a local government to do what it wants to do" (Gargan, 1981, p. 656), as a function of expectations, resources, and problems. Honadle's (1981) framework, primarily rooted in defining local or community capacity, focuses on identifying the following aspects of capacity as the ability to

> anticipate and influence change; make informed, intelligent decisions about policy; develop programs to implement policy; attract and absorb resources; manage resources; and evaluate current activities to guide future action. (p. 577)

The quest to further articulate capacity has continued, but with less than clear success, in a way meaningful to federal judges determining when to intervene. For example, Milton Esman (1991) offers a definition of capacity focused on enabling sustainable improvements and problem solving in societies by promoting proper incentives, institutions, and skills. Administrative capacity has been similarly broadly defined by Bertelli and Lynn (2001) as the "power to take action in fulfilling public policy goals" (p. 340). These definitions are quite general and leave the

courts facing considerable ambiguity with respect to specific foci of examination regarding administrative capacity.

We find that even though Honadle's (1981) framework of capacity is more specific, it is somewhat inaccessible to federal courts that would look at capacity as a basis for whether state program administrators can handle lawful program execution without federal intervention. We offer a framework of capacity here that seeks to guide judges with more succinctness than previous definitions.

As was done by McGuire, Rubin, Agranoff, and Richards (1994) in their treatment of community capacity for development, we find it helpful to divide capacity, for purposes of identification, into three categories. For purposes of the intervention question, these categories reflect, as suggested by Gargan (1981), an emphasis on defining capacity in both managerial terms and in terms of factors external to management. Accordingly, we suggest administrative capacity be assessed in terms of accountability, decision-making process, and resource adequacy.

Mechanisms of Accountability

Accountability is the first point of assessment because it serves as a straightforward, if not a binary yes-no, inquiry on which to conduct further inquiry into capacity. As has been defined elsewhere, accountability comprises those influences, be it statutory, regulatory, political, or otherwise, that dictate what values are to be woven into the fabric of administrative decisions (Bertelli & Lynn, 2001; H. A. Simon, Thompson, & Smithburg, 1950).

In inquiring whether mechanisms of accountability are present, federal judicial bodies should survey whether there are adequate statutory, regulatory, and political guidelines to ensure that an administrator or administrative body is subject to mechanisms recommending a wide scope of values beyond values internal to the administration or administrator. In essence, this is a check on the decision-making environment to make sure that administrative decisions are not made in a setting that would allow or foster arbitrariness because of a deficiency of value-input mechanisms in the environment.

An examination might identify, for example, the existence of a complex state administrative procedure act. Such acts exist to a greater or lesser extent in the vast majority of states. Intricate case law, legislation, and regulation, regarding a host of policy areas including, for example, mental health, environmental use and protection, and child welfare and

custody, abound at the state level. Furlong (1998) also reminds us that in addition to executive, legislative, and judicial mechanisms, interest groups should also be considered among mechanisms of influence and accountability. State administrative procedure acts and other state legislation may facilitate interest group participation in administrative processes.

On examination, a federal court may find that an administrative agency responsible for a program in question is embedded in ample accountability mechanisms that provide access to those who may be affected by decisions of the agency and those who are concerned with program operations and effects. The allegation that existing accountability mechanisms are not likely to yield the preferred condition of the plaintiff constitutes insufficient grounds for federal judicial intervention. It is inadvisable for the federal court to presume that carefully constructed state accountability mechanisms are incapable of responding to citizens' petitions. On the other hand, if evidence is presented that accountability mechanisms are absent or woefully lacking, such evidence would add to the case for federal judicial intervention.

Decision-Making Process

This second category of capacity focuses on the decision-making process rather than the decision-making environment discussed under accountability. In essence, it is an investigation into how well democratic and constitutional values are incorporated into an administrative decision. The standard used traditionally by the court in reviewing this phenomenon has been one of rationality.

Martin Shapiro (1988) offers a telling review of judicial supervision of rule making in the federal government that provides a basis for caution for judicial development of a common law for the assessment of rationality of administrative actions in the institutional reform context. As Shapiro traces the development of the federal judicial approach to rule making, he demonstrates how courts moved from a posture of deference, to insisting on procedural correctness, to demanding substantive rationality, to requiring synoptic rule making—a perfect rule-making process (p. 119). What began as procedural review evolved into a review of the substance of rules and their rationality. Rationality, in turn, evolved into synopticism. Shapiro went on to point out that synopticism is about using the right process to arrive at the right decision—the decision that chooses the correct policy to arrive at the true values at the least cost. As such, it entirely merges the procedural and the substantive in arriving at a "right" answer

(pp. 126-127). Federal judges adopted the following posture toward administrative actors: "If you are claiming expert discretion, prove to us that your decision is expert—that is the correct decision based on scientific knowledge" (p. 138). That, of course, is an impossible directive given the unknowns of scientific and uncertainties in human behavior. This policy forced agencies to pretend synopticism in their presentations and supporting documentation. The results were disastrous: The rule-making process slowed, decision making shifted from responsible administrators to gun shy lawyers, and documentation exploded (p. 152).

We argue that neither rationality, synopticism, nor pluralism is an appropriate judicial standard to determine capacity. Herbert Simon (1948), March and Olsen (1983), O'Toole (1997), and Golden (1998), among others, confirm the inappropriateness of these standards in reflecting the reality of decision making. Instead, as introduced by Shapiro (1988), we find that a standard rooted in deliberative prudence offers greater clarity, if not reality, in determining capacity:

> Prudence involves not only uncertainty about facts but a particular approach to values. Those who follow the prudential way recognize [that] absolutely demonstrable truths about values cannot be achieved [but that administrators can achieve] some intermediate level of assurance about moral values that lies far short of "scientific certainty," but far beyond mere personal assertion. (p. 135)

This final clause emphasizes a guard against arbitrariness while still providing a standard not disingenuous of the reality of managerial decision making where unbounded rationality is nothing more than futile fiction and, as such, should not be used as an accurate determination of capacity.

The evidence sought here is twofold: whether the decision maker used prudence and deliberation to balance the values demanded by mechanisms of accountability and whether there is evidence that the central tendency of administrative decisions is one of prudence and deliberation. The first prong of this inquiry is relatively straightforward in that it rests on whether an administrator made an investigation, albeit a boundedly rational one, into the facts and values pertinent to a decision. Such an investigation recognizes that a decision maker's understanding of the past, the present, and, certainly, the future is limited and cannot easily be reduced to absolute rules or principles (Shapiro, 1988) beyond those of the heuristic in nature (Simon, 1948). Likewise, the second prong seeks to assess patterns of this type of decision making and whether the central tendency lies

within or beyond prudence and deliberation. Evidence of imprudent tendencies might include an inordinate number of lawsuits and administrative adjudicatory proceedings, with judgments against the administrative decision makers. Nonetheless, it is not the place of the reviewing judiciary to substitute its own balance of values for the balance arrived at by the administrative decision maker. Legislatures often delegate the task of balancing competing values to administrators because of the innumerable objectives and values at stake and the unknown nature of future trade-offs in complex programs, and as long as the administrator makes choices from among the array of possible prudent alternatives, it is not for the federal judiciary to impose a preferred alternative. A federal court's responsibility is to decide whether the administrative decision makers have demonstrated that they are capable of making prudential choices from among a range of reasonable alternatives.

The goal of respecting and preserving administrative decision making based on deliberation and prudence should be taken seriously by the courts. In *Marbury v. Madison* (1803), Chief Justice Marshall pointed out the limited nature of judicial review of administrative discretion: "The province of the courts is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties, in which they have of discretion" (p. 170). Federal courts have moved away from Marshall's view of judicial review and have replaced it with a judicial scrutiny that has displaced agency expertise and political bargaining, which is central to regulatory politics (O'Brien, 1986, p. 47). O'Brien (1986) observes that the new era in administrative law presumes that agencies cannot be politically accountable for carrying out their delegated responsibilities and that judicial judgment and competence are superior to that of administrative agencies. He concludes both these assumptions, as *Marbury* (1803) recognized, are antithetical to the principle of separation of powers and the role of the judiciary in a constitutional system of free government (O'Brien, 1986). Of course, the task of deciding on rights inevitably impinges on how executive officers perform their duties. There is no easily drawn line. Nonetheless, as Shapiro (1994) points out, "Many judicial decisions holding that an administrative act fails for 'clear error of law' really arise in situations where a statute allows a discretionary choice of interpretations and a court believes that an agency has made a poor choice" (p. 511).

The ability of executive agencies to fulfill their mandate to implement programs necessitates the centrality of political control so that the discretion used by administrators can be monitored:

> Too often the search for legal control of discretion becomes frantic and counterproductive because it conceives itself as either the only or the necessarily best mode of controlling discretion. The result may be an unrelenting pressure to introduce formalized, courtlike proceedings and courts themselves into more and more phases of government decision making. There are frequent complaints today that a climate of "adversary legalism" is strangling the regulatory sphere of American government, creating inflexibility and inertia at huge costs both to economic development and protection of the public. (Shapiro, 1994, p. 510)

Consideration needs to be given to the requirements of administrative responsibility and the contribution of public administrators to serve the public effectively. Numerous public administration scholars have found that administrators primarily try to limit their responsibility and risk in discretionary situations (e.g., Blau, 1955; Jones, 1977; Lipsky, 1976; L. R. Wise, 2000). This behavior not only reduces the quality of government outputs for citizens but also undermines an organization's ability to achieve its primary mission. Incentives are required to increase engagement of such public servants to secure greater personal involvement for their work and its consequences (Gawthrop, 1998a). What are not needed are systems and doctrines that provide additional disincentives for engagement. Engagement by public administrators requires "thinking administration" (Gawthrop, 1998a, p. 767). Public servants need to "think of what ought to be done instead of merely doing that which must be done" (pp. 764-765).

Effective democratic administration requires more than adhering strictly to narrow legal prescriptions.[8] To serve the goals of democratic administration, administrative responsibility must extend beyond proving that administrators have avoided legal prohibitions. Administrators must foster thinking about, and commitment to, the larger purposes of the programs being administered and must spur innovative action to implement programs to achieve positive outcomes for the intended beneficiaries.[9] Focusing only on adhering to correct procedure undermines the very purpose of administrative responsibility and ultimately the legitimacy of the rule of law.[10] To be effective, implementation of public programs must be guided by an overall vision that cannot be realized by having public managers follow statutes and react to the political forces of the moment.[11]

Whereas vision should be informed by statutory interpretation and political direction from elected officials, accomplishment of such a task ultimately requires the best judgment of the public administrator. Even an unlimited amount of judicial supervision and guidance will not substitute for such judgment. Inevitably, some judgments will prove to be wrong.

But if the reaction to wrong judgments is to attempt to legislate away all future errors, the objective of administrative responsibility will be defeated. As former Judge Jerome Frank (1942) observed, it will not eliminate the effect of human error.[12]

Resource Adequacy

Recalling that two of Honadle's (1981, 1986) six dimensions of capacity dealt with resources, the final category of capacity that should be considered deals with the resource environment of the administrative body. The purpose of this category is to alert federal judges to poor administrative behavior that may be the result of resource issues.

Recognizing that the overwhelming proportion of state and local agencies operate in resource-constrained environments, the task of the federal court is not to determine the present existence of resources available to a particular administrative agency to potentially remedy any deficiencies that may be found. Rather, the focus should be on the ability of the jurisdiction to garner resources that may be required to provide a remedy. There have been cases when it became evident that any efforts of the responsible state leaders to acquire budgetary resources to remedy a rights violation would inevitably fail. For example, in one of the original mental health cases in Alabama, *Wyatt v. Stickney*, the state's constitutional and statutory structure, combined with the ideology and political aspirations of state leaders and with the advantage opposing interest groups enjoyed in blocking any funding for mental health, produced an environment in which additional resources to address the rights violations perpetrated against those held in state mental health institutions would not be made available under any conceivable set of circumstances (Cooper, 1988, p. 179). Deferral to state processes would not be able to secure the required rights vindication.

In contrast, in the school desegregation case, *Missouri v. Jenkins* (1990), a federal judge ordered a series of remedies that required expenditures that extended beyond the revenue capacity of the local school district under provisions of the state constitution. The judge chose to order a tax increase even though another alternative was available. Under the doctrine of joint and several liability, the state as a codefendant could pay the share that the local unit was unable to pay (O'Leary & Wise, 1991, p. 320). In other words, the *Jenkins* (1990) situation illustrates that federal negation of state laws is not the only recourse to an administrative-fiscal

problem. State courts in the numerous school financing cases have not been hesitant to order the reconsideration of entire school financing laws, many of which have been long standing. Thus, federal courts need not assume that if there are resource issues involved in addressing a potential rights violation, only federal courts can address them.

CONCLUSION

The position taken here is that the federal system can be utilized to a greater extent to achieve a balanced approach to the vindication of individual rights and to diminish the complexity of achieving meaningful remedies through state administrative means. We submit that such an approach is preferable to a federal judicial monopoly approach. Numerous reports have documented that the federal courts are overloaded with a complex array of criminal and civil cases that only they can adjudicate. An appropriate use of abstention can facilitate a fuller use of the federal system by further involving state courts in areas where they enjoy comparative advantages and can thereby achieve a better utilization of judicial resources for the country as a whole.

To facilitate a balanced abstention approach, federal courts should use relevant criteria that undergird the rationale for abstention. No precise scientific formula is advocated. Nonetheless, it is important to weigh the factors discussed here. By doing so, we feel that state courts will be more systematically enlisted in the enterprise of rights protection, and state and local agencies will be in a better position to respond to the requirements of rights protection. Both the values of individual rights and considerations of federalism are likely to benefit. Among other advantages, clarifying federal intervention would help to alleviate a decades-old problem of anticipating the increasing, albeit unpredictable, costs of litigation for municipalities, counties, and special districts (MacManus & Turner, 1993).

Taken together, federalism, state judicial capacity, federal judicial capacity, and administrative capacity constitute the considerations to be balanced by a federal court before it intervenes in state policy administration. Careful consideration and balancing of these factors should provide a more systematic basis for arriving at a workable division of labor for rights protection.

NOTES

1. O'Connor (1981) argues, for example, "There is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions" (p. 813).

2. In *New Orleans v. New Orleans Pub. Serv., Inc*. (1989), the decision reads

> It is clear that the mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction. That is so because when we inquire into the substantiality of the State's interest in its proceedings we do not look narrowly to its interest in the *outcome* of the particular case—which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the State . . . . Because pre-emption-based challenges merit a similar focus, the appropriate question here is not whether Louisiana has a substantial legitimate interest in reducing [New Orleans Public Service, Inc.'s] retail rate below that necessary to recover its wholesale costs, but whether it has a substantial, legitimate interest in regulating intrastate retail rates. It clearly does. The regulation of utilities is one of the most important functions traditionally associated with the police power of the States. (p. 365)

3. Also see the annual surveys of developments of state constitutional law in *Rutgers Law Journal*.

4. On school finance, see Harrison and Tarr (1996). On the rights of defendants, see Latzer (1991). On the right to privacy, see Porter and O'Neill (1988). For an overview of state rulings, see Williams (1993).

5. *Louisiana Power & Light Co. v. City of Thibodaux* (1959) serves as an additional illustration of where federal abstention might be appropriate for the presence of a state question of law of state policy import. *Thibodaux* called "upon federal courts to defer to state courts on questions like eminent domain, which involve matters 'close to the political interests of a State' that are 'intimately involved with sovereign prerogative'" (Ferejohn & Kramer, 2002, p. 268).

6. Mishkin (1978) notes,

> An institutional remedy inevitably involves allocation of state resources, at times in major amounts. To such decisions, the more abstract problems, possible countervailing considerations, and possible competing claims are all highly relevant. There is nothing in the nature of litigation which necessarily brings these matters out, or indeed, which provides a good vehicle for their development even if tried. (p. 965)

7. Advisory opinions do not arise from actual court cases but are issued by courts in response to some question submitted to it, usually by a government body or officer such as a legislature or governor.

8. As L. R. Wise (2000) observes,

> In this sense, the demand for engagement challenges the morality of rule-following behavior. A religious leader may perform the forms and rituals of the sacrament

without engaging an internal spiritual emotion that creates an affective bond with the congregation. Similarly, a bureaucrat may go through the routines and motions of a job following the forms and rules prescribed but never engaging an affective emotion for the citizen clients he or she is positioned to serve, or in turn, feeling any concern for the outcome of their interaction. (p. 349)

9. Gawthrop (1998b) states:

As applied to public management, the notion of professional responsibility is usually defined in terms of procedural obligations—for example, the obligation to adhere faithfully to legislative intent and the details of due process, the obligation to obey the law, and the obligation to recognize and respect the inviolability of organizational superior-subordinate relationships. If democracy, however, is viewed as a parabolic way of thinking about life in a community rather than as an institutional contrivance, the notion of professional responsibility assumes a role of major proportions in our democratic equation. (p. 142)

10. Gawthrop (1998b) states,

Public managers must recover the truly authentic and creative freedom to decide what they should do ethically in resolving the daily conflicts and challenges that confront them. Until they are capable of freeing themselves from the bondage of habit, any attempt to define professional behavior as truly ethical is an exercise in futility that can only result in pathetic self-deception. The habits of the self-serving good allow public servants to pursue procedural, quasi-ethical life. The net result, to paraphrase H. Richard Niebuhr, is a government of persons without fault, operating in a society without judgment, through the ministrations of a Constitution without a purpose. (p. 139)

11. Gawthrop (1998b) states,

The implementation of public policy—like the rule of law, or the administration of justice, or the recognition of any of the inalienable rights we revere—involves much more than the mechanistic application of statutory and programmatic directives that can be shaped solely on the basis of immediate benefit or pragmatic expediency. The administrative implementation of policy must incorporate a teleological sense of purpose that clearly transcends the exigencies of the present. (p. 34)

12. Frank (1942) states,

It is imperative that in a democracy it should never be forgotten that public office is, of necessity, held by mere men with human frailties . . . . To pretend, then that government, in any of its phases, is a machine; that it is not a human affair; that the language of statutes—if only they were adequately worded—plus appeals to the upper courts, will, alone, do away with the effect of human weakness in government officials is to worship illusion. And it is a dangerous illusion. (pp. 3-7)

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