

# JUDICIAL REMEDIES: BRAKING THE POWER TO FIX IT

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It is my thesis that there are indeed some discernable limits to what judges can properly do at the remedial stage of a discrimination case. At the outset, let me note that there is, at least theoretically, much to Judge Easterbrook's thesis.<sup>1</sup> Clearly, the judicial definition of entitlements, or "rights," affects the way that remedies are drawn.

It is difficult, however, to see any meaningful limiting principle in the approach that utilizes the judge's definition of "entitlements" as the exclusive constraining influence on the scope of remedies. I noticed that Judge Easterbrook was careful to focus his remarks entirely on the entitlements side of the equation, as opposed to the remedial side. If judges adhere to the law as written rather than attempt to rewrite it, then the use of substantive legal definitions could well serve as a curbing influence on remedial abuses. But judicial activism is regrettably not yet a thing of the past and will, realistically, be with us for some time. This makes many of us shudder at the prospect of leaving remedies to the unfettered discretion of judges who have whimsical notions about the elastic nature of individual rights.

So where do we turn for objective curbs on remedial excesses by our courts? Obviously, the *written* laws that make up our federal and state codes form one general limitation on remedial authority. In this sense, the linkage between substantive liability and the nature of the relief awarded cannot be ignored any more than it should be the sole point of reference.

Beyond that benchmark, however, there are some independent limiting principles that I regard as constraining judicial remedial power. The doctrine that remedies must be "narrowly tailored" to fit the particular violation is one such constraining influence. This doctrine has gained considerable attention from the courts recently. Thus, the Supreme Court in 1989 used this "tailoring" test in examining the constitutionality of

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1. See Easterbrook, *Civil Rights and Remedies*, 14 HARV. J.L. & PUB. POL'Y 103 (1991).

legislative remedies for past discrimination.<sup>2</sup> The requirement of narrow tailoring imposes on the judiciary discipline to fashion relief that is both specific to the parties before the court and specific to the wrong to be cured.

Party-specific relief has reference to both sides of the dispute. From the plaintiff's perspective, to meet the narrow tailoring requirement a remedy must be sufficient to correct the injury or the wrong suffered by the victim, yet no more expansive. This victim-oriented relief attaches only to the complaining parties before the court who have been victimized by the proven wrongdoing. For the most part, victim-oriented relief can be applied in all areas of civil law; it therefore should serve as a remedial benchmark not only in cases involving civil rights, but also in those concerning, for example, contracts, torts, or products liability.

On the defendant's side, the limiting principle is much the same: Tailored relief reaches only the wrongdoer, not others, perhaps with "deeper pockets," who are untouched by the verdict. Judge Easterbrook made reference to the Chicago school desegregation case, which has been tied up in the courts for years on a number of legal issues.<sup>3</sup> In that case, the Seventh Circuit Court of Appeals twice considered the question whether the United States could be required to provide funding for the desegregation plan as a party to the consent decree, notwithstanding that it had never been charged with an offense.<sup>4</sup> On both occasions, the Seventh Circuit held that the district court could not require payment from the federal government. In addition, the Supreme Court has voiced support for the principle that the remedial authority of a court allows no discretion to visit penalties on those not adjudged responsible for the wrong at issue.<sup>5</sup> Just as those receiving redress must be the litigating parties who can demonstrate that they are victims of the unlawful conduct, so, too, those against whom the

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2. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

3. See *United States v. Board of Educ. of Chicago*, 567 F. Supp. 272 (N.D. Ill.), *aff'd in part, vacated in part, and remanded*, 717 F.2d 378 (7th Cir. 1983), 588 F. Supp. 132 (N.D. Ill.), *vacated and remanded*, 744 F.2d 1300 (7th Cir. 1984), 621 F. Supp. 1296 (N.D. Ill. 1985), *vacated and remanded*, 799 F.2d 281 (7th Cir. 1986).

4. See *United States v. Board of Educ. of Chicago*, 799 F.2d 281 (7th Cir. 1986); *United States v. Board of Educ. of Chicago*, 744 F.2d 1300 (7th Cir. 1984).

5. See *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) ("The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation.").

remedy is assessed must be the litigating parties guilty of that misconduct. Accordingly, in *Milliken v. Bradley*, the Court's majority made it clear that the remedial power of the judge in that case could not extend to neighboring school districts that were neither before the court nor implicated in the wrongdoing.<sup>6</sup>

These narrow-tailoring limitations on a judge's otherwise broad discretion to fashion relief apply without regard to the judicial definition assigned to the rights or entitlements that are in dispute. To be certain, the substantive definition of the entitlements might impact on the determination of which parties, or how many, are arguably within the remedial range of a particular case. The substantive definition of entitlements, however, should be construed so as to insure that the relief ultimately fashioned is tailored to the injured and guilty parties.

Overarching constitutional limitations also apply, in my view, to the courts' remedial powers. In *Spallone v. United States*,<sup>7</sup> the Yonkers housing discrimination case, a majority of the Supreme Court agreed with such a viewpoint. In *Spallone*, the Court set aside a district court's contempt orders against four members of the Yonkers City Council. The Court ruled that entry of the orders had been an abuse of judicial discretion because the district court had failed to allow sufficient time for a separate contempt citation against the city to work its intended effect.<sup>8</sup>

Chief Justice Rehnquist's majority opinion in *Spallone* does not rest on separation-of-powers reasoning, nor is it based upon legislative immunity or interference with First Amendment rights of association. The opinion is unmistakably concerned, however, with courts' exercise of their remedial powers in a manner that intrudes on the legislative domain.<sup>9</sup> The *Spallone* majority, at the very least, recognizes that there are constitutional limits that hold judges to the task of judging and do not permit them to step into the shoes of legislators, who alone under our Constitution have the task of legislating. To be sure, the Court found it unnecessary to state the principle so absolutely in *Spallone*, but its finding of "abuse of discretion" should not be misread as an indifference to the limited spheres of op-

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6. See *id.* at 744-45.

7. 110 S. Ct. 625 (1990).

8. See *Spallone*, 110 S. Ct. at 632-35.

9. See *id.* at 633-35.

eration assigned to each of the three branches of government under our Constitution.

The Eighth Circuit Court of Appeals decision in the Kansas City school desegregation case highlights the point.<sup>10</sup> The district court in that case had entered a remedial order imposing an income tax and demanding a property tax increase throughout the State of Missouri in order to raise revenues to support a comprehensive magnet school program.<sup>11</sup> On appeal to the Eighth Circuit, the court-ordered income tax was invalidated as beyond the proper scope of judicial authority.<sup>12</sup> The lower court's direction that the property taxes be increased was upheld as within constitutional bounds.<sup>13</sup>

As presently drawn, the line etched by the Eighth Circuit between acceptable and unacceptable judicial relief is discernable, but just barely. Hopefully, the Supreme Court will clarify matters by barring judges from *directing* legislative adoption of tax increases (under a threat of judicial sanctions for non-compliance) in addition to barring them from actually *imposing* income tax increases. The taxing power is properly within the sphere of the legislative branch under our scheme of government; it is a constitutional misfit in the remedial hands of judges.<sup>14</sup>

The mischief lurking in *Jenkins* can be better appreciated if the Eighth Circuit's ruling is combined with the message in *Spallone*. Together these decisions seem to be saying that remedial steps the courts are barred from taking directly under the separation-of-powers doctrine, like imposing taxes, can still be accomplished indirectly. For example, rather than imposing its own tax, a lower court need only direct that legislative action

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10. See *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988), *aff'd in part, rev'd in part, and remanded*, 110 S. Ct. 1651 (1990).

11. See *Jenkins*, 855 F.2d at 1301.

12. See *id.* at 1315.

13. See *id.* at 1310-15.

14. After I offered this view of the appropriate holding in the *Jenkins* case, the Supreme Court ruled that the distinction between judicial imposition of a tax and a judicial direction to the taxing authorities to increase taxes has constitutional significance. See *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990). While not persuaded that such fine line-drawing skirts clear of the separation-of-powers concerns that loom large when judges undertake to fund their remedial orders by involving themselves in the business of "lay[ing] and collect[ing] Taxes," U.S. CONST. art. I, § 8, the *Jenkins* majority has made such arguments more difficult in the future, albeit still available in some circumstances.

be taken to increase taxes, and then hold the state or local legislative body in contempt if it fails to comply.

That is obviously not a happy result for constitutional purists. But *Spallone* is not a very satisfactory decision. It skirts a doctrinal rationale, and treats no differently the four councilmen who refused to vote for additional low-cost housing. A good argument could have been made for upholding the contempt order against two of the four (that is, the two in office who voted for the original consent order but then changed their position after it was entered), but not the other two (one of whom adamantly opposed the decree throughout and the other who was elected to the City Council after entry of the decree and took no part in its preparation or adoption).

The Supreme Court's recent decision in *Martin v. Wilks*<sup>15</sup> is worth reading to illuminate this point. In *Martin*, one issue was "court-access."<sup>16</sup> White firefighters in Birmingham, Alabama, sought to challenge a racial preference program ordered into place under a consent decree between the city and its minority firefighters.<sup>17</sup> The white firefighters' initial efforts to have their objection to the plan heard had been to no avail. When they sought in a separate action again to contest the fire department's preferential hirings and promotions under the decree, the lower courts held that they were barred from attacking the court-approved program because the motions they filed were untimely.<sup>18</sup> The Eleventh Circuit reversed the district court holding.<sup>19</sup>

In affirming the Eleventh Circuit, the Supreme Court focused on the fact that the complainants had not been parties to the suit by minority firefighters from which the consent decree emerged and thus were not parties to its settlement.<sup>20</sup> As such, the complainants were not bound by the terms of the preference program and could properly contest its operation on the basis that it was racially discriminatory against them.<sup>21</sup>

Applying the same logic to *Spallone*, the Yonkers City Council

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15. 109 S. Ct. 2180 (1989).

16. *Martin*, 109 S. Ct. at 2184.

17. *See id.* at 2182-83.

18. *See id.* at 2183.

19. *See In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1498 (11th Cir. 1987).

20. *See Martin*, 110 S. Ct. at 2187.

21. *See id.* at 2188.

member elected to office *after* entry of the consent decree, and adamantly opposed to it, should not have been cited personally for contempt. He, like the white firefighters in Birmingham, was not bound by the earlier court action. It may be, however, that council members in office at the time the decree was entered should be treated differently. If they initially voted for the decree, but after it was entered changed their position and sought to thwart its enforcement, the argument for reaching them personally in a contempt order—if the city persists in its refusal to respond to the court—has some appeal. On the other hand, contempt may not be an appropriate judicial response to a council member who at all times opposed entry of the consent decree, and continued after its entry to persist in his opposition.

Where such lines are drawn is relevant, of course, to the general boundaries on a court's remedial powers. As suggested above, one constitutional breakpoint is reached whenever a court steps out of its judicial role and into a legislative role. Beyond that, a court should not cross substantive constitutional lines in devising remedies for particular controversies. For example, in repairing discrimination suffered by the Birmingham minority firefighters, the court should not have been able to devise relief that produced racial discrimination against others. Uneven government treatment based on race, gender, religion, or ethnic background invades constitutionally forbidden territory, even if sponsored for benign reasons;<sup>22</sup> judges are as bound by this constitutional imperative as are legislators.

Even having stated the proposition so boldly, there is invariably at least one exception for every rule. Not even the command to public authorities to behave constitutionally is absolute. The rule has been required to yield when one can show that such a response is "compelled." Thus, the free speech protection gives way to a ban on certain speech in compelling circumstances; for example, one cannot falsely shout fire in a crowded theatre.<sup>23</sup> Similarly, recent Supreme Court civil rights decisions permit the possibility of "narrowly tailored" preferential relief when compelled as a last resort.<sup>24</sup>

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22. *But cf.* *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 110 S. Ct. 2997 (1990); *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978).

23. *See Schenck v. United States*, 249 U.S. 47, 52 (1919).

24. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *United States v. Paradise*, 480 U.S. 149 (1987). Since these remarks were made, the Supreme Court

Chief Justice Rehnquist's opinion in *Spallone* can be read to convey a similar message. The contempt orders against the individual council members were held not yet to be compelled, because all other remedial efforts had not been exhausted.<sup>25</sup> But the door was clearly left open for the court to cross the line—to move into forbidden “legislative” or “quasi-legislative” territory—if it was ultimately compelled to do so as a last-resort judicial response.

There is always the risk that the exception will swallow the rule. If courts are given too much latitude in attaching the “compelled” label to the relief they fashion, that risk looms large. Some comfort can be derived from the fact that the “compelling circumstances” exception to constitutional mandates has been employed sparingly by our judiciary. And the present Supreme Court appears unprepared to give it wider latitude in the exercise of courts' remedial powers.<sup>26</sup>

It is equally important to make certain that judicial decrees are not allowed to outlive their usefulness. This consideration is especially significant in the school desegregation cases. Few court decrees have lasted longer than those entered in the 1960s and 1970s to achieve school desegregation. Those decrees imposed on public school boards a range of requirements—including forced busing, rezoning of districts, and closing and consolidating school facilities—all to desegregate the public school systems. At the time that each order was entered, it was anticipated that compliance would result in a

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decided *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 110 S. Ct. 2997 (1990). By a five-to-four majority, the Court fashioned yet another exception to the constitutional command that Congress not classify by race—albeit under circumstances unrelated to the panel's discussion of judicial remedial powers. Radio and television licenses could, in the majority's view, be distributed along racial lines by a federal agency, assuming evidence of congressional acquiescence, so long as the purpose for such a racially discriminatory distribution procedure was to diversify program content, a purpose labelled by the majority as wholly “benign.” *Id.* at 3010. In reaching this conclusion, the Court's majority employed the standard that a “benign race-conscious program that is substantially related to the achievement of an important governmental interest is consistent with equal protection.” *Id.* at 3026. This standard echoes ominously the “important governmental objective” reasoning that prevailed in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and the separate-but-equal doctrine some 150 years ago.

<sup>25</sup> See *supra* note 7 and accompanying text.

<sup>26</sup> That comfort level has understandably dropped significantly since the Supreme Court's decision in *Metro Broadcasting*. See *supra* note 24. It is important to emphasize, however, that *Metro Broadcasting* did not concern an exercise of judicial remedial power, but involved only the power of Congress to enact a racial classification in a non-remedial context. See *Metro Broadcasting*, 110 S. Ct. at 3028 (Stevens, J., concurring).

school system no longer racially divided, but “unitary.”<sup>27</sup>

Most of the school decrees have since been modified or dramatically altered in response to changing conditions and demographics. The district courts eventually began to declare some school systems unitary, finding that the racial segregation of students had come to an end. But extensive “white flight” in a number of areas made it impossible to accomplish the full measure of desegregation originally contemplated.

It was argued in at least one case that a school board that had fully complied for years with a desegregation decree, but had predictably failed to eliminate all one-race schools, should not be entitled to a declaration of unitariness, or, even if unitariness was declared, such a board should not be released from the decree. The Fourth Circuit rejected these arguments and ruled in favor of the school board on both these issues in *Riddick v. School Board of Norfolk*.<sup>28</sup> In *Norfolk*, the Fourth Circuit found that full compliance with the court decree for a number of years had eliminated all government-inspired segregation in Norfolk, and held that a declaration of unitariness was appropriate, notwithstanding the fact that there remained some one-race public elementary schools due to demographic changes within the system.<sup>29</sup> The Fourth Circuit further reasoned that unitariness signals the end of the court decree and the court’s jurisdiction.

The finite nature of court decrees is important to underscore. The *Norfolk* decision recognizes that court orders do not last forever. After full compliance with remedial requirements and a curing of the wrong, the defendant should be released from the “penalty box.” After all, even criminals are set free once they have served their sentence. Similarly, in a civil action, if a school board eliminates the discriminatory practices and successfully achieves unitariness, it should not continue to be the subject of a court order entered much earlier against other board members. Rather, the court’s jurisdiction should come to an end. If new problems arise, the court is always available to receive new complaints in a subsequent lawsuit.

The Tenth Circuit recently took a different view. In *Board of*

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27. See, e.g., *Green v. County School Bd.*, 391 U.S. 430 (1968).

28. 784 F.2d 521 (4th Cir. 1986).

29. See *Norfolk*, 784 F.2d at 535.

*Education v. Dowell*,<sup>30</sup> the Tenth Circuit appears to have held that a school board cannot escape the jurisdiction of the court even after a declaration of unitariness, but can forever be held answerable to the court of original jurisdiction to protect against "backsliding," or a reversion to the discriminatory behavior of old. The Supreme Court has granted certiorari to review this case.<sup>31</sup>

Just as a judge's power to fashion remedies is not open-ended, but must adhere to certain limiting principles as to parties, subject matter, and constitutional integrity, so too, his remedial jurisdiction does not survive in perpetuity. The judge's jurisdiction ceases once the remedial purposes have been achieved. To be sure, this still leaves plenty of open space for courts to roam in structuring appropriate relief, but it does not give them the *carte blanche* authority that others endorse.

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30. 890 F.2d 1483 (10th Cir.), *cert. granted*, 110 S. Ct. 1521 (1990).

31. *Dowell*, 110 S. Ct. 1521 (1990).