

# THE LIMITLESSNESS OF JUDICIAL CAPACITY TO RIGHT CONSTITUTIONAL WRONGS

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I would like to approach the topic of remedies from a different perspective than that of Judge Easterbrook.<sup>1</sup> Let me first state that I agree with Judge Easterbrook that much of the emotional debate about remedies is not in fact about the propriety of remedies as such, but rather about different definitions of underlying rights, different understandings of entitlements. For example, in the area of voluntary and involuntary busing, if one perceives the underlying entitlement to be an assurance of a desegregated education, then methods that ensure such an education become critical. If one believes the underlying entitlement is the opportunity for desegregated education and not the assurance that segregated school systems will in fact become desegregated, then more voluntary approaches can work to assure such an opportunity.

But the primary focus of this presentation is not involuntary versus voluntary remedies, but rather the limits of judicial authority. I will use *Spallone v. United States*<sup>2</sup> (the "Yonkers case") to examine that question. The issues that arose in *Spallone* are unique. In the original case that gave rise to *Spallone*, the United States brought suit against the City of Yonkers and its community development agency for intentionally creating racially segregated housing in violation of Title VIII of the Civil Rights Act of 1968<sup>3</sup> and the Equal Protection Clause of the Fourteenth Amendment.<sup>4</sup> The City of Yonkers and the Yonkers Board of Education were also sued for acts that had resulted in racial segregation of the city's public schools.

In November 1985, in the school desegregation branch of the case, Judge Sand found the City of Yonkers and the Yon-

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1. Judge Easterbrook asserts that most disputes over remedies in civil rights cases are actually disputes over the underlying substantive entitlements. See Easterbrook, *Civil Rights and Remedies*, 14 HARV. J.L. & PUB. POL'Y 103 (1991).

2. 110 S. Ct. 625 (1990).

3. 42 U.S.C. §§ 3601-3631 (1988).

4. U.S. CONST. amend. XIV, § 1 ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws").

kers Board of Education liable for segregative conduct.<sup>5</sup> The district court then asked defendants to devise remedies to enable them to comply with the Constitution. The Yonkers Board of Education devised remedies, and, with minor amendments by the Justice Department and the NAACP, the school remedies went into effect in September 1986.<sup>6</sup>

The court-approved remedy in the school desegregation case was a controlled choice plan—a mix between a mandatory and a voluntary plan. Parents of elementary school-aged children were required to choose to send their children to one of three schools that would eventually be desegregated. At the secondary school level, zone lines were altered and mandatory desegregative assignments made with transportation provided. The plan has been successfully implemented, and the school district's enrollment has been increasing without significant white flight.<sup>7</sup>

Ironically, in the public housing aspect of the case, the very same city refused at every turn to comply with the same court's order to desegregate. For example, the court ordered Yonkers to present a long-term housing plan by November 1986.<sup>8</sup> Instead of producing and presenting a plan, the city presented a one-page letter from its counsel indicating that the City Council was unwilling to submit any plan.<sup>9</sup> It flatly refused to comply.

Pending appeal, Judge Sand and the Justice Department were, perhaps understandably, hesitant to proceed with remedies against the city's contumacious conduct.<sup>10</sup> Finally, in late December 1987, a panel of the Second Circuit unanimously affirmed Judge Sand's decision on liability and remedy.<sup>11</sup> The parties then agreed to a consent decree setting forth actions the city would take to implement the remedial order, including

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5. See *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

6. See *United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1538 (S.D.N.Y. 1986).

7. See Report from Dr. Christine Rossell, Boston University, to Dr. Donald Batista, Superintendent of Yonkers Public Schools (Jan. 25, 1990).

8. See *Spallone*, 110 S. Ct. at 628-29.

9. See *id.* at 629.

10. *Cf. Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *New York Nat'l Org. of Women v. Terry*, 886 F.2d 1339, 1349 (2d Cir. 1989) (noting that filing notice of appeal divests district court of jurisdiction to deal with matters raised for review), *cert. denied*, 110 S. Ct. 2206 (1990).

11. See *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1184 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

the passage of a legislative package ("The Affordable Housing Ordinance") within ninety days.<sup>12</sup> The district court approved the decree on January 28, 1988.<sup>13</sup>

In June 1988, the district court finally entered a long-term housing plan based on a draft prepared by city lawyers. The City Council was ordered under threat of contempt to comply with the consent decree by passing the package.<sup>14</sup> This gave rise to the issue of the court's authority to enforce the agreed-to remedy. Should Judge Sand simply have ordered the housing plan into effect? The consent decree had been subject to dispute; obviously, the City Council did not intend to pass the required ordinance. Thus, the question arose: What benefit derived from telling the City Council to pass the ordinance at pain of contempt?

As the NAACP's lawyer, I saw no benefit to such a route, and I argued that: (1) The judge should enter an order creating an independent structure with responsibility for getting integrated affordable housing constructed and vest that entity with the authorities possessed by the city over such matters as zoning, land use, and building codes; (2) the city should not be held in contempt for failure to proceed; and (3) the individual council members should not be held in contempt. Why not hold the city and its council members in contempt, particularly when their conduct was so clearly contemptuous of the court and the Constitution? Because such an action would only further polarize the situation, would make martyrs of these individuals whose contumacious conduct was absolutely plain, and would fail to further the remedial objective supporting the order's implementation.

At a July 5, 1988 hearing, the government's lawyer stated exactly the contrary position. The government believed it critical that Yonkers be made to follow the rule of law. The NAACP, on the other hand, believed that Yonkers could be made to follow the rule of law if the judge would appoint a commission, a master, or a czar to implement housing remedies in the city.

Though he had first proposed the creation of such an entity, Judge Sand ultimately rejected the NAACP's position. He imposed the contempt fines—first against the city and then, a few

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12. *See Spallone*, 110 S. Ct. at 629.

13. *See id.*

14. *See id.* at 630.

days later, against the individual council members.<sup>15</sup> The fines against the city doubled each day in perpetuity until the Second Circuit later capped the fines at \$1 million a day.<sup>16</sup> The fine against the council members was set at \$500 a day with imprisonment on the tenth day.<sup>17</sup> Judge Sand had accepted the United States' proposed remedy.

The fines against the council members were stayed by the United States Supreme Court, pending review of the defendants' petition for writ of certiorari.<sup>18</sup> Finally, in September, as the fines on the city reached \$832,000 a day, the city council voted, five-to-two, to pass the required ordinance.<sup>19</sup> The Supreme Court granted certiorari to review the case.<sup>20</sup>

This case is useful for examining the limits of judicial authority and how the Supreme Court set the limits. In seeking certiorari, the council members advanced several broad arguments. First, they asserted that, as local legislators, they enjoyed absolute legislative immunity that precluded any court from requiring them to vote in any way, even in a way which would secure a constitutionally required, long-term housing ordinance.<sup>21</sup> Notwithstanding the prior adoption of the consent decree of January 1988, which specifically required adoption of the long-term housing ordinance and enumerated its provisions, the four council members (including two who had supported the consent decree and two who had opposed its adoption) argued that a judicial order forcing their vote was an intrusion of their absolute legislative immunity.<sup>22</sup> Second, several of the council members argued that, as council members and as citizens, they had an absolute First Amendment freedom of speech right that proscribed judicial orders that would compel them to vote against their respective wills.<sup>23</sup>

The Supreme Court, though it invalidated the fines on other grounds, rejected both arguments. With respect to legislative immunity, the Supreme Court determined that, if other reme-

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15. *See id.*

16. *See* *United States v. City of Yonkers*, 856 F.2d 444, 460 (2d Cir. 1988).

17. *See id.* at 450.

18. *See* *Spallone v. United States*, 487 U.S. 1251 (1988) (staying contempt fines against Yonkers City Council members).

19. *See* *Spallone v. United States*, 110 S. Ct. 625, 631 (1990).

20. *Spallone v. United States*, 109 S. Ct. 1337 (1989).

21. *See* *Spallone*, 110 S. Ct. at 630-31.

22. *See id.* at 631.

23. *See id.*

dies failed to force the city's compliance with the district court order, individual sanctions against the local legislators would be both proper and useful.<sup>24</sup> Second, with respect to the freedom of speech right, the Supreme Court intimated that this right was subsumed within legislative immunity and did not have independent juridical vitality.<sup>25</sup>

Although this case was perceived by some as a victory for the council members, I believe that it was not. Rather, it was a traditional, narrow exercise of Supreme Court supervision of a district judge's equitable authority. Furthermore, although I disagreed with Judge Sand in the district court, I believe that the Supreme Court's opinion is wrong and that it reflects rather strange hindsight, as opposed to a principled explication of why Judge Sand's judgment was incorrect. Indeed, Judge Sand's judgment could be perceived as correct if one believed city council compliance was critical, a value the Supreme Court embraced in *Spallone*. The difference, as I saw it, however, was that implementation of the order, which could have been accomplished without the the council members' compliance, was more important than forcing them to comply.

*Spallone* illustrates my view that there are no limits on judicial authority. Where there are adjudicated constitutional and perhaps statutory violations, as in *Spallone*,<sup>26</sup> I believe that the federal courts have plenary authority to remake underlying institutions in order to eviscerate the effects of the constitutional violations.

A recent example is *Missouri v. Jenkins*,<sup>27</sup> in which the Court required government entities to raise taxes if necessary to vindicate underlying constitutional rights. In *Jenkins*, the Supreme Court held that federal courts have the authority to set aside state-imposed limitations on local taxing authorities if such limitations hinder fulfillment of constitutional guarantees.<sup>28</sup> A contrary regime would allow a taxing authority to reduce or limit taxes—in a sense, strip itself of necessary public resources—as a means of frustrating achievement of basic constitutional rights. This seems to me a patently ridiculous outcome.

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24. See *id.* at 634-35.

25. See *id.* at 634.

26. See *id.* at 628-29.

27. 110 S. Ct. 1651 (1990).

28. See *Jenkins*, 110 S. Ct. at 1666.

I wish to place the *Spallone* case in context. It has long been held that the federal courts have the responsibility to tailor their remedial orders to the underlying violations.<sup>29</sup> Where those underlying violations relate to structural and systematic oppression of racial minorities, the judiciary's role is inherently and necessarily broad-based.<sup>30</sup>

For example, while working with the United States Department of Justice from 1978 to 1981, I was involved in the Cleveland school desegregation case, *Reed v. Rhodes*.<sup>31</sup> In *Reed*, Chief Judge Frank J. Battisti found historic and pervasive segregative conduct by the Cleveland Board of Education, and later by the State of Ohio.<sup>32</sup> The judge entered one of the most expansive remedial decrees ever issued in a school desegregation case,<sup>33</sup> seeking aggressively to undo the effects of discrimination and segregation.

The local authorities essentially refused to comply. As in *Spallone*, they argued that the district court, despite the affirmance of its orders by the Sixth Circuit,<sup>34</sup> had overstepped its judicial bounds.<sup>35</sup> Through institutional devices, the local officials effectively sabotaged the ability of the Cleveland School System to meet the requisites of the order.

I was the government's lawyer at that time. The United States argued that the federal district court had the power to appoint a special master to run the Cleveland School System so as to assure compliance with remedial orders. This tailored remedy was necessary to enforce the court order that would secure for Cleveland's minority school children the advantages of a desegregated and non-discriminatory public education.

In my judgment, in such a situation, the federal court has no alternative but to take over the non-compliant institution. As radical as this approach might seem, one must remember that

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29. See *Milliken v. Bradley*, 418 U.S. 717 (1974).

30. See *Griffin v. Prince Edward County School Bd.*, 377 U.S. 218, 233 (1964); *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir.) (en banc), cert. denied, 469 U.S. 816 (1984); *United States v. Missouri*, 515 F.2d 1365 (8th Cir.) (en banc), cert. denied sub nom. *Ferguson Reorganized School Dist. R-2 v. United States*, 423 U.S. 951 (1975).

31. 422 F. Supp. 708 (N.D. Ohio 1976), aff'd in relevant part, 607 F.2d 714 (6th Cir. 1979), cert. denied sub nom. *Cleveland Bd. of Educ. v. Reed*, 445 U.S. 935 (1980).

32. See *Reed*, 422 F. Supp. at 796-97.

33. See *id.* at 797.

34. See *Reed v. Rhodes*, 607 F.2d 714 (6th Cir. 1979), cert. denied sub nom. *Cleveland Bd. of Educ. v. Reed*, 445 U.S. 935 (1980).

35. See *Cleveland Bd. of Educ. v. Reed*, 445 U.S. at 936-38 (Rehnquist, J., dissenting from denial of certiorari).

the Fourteenth Amendment is primarily directed to public officials. Where public officials refuse to discharge their duties in compliance with constitutional requirements, the federal judiciary is the only check on such recalcitrance. Our system has no other political apparatus to do the job.

In a democratic and majoritarian system, when the minority's rights are not vindicated through the political process, it necessarily becomes the structural role of the courts to defend those rights. This role may very well involve a change in the institutional structure and processes of the offending entity.

Courts should not shy away from their remedial role out of fear of infringing on "local autonomy." I believe that in the Supreme Court cases since *Milliken v. Bradley*,<sup>36</sup> there has been a troubling conception that deference to local autonomy constitutes a limitation on judicial authority in the remedial context. What is the local interest that places a constraint on judicial authority in a remedial context? I have not been able to identify it in any case where there was an independent constitutional violation that predicated the exercise of such authority.

It is interesting to try to decipher the Supreme Court's point of view in cases like *Milliken*. Clearly, in *Milliken*, there were suburban school districts that had never been found liable for segregative conduct.<sup>37</sup> These schools were initially included by Judge Stephen Roth in the school desegregation plan as the only means of desegregating the City of Detroit's public schools. Notwithstanding the segregative consequence of excluding them from the remedy order, the Supreme Court found that local autonomy, along with other due process principles, justified that remedy's reversal. But beyond the due process argument—which requires that to be included involuntarily in such a plan, a party must be found liable after trial—what else is meant by local autonomy? I am not prepared to venture a hypothesis.

Finally, I will briefly address the unitariness discussion that Judge Easterbrook introduced.<sup>38</sup> I litigated a case in Jacksonville, Florida, in which the Eleventh Circuit Court of Appeals reaffirmed its view that, so long as a school district is not unitary, that district has an ongoing affirmative obligation to en-

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36. 418 U.S. 717 (1974).

37. See *Milliken*, 418 U.S. at 719.

38. See Easterbrook, *supra* note 1, at 104-05.

sure that its actions are maximally desegregative.<sup>39</sup> Apparently, this was in response to cases being argued and decided in the Fourth and Tenth Circuits.<sup>40</sup> In other words, the issue is not whether the school districts are unitary or not unitary in the abstract; rather, the issue is whether those districts, over time and before they became unitary, have taken the maximal steps to ensure racial desegregation. If they have not, then the issue of unitariness is reserved.

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39. See *Jacksonville Branch, NAACP v. Duval County School Bd.*, 883 F.2d 945 (11th Cir. 1989).

40. See *Keys v. School Dist. No. 1*, 895 F.2d 659 (10th Cir. 1990); *Brown v. Board of Educ.*, 892 F.2d 851 (10th Cir. 1989); *Dowell v. Board of Educ.*, 890 F.2d 1483 (10th Cir. 1989) (denying school board's request that injunction of injunction based on unitary status); *School Bd. v. Baliles*, 829 F.2d 1308 (4th Cir. 1987) (finding Richmond schools unitary and thus not ordering further funding of desegregation).