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A New Judicial Federalism?

FOR A TIME it seemed that federal court orders governing our state agencies had become a curious characteristic of our country, our federalism, our time. To some no doubt it still seems so. Federal trial judges continue to order our sovereign states to reapportion their legislatures; under federal court orders state prisons are abandoned and hospitals rebuilt; whole populations of school children are shifted daily as under federal court orders the school buses roll.

And this unprecedented regime is only a point of high relief in the larger picture, a picture of proliferating litigation in the federal trial courts, extraordinary sorts of cases raising broad issues of public concern on behalf of huge classes of consumers or environmentalists or minorities.

But this massive federal judicial power, in its acute phase, may have informed only a brief chapter in the history of our federalism, a period coinciding roughly with the last years of the Warren Court. Today's heroic exercises of that power may with hindsight come to seem a phasing out and winding down. How did federal trial judges come to wield such powers? Is the Burger Court dismantling the engine? Are we to return to the status quo ante?

These inquiries will be advanced only in part by comparing the constitutional interpretations of the Warren and Burger Courts. Although it is a truism that an expansive view of rights will generate increased litigation, and that a restrictive view of rights will chill litigation, a more complete understanding can be had only by examining what the Supreme Court has done about federal trial-court power itself. By treating court powers as crudely distinct from legal rights, we can reach the sources of today's federal "judicial activism," trace the broader outlines of contemporary judicial federalism, and gain insights into the changes now occurring.

But there is an additional reason why the subject of judicial power, once more or less abandoned to the specialist, has become rather more interesting to others. A Supreme Court bent on retrenchment can accomplish only so much through head-on confrontation with Warren Court constitutional interpretations. The Court is not about to overrule *Brown v. Board of Education*. If retrenchment is to come then, it will tend to come not through rulings restrictive of rights, but more subtly, through rulings restrictive only of the powers of federal courts to enforce those rights. And in fact that has been the preferred method of the present Court.

In this essay I have singled out two cases in the Burger Court which limit federal judicial power. I have done this not so much to comment on the cases themselves as to illumine in a very brief space the origins, significance, and late decline of federal public interest litigation, and of the power of federal trial judges to govern the states by decree.

The latter power raises grave issues of federalism, and I have focused on those when dealing with the second case. But on a deeper level both cases, in restricting power, raise another issue of federalism, and a central question to be put to the present Court. Because the underlying premise, and, as one suspects, the *raison d'être*, of the current assault on federal judicial power is that substantive rights are to be left overtly undisturbed, the necessary implication of a contraction in federal jurisdiction is that the state courts are intended to effectuate the rights in question. Yet if this expectation proves too optimistic, limits on federal judicial power become the functional equivalent of denials of individual rights. From this perspective I have contrasted the approaches of the Warren and Burger Courts, and at the close offered a few personal observations about the Court's current course.

1. The Public Action, the Private Attorney General, and the Frozen Tundra of the North

The building of the Alaska pipeline has been one of those romantic enterprises one tends to associate with the nineteenth century rather than with ours. As a giant consortium of oil companies pushed the work across the tundra, job-seekers poured across the continent into oddly luxurious camps for six-week stints, eating steaks *ad libitum* and struggling to forge a chain between remote supply and insatiable demand at temperatures of 60 below. But the world is full of cynics (or idealists) who lack the spirit of romance. An organization of environmentalists, concerned about wildlife cycles, discovered that the consortium had not complied with federal environmental regulations, and that federal authorities had winked their eyes at the omission. The environmentalists sued the federal agency and the consortium, seeking an injunction against construction of the pipeline until compliance was obtained. As was perhaps to be expected, particularly in view of the Arab oil embargo, Congress bailed out the consortium with special enabling legislation. The litigation was mooted. Everybody had to go home.

But one issue remained, and the lawyers persisted with the case. That issue, as it finally reached the Supreme Court,¹ was the unglamorous question whether the federal trial judge had the power to order the defendant consortium to pay the environmentalists' lawyers' fee. The answer would profoundly affect a phenomenon we have set ourselves to explore here: the explosion of federal public interest litigation in our time.

Why should a party to a lawsuit ever be ordered to pay another party's legal fees? In the United States the practice has always been that each party pays its own lawyer. The fee shifting proposed in the pipeline case would make sense only where it was thought desirable as a matter of public policy to encourage litigation. Yet here again, in the United States it has been the general policy to

discourage litigation. And if the purpose of fee shifting was to encourage litigation, the practice could never be administered in an even-handed way. (Nothing will so efficiently discourage lawsuits as the traditional English practice of making losing plaintiffs pay winning defendants' legal fees.) Yet one-way fee shifting had become commonplace in federal litigation by the close of the 1960s. Three discrete events in the judicial history of the sixties are important to an understanding of this pattern.

The first of these was the 1961 decision in *NAACP v. Button*. That case and its progeny seemed to say that lawyers had rights under the First Amendment to create litigation: to identify potential plaintiffs; to advise them of their rights; to institute litigation on their behalf and on behalf of an organization or union of which they might be members, or whose members were similarly situated. As long as this litigation was group litigation in the public interest, the states apparently could neither prosecute nor disbar lawyers for conduct previously thought unethical: "ambulance-chasing," "capping," "running," stirring up litigation for private gain, buying up cases, paying the client's expenses; in short, lawyers seemed to have a new constitutional right to commit the ancient professional sins of champerty, maintenance, and barratry.²

The second event occurred in 1966 with the promulgation of new, revised, updated rules of court to govern federal class actions. The event was not calculated to imprint itself upon the public consciousness. But two of these rules made possible altogether new kinds of lawsuits.

Suppose that a giant corporation has bilked the public of millions in overcharges. In the conventional private litigation model, a consumer litigious enough to sue for the small individual overcharge could do so only in small claims court. No lawyer would take the case; one-third of an overcharge even as large as \$75 still amounts to \$25, or about ten minutes of a trial lawyer's time. Meanwhile, the \$75 damages awarded to the plaintiff will fail to deter the corporation from further wrongful conduct, or to vindicate the public interest in fair dealing in the national marketplace.

But after the 1966 class action for damages became available, and given the 1961 *Button* case, there was an alternative. In the new litigation model, counsel would search public records and conduct investigations. Learning that illegal overcharges had been made, counsel could search out a consumer, somehow persuade that consumer to lend its name to a lawsuit in which it could have only the most minimal interest,³ and file on its behalf and on behalf of all those similarly situated a modern federal class action for damages. One-third of three million is, after all, a million. The corporation would be deterred, the public interest vindicated, and counsel made rich. The modern consumer class action was born.

These giant litigations, "Frankenstein monsters parading as class actions,"⁴ lumbered almost unmanageably through the federal courts, and a vigorous "class action" or "public interest" bar sprang up to realize the profits. Federal trial judges scrutinized and often themselves set the percentages of the damages funds which were skimmed off the top for counsel. It was also necessary—and was required under the new class action rules—to monitor settlements for abuse. The defendant companies were not overly concerned about the size of plaintiffs' attorneys' fees. But the class suit could leverage exposures to the point

where damages would exceed company assets. That was especially so whenever the allegedly violated statute authorized treble damages, as in the Clayton Act, or some fixed sum as minimum damages per violation, as in the Truth in Lending Act. Under such pressure, quick settlement would often seem to defendants their best strategy. Entrepreneur lawyers, having jockeyed the defendants into this position, could then sell out the interests of the class, together with the public interest in full deterrence, for a quick maximization of profits on investment. But the federal class action for damages had a number of conspicuous successes, and even a few of the state courts began to catch this fever.

The other new federal class action rule authorized suits for injunctions against continuing harms to a class. (The pipeline case fell into this category, and in the next section we will have a look at another example, a civil rights case, when we take up the question of federal court orders against a state agency.)

Now an injunction suit is in one crucial way very like a small consumer claim: it is not very appealing to a trial lawyer, who like everyone else must make a living. By scooping the consumer claim out of small claims court and "making a federal case out of it," the new class action for monetary relief had made the case worth a lawyer's time. But in creating a forum for suits seeking injunctions against group harms, the new rules had done nothing to make such litigation more feasible from a lawyer's point of view; the result of a successful suit could be only a court order, and that buys no shoes. Unless such a litigation were funded by an organization like the NAACP Legal Defense Fund or the ACLU it was unlikely to materialize.

That brings us to the third event. In 1968 the Supreme Court voiced approval⁵ of the practice of ordering losing defendants to pay winning plaintiffs' lawyers in injunction suits. The Court pointed out that in such cases fee shifting might well serve the public interest. Agencies created by Congress to enforce federal rights could not always find time or resources for full enforcement. But given appropriate incentives, private lawyers could be created watchdogs of the public interest: "private attorneys-general."⁶ And under the *Button* case, lawyers were more or less free to ambulance-chase this sort of litigation into existence; by hypothesis, it was group litigation in the public interest.

These separate strands conjoined were the genesis of the explosion of public interest litigation at the close of the sixties. Whether counsel in the role of knights on white horses jostled for first cuts from damages funds, or for fee awards to be paid by losing defendants, federal judges for the most part recognized that public interest lawyers were private attorneys-general, and rewarded them generously in the public interest.⁷

The federal class action for damages was done to death by the Burger Court in 1974, in *Eisen v. Carlisle & Jacquelin*. A lawyer's investment in class action litigation is always considerable; it is counsel, not the nominal client, that risks the expense of pretrial maneuvers; and making the litigation costly is a corporate defendant's usual strategy. Yet the nature of these suits is such that expensive investigation in the corporate files must be undertaken. Nevertheless the game remained worth the candle until in *Eisen* the Supreme Court upped the ante for entrepreneur counsel to the point of rendering prohibitive an investment in class litigation. The Court held that in a class action for damages each and every ascertainable member of the class must be notified of the pendency of the ac-

tion, and that the named plaintiff must bear the expense of notice.⁸ In *Eisen*, the named plaintiff had \$70 at stake, and the estimated cost of notice was in six figures.⁹

Similarly, the Alaska pipeline case was the intended coup de grâce for the federal injunction suit. For there the Court held federal courts powerless to shift fees in injunction suits—powerless, that is, unless Congress authorized the practice, as it has for example in certain antitrust cases. It will be noted that the pipeline ruling was not about the *rights* of defendants, but only about the *powers* of federal courts. Thus, of course, both Congress and the state courts remain free under the pipeline case to provide for fee shifting.

I doubt that the Court was motivated by a perceived need for fairness to defendants. The defendants protected by the ruling *ex hypothesi* will have been found in violation of national law. Then, too, their conduct is likely to have injured not only the named plaintiff, but a broad segment of the public. These defendants in the nature of things will tend to be large corporations or governmental agencies, able to spread these costs to the public. In the ordinary injunction case, moreover, these defendants will have no damages to pay; their duty will be to obey a court order.

I also doubt that the Court was motivated by special antipathy to the sort of plaintiffs upon whom the case has had the heaviest impact: those individual litigants with a grievance great enough to impel them to seek out counsel, on the old litigation model. The least justifiable such impact was on the individual civil rights complainant unable to afford the costs of litigation and without access to group funds. Congress had already authorized fee shifting in school desegregation and job and housing discrimination cases, and in 1976 Congress legislatively repealed the pipeline case in a spectrum of other civil rights cases.¹⁰ The largest class of civil rights injunction suits was not omitted from the legislation, suits (like that discussed in the following section) challenging the actions of state officials under the old Civil Rights Act.

The shock waves generated by *Alyeska* were also felt, of course, in the treasuries of public interest groups, from the NAACP through the firms providing legal services on grant money to the community organizations using the pro bono services of lawyer members. All have felt the loss of the potential source of help.

But hardest struck has been our friend, the entrepreneur, the private attorney general. Here appears to have been the Court's real target, in both *Eisen* and the pipeline case. These shots have found their mark, and the golden age of federal public interest litigation is over. The public interest in wider enforcement of national policy has been the unfortunate additional casualty.

I would not too quickly attribute such rulings to the evolving political outlook of the justices. An equally likely explanation for the pipeline case, and for the case following, lies in the justices' concern about crowded federal dockets. Chief Justice Burger is foremost among the distinguished authorities warning that the federal judicial system is approaching collapse, and that the explosion of litigation cannot be managed.¹¹ If Congress will not provide more federal courts and judges, the unspoken conclusion is that the Court will have to cut down on access to federal justice.¹² The pipeline case shows on just how broad a front the Burger Court's assault on federal trial court jurisdiction is being waged.

2. "Principles of Federalism" and the Unwinning of the Civil War

The 1976 case of *Rizzo v. Goode* is remarkable chiefly for a pronouncement by the Burger Court which undoubtedly represents the most extreme position it has yet taken on federal judicial impotence.

The grant of certiorari surprised observers. A federal trial judge in Philadelphia had ordered high officials of that city, including the mayor and police commissioner, to establish citizen complaint procedures in the police department. The order was based on proof at two long trials showing recurrent incidents in which the police had abused the rights of citizens, particularly of minority citizens; of failure on the part of the defendant officials to supervise police misconduct; and of official unresponsiveness to repeated citizen complaints. But the trial judge had rejected those of the plaintiffs' requests which demanded that he appoint a receiver to run the Philadelphia police department, and that he regulate by decree the way in which the police did their jobs. He had granted the order for complaint procedures in the hope that with time improved complaint procedures would ameliorate police conduct. A unanimous Court of Appeals had affirmed. But the Supreme Court capped its unexpected grant of certiorari by reversing. Among other things, the Court held that the trial judge's decree had offended "principles of federalism."

Viewed narrowly, as a curb on the flights of judicial remedial imagination, *Rizzo* simply will not square with what we know federal trial judges can do. If in a proper case they could order the police to institute procedures for hiring and firing personnel, why should they lack power in this case to order the police to institute complaint and disciplinary procedures for the same personnel? Of course the greater power might be held not to include the lesser in a particular case; but although *Rizzo* bristles with opportunities for justifying such a ruling,¹³ Mr. Justice Rehnquist, writing for the five-man majority, seems to go out of his way to isolate the federalism issue and make it stand alone in striking down the decree.

My difficulty with "principles of federalism" as a rationale for the result is that such a rationale could do the same job in every case; that it would justify overruling that central but little-read decision in which the Warren Court created the modern federal injunction against a state, the second opinion in *Brown v. Board of Education*.

It will be remembered that in the first *Brown* decision in 1954, the Court at last struck down the states' power to segregate schoolchildren by race. But the rights thus generated were without precedent, and the Court ordered further briefs and argument on the way in which those rights could be enforced if need be. The following year it handed down *Brown II*.

Reading *Brown II* at a remove of a generation, one is struck by the Court's quiet accuracy and prescriptive power in outlining the permanent pattern of federal civil rights litigation. Failing voluntary compliance, desegregation of the public schools in our country was to be enforced through the filing of lawsuits against school boards in the federal trial courts. The trial judges would retain jurisdiction of these suits and continue to supervise the local desegregation process for its duration. They were to consider all the attendant difficulties, and then to fashion their decrees sensitively but imaginatively, if possible using plans

negotiated between the parties. They were authorized to draw upon the affirmative injunctive powers they had exercised until then only in the framing of antitrust decrees; powers to restructure and then regulate whole industries would now be used to restructure and then regulate whole school systems and their populations.

So *Brown II* is in a strict sense the immediate source of that affirmative remedial power, not only in school desegregation cases, but in all civil rights cases, which continues to astonish the country. It seems to stand on the landscape of our current jurisprudence at the polar extreme from the position occupied there by "principles of federalism." It is surprising, then, that although the Burger Court has launched a powerful attack on *Brown II*, significantly limiting its force, until *Rizzo* federalism has not been the weapon. Rather, the Court has insisted on a punishment-to-fit-the-crime approach, limiting a federal injunction to the violation proved. And in cases after *Rizzo*, the Court has finessed opportunities to turn "principles of federalism" into a doctrinal limit on the scope of federal injunctions. At the close of this past Term, the Court approved a federal court order in the Detroit desegregation case which by mandating expensive remedial programs had created local fiscal exigencies. Yet, over the "principles of federalism" argument, the Court unanimously approved the Detroit decree.

It may be appropriate, then, to view *Rizzo* more broadly, as an attempt to confine not simply the *scope* of federal injunctions, but their *availability*. In this view, "principles of federalism" would be intended to establish a doctrinal limit on access to federal courts. Yet here, too, there is the same difficulty. "Principles of federalism" could do the same job in every case. It could shut down federal civil rights jurisdiction whenever what is sought is a court order against a state official. It would justify overruling the panoply of Warren Court decisions which opened federal courthouse doors to such cases.

It is no exaggeration of the achievements of the Warren Court to say that in civil rights cases against state officials the Warren Court did open the door to federal justice. It is not generally emphasized that much of the significant work of the Warren Court in fact took the form of simple door-opening rulings. From a civil rights lawyer's point of view the really great cases of the recent past may well have been these sorts of cases. *Baker v. Carr* (1962), of course, in striking down the malapportionment of a state legislature, was preeminently a colossus of constitutional interpretation; but that case also took a great issue of the day and authorized its adjudication in federal courts, despite the ancient barrier which had prevented federal litigation of such "political questions." Virtually all our state legislatures were malapportioned at the time, and federal court-ordered reapportionment, under *Brown II*, was the contemplated remedy. *Fay v. Noia* (1963) hacked away an underbrush of barriers, partly rooted in the concerns of federalism, which had stood between state prisoners and federal judicial scrutiny of the legality of their detentions. *Monroe v. Pape* (1961) cut a swathe through a similar thicket that had blocked civil rights challenges to state officials. These watershed events, with *Brown II*, are the link between Warren Court activism and the activism of ordinary federal trial judges in our own time.

The Burger Court has striven in direct and indirect ways to attack those cases. The pipeline case, of course, was a prodigious assault, its impact on civil rights injunction suits cushioned only up to a point by Congress. A heavy new

burden of proof of discriminatory intent has seriously impaired the usefulness of *Brown*, *Baker*, and indeed most civil rights injunction suits in federal courts. *Fay v. Noia* has met with particularly rough treatment, the Court ruling last year that Fourth Amendment claims of state prisoners could not be heard in federal habeas corpus, and that in any event some of the old barriers to state prisoners' claims must be reinstalled. New immunities defenses have crippled the *Monroe v. Pape* civil rights action for damages. Older devices, like the formerly strict requirement of "standing to sue" in federal courts, have been dusted off for new service. And, as I mentioned, the Court has limited the injunctive power staked out in *Brown II* to the violation proved, in turn a function of the new "intent" requirement.¹⁴

Much of the Burger Court's door-closing has been in the avowed service of our federalism; *Rizzo* is one instance. But the Court has never set down standards by which we can try to determine in a given case whether the concerns of federalism outweigh the concerns underlying the Warren Court legacy. What is the test? Where does federalism end and federal enforcement begin? In *Rizzo* we need very much to know what the Court means by "principles of federalism," so that we can determine which civil rights injunction suits remain permissible and which do not. But the opinion, although emphatic, in the end suggests only a vague concern for the dignity and autonomy of the state—something of a feat, considering that Pennsylvania itself as *amicus curiae* had supported the trial judge's decree. So *Rizzo* rests mysteriously in the reports, at once a sign and a danger, like a loaded revolver tucked carefully away in a bureau drawer.

Whatever limitations and qualifications the facts of *Rizzo* suggest, it is now widely believed that under *Rizzo* police misconduct cases are "out." School desegregation cases—after a long period of breath-holding—are now seen despite *Rizzo* to be "in." Such results seem simply *ad hoc*.

Yet our federalism is important to us. A little reflection may enable us usefully to put into words some of its more powerful appeals. It will remain then only to ask whether any of these concerns seem compromised *a priori* by federal injunctive power against state officials.

Why should the work of the highest state officials and judges be reviewed, undone, prohibited, regulated, not by the state courts, not by the great national tribunal, but in the most undignified way, by ordinary federal trial judges? Why should the delegation of essentially local governmental tasks to local agencies—a virtue of our federalism—be frustrated, and the discretion of local authorities impeded as they work to deliver vital governmental services? Why should unelected federal judges with life tenure, answerable to no one, be able to govern the states, displacing duly elected state officials? Why allow a federal judge, representative of no electoral constituency, virtually to levy and appropriate taxes? A refusal to permit these inroads on federalism would mean the relinquishment only of a forum for certain lawsuits, not of underlying legal and constitutional rights. Since the state courts can enforce the Constitution, and under the Supremacy Clause are bound to do so, why should not the states be permitted to correct their own wrongdoing, always under the supervision of the Supreme Court? Certainly such arrangements would accord with the original understandings. We feel that the states would never have ratified the original compact had they believed that they could be governed by decrees of federal

judges. The Eleventh Amendment, giving the states sovereign immunity from suit in federal courts, seems to embody this early understanding.

In bringing renewed prominence to these concerns of federalism, the Burger Court may seem to many to be returning to a judicial federalism more in keeping with our institutions and our history than the judicial federalism ushered in by the Warren Court. In this view the Warren Court's door-opening has been, on the whole, a mistake.

But such views somewhat overstate the present Court's aims and the previous Court's role, failing to take into account, as the Court must, great events in the history of our institutions. The Warren Court, of course, did not confer civil rights jurisdiction on federal courts. Only Congress could do that, and it had already done so, in the Civil Rights Act. After the Civil War was fought and won, Congress perceived the ante bellum institutions of judicial federalism to be utterly inappropriate to the tasks that confronted the country. The great problem for the radical Reconstruction Congresses was to impose national standards upon the states, to establish the rule of national law in this union. The Ku Klux Klan rode "unwhipped of justice" while freedmen and carpetbaggers looked to local authorities for protection and found none; looked to local courts for vindication and had none. Federal civil rights jurisdiction was created then.¹⁵

It is difficult to say that there remains today no further need for that jurisdiction. On the contrary, today there is broad consensus¹⁶ among scholars, judges, and lawyers that the stand taken by Congress after the Civil War was in fact essential to our federalism. It is now widely understood that there must be power in federal courts to hear civil rights lawsuits against the states. The fundamental rights which that greatest of Reconstruction achievements, the Fourteenth Amendment, guaranteed to individuals *as against the states* for the first time, will never seem secure in the absence of a neutral forum for their adjudication. Thus, even the Eleventh Amendment, giving sovereign immunity to the states in federal courts, had to be subordinated to the goals of the Fourteenth Amendment. And this was done by the Supreme Court, not in the Warren Court era, but in 1908.¹⁷

In reflecting on the part played by the Warren Court, there is a sense in which its role, though decisive, was not at all on a heroic scale. In giving broad access to federal civil rights jurisdiction, the Warren Court was simply thrusting aside obstacles to federal justice erected by the Supreme Court in other days. But those obstacles accounted for the tragic ineffectiveness of the Fourteenth Amendment and the Civil Rights Act until our own time. What gave these technical moves their grandeur was that they helped make possible the Court's visible struggle in our lifetime to fulfill the promise of the Fourteenth Amendment and to give us back our national ideals.

That the Burger Court in fact has not returned us to the status quo ante is a measure of the consensus the Warren Court legacy still commands. The Court will not return us to a judicial federalism the Civil War was fought in part to restructure, and which time has taught us is inconsistent with the preservation of national standards in a federal union.

Of course there are principles of federalism which must temper the exercise of federal injunctive power. For this purpose federal judges have broad powers

to invite the participation of affected parties, and to shape their decrees to accommodate such concerns. But little in our federalism should require deference to the freedom of state officials to violate or refuse to enforce national law without federal interference.

Rizzo, then, is not only a shot in the dark, but a misfire. However the case ought to have been decided, the "federalism" rationale, unique in that context and a sport in our law, ought never to have been advanced.

As I write this the controversy between the Philadelphia police and minority groups has flared up once more. At the time they filed the federal cases, the plaintiffs had correctly perceived that a class action for an injunction would not have worked in Pennsylvania state courts. But Goode brought an individual action for damages there, and this was ultimately settled for a modest sum. As for the federal injunction suit, the police never did institute grievance procedures along the lines mapped out by the trial judge. The minority plaintiffs moved to obtain their attorneys' fees, but that effort collapsed under the double barrage of the pipeline case and their own defeat in the Supreme Court. The litigation goes on: the city is now seeking to recover from the plaintiffs its costs in defending the suit. Meanwhile, a series of articles in the *Inquirer* appears to have sparked fresh concern, and a federal grand jury is now sitting in Philadelphia to investigate continuing charges of police brutality. Two hundred members of the Philadelphia police force have paraded to demonstrate their opposition to these charges. Although it is most unlikely that the remedy granted by the federal trial judge would have produced any dramatic result, it seems as unclear now as it did when the Supreme Court handed down the *Rizzo* opinion how federalism was served by aborting his attempt to adjust this controversy.

In this pair of brief studies of Supreme Court cases, both prosaically dealing with remedial power rather than legal rights, we have traced to the Warren Court some of the sources of contemporary federal judicial power, and have seen some of the ways in which the present Court is limiting access to that power.

The emerging pattern of judicial federalism will be one of decreasing access to the federal trial courts for the enforcement of federal rights, and increasing pressure on the state courts. For a number of reasons that pressure may well fail to reallocate the jurisdiction of public interest litigation and civil rights cases to our state courts in anything like the degree which the current Court seems to anticipate.

What the Court may have to face up to here is a crisis of confidence, not in the Supreme Court, but in the county courts of our states.

The underpinning of the argument that jurisdiction of federal claims ought increasingly to be confided to the state courts is the ultimate benign stewardship of the Supreme Court. But the Supreme Court today cannot possibly protect all federal claims dealt with adversely in the state courts. These days the Court takes jurisdiction in less than 15 percent of all cases petitioning for review. Yet even if the state courts without such supervision would zealously effectuate federal claims asserted there, they can no longer as a practical matter do so. Today federal courts have moved far ahead of state courts in development of

remedial power. Federal courts have broad, massive, affirmative injunctive powers which many of our state courts have long held themselves incapable of exercising; can consolidate multistate litigation; can hear suits on behalf of nationwide classes, and can decree nationwide relief. Thus, to deny access to federal courts today may be to deny, over a broad range of claims, any effective remedy to those aggrieved. The suitors denied federal injunctive relief because of "principles of federalism," or debarred from federal adjudication by the indirect expedient found in the pipeline case, will have been denied any day in court—unless they can bring their cases in one of those few state courts that today are ready and able to manage what may well be essentially federal litigation.

The argument is being made that the states can, and should, ready themselves to take up these important tasks.¹⁸ The improbability of securing Supreme Court review is seen to be an advantage by advocates of the rights of minorities and consumers today; it is even suggested that the states can triumphantly avoid review in a conservative Supreme Court by grounding their decisions on state law. But the long road the states would have to travel to do the whole job is not generally perceived. Ideally, their courts will have to begin to allow fee shifting; to hear modern class actions embracing nonresident members of the class; and to exercise not only the affirmative injunctive power but in addition the unitary administration¹⁹ these cases require. The states need to draft, promote, and adopt uniform legislation enabling their courts to consolidate duplicative litigation and to require and simplify enforcement of each others' decrees.

But even if the states could meet these challenges, equipping themselves superbly and adjudicating civil rights and other public interest cases with uniform and sympathetic concern for the national interest, it is hard to see what we gain by denials of access to the optional federal forum provided by Congress.

We lose a great deal. At a minimum we lose the appearance of fairness. Principles of federalism cannot really require that the minority citizens in cases like *Rizzo* be forced to sue the mayor and police commissioner in the local county courts. And it is too late in our history to indulge the presumption that those courts will always be vigorous in guarding the interests of such plaintiffs as the environmentalists in the pipeline case in the teeth of extremely powerful local opposition. Certainly in a case raising racial issues, or even one in which one of the parties may be a member of a minority race, the records of the state courts in our very recent past make it inappropriate to deny to these parties access to an alternative federal forum when Congress has provided one. And whatever value one may place upon the Supreme Court's new "principles of federalism," in civil rights cases surely Congress has weighed those principles, struck the balance, and found a concurrent jurisdiction needful. Federal courts have no basis for abdicating this jurisdictional responsibility.

If we face up to these realities, we perceive that cases like *Rizzo* and the pipeline case will not so much shift litigation from the federal to the state courts as discourage it altogether. Then we lose not only remedies, of course, but rights. And thus the supreme national tribunal cannot continue actively to discourage civil rights and other federal public interest litigation without taking real toll of our national ideals.

That being so, the judicial federalism emerging from the Court's current course rests on assumptions that are—regrettably—much too brave, and places at risk stakes that are much too high.

REFERENCES

¹*Alyeska Pipeline Service Co. v. The Wilderness Society* (1975).

²Very briefly, champerty is a lawyer's buying up an interest in the outcome of a lawsuit. Maintenance is a lawyer's investing in the outcome of a suit by payments to a client; however, such payments are unavoidable in some personal injury litigation where a contingency fee is all the client can afford, and there are medical or other expenses to be covered in the interim. Barratry is a lawyer's solicitation of cases.

³Perhaps for this reason named representatives in large consumer class actions frequently seem to be relatives or associates of counsel.

⁴I paraphrase Judge Lumbard's *cri de coeur* in the second Court of Appeals opinion in the *Eisen* litigation, discussed in the text shortly.

⁵*Newman v. Piggie Park Enterprises, Inc.* The scope of *Piggie Park* remained unclear, however, because an act of Congress there conferred discretion on the trial judge to make the fee award. What was useful about *Piggie Park* in other cases was its language and rationale.

⁶The phrase seems to appear for the first time in a 1943 federal appeals court opinion by Judge Frank.

⁷These days, in the wake of an influential Court of Appeals decision, lower federal courts and state courts active in such litigation compute fees on the basis of time, skill, and risk. The large percentage fees of the past are infrequent. Unfortunately, the result makes less sense in this context than might appear. These suits would not have been brought but for counsel. The absentees have too little at stake to have filed suit, and do not care whether or not they recover. The purpose of the suit is deterrent, not compensatory; and the purpose of the large percentage fee is to place a real premium on such litigation.

⁸I overstate this somewhat. Consumer class actions in which the absentees are unascertainable would be available after *Eisen*, because notice to these absentees could be provided relatively cheaply by publication. However, the Court all but eliminated such class actions in the spring of 1977, holding that retail consumers could not sue manufacturers under the antitrust laws, until then the chief vehicle for federal consumer class actions.

⁹Here, too, the result is untenable. No consideration of fairness requires notice to absentees who by hypothesis have so little at stake that individual suits would not have been brought. They simply have nothing to lose. Absentees with extraordinary interest in the subject of the litigation under these circumstances would not be bound anyway by an adverse ruling. The federal court rule's mandatory notice requirement should have been judicially modified, especially in view of the fact that the Supreme Court itself had ruled thirty years before that in a class action adequacy of representation was sufficient to bind the absentees to a judgment.

¹⁰Clumsily, Congress chronically authorizes fees to prevailing parties rather than plaintiffs. The Supreme Court has recently agreed to decide in an employment discrimination case whether a federal trial judge under such a provision can actually order losing plaintiffs to pay winning defendants' fees. Because such a practice would undercut the legislative intent to encourage private enforcement in such cases, the lower courts have usually treated such provisions as providing fees for winning plaintiffs only.

¹¹This is the recurrent theme of the Chief Justice's annual State of the Judiciary Addresses. See H. Friendly, *Federal Jurisdiction: A General View* (New York and London: Columbia University Press, 1973), Part II. Civil filings in the federal trial courts have doubled since 1969.

¹²See, e.g., 123 Cong. Rec. S95, 201-205 (daily ed., Jan. 10, 1977) (remarks of Sen Mathias); Statement, Board of Governors, Society of American Law Teachers (Oct. 9, 1976); see also Lewis, "The Doors of Justice," *New York Times* (Mar. 29, 1977), p. 29.

¹³The plaintiffs failed to show that the named defendants intended to violate their constitutional rights, and the patrolling officers actually responsible for trespassory invasions of their rights were not joined as defendants. In any event, *Rizzo* concerned police misconduct, which the Chief Justice had recently described as virtually unjudicable in a federal injunction suit; and the decree set up a quasi-judicial remedy; the Court has ruled that federal courts may not regulate the general conduct of state tribunals. See *O'Shea v. Littleton* (1974).

¹⁴For example, if intentional discrimination has been proved in one school district only, a federal court now lacks power to order busing of school children between that district and a second one not shown to lie within the scope of the intentional violation.

¹⁵(1871). Federal jurisdiction to grant habeas corpus to state prisoners was conferred in 1867; and, in a parting shot, general jurisdiction over all cases arising under federal law was conferred in

1875. With the Fourteenth Amendment (1868), these achievements of Reconstruction were intended to shift judicial power over cases arising under federal law from the state courts to the federal, and in particular, to authorize federal lawsuits against state officials.

¹⁶Judge Friendly, in his book cited at note 11, seems to recognize this; see p. 75. See also C. Wright, *Law of Federal Courts* (3rd ed., St. Paul, Minn.: West, 1976), pp. 208–211.

¹⁷In the great case of *Ex parte Young*. *Young*, however, accomplished this result at the behest of railroad interests seeking relief from allegedly confiscatory rates. The case was brought in the general jurisdiction over federal questions, not, of course, in the civil rights jurisdiction.

¹⁸Brennan, "State Constitutions and the Protection of Individual Rights," 90 *Harv. L. Rev.* 489 (1977).

¹⁹In many states trial judges are assigned not to cases, but to sessions, and frequently ride circuit among the various counties.