The Hostility of the Burger Court to Mental Health Law Reform Litigation

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The Founding Fathers did not recognize the concept of an activist judiciary.

The Judiciary, from the nature of its functions will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annul or injure them . . . . The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or the wealth of the society; and can take no active resolution whatever.¹

In recent years, many courts (and especially the federal courts) have become the focus for the pursuit of goals of major institutional reform in cases brought by advocates for prisoners, mental patients, students, and others.² These advocates turned to the courts because the legislative and executive branches were unwilling to devote larger shares of scarce resources to improving conditions at custodial institutions.³ Primarily using the Civil Rights Act⁴ as the basis for jurisdiction, advocates throughout the 1960s and 1970s brought many actions seeking institutional reform in the federal courts.⁵ These actions, alleging the existence of unconstitutional conditions sought wide-ranging relief to remedy the unconstitutional conditions.⁶ Frequently, such advocates found federal judges willing to tackle the task of changing institutions.⁷

After determining that constitutional violations existed, federal judges had to confront the issue of what relief was appropriate and necessary. Frequently, judges discovered that once they became involved with the effort to change an institution, a simple injunctive decree would not suffice.⁸ Rather, a broad use of equitable power was necessary to accomplish the goals of upgrading an institution. As Professor Chayes noted, "the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before courts and required the judge's continuing involvement in administration and implementation."⁹ The active role of the courts was justified by the continuing failure of public officials to make changes voluntarily.¹⁰

Central to the development of activism of the federal courts has been an expansion of traditional equitable relief, especially the affirmative injunction.¹¹ Courts have used their power to specify particular requirements rather than simply to declare conditions to be violative of the Constitution and to leave the implementation to public officials.¹²

After determination of liability, law reform cases, unlike the usual civil case, do not simply end. Common to virtually all such cases is retention of jurisdiction by the trial court, which leads to an elaborate relief and im-

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plementation phase of the litigation. This phase generally proves to be much longer and often more significant than the liability phase.

When conditions at an institution are challenged, the response from judges overseeing implementation of change is often an attempt to set constitutionally acceptable standards. "These standards are frequently written in great detail, covering specific requirements on a wide range of issues, such as privacy in bathrooms, the provisions of staff on various work shifts, the use of seclusion, the nature of educational and recreational programs, standards for recordkeeping, and procedures for patient reviews." Where courts have set out constitutionally adequate standards, they have relied on a variety of outside experts to assist in establishing what these standards should be.

In addition to setting out minimally acceptable constitutional standards, judges, as part of their long-term functions in overseeing the operation of public institutions, often have become intimately involved in the operation of the institutions. Judges often have appointed a representative—denominated a master or a monitor—to be involved in the day-to-day functioning of the institution. The two remedies—masters and monitors—traditionally have different purposes. Monitors generally have made recommendations to governmental defendants to make changes in the institutions and have required judicial involvement only when their initiatives have failed. The master, on the other hand, makes recommendations directly to the court and often acts as an arbiter between the parties. When further judicial intervention has been required, some judges have appointed a receiver to run the institution. The elected or appointed authorities are removed and the court-selected individual or group makes management decisions.

All these remedial devices bring a court into daily management of public institutions and thereby into the political fabric of a community. Such involvement raises considerable question whether this is an appropriate function for a court.

Frequently the principal conflict becomes one of funding. The increased judicial oversight of public institutions has meant dramatic increases in the expenditures for such institutions. This impact has been particularly great because courts have rejected legal defenses based on lack of funds. However, the funding role played by judges has been tricky because no court has directly ordered the expenditure of funds and been upheld. The reason is simple: the court may have authority over the executive branch in these lawsuits, but it lacks jurisdiction over legislatures. In most cases, courts have successfully encouraged legislatures to appropriate funds by giving the state the simple choice of providing necessary funding or closing an institution by court order.

One major long-term problem with institutional reform litigation is the extent of court involvement. Will a court really supervise expenditures of funds as long as it takes? The answer seems to be negative. As a rule, courts are willing to remain overseers only until the most egregious situations are
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remedied. Typically, courts have offered to withdraw from cases after some period of direct oversight to facilitate completion of a final decree. Because of docket demands, judges simply cannot oversee an institution forever.

This recognition of the difficulty of long-term judicial supervision of public institutions has led to a retreat from the type of activist judicial oversight of public institutions that typified public law litigation in the 1960s and 1970s. While leadership for the activist phase came primarily from federal district courts in cases involving prisons, mental hospitals, and schools, the principal direction for retreat from activism comes from the Burger Court itself.

The U.S. Supreme Court has developed a consistent policy of deference to state and local governmental administrators and has thereby made more difficult the kind of sweeping law reform or structural litigation described earlier. This deference has been particularly striking in mental health cases. But the Supreme Court's efforts have been principally directed not only at substantive decision making but also at creation of a series of procedural hurdles that makes reaching of the merits in law reform litigation much more difficult. Another major priority of the Burger Court has been recognition of the prerogatives of governmental officials and an unwillingness to second guess them in most situations.

In a series of decisions ranging from a section 1983 action brought to enjoin a pending state criminal proceeding to injunctive suits against local executive officials, the Court has added federalism to equity and comity as standards for determining the availability and scope of federal equitable relief.

The U.S. Supreme Court has expanded concepts of standing and ripeness as well as sovereign immunity and the eleventh amendment to shield local public officials from damages suits and to make more difficult the bringing of law suits designed to create structural reforms. This has been coupled with a clear intention of relying increasingly on the decisions of state courts and the policy judgment of state and local governmental officials. These developments are most visible in Supreme Court decisions limiting federal court intervention into state court proceedings and in the expansion of the standing doctrine. The first issue involved the expansion of the doctrine of *Younger v. Harris* to influence executive as well as judicial action. The *Younger* doctrine drew on the traditional equitable notion that equity would not enjoin a crime, but it assumes the criminal proceedings would proceed fairly in the state court and that federal intervention was improper until the state court had acted.

The impact of *Younger* was to put an end to the previous trend, allowing a broad right of access to the federal courts to challenge criminal proceedings on constitutional grounds. As a result of *Younger* and its progeny, there is a large category of civil rights cases where today federal jurisdiction
will be exercised only by the grace of the particular federal judge. Within the
class of cases, federal jurisdiction for constitutional challenges is not a right,
and the expectation is that it will not be allowed.'36

The expansion of Younger to civil cases has served to eliminate federal
jurisdiction from many institutional reform cases.37 The most striking
eexample of this trend is in Rizzo v. Goode,38 where the U.S. Supreme Court
reversed a decision that ordered broad-based relief to plaintiffs who alleged
that practices of the Philadelphia Police Department discriminated against
minorities. The district court had issued a mandatory injunction requiring
development of policy manuals and civilian review boards. The Supreme
Court chose to reverse the district court decision in the name of equitable
abstention.39 "Rizzo transforms abstention from the question of timing to
something far more substantive."40 The court developed an entirely new set
of standards in Rizzo. After all, here were executive branch officials who
were alleged to be indifferent to the civil rights of the plaintiffs. The impact
of the decision was to entirely deny the plaintiffs a forum by deferring to
officials "whose very imperviousness in the face of civil rights violations by
subordinate police officers alleged to violate constitutional rights . . . ."41 By
denying the plaintiffs any remedies against the mayor and other community
leaders, the Court prevented any broad-based class relief and left the
plaintiffs with only damage remedies against individual police officers who
were brutal. These eliminated the opportunity to reform the Police
Department from the top. Rizzo sends a loud-and-clear signal that the Supreme
Court does not want the federal courts to be specifying large-scale reforms
in public institutions. The contrast from the spirit of reform indicated by
such cases as Wyatt v. Stickney42 could not be more obvious.

The same hostility toward reformist lawsuits is indicated in the Supreme
Court's restrictive interpretations of standing. Traditionally, civil liberties
lawyers have preferred to litigate in the federal courts.43 However, access to
the federal courts is made extremely difficult by decisions that prevent
plaintiffs seeking broad-based relief from gaining the necessary standing to
survive procedural objections to their bringing lawsuits.44 These decisions
have taken federalism and turned it on its head. Rather than providing for a
balance between the state and federal governmental systems, the Supreme
Court's limitation on access to the federal courts and its extreme deference
to state and local governmental officials represents a major departure from
the role of the federal courts as a protector of individual rights.45

The U.S. Supreme Court's reluctance to permit major institutional law
reform measures to proceed is clearly illustrated in its response to efforts to
improve the conditions of mental patients. While there have been major
advances in mental health law, the willingness of the federal courts to order
major structural reforms in institutions has faded. As in other areas, the
lower federal courts have had to change their tune as the result of decisions
of the U.S. Supreme Court.46 The first illustration of this occurred in
O'Connor v. Donaldson,47 a case brought by an elderly man who had been
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housed in a mental hospital for many years even though he was no longer considered dangerous. Although the Supreme Court upheld the damage award to Donaldson, the Court made clear that it was not creating any broad constitutional right to treatment. Rather, the decision was narrowly based and founded on tort principles.47

Three recent decisions illustrate the Supreme Court’s reluctance to permit the federal courts to be a vehicle for major law reform in mental health law. In Pennhurst State School and Hospital v. Halderman,48 the Court reversed a decision that had permitted a broad-based attack on conditions at a Pennsylvania state school for the retarded. The district court, concerned about the rights of habilitation of the residents, had ordered the institution to be closed.49 The Court of Appeals for the Third Circuit had modified the district court’s decision, basing the plaintiffs’ cause of action on an implied right of action in the Developmental Disabilities Act.50 The Supreme Court, however, found that the action could not be maintained. The Court, in a decision by Mr. Justice Rehnquist, found the Developmental Disabilities Act to be no more than a general statement of purposes.

We are persuaded that s6010, which read in the context of other more specific provisions of the Act, does no more than express a congressional preference for certain kinds of treatment. It is simply a general statement of "findings" and, as such, it is too thin a reed to support the right and obligations read into by the court below.51

In its analysis for congressional intent, the Court seems to be applying too rigid a test.52 The Pennhurst plaintiffs needed access to the courts to present their claims that the conditions at the hospital violated constitutional standards. By being denied a jurisdictional basis for their claims, the plaintiffs were left with neither rights nor remedies unless they could bring their constitutional claims under s1983.53 In the case of the Pennhurst plaintiffs, they have turned it to their advantage by finding an alternative theory for court jurisdiction based on state law.54

The Supreme Court’s decision in Pennhurst is consistent with the general trend away from the Court’s permitting the federal courts imposing financial obligations on public institutions to assist a particular group or class.55 As with the other decisions that are ostensibly procedural in nature, the decision in Pennhurst has important substantive considerations. In denying a cause of action, the Court had to be aware that important legal rights of the patients might not be litigated.56 Neither the Court’s suspicions about the ability of a federal court to formulate relief nor its doubts about the ability of the federal judiciary to oversee an institution for the retarded justifies its conservative posture relative to access to federal courts.

In a second case originating from Pennhurst State School and Hospital, the Supreme Court continued its practice of narrowing rights of mental patients. In Youngberg v. Romeo,57 the Court considered the state government’s appeal of a decision that (among other things) recognized a liberty
interest in a program of habilitation to retarded patients. The Plaintiff had brought a 1983 action seeking damages because of physical injuries he had suffered while a patient at Pennhurst. The Plaintiff also had been physically restrained as protection from self-inflicted injury. After an eight-day trial, the jury returned a verdict for the defendants, but the Third Circuit had reversed and remanded for a new trial.

With regard to constitutional issues involving safety and freedom from restraint, the Supreme Court had no difficulty finding for the patients since it had recognized the existence of such rights for prisoners. Romeo’s claim for a constitutional right to habilitation caused the court considerably more difficulty. The Court effectively dodged the issue by determining that Romeo was only seeking “training related to safety and freedom from restraints” rather than a per se constitutional right to habilitation.

Even so, the Court was quick to note that “interference by the federal judiciary with the internal operations of these institutions should be minimized.” While the Court determined that mental patients should have greater rights than inmates of correctional facilities, the Court was unwilling to permit the judiciary to set standards for the institution in a manner that had characterized judicial intervention into mental facilities in an earlier era. As a result, while Romeo is superficially a victory for the patients, it appears to be a victory without substantial meaning. The Court has reiterated its dislike for active judicial involvement that protects patients by setting out necessary constitutionally required standards and has merely recognized the existence of vague unarticulated rights for patients. Romeo ranks as an extremely hollow victory for patients.

The third major decision also illustrates how the Supreme Court has used procedural devices to limit the efforts directed at institutional law reform. In Mills v. Rogers, the Court considered the appeal of a circuit court decision that recognized a constitutional right of mental patients to refuse psychotropic medication. Whether such a constitutional right exists is probably the most controversial issue in forensic psychiatry today except for the insanity defense. The Court could have provided important guidance to the lower courts by determining whether the constitutional right to refuse treatment is a liberty interest protected by the Fourteenth Amendment and, if such a right exists, how it should be implemented. The Boston State case provided the Supreme Court with an extraordinarily detailed record of the benefits and liabilities of psychotropic medications. Nonetheless, the Court declined the opportunity to reach the merits of the case. The Justices’ reasoning for ducking the merits reveals another means for deferring to state institutions, in this case the Massachusetts judiciary. Soon after the Court of Appeals decided that Boston State appeal, the Supreme Judicial Court of Massachusetts issued an opinion that based a constitutional right to refuse psychotropic medication on state common law grounds as well as the U.S. Constitution. This decision recognized a broader right to refuse psychotropic medication than has been recognized by other courts.
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The Supreme Court, following the tradition of deferring to state court decisions based on independent state grounds, declined to reach the merits and instead returned the case to the Court of Appeals for a determination of what the state law is. In so doing, the Court postponed the time when it will determine the scope of the constitutional right to refuse treatment, but it is unlikely the issue will go away. The court in taking the path of least resistance has probably only postponed the time when it will have to decide the issue.

The net impact of these three decisions is that the rights of committed mental patients remain about as they were. The rather clear direction from the Supreme Court is that the federal judiciary should not oversee the operation of institutions and provide the kind of daily intervention some courts previously required. On the other hand, there has not been a denial of rights. Rather, the strict reading of statutes that might provide causes of action, the strict interpretation of pleading requirements, and the strict application of judicial abstention doctrines have all combined to limit the degree of intervention into mental health institutions by federal courts. The substantive impact is harder to gauge because of the absence of clear decisions on the merits. While perhaps no decision is better than a decision denying the existence of constitutional rights, it is an abdication of the Supreme Court's responsibility not to provide the kind of guidance the lower federal courts and public officials need. The abdication of judicial responsibility benefits nobody.

References

1. The Federalist No. 78 (A. Hamilton)

Mental health professionals have been unhappy about the active involvement of the federal courts in institutional decision making. See, for example, Appelbaum: Civil rights litigation and mental health; section 1983. Hospital and Community Psych 32:305, 1981. Lawyers have generally applauded the developments. "It does not seem to be an outrageous abuse of judicial authority for courts to supervise state and local authorities in order to insure that these officials protect the constitutional rights of prisoners, patients, and school children." Eisenberg and Yeazell: The ordinary and the extraordinary in institutional litigation. Harv L Rev 93:405, 1980
5. The history of institutional law reform dates from Brown v. Bd of Education (Brown II), 349 U.S. 294, 300 (1955), where the U.S. Supreme Court fashioned a broad remedy to eliminate segregated schools. "In fashioning and effectuating the decrees, the Court will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. The cases call for the exercise of these traditional attributes of equity power." Brown II at 300


7. Judge Johnson wrote "When such transgressions are properly and formally brought before a court—and increasingly before federal courts—it becomes the responsibility of judiciary to insure that the Constitution and laws of the United States remain, in fact as well as in theory, the supreme law of the land." Johnson: The Constitution and the federal district judge. Tex L Rev 54:903, 905 1970

Judge Friendly echoed this view, "It is hard to conceive a task more appropriate for federal courts than to protect civil rights guaranteed by the constitution against invasion by the states." Friendly H: Federal Jurisdiction: A General View. 90, 1973

The most compelling justification for judicial activism appears in this case from the Virgin Islands. "This Court will not shy away in the face of charges of judicial activism when it acts to protect the fundamental rights of persons protected thereby, when we consent to the disparragement of the constitutional right of anything no matter how unacceptable that person may be in the eyes of society whether affirmatively or through implication by inactions then it becomes easier and easier to compromise these rights in the future when it comes to other classes of persons whom we may not care for. The strength of our constitutional guarantees can be measured by the protection which they afford to our weakest member. By denying them to some, they have less meaning for us all." Barnes v. Govt. of Virgin Islands, 415 F. Supp. 1218 (D.V.I. 1976). See also Wisdom: "The frictionmaking, exacerbating political rule of federal courts. Sw L J 21:411, 1967 and Diver: The judge as political powerbroker: superintending structural changes in public institutions. Va L Rev 65:43, 44-46, 1979


11. Perez v. Boston Housing Authority, 379 Mass. 703, 400 N.E.2d 1231, 1247 (1980). Professor Chayes has said, with some exaggeration, "One of the most striking procedural developments of this century is the increasing importance of equitable relief. It is perhaps too soon to reverse the traditional maxim to read that money damages will be awarded only when no suitable form of specific relief can be devised. But simply the old sense of equitable remedies as extraordinary has faded."


16. "Judges have increasingly resorted to outside help—masters, amici, experts, panels, advisory committees—for information and evaluation of proposals for relief. These outside sources com-
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...monly find themselves exercising mediating and even adjudicatory functions among the parties." Chayes: The role of judge in public law litigation. Harv L Rev 89:1281, 1300-1301, 1976

17. Mishkin: Federal courts as state reformers. Washington and Lee L Rev 35:949, 959, 1978. "It is characteristic of decrees in the field of institutional reform that they appoint sundry parajudicial officers to assist the court not only in delineating the remedies, but often in conducting or overseeing the actual implementation of the remedies. These agents or officers of the court are given functions accommodated to the particular needs. They are called by different names: masters special masters, examiners, experts, monitors, referees, commissioners, administrators, observers, visitors, ombudsmen, committees, panels, etc." Perez v. Boston Housing Authority, 379 Mass. 703, 400 N.E.2d 1231, 1249 (1980)


24. Brewster v. Dukakis, 675 F.2d 1 (1st Cir. 1982) (executive defendants can be ordered to use best efforts to obtain full funding but no more than that)


26. Frug: The judicial power of the purse. U Pa L Rev 127:715, 730, 1978. This is not to suggest that law reform is cheap. Professor Frug estimates that the cost of prison reform litigation in Louisiana has been $106 million. Idem at 727. Thus, long-term supervisors of institutions could lead to a major reallocation of resources. Idem at 728.


terms of how they will affect the substantive ones... restrictive jurisdictional practices may substitute for a value judgment that if articulated would reflect hostility to civil rights cases on the merits." Field: The uncertain nature of federal jurisdiction. William and Mary L Rev 22:683, 724, 1981. "The Court might have also avoided those grounds because of its reluctance to adopt the kind of affirmative remedies that lower court cases have ordered." Frug: The judicial power of the purse. U Pa L Rev 126:715, 773, 1978


32. Idem. In many respects this trend is not new. "The inference seems to be conclusive, that the state courts would have concurrent jurisdiction in all cases arising order where it was not expressly prohibited. The Federalist No. 82 (A Hamilton) (H. Lodge ed. 1880) The Court has recognized this. See for example, Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) (Concurrent jurisdiction with state courts to enforce 42 U.S.C. s1983); O'Connor: Trends in the relationship between the federal and state courts from the perspective of a state court judge. William & Mary L Rev 22:801, 1981. The Supreme Court signaled its intention to return authority to the states more than 100 years ago Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873)


34. The Warren Court had appended to permit active federal court intervention when there was a constitutionally based objection to state court prosecution. Dombrowski v. Pfister, 380 U.S. 479 (1965). Dombrowski represented the "deepest penetration into state criminal process." Rosenfeld: The place of state courts in the era of Younger v. Harris. B U L Rev 59:597, 620-621, 1979. "The Younger doctrine itself with antecedents reaching far back into the history of federal equity, centrally reflects the judgment that federal court interference with state court enforcement proceedings represents an extraordinary intervention, to be authorized only if there is a showing that the federal claim cannot be fully and fairly litigated in the enforcement court." Bator: The state courts and federal constitutional litigation. William and Mary L Rev 22:605, 620-621, 1981

35. Rosenfeld: The place of state courts in the era of Younger v. Harris. B U L Rev 59:597, 598-599 Douglas v. City of Jenrette 319 U.S. 157 (1943) "Notwithstanding the authority of the district court as federal court, to hear and dispose of the case petitioners are entitled to the relief prayed only if they established a cause of action in equity ... Courts of equity in the exercise of their discretionary powers should . . . refuse to interfere with or embarrass threatened proceedings in state court save these exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent . . ." Douglas v. City of Jenette, 319 U.S. 157 (1943). "More recent cases acknowledged the need for judicial deference recognizing judicial inability to deal with some problems and giving states wide discretion in administrative time and legislative areas." Nagel: Separation of powers and the scope of federal equitable remedies. Stan L Rev 30:661, 677, fn. 99, 1978. See Meachum v. Fano, 427 U.S. 215, 228-229 (1976); Goss v. Lopez, 419 U.S. 565, 578-80 (1975). The Standard for public official is whether he knew or should have known that conduct violates s1983. Idem att 1216 Fn. 152. See Estelle v. Gamble, 429 U.S. 97 (1976) "Officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in
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respect of Torts done in the cause on those duties-suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous and effective administration of government.‘‘ Barr v. Matteo, 360 U.S. 546, 571 (1950). But See Rosenfeld: The place of state courts in the era of Younger v. Harris. B U L Rev, 59:597, 614 (1979). (‘‘The antidote to state court insensitivity came in the form of an open channel to the federal courts under the mandate of section 1983, with an occasional passing assertion that resort to state forums was unlikely to offer an adequate remedy even under traditional equitable federalism. The court cast aside the requirement that a plaintiff exhaust available state remedies.’’)

‘‘The language of decisions emphasizing the availability of state causes of action to indicate the personal liberty interest threatened by the challenged state action while denying the existence of any federal claim suggests an enhanced willingness to view the state as an integral unit and to defer to its judgment on individual deprivations at least until the state courts have had an opportunity to apply state law.’’ Developments: Section 1983 and federalism. Harv L Rev 90:1133, 1181, 1977. The reliance on state officials is further illustrated by decisions relating to immunity. See for example Scheuer v. Rhodes 416 U.S. 2332 (1974) (no absolute immunity for a governor-qualified good faith immunity.) Wood v. Stickland 420 U.S. 308 (1975). (Good faith standard may be both subjective and objective) Scheuer and Wood provide a defense based on reasonableness of conduct. Developments at 1213. The only exception to this has been the broadened right of access to the federal courts under Section 1983. Neuborne: Toward procedural parity in constitutional litigation. William & Mary L Rev 22:725, 736, 1981. The elimination of an exhaustion requirement under s1983 illustrates the broadened scope Barry v. Barch, 443 U.S. 55, 63, Fn. 10 (1979); Patsy v. Bd of Regents of Florida, 102 S. Ct. 2557 (1982)

36. Field: The uncertain nature of federal jurisdiction. William and Mary L Rev 22:683, 720(1981). ‘‘The jurisprudence of abstention has not been entirely free of this kind of result orientation, which goes far to explain why critics of Younger v. Harris and its progeny suspect an ulterior desire on the part of members of the Burger Court to constrict the scope of s1983 under the rubric of federalism.’’ Rosenfeld: The place of state courts in the era of Younger v. Harris. B U L Rev 59:597, 617, fn. 124, 1979; Sager: Fair measure: The legal status of under-enforced constitutional norms. Harv L Rev 91:1212, 1979; Laycock: Federal interference with state prosecutions: the cases Dombrowski F o r g u t. U Chi L Rev 46:636, 1979; Aldisert: On being civil to Younger. Conn L Rev 11:181, 1979. ‘‘The Younger doctrine is likely to serve as a discretionary tool of federal courts because it is unlikely they will apply the doctrine uniformly to exclude cases from federal courts in the way of doctrine’s contours suggest. Field: The uncertain nature of federal jurisdiction. William and Mary L Rev 22:683, 719, 1981. See for example, Wooley v. Maynard, 430 U.S. 705 (1977) (Allowing federal injunction against state prosecution). See generally Nagel: Separation of powers and the scope of federal equitable remedies. Stan L Rev 30:661, 1978. ‘‘Abstention cases which followed Younger reflect something even more controversial, an explicit constriction of access, accomplished largely by disregarding decisions of the Warren Court, which has rejected the necessity of exhaustion of state judicial or administrative remedies in civil rights suits.’’ Rosenfeld: The place of state courts in the era of Younger v. Harris. B U L Rev 59:597, 599, 1979. But see Mitchum v. Foster, 407 U.S. 225 (1972) ‘‘[t]he legislature history of the Civil Rights Act of 1871 makes evident that Congress clearly conceived that it was altering the relationship between the states and the nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights if it realized that state officers might in fact be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.’’ Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very s1983 was to interpose the federal courts between the states and the people, as guardians of the people’s federal rights to protect the people from unconstitutional action under color of state law. In carrying out that purpose Congress plainly authorized the federal courts to issue injunctions in s1983 actions by expressly authorizing a suit in equity as one of the means of orders.


39. ‘‘Thus the principle of federalism which plays such an important part in the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of state or local government such as respondents here,’’ Rizzo v. Goode, 423 U.S. 363, 380 (1976)

41. Rosenfeld goes on to say "Rizzo is an ill-founded invocation of Younger carries abstention beyond its boundaries and should be laid to rest." Idem at 623.


46. 422 U.S. 563 (1975)


50. Halderman v. Pennhurst State School and Hospital, 612 F.2d 84 (3rd Cir. 1979). Other courts that had found causes of action in the s6010 are Naughton v. Beviluqua, 458 F.Supp. 610 (D.R.I. 1978) Aff'd 465 F.2d 586 (1st Cir. 1979) and Medley v. Ginsberg 492 F.Supp. 1294 (S.D.W. Va. 1980). The doctrine of implied causes of action comes from Cort v. Ash, 422 U.S. 66 (1974) which has a four part test: (1) Is the Plaintiff one of a class for whose benefit the statute was created? (2) Is there any
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showing of legislative intent? (3) Is a private right of action consistent with the underlying purposes of the statute? (4) Is this a cause of action which is traditionally one of the state laws for which a federal cause of action would be inappropriate?

The Supreme Court in other contexts has indicated that the most important of the Cort factors is the statement of Congressional intent. TransAmerica Mtg. Advisors Inc. v. Lewis, 444 U.S. 11, 23-24 (1978). Transamerica indicates that both of the first two Cort factors must be met. The last two factors do not create jurisdiction by themselves. Touche Ross & Co. v. Redington, 442 U.S. 560 (1979). The impact of these discussions is to move away from implied causes of action. Note: Implied private rights of action under federal statutes: congressional intent, judicial deference, or mutual abdication? Fordham L Rev 50:611, 1982. ‘‘Not only is it ‘far better’ for Congress to so specify when it intends private litigants to have cause of action, but for this very reason this court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the legislative branch.’’ Cannon v. University of Chicago, 441 U.S. 677, 718 (1979)(Rehnquist, J. concurring)


52. The Conference Committee Report had expressed the hope that the rights of developmentally disabled persons could be enforced in court. Conf. Rep. No 473, 94th Cong, 1st Sess, 42 1975 Code Cong. & Add. News 943, 961. The House Report stated ‘‘These rights are generally included in recognition . . . that the developmentally disabled . . . have a right to receive appropriate treatment for the conditions for which they are institutionalized and that the right should be protected and assured by the Congress and the courts.’’ 1975 U.S. Code Cong. and Ad. News 916, 961; H.R. Rep. No. 473, 94th Cong. 1st Sess


56. Note: The right to habilitation: Pennhurst and found an implied cause of action under this are again before the

57. Note: Pennhurst


60. Idem at 2464

61. Idem at 2466. The Court cited correctional cases for the proposition that the judiciary should defer to institutional decision makers. Rhodes v. Chapman, 452 U.S. 337 (1981); Bell v. Wolfish, 441 U.S. 520 (1979). Three Justices recognized a broader constitutional right. Chief Justice Burger ‘‘would hold flatly that respondent has no constitutional rights to training or ‘habilitation’ per se.’’ Idem at 2466

62. 102 S. Ct. 2441 (1982)

63. The case involved a class action brought by patients at Boston State Hospital The patients lost their damage claims but prevailed upon their constitutional claims. Rogers v. Okin, 478 F. Supp. 1342 (D. Mass 1979) Aff’d in part rev’d in part 634 F.2d 650 (1st Cir. 1980). Remanded 102 S. Ct. 2442 (1982)

64. The literature on the subject is legion. Note: A mental patient’s right to refuse anti-psychotic drugs: a constitutional right needing protection. Notre Dame Law 57:406, 1980; Appelbaum and Gutheil:
67. The Court determined that the Right was absolute unless a court determined by proof beyond a reasonable doubt that the refusal should be overcome.
68. Mills v. Rogers, 102 S. Ct. 2442 (1972). The case has been remanded to the Supreme Judicial Court of Massachusetts for consideration of Massachusetts law. Rogers v. Commission of Mental Health No. 2995
69. One impact may well be that Massachusetts will develop one legal standard and the rest of the county another. This would not be the first time. With regard to involuntary civil commitment, Massachusetts' standard burden of proof is "beyond a reasonable doubt," Superintendent of Worcester State Hospital v. Hagberg 374 Mass. 271, 372 N.E.2d 242 (1978), while the Supreme Court has required only clear and convincing evidence, Addington v. Texas, 441 U.S. 418 (1979). See generally Brant: Bucking the Burger Court. Boston Observer 1:1 (July 9, 1982) 70. The Supreme Court remanded Rennie v. Klein for reconsideration in light of Rogers. Rennie v. Klein, 653 F2d 836 (3rd Cir. 1981), remanded 102 S. Ct. 2959 (1982). Another example of a situation (in this case, mootness) to avoid a major constitutional decision was the area of reverse discrimination. Compare DeFunis v. Odegaard, 416 U.S. 312 (1979) with Regents of the University of California v. Bakke, 438 U.S. 265 (1978)