

Review Essay

Telling Government What's Right

Paul R. Dimond*

*Suing Government*¹ offers a carefully argued and provocative analysis of official wrongs and citizen remedies. Peter Schuck surveys the field from two perspectives; private tort law with the goal of promoting compensation of victims, and from that of organization theory, with the aim of modifying illegal behavior of government personnel. From these vantage points, Schuck identifies several problem areas on the contemporary legal landscape.

First, current immunity doctrine, although designed both to promote vigorous decision-making by officials and to protect state treasuries, is incompatible with the need to compensate victims of official wrong doing.² Second, personal damages against officials are ineffective in correcting wrongdoing by government personnel; such damage awards merely encourage abdication of official responsibility by making inaction less risky than action.³ Injunctions, particularly structural injunctions, generally are inadequate to alter bureaucratic behavior and inappropriate for securing governmental reform.⁴

Based on these findings, Schuck proposes a fundamental change in judicial imposition of remedies for governmental wrongs. First, he proposes a system of enterprise liability to compensate victims for official wrong-doing: Damages would be assessed against the budgetary unit of government with the most direct control over the wrong, and not against specific officials.⁵ Second, he advocates use of internal disciplinary controls to change officials' behavior.⁶ Fi-

* B.A. Amherst College, 1966, J.D. University of Michigan Law School 1969; Professor of Law, Wayne State University (on leave 1984-85).

1. *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS*. By Peter Schuck. *New Haven: Yale University Press*, 1983. Pp. x, 225. \$25.00.

2. P. SCHUCK, *SUING GOVERNMENT* at 82-121 (hereinafter cited by page number only).

3. pp. 55-59.

4. pp. 147-181.

5. pp. 125-146.

6. pp. 100-146.

nally, he urges judges to proceed with extreme caution in issuing any form of injunctive relief, saving the structural injunction for the rarest circumstances and issued then only in the form of general guidelines and not detailed prescriptions.⁷ Such sweeping reform of the remedial landscape, Schuck suggests, is best effected by legislatures, primarily Congress, rather than the courts.⁸

Two kinds of questions arise from Schuck's analysis. Part I of this Review Essay considers issues that emerge within the analytic framework of private tort law and organizational theory chosen by Schuck. Part II discusses issues that arise from Schuck's failure to consider the broader perspectives of public law and public values. By paying little heed to the role courts can play in shaping and giving voice to widely held values (even in cases where courts are not well suited to realize those values), Schuck deprives his proposed reforms of a crucial legitimating force. The value of technical virtue, if not coupled with some declaration of public values, cannot reshape the realities of the relations between individual and state in an advanced bureaucracy.

I. *Issues Emerging Within the Perspective of Private Tort Law and Organizational Theory*

Even if one wholeheartedly accepts the twin perspectives of private tort law and organizational theory as the proper ones for approaching the subject, one can question Schuck's analyses and conclusions. The forms of Schuck's arguments are too easily manipulated by those seeking to implement value choices that are not (and need not be) stated within Schuck's framework. Indeed, very similar analyses could lead to conclusions that he would find distressing. For example, the claim that substituting enterprise liability for individual liability would enhance the rigor of bureaucratic decision-making loses much of its force when we realize that rule-makers (be they courts or legislatures) could adopt Schuck's views on the inappropriateness of personal liability but reject his views on governmental liability. It seems quite plausible that, at least in particular cases, a rule-maker might conclude that the cost to the states of establishing disciplinary procedures simply outweighed the potential for individual harm. This conclusion, coupled with an acceptance of Schuck's argument that the threat of personal liability leads to official inaction would leave us with a system of state offi-

7. pp. 147-196.

8. pp. 196-198.

Telling Government What's Right

cially free to act vigorously to violate people's rights and states immune from compensating the victims of such official abuse.

Similarly, Schuck's suggestion that internal disciplinary and management controls could be instituted that would be more effective than injunctions in transforming official behavior is at least as debatable. A governmental entity might well choose to continue the wrongful conduct, and to pay the price of any damage awards that would issue from local juries, but refuse to impose any internal disciplinary controls or to reform the illegal behavior of its officers. In the absence of some form of judicial injunction, such a policy would come cheaply if jurors tended to favor the specific wrong at issue.

I am also not persuaded that the goal of promoting vigorous decision-making compels us to relieve individual officials of personal liability in *all* cases, particularly when the harm to the citizen is intentional. Although the governmental unit is best suited to compensate the victim of official wrong, that victim should be able to seek punitive damages against officials in appropriate cases.⁹ At some point protecting individual officials from all damage awards conjures up images of a faceless bureaucracy, where some "Big Brother" may bear ultimate responsibility but individual officers go nameless and blameless. We want to discourage the vigorous violation of rights, even while encouraging vigorous decision-making.

Finally, many of Schuck's challenges to the decision-making capacity of federal courts are questionable. For example, Schuck argues that courts can deal with "adjudicative" but not "social" facts.¹⁰ He claims that courts cannot communicate with governmental officials, bureaucrats, and the people as well as other institutions can.¹¹ He argues that there is too large a factual "chasm" between the violation proven and the remedy ordered by courts.¹² Although

9. *Cf. Smith v. Wade*, 103 S. Ct. 1625, 1637 (1983) ("reckless or callous disregard [by a government official of another person's] rights, as well as intentional violations of federal law, should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages.")

10. Pp. 156-158. *But see Reynolds v. Sims*, 377 U.S. 533, 562-68 (1964) (outlining social consequences of vote dilution); *Brown v. Board of Education*, 347 U.S. 483, 493-95 (1954) (rejecting systematic use of segregation to humiliate blacks); and *Strauder v. West Virginia*, 100 U.S. 303, 308-10 (1880) (discussing prejudice to black defendants caused by exclusion of blacks from juries).

11. pp. 161-63.

12. p. 156. *But see Brown v. Board of Education*, 349 U.S. 294 (1955) (refusing to issue order mandating immediate remedy of violation against even named plaintiffs). Indeed, the Burger Court's most surrealistic jurisprudential adventures have arisen when attempting to limit the concept of the underlying violation to the incremental extent to which particular defendants exacerbate underlying conditions in any community. *See, e.g., Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977).

each of these propositions may have some merit in some types of cases, they all seem overstated to add support to his particular proposals for restructuring remedies.¹³ Given the scope of Schuck's analysis and his sweeping proposal for reform of the remedial structure of redressing official deprivation of citizen rights, these are only "minor quibbles."¹⁴ If the legal, political and social landscape of today and tomorrow were limited to private tort law and bureaucratic organization, Schuck's book would be due great acclaim as a persuasive proposal for comprehensive reform in the way we think about personal rights and remedying official wrongs.

II. *Issues arising From the Perspective of Public Law and Public Values*

The landscape, however, is not so limited. In another review, Cass Sunstein has pointed out the shift from private to public conceptions of tort law in an age of affirmative governmental responsibility.¹⁵ This development provides a third, and perhaps more cogent, perspective from which suits against government should be evaluated. This perspective demands careful attention in considering the appropriate framework for remedying official wrongs.

Rather than recap Sunstein's exploration of this public law perspective, which serves to justify the propriety of the structural injunction in a broad set of circumstances,¹⁶ let me add a fourth

13. In contrast, Schuck's discussion of the need to avoid detail in structural injunctions and to promote the governmental defendant's exercise of choice in implementing even comprehensive remedy is most inciteful. See pp. 190-192. Such pragmatic rules for understanding the strengths and weaknesses of judicial power need not be prescriptions for default by the courts, even in the most complex and controversial cases. In the Wilmington school case, for example, District Judge Murray Schwartz exercised such restraint in directing state and local defendants to design and implement an effective and equitable metropolitan school desegregation plan. See *Evans v. Buchanan*, 435 F.Supp. 832 (D. Del. 1977), 447 F.Supp. 982 (D. Del. 1978), 447 F.Supp. 1041 (D. Del. 1978), 468 F.Supp. 944 (D. Del. 1978), 512 F.Supp. 839 (D. Del. 1981) *aff'd in part and vacated in part*, 582 F.2d 750 (3rd Cir. 1978). One retrospective analysis suggests that Judge Schwartz's care and caution were critical to the relative efficacy of the remedy in practice. See J. RAFFEL, *THE POLITICS OF SCHOOL DESEGREGATION* (1981). A final irony in this example, however, is that Justice Rehnquist's hostility to the right at issue apparently was blinding: he argued that Judge Schwartz had imposed a "draconian" remedy and treated the State and local school boards like a "railroad in reorganization." See *Delaware Board of Education v. Evans*, 446 U.S. 923, 926 (1980) (Rehnquist, J., dissenting from denial of certiorari). The course of the entire case is discussed in P. DIMOND, *Beyond Busing* 283-339, 347-361, 388-393 (forthcoming 1985).

14. Sunstein, *Judicial Relief and Public Tort Law*, 92 *YALE L.J.* 749, 755-57 (1983). See also, Symposium Issue, 32 *ALA. L. REV.* (1981).

15. Sunstein, *supra* note 14, at 757-58.

16. *Id.* at 759-61. For general discussions of the differences between traditional conceptions of private law adjudication and newer understandings of public law litigation, see Chayes, *The Role of the Judge in Public Law Litigation*, 89 *HARV. L. REV.* 1281 (1976);

Telling Government What's Right

perspective, one emphasizing the transformative power of public values voiced landmark of legislation and judicial decision. The view from this vantage point warns us against the danger of concentrating long and hard on technical questions regarding the implementation of assumed goals, while ignoring critical questions about basic value choices. This perspective has implications both for Schuck's discussion of damages and his treatment of injunctions.

A. *Damages, State Immunity, and State Responsibility*

Consider first the question of state liability for damage awards. Schuck's proposal for governmental liability fails with respect to state violation of federal rights unless courts can award damages against the states. If the states choose not to permit such damage awards in state courts, then the the eleventh amendment doctrine of sovereign immunity, as judicially developed, must be limited by Congress or the Court in order to achieve Schuck's proposal for governmental liability. Although Schuck does criticize current eleventh amendment immunity doctrine,¹⁷ his analysis fails to explore the struggles over the meaning of our federalism that led to the expansion of the eleventh amendment in *Hans v. Louisiana*.¹⁸ Reconstruction had ended on a sorry note with the retrenchment from national power that spawned the Supreme Court's abdication to the doctrine of state sovereignty in a variety of cases.¹⁹ In the following decades, however, the Court proceeded to limit this doctrine in order to permit federal court supervision of state regulation of the economy and capitalist prerogatives.²⁰ *Ex Parte Young*²¹ provided the necessary fiction: State officials act as private persons for purposes of the eleventh amendment when they violate their duties under the fourteenth amendment. They are therefore subject to

Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Fiss, *The Supreme Court, 1978 Term — Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

17. pp. 44-46, 118-119.

18. 134 U.S. 1 (1890) (eleventh amendment bars all suits by private citizens against their own state). By its literal terms the eleventh amendment bars only suits against a state by a citizen of a foreign state. U.S. CONST. amend. XI.

19. See, e.g., *The Slaughterhouse Cases*, 83 U.S. 36 (1873) (upholding state grant of monopoly over slaughterhouses); *United States v. Cruikshank*, 92 U.S. 542 (1875) (dismissing criminal prosecution against state official for civil rights violations); *The Civil Rights Cases*, 109 U.S. 3 (1883) (striking down Civil Rights Act of 1875); and *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding "separate but equal" standard in segregation cases).

20. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating state law establishing limits on length of work day and work week).

21. 209 U.S. 123 (1908).

federal court injunctions enforcing the dictates of the fourteenth amendment.

But should any state which is under a federal constitutional duty not be subject as a state to an individual's suit in federal court for violation of that duty?²² Why, indeed, should Congress be required to issue a clear statement that states are liable as states for such violations before federal courts may issue damage awards against the states if the federal court already has jurisdiction over the entire case?²³ Surely, the legal landscape surrounding the adoption of the eleventh amendment does not provide the answer in the face of the revolution in our federalism that accompanied adoption of the fourteenth amendment and passage of the 1871 Civil Rights Act, the 1875 Civil Rights Act, and the 1875 general federal question jurisdiction statute.²⁴

The Burger Court's decisional rules in *Edelman v. Jordan*,²⁵ *Fitzpatrick v. Bitzer*,²⁶ and *Quern v. Jordan*²⁷ seem at best poor rationalizations to keep the post-Reconstruction Court's doctrine of state sovereignty alive in the face of a quite different constitutional mandate.²⁸ The modern Court did, after all, reject post-Reconstruction

22. *But see* *Alabama v. Pugh*, 438 U.S. 781 (1978) (upholding injunction in prison reform suit but striking State and Board of Corrections as defendants). *Ex Parte Virginia*, 100 U.S. 339, 346-347 (1880) seemed to have a more affirmative vision of State responsibility to meet federal duties imposed by the fourteenth amendment. But, then, the promise of *Strauder v. West Virginia*, 100 U.S. 303, 307-308 (1880), that the Fourteenth Amendment might protect blacks from caste subjugation, soon fell to judicial legalization of Jim Crow. *See Plessy v. Ferguson*, 163 U.S. 537, 550-552 (1896).

23. The difficult issue for the framers of the Reconstruction legislation was not whether the states were liable as states for the violation of citizens' civil rights, but rather how far down the line of state subdivisions (e.g., municipalities, individual officers and private persons) federal law could go in securing federal right in the event of state default. *See Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 *YALE L.J.* 1353 (1964).

24. 16 Stat. 40, 433 (1871 Act); 18 Stat. 335 (1875 Act); 28 U.S.C. 1331 (general federal question statute. *See, e.g., Mitchum v. Foster*, 407 U.S. 225, 238-242 (1972) (describing "the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment . . . The very purpose . . . was to interpose the federal courts between the States and the people, as guardians of the people's federal rights.") *See also* Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 *MICH. L. REV.* 462, 470-471 (1980).

25. 415 U.S. 651 (1974) (federal courts may not order retroactive damage awards against state treasury).

26. 427 U.S. 445 (1976) (Congress may authorize retroactive damage awards under section five of the Fourteenth amendment).

27. 440 U.S. 332 (1979) (federal court may order state to pay for notice of decision to members of plaintiff class but may not authorize retroactive damage awards under 42 U.S.C. Section 1983 absent clear Congressional intent to remove immunity cases).

28. *See, e.g., Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 *COLUMBIA L. REV.* 1889 (1983) (eleventh amendment merely a response to post-revolutionary war debts). The post-Reconstruction vision of state autonomy is also

Telling Government What's Right

doctrines in other areas. For example, in *Jones v. Alfred Mayer Co.*²⁹ and *Brown v. Board of Education*,³⁰ the Warren Court overturned the post-Reconstruction Court's readings of the thirteenth and fourteenth amendments in the *Civil Rights Cases*³¹ and *Plessy v. Ferguson*.³² Indeed, the real puzzle is why the jurisprudence of *Hans v. Louisiana* and the *Ex Parte Young* fiction still so dominates our current thinking about constitutional violations and equitable remedies, as well as state immunity from damage awards.³³

Unless and until the value of state responsibility to meet federal duties supersedes the value of federal court deference to the doctrine of state sovereignty, neither the Congress nor the Court will seriously consider adopting Schuck's proposal of state liability for damages for state violation of citizen rights. Yet Schuck largely ignores the pitched battle being fought within the Burger Court over this very issue.³⁴

evident in the abstention doctrine expounded in *Younger v. Harris*, 401 U.S. 37 (1977); and in the heightened standing requirements for plaintiffs seeking injunctive reformulations of state bureaucratic procedures; see, e.g., *Rizzo v. Goode*, 423 U.S. 362 (1976). The Court has occasionally moved away from this vision. See, e.g., *Milliken v. Bradley*, 433 U.S. 267 (1977) (upholding injunction ordering state to expend additional funds on public education to remedy unlawful segregation). Most recently the Court has evinced an almost complete lack of desire to protect state autonomy from the federal legislative process. See *Garcia v. San Antonio Metro Transit Authority*, 53 U.S.L.W. 4135 (Feb. 19, 1985) *overruling* *National League of Cities v. Usery*, 426 U.S. 833 (1976) (Fair Labor Standards Act may constitutionally be applied to states and their subdivisions).

29. 392 U.S. 409 (1968).

30. 347 U.S. 483 (1954).

31. 109 U.S. 3 (1883).

32. 163 U.S. 537 (1896).

33. Nevertheless, Professor Tribe defends the fiction, *L. TRIBE, AMERICAN CONSTITUTIONAL LAW* 133 (1978), and calls the naming of a state as defendant for violating its duties under the Fourteenth Amendment just a "gross pleading error." *Id.* Unfortunately, the jurisprudential perspective of the *Ex Parte Young* fiction remains focused on the individual wrong and not on the state's responsibility to protect the constitutional rights of citizens.

34. Justice Brennan's challenge in dissent to *Edelman* and his modification for the Court of *Monroe v. Pape*, 365 U.S. 167 (1961) (allowing Section 1983 actions against municipal official only in individual capacity) in *Monell v. Department of Social Services*, 436 U.S. 653 (1978), can be seen as the initial steps along the road to a new understanding of the appropriate legal landscape — a perspective in which government as an enterprise, as well as particular officers, owe duties to all persons. The compromise reached in *Monell*, which subjected cities to liability for violations of 42 U.S.C. § 1983, but only if the wrong-doing amounted to an official policy or custom, can be seen as a cautious move away from the atomistic framework of *Ex Parte Young* and toward a more comprehensive understanding of governmental responsibility. The battle over this framework, however, is directly joined in the assault launched, entirely in dicta, by Rehnquist against Brennan in *Quern*; that assault is carried out under the guise of statutory construction. See 440 U.S. at 348 ("Our cases consistently have required a clearer showing of congressional purpose to abrogate Eleventh Amendment immunity than our Brother BRENNAN's able to marshal.") Given Rehnquist's strong support for state discretion rather than state responsibility, it is hardly surprising that he is the staunchest

My point is not so much that I hold out greater hope than does Schuck (although I do) for judicial reform of the current chaotic pattern of damage remedies that amounts to nothing less than a minefield for citizens seeking redress for governmental wrongs. Rather, my point is that congressional reform will not be forthcoming unless the fundamental issue in our federal system of state responsibility versus state discretion is directly confronted and fully exposed. The perspectives of private tort law and administrative bureaucracy do not shed much light on this issue that is so basic to state liability for damages.

B. *Injunctions, Remedial Limits, and Constitutional Values*

The issue of injunctive relief also raises questions regarding basic value choices. Whether and how a court confronts these choices has strong effects on the process of translating these values into social reality. This is true regardless of the opportunities taken or foregone in any specific case. Three Supreme Court decisions that parade under the guise of remedies—*Giles v. Harris*,³⁵ the second decision in *Brown v. Board of Education* (“*Brown II*”),³⁶ and the first decision in *Milliken v. Bradley* (“*Milliken I*”)³⁷—provide a good illustration of this phenomenon. In *Giles*, plaintiffs complained that Alabama had violated the fifteenth amendment by blocking some 5,000 blacks, who had previously voted, from voting in Montgomery solely because of their race. Justice Holmes addressed the plaintiff’s claims from a private law and institutional perspective similar to that used by Schuck. Wringing his hands over what he assumed was the incapacity of federal courts to enjoin state election machinery, Holmes denied the plaintiff’s request for an injunction on the ground that equity protected only property rights not civil rights and remitted the plaintiff to a damage action in Alabama state courts.³⁸ From this private law perspective Holmes could not even

defender of the atomistic views generated by the *Ex Parte Young* fiction. Ironically enough, the conservative wing of the Burger Court seems, however, quite willing to recognize the *Ex Parte Young* doctrine as a fiction when such a recognition will serve to lessen state responsibility. See *Pennhurst State School & Hospital v. Halderman*, 104 S. Ct. 900, 911 (1984) (eleventh amendment bars federal injunction against state officials based on violations of state law).

35. 189 U.S. 475 (1903).

36. 349 U.S. 249 (1955).

37. 418 U.S. 717 (1974).

38. 189 U.S. at 486-88. Indeed, it is not surprising that Justice Holmes relied on *Hans v. Louisiana* in *Giles*, 189 U.S. at 487-88. ([O]ne of the first questions is what [a federal court] can do to enforce any order that it may make, [The violation here] is alleged to be the conspiracy of the state although the state is not and could not be made a party to the [case]. *Hans v. Louisiana*, 134 U.S. 1. The [Federal] court has no constitu-

Telling Government What's Right

muster a clear declaration of the constitutional wrong inhering in Alabama's disfranchisement of black voters. That the Supreme Court then approved Alabama's denial of damages to the plaintiff for this gross violation of the fifteenth amendment was only a fitting anti-climax.³⁹ Black suffrage, and all that it might have meant for the history of the country in 1903 and since, was the transforming value at issue. Money damages were irrelevant.

Over the past two decades, the Court has posited "one-person, one-vote" as a rule for electing our representatives and prohibited racial exclusion of blacks from all opportunity to win elections.⁴⁰ The relative success of the judicial intrusion into this arena, long deemed the most essential attribute of state sovereignty, provides a counter-example to the hand-wringing of Holmes and Schuck over the efficacy of structural injunctions. More importantly, however, the contrast between these two eras has little to do with the affirmative state, bureaucracy or private tort law. Transforming values were at stake. In one era the Court acted to fuel the move to disfranchise black voters, while in the other the Court acted to end the hegemony of some vested interests controlling elections by opening the process of representative democracy to all citizens on a more equal basis.

In *Brown II*, the Court delayed the admission of the named black plaintiffs to whites-only schools on the express ground that the states would need time to transform their dual system of public education into a non-discriminatory system.⁴¹ From another quasi-private law perspective not dissimilar to that suggested by Schuck, such a trade-off might seem unconscionable. The Court could have issued a quite specific negative injunction to prevent the whites-only schools from obstructing the transfer of the named plaintiffs as the

tional power to control [the state's] action by any direct means. And if we leave the state out of consideration the court has a little practical power to deal with the people of the state in a body.") Schuck's micro-view of implementation problems and the ineffectiveness of injunctions in transforming the behavior of "street-level" bureaucrats seems to share some of this atomistic private law perspective of equity although he would not, of course, limit injunctive relief to remedying deprivations of property rights given today's legal landscape. See pp. 150-198.

39. Compare *Giles v. Teasley*, 193 U.S. 146 (1904) (dismissing appeal of *Giles* plaintiff's action for damages in state court; judgment below was based on adequate state ground) with Dimond, *The Anti-Caste Principle*, 30 WAYNE L. REV. 1, 20 and n. 57 (1983).

40. See generally, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); and *Rogers v. Lodge*, 454 U.S. 811 (1982).

41. 349 U.S. at 300-301. See also Dimond, *supra* note 39, at 25 and n. 90.

Court had previously done in the higher education cases.⁴² From Holmes' private law perspective in *Giles v. Harris*, no equitable remedy would have been forthcoming and plaintiffs would have been limited to damage actions when they wanted to be free from State-imposed segregation.⁴³ But from the perspective of the constitutional value at issue, something more than voluntary transfers and damages was at stake—that something was nothing less than the continued legitimacy of a system of forced racial ghettoization by which the white majority subjugated an entire race to a subordinate caste.⁴⁴

There was, of course, a huge gap between the inchoate right declared in the first *Brown* opinion (“*Brown I*”) and the unarticulated remedy provided in *Brown II*. Yet a transforming constitutional value was given credence. In contrast to *Plessy* and *Giles*, where the Court legitimated segregation and disfranchisement, and thereby fueled the growth of the regime of Jim Crow caste, the bifurcation of the “remedy” in *Brown II* allowed the Court to sanction something akin to an anti-caste principle in *Brown I*.⁴⁵ The “gap” between the

42. See, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950) (ordering black student to be admitted to state law school).

43. Suppose that individual blacks had sought damages for violations of the *Plessy* court's “equality” constraint on Jim Crow separation. How many local juries would have awarded damages? If the legal landscape were dominated by the *Plessy* court's validation of forced racial segregation, we could not even conceive of such awards against officials for implementing the state mandate of forcing blacks into unequal facilities. Even if such damages had been awarded, they would have done nothing to free blacks of the yoke imposed by Jim Crow.

44. See Dimond, *supra* note 39; note 23, at 507-511; Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955).

45. See Dimond, *supra* note 39, at 5 n. 12, 15, and 23-25 and n. 90. Schuck notes the causal “chasm” between the details of structural injunctions and factual findings of any violations, p. 156), criticizes the lack of any “compass” for courts in framing equitable relief while adrift on a “sea of remedial discretion,” p. 175, and argues for a tighter fit between rights and remedies even to the extent of limiting final declarations of rights and wrongs to conform to the difficulties of framing and implementing structural injunctions. p. 176 *et seq.* While Schuck concedes that in rare instances the Court can issue declarations of rights and wrongs that will transform social values, p. 167-68 (citing *Brown* and the Reapportionment Cases), he argues that Courts generally should consider the varied problems of implementing meaningful relief before making a final determination of liability. p. 168 *et seq.* Once again, however, Schuck's thinking on these issues seems limited primarily to the twin perspectives of private law jurisprudence and organizational theories of bureaucratic behavior. The danger is that his understanding of “integrating” hearing on violation and remedy in order to formulate the least restrictive remedy, p. 186-196, may lead judges to legitimate continuing wrong. See, *supra* text accompany notes 34-40.

Perhaps, a richer understanding of these issues could be generated by making the perspectives of public law and transforming values more prominent. In this context, *Brown* and the Reapportionment cases might look more like the paradigm rather than the exception for judicial review by the Supreme Court; thinking on rights and wrongs

Telling Government What's Right

constitutional value first declared in *Brown I* and the refusal to order any specific remedy in *Brown II* at least served to give blacks a moral claim to some entitlement. That claim helped to fuel the Civil Rights Movement, symbolized by Dr. King, that began to transform our society.⁴⁶

The tragedy in all of this for the Burger Court is that its rulings in the segregation cases should have plumbed the deepest public meaning of the constitutional value at issue in *Brown I*. The Court, instead, has reverted to a private law model of equity that seeks to tailor the remedy to fit the nature and scope of the violation; in the process, however, the Court has often trimmed broad violations to fit narrow remedies that offend the majority of the body politic as little as possible. *Milliken I* represented the nadir of this approach.⁴⁷ Faced with the issue whether a complex system of racial ghettoization in community life confined blacks on a caste basis to an expanding blacks-only core surrounded by a receding whites-only ring, a narrow five-person majority just avoided this critical issue. These Justices viewed the case more as a private dispute in which plaintiffs

would be both more honest and comprehensive; gaps between declared rights and general rather than detailed injunctions would be seen more as an institutional necessity (and opportunity) that Courts must honestly bear and forthrightly explain in order to "gain assent", p. 181, quoting A. BICKEL *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 251 (1964); and the Court would not seek to hide behind the fiction that a particular, detailed structural injunction is somehow compelled in order to tailor the remedy to fit the exact contours of some precisely defined violation. From this perspective the risk that a court will avoid or limit ruling on constitutional liability or entitlement because of its perception of remedial difficulties in practice seems at least as great as the risk that a court will so forthrightly and fully declare constitutional right and wrong without any regard for any remedial concerns as to make its violation finding irrelevant. (This concept of judicial review, however, does not necessarily require the Supreme Court to be the "final arbiter" in interpreting all constitutional values. Indeed, the debate concerning tailoring remedies to fit right just ignores a core function of law and the Court, the declaration of rights and wrongs under the Constitution. See P. DIMOND, *supra* note 12, at 395-402; Dimond & Sperling, *Of Cultural Determinism and the Limits of Law*,—MICH. L. REV. — (1985) (forthcoming); Dimond, *An Exploratory Essay on Provisional Review: Toward an Alternative Form of Judicial Review*,—HASTINGS CONST. L.Q. — (1985) (forthcoming).

Perhaps, my basic disagreement with Schuck arises from the different perspectives from which we have personally experienced law — constitutional issues concerning the meaning of discrimination in my case, administrative reform within the context of statutes and the regulatory state in his. Nevertheless, I am not convinced that this difference explains all of our disagreement. For example, a case can be made that detailed structural injunctions are more appropriate in enforcing congressional statutes than in securing constitutional rights, *See* note 10 *supra*, precisely because the courts are enforcing the majority's will in the former and therefore are directly subject to congressional control should there be any disagreement over the rights and remedies, costs and benefits as measured by the courts.

46. This idea is insightfully developed in a student note. Note, *Judicial Right Declaration and Entrenched Discrimination*, 94 YALE L. J. — (forthcoming May 1985).

47. 418 U.S. 717 (1974).

originally pleaded and proved only a violation within the center city and therefore refused to review the broader proof and findings in the trial court because the court of appeals had not addressed this issue.⁴⁸ As a result, the majority was able to proclaim that a Detroit-only violation authorized only a Detroit-only, not an "interdistrict remedy."⁴⁹ The Court thereby sought to absolve white America from responsibility for the ghetto.⁵⁰

The tragedy in all of this for Peter Schuck is that his thoughtful proposals for governmental liability for damages and for caution in ordering too detailed structural remedies have little chance of success if our thinking is limited primarily to private law models and the theory of bureaucratic organization. On that terrain technical argu-

48. Compare *Milliken I*, 418 U.S. at 723, 728 n. 7, 745-746, 752 with H. WILKINSON, FROM *Brown* TO *Bakke*: LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 786-845, 1219-1235 (1974); cf. Dimond *supra* note 39, at 39-41 & note 154.

49. *Milliken I*, 418 U.S. at 737-53. But see *Hills v. Gautreaux*, 425 U.S. 284, 299 (1976); and Dimond, *supra* note 39 at 39-41 and n. 154. Schuck's similar focus on the micro-level of implementation and bureaucratic behavior may also obscure understanding of the constitutional wrong at issue and the problems associated with some school desegregation decrees. See, e.g., pp. 164, 168 (arguing that judicial treatment of Boston school case led to white flight in Boston). Consider, for example, the possibility that the basic wrong at issue in the Boston school case is not the extent and continuing effect within the local school district of particular acts of intentional segregation by Boston school authorities but a much wider-ranging, governmentally fostered and condoned system of racial ghettoization throughout the greater Boston area for which the state bears ultimate responsibility under the Fourteenth Amendment. See, generally, Dimond *supra* note 39. Because the legal landscape of today has been so much shaped by the atomistic views following *Ex Parte Young*, however, the lawyers, the judges, the Boston school officials, the media, the State, the President, the Congress, and Professor Schuck confine their thinking and energies to the acts of Boston school authorities and school segregation within Boston. From this context, the wonders are (a) that there have been so few cases of massive resistance to city-only school desegregation decrees and (b) that "white flight" (i.e., the flight of white persons to virtually all-white suburbs and private schools when a center city desegregates its schools) has not increased more dramatically. Isn't it possible that the lesson of such cases has less to do with the mechanics of structuring injunctions and more to do with how we as a people (and our judges who are supposedly independent fact-finders and interpreters of the meaning of the state duty to afford equal protection of the laws to all persons) think about coming to grips with such basic issues as the meaning of the continuing racial separation in contemporary America?

50. H. WILKINSON, *supra* note 48, at 242; also P. DIMOND, *supra* note 13 at 26-118, 391-402 (forthcoming 1985). Ironically, the court had the opportunity in *Milliken I* to consider *only* the area-wide nature of the violation because the Court of Appeals had already vacated the area-wide remedy contemplated by the district court. *Bradley v. Milliken*, 484 F.2d 215, 251-52 (6th Cir. 1973).

Telling Government What's Right

ments advocating basic reform are simply doomed. The perspectives of public responsibility and transforming national values must be added if Schuck's ideas are to be considered seriously on their actual merits in our time.⁵¹

51. Schuck does not omit consideration of these two additional perspectives. pp. 167-168. My fear, however, is that his emphases on private law and bureaucratic behavior do not fully illuminate the compelling need to reconsider the critical issues of governmental responsibility for damages and the appropriate nature and function of judicially framed declarations and other equitable remedies for structural violations.

