Appellate Supervision of Remedies in Public Law Adjudication

Robert L. Hinkle
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IN PUBLIC LAW ADJUDICATION

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I. INTRODUCTION

The business of the federal courts is changing. Resolving private disputes is no longer their only or perhaps even their primary function. Instead, federal courts are increasingly in the business of making decisions with widespread public ramifications. The courts restructure public institutions such as school systems, prisons, and mental hospitals; they reorganize segments of the business community by dismantling corporate mergers and revising employee seniority systems; and they shape the political structure by reapportioning state legislatures and overseeing voter registration.

To some extent the federal courts in these public law cases are doing nothing essentially different from what they have always done, i.e., adjudicating rights and duties. Thus part of any school desegregation case is determining whether constitutional rights have been violated, and part of any reapportionment case is determining whether the existing legislature is unconstitutionally constituted. The liability phase of the public law case may be more complex and will involve

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3. See, e.g., Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974).
9. No bright line separates public from private law cases. Rather, "public law" is used as a rough expression for adjudication which impacts upon the public, i.e., which significantly affects persons other than a few participants in some dispute. Theoretically, of course, every case could affect the public by bringing about incremental changes in the law. Public law cases, however, ordinarily have immediate and widespread effects irrespective of the operation of stare decisis.
decisions of greater consequence than the liability phase of a private lawsuit, but the essence of the proceedings will be the same.\textsuperscript{10}

At the stage of the litigation where the court grants relief, however, the situation is different. Providing relief in many public law cases raises problems of a completely different order from providing relief in a traditional private lawsuit. In a traditional private lawsuit the remedy is closely linked to the right; once liability is established the remedy is almost precisely determined.\textsuperscript{11} In a public law case, on the other hand, a determination of liability often does nothing to narrow the choice among numerous remedial alternatives.\textsuperscript{12} In addition, public law remedies are likely to be both enormously complex and of tremendous public importance. Their impact is not limited to the parties to the lawsuit but extends to large segments of the public and may affect virtually everyone in the country.

Relatively little attention has been given to the possibility that these differences in the nature of public law remedies call for differences in the way the judicial system goes about choosing them. One aspect of the problem which has almost completely escaped attention is the kind of relationship which should exist between federal district and appellate courts with regard to formulating remedies.

Despite the obliviousness to the issue evinced in numerous appellate opinions,\textsuperscript{13} the proper appellate role in overseeing public law remedies is an issue of considerable significance. First, the importance of the remedial choice makes it essential that the decision-making process be as reliable as possible, and the relationship between

\textsuperscript{10} The differences in the substantive law involved in public and private lawsuits will of course affect the character of decisionmaking. Differing considerations will be taken into account in adjudicating liability. In addition, the different goals of public law adjudication may affect such procedural doctrines as standing and the availability of class actions. See generally Scott, Two Models of the Civil Process, 27 Stan. L. Rev. 937, 940-49 (1975); Chayes, supra note 1. Nevertheless, the essential inquiry remains the same at the liability phase of public and private law cases: has the governing legal standard been violated?

\textsuperscript{11} See Chayes, supra note 1.

\textsuperscript{12} For example, in a school desegregation case a court must inevitably choose among an almost limitless variety of possible remedies. The necessity for choice could be eliminated by adopting a remedy such as an award of liquidated damages to any student subjected to discrimination. However, any such result would clearly be unacceptable, and fashioning an acceptable remedy for a particular fact situation unavoidably requires choosing among myriad alternatives. See Green v. County School Bd., 391 U.S. 430, 439 (1968).

\textsuperscript{13} Compare, e.g., Hartford-Empire Co. v. United States, 323 U.S. 386 (1945) (broad appellate review undertaken without explanation) with Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940) (narrow appellate review undertaken without explanation).
district and appellate courts may greatly affect the reliability of that process. Second, justifying the federal judicial role is nowhere more difficult than with regard to public law remedies, and the relationship between district and appellate courts may greatly affect both the perception and the fact of judicial integrity.

This article analyzes the relationship between federal district and appellate courts in formulating public law remedies.

II. The Appellate Role In Traditional Private Adjudication

Because courts have frequently ignored the issue of the appropriate appellate role in formulating public law remedies, they have often uncritically applied the standards of review developed for dealing with remedies in traditional private lawsuits. It is therefore useful to begin an analysis of the appellate role respecting public law remedies with a brief overview of the analogous appellate role in traditional private adjudication.

As previously indicated, private law remedies are closely linked to the underlying rights. A well-established structure has evolved which provides a right-remedy interlock. This structure establishes that the remedy for a tort is an award of damages, and it delineates the elements properly includible in the damages. Similarly, the structure determines whether the remedy for a breach of contract is a damages award or a decree of specific performance. These standards are not completely self-executing; there are still cases as to which the remedial choice is not precisely determined. Nevertheless, for the most part the right-remedy interlock clearly dictates the remedial decision.

A meaningful appellate role in choosing private law remedies is assured because appellate courts formulate the right-remedy interlock structure. It is taken for granted that announcement of the rules governing when damages will or will not be awarded, or when injunctive relief is or is not available, is an appellate function. Nobody would have maintained, for example, that in deciding the question in Bivens v. Six Unknown Named Agents—whether a damage action would lie directly under the fourth amendment—the Supreme Court should have deferred to the district court's disposition of the issue to any extent at all. The availability of damages was obviously a

14. See Chayes, supra note 1, at 1319.
15. See note 13 supra.
“question of law”\(^{17}\) as to which de novo appellate consideration was in order.\(^{18}\)

Although the structure of right-remedy interlocks dictates the remedial choice in the vast majority of traditional private lawsuits, it does not always determine the remedial choice completely. For example, the structure may establish in a given situation that an injunction would be proper without mandating that the injunction in fact be issued.\(^{19}\) More importantly, when the structure approves the issuance of an injunction it generally does not dictate the precise terms of the injunction.\(^{20}\) Hence the right-remedy interlock structure may dictate that the remedy for a defendant’s breach of a contract containing a noncompetition clause is an injunction against conducting business in the relevant area, but the structure does not precisely specify such terms of the decree as how the defendant’s business will be defined or what the relevant area will be. Thus in many circumstances, decisions with respect to injunctions are discretionary, i.e., an ad hoc choice is required. There is nothing in the nature of things which indicates that these discretionary decisions should be made solely by district courts, but it is to them that the private law system allocates the decisions. District court resolutions of these issues are said to be reversible only for “abuse of discretion,” a standard usually associated with almost certain affirmance.

Despite these pockets of district court discretion, appellate control of private law remedies is extensive. First, most private law cases involve damages or specific relief. A district court ordinarily has no discretion to withhold these remedies, nor does it have discretion in formulating their terms. Second, even in cases where there is discretion, its scope is narrow and its significance is limited. The district court may have discretion in choosing the terms of a decree, but the right-remedy interlock will make the purpose of the decree clear. For example, the right-remedy interlock may dictate that the purpose of the decree against our defendant contract-breaker is to prevent future competition with the plaintiff. The scope of discretion in choosing

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17. Traditionally, “questions of law” are subject to de novo appellate consideration whereas “questions of fact” are not. The phrases themselves provide only very imprecise guidance; indeed, they are perhaps better seen as conclusory labels than as analytical tools. See generally K. Davis, Administrative Law Text 545–49 (3d ed. 1972). Nevertheless, the gloss which the phrases have accumulated makes them useful guides.


the terms of decrees to accomplish that purpose is narrow. Furthermore, a discretionary decree containing one set of terms is likely to be little more efficacious or less obtrusive than another decree containing a wholly different set of terms. Thus the district court's discretion is channeled and its choice will have limited significance.  

The pockets of district court discretion which exist in the private law remedial system do not destroy appellate control because they are relatively insignificant. But when those same pockets of district court discretion are uncritically carried over into a public law system, the situation is different. The scope of district court discretion is magnified because there are virtually limitless ways to frame broad and complex public law remedies; the significance is magnified because the remedial alternatives may vary greatly in effectiveness and obtrusiveness. Accordingly, appellate remedial control is greatly reduced.

Nevertheless, federal courts have often uncritically applied the private law approach in public law cases. The result has been to insulate from effective appellate supervision remedial decisions of enormous importance. But the pressure on appellate courts to oversee remedial decisions of such consequence—decisions with which they almost always come in contact because of the frequency with which public law remedies; the significance is magnified because the remedial for expanding the appellate role.

III. APPellATE APPROACHES IN PUBLIC LAW ADJUDICATION

A. Rules Specifying the Remedy Which Must Be Chosen

One way federal appellate courts have sought to control public law remedies is by announcing rules specifying the type of remedy which a district court must choose in vindicating a particular right. Such rules establish right-remedy interlocks. Just as announcement of the rules which establish the right-remedy interlocks in traditional private adjudication is an appellate function, announcing analogous

21. The same is true of district court decisions to withhold injunctive relief altogether. The scope of district court discretion is narrow because appellate courts announce guidelines governing the decision. The significance of the remaining district court discretion is limited because in circumstances where the guidelines do not clearly dictate the decision, it is not likely to make much difference whether the injunction issues or not.


23. See notes 15-16 and accompanying text supra.
rules in public law cases is assumed to be an appellate function.\textsuperscript{24} And just as the approach provides a meaningful appellate role in choosing private law remedies, the same is true with respect to public law remedies.

The approach is illustrated by the Fifth Circuit's handling of cases involving racially discriminatory voter registration. Faced with a series of such cases during the mid-1960s, that court announced the rule that a "freezing" remedy was required.\textsuperscript{25} Freezing required black applicants to be evaluated on the basis of the minimum standards which were in fact applied to earlier white applicants, regardless of higher statutory standards which would concededly be valid if applied uniformly.\textsuperscript{26} Freezing, of course, was not the only remedy which could have been chosen for voter discrimination. The registrar could have been ordered to register particular applicants or not to discriminate among applicants on the basis of race; additionally, certain tests or practices could have been enjoined. While these remedies may have been deemed inadequate, surely other alternatives would have been at least as effective as freezing. For example, a receiver could have been appointed with instructions to register every applicant meeting the minimum age requirement. But despite the host of alternatives, the court of appeals chose freezing.

The Fifth Circuit's voter discrimination approach effectively constrained district court decisionmaking. The court not only announced that the appropriate remedy was freezing, but it went so far as to set forth the required decrees verbatim so that there could be no doubt what was envisioned.\textsuperscript{27} Moreover, the court's rule did not un-

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\textsuperscript{24} See, e.g., United States v. Duke, 332 F.2d 759 (5th Cir. 1964).


\textsuperscript{26} The decrees also gave the defendants the option of requiring the re-registration of all voters according to the higher standards, but that option was obviously unlikely to be taken. See, e.g., United States v. Duke, 332 F.2d 759, 770 (5th Cir. 1964).

\textsuperscript{27} See, e.g., United States v. Ward, 345 F.2d 857, 861-64 (5th Cir. 1965); United States v. Ward, 349 F.2d 795, 805-07 (5th Cir. 1965). The court may first have been prompted to set forth the decrees verbatim because of fear of district court resistance to the appellate mandates. In United States v. Duke, 332 F.2d 759 (5th Cir. 1964), the district court had refused to find a constitutional violation despite clear evidence of egregious racial discrimination. In reversing, the court of appeals did not set forth the decree but elaborated detailed guidelines. \textit{Id.} at 771. Later in United States v. Ward, 345 F.2d 857 (5th Cir. 1965), the district court had refused to rule on whether a pattern of racial discrimination existed. The court of appeals held the refusal to be erroneous and determined that a pattern of discrimination did exist. The court noted that there had been a long delay since suit was filed despite the ease with which the small number of blacks in the relevant county could be accommodated, and it proceeded to set forth the decree verbatim. \textit{Id.} at 861-64.
\end{quote}
desirably sacrifice flexibility. The factual situations involved were sufficiently similar that the choice of a remedy could sensibly be made once and for all.\footnote{28} In sum, it was an approach that worked well.

Such an approach will not work well in many other areas, however. Most of the difficult remedial problems involve factual situations which vary greatly from case to case. A single rule was formulated to deal with the not-too-different voter discrimination cases; such a rule cannot be formulated to deal sensibly with the widely varying factors affecting choices among remedies for unconstitutional prison conditions, segregated school systems, uncompetitive markets, racially discriminatory seniority systems, or a host of other problems calling for fine choices among complex remedies. Affirmative rules prescribing remedial choices are desirable only where the factual settings are sufficiently similar both to make the same remedy effective in each case and to make no other remedy more effective in particular cases. By and large, if appellate courts are to supervise remedies meaningfully, they will have to do so by some method other than the announcement of rules establishing right-remedy interlocks.

\textbf{B. Rules Designating Which Remedies May or May Not Be Chosen}

Federal appellate courts have sometimes prescribed rules specifying the types of remedies available for vindicating particular rights. Rather than deciding which remedy must be chosen, such rules limit the appellate role to announcing various alternatives from which the district court may choose. It is taken for granted that this is properly an appellate function.\footnote{29}

An example of the approach is \textit{Swann v. Charlotte-Mecklenburg Board of Education}.\footnote{30} When the local school board challenged the use of remedial devices such as altering school attendance zones and

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However, even if the appellate court's practice of authoring the decrees was first undertaken because of the fear of district court resistance, the practice did not remain so limited. In another case, United States v. Ward, 349 F.2d 795 (5th Cir. 1965), the court expressly disclaimed any apprehension about the district judge, noting that his limited remedy had been adopted in reliance on previously-controlling Fifth Circuit precedents. \textit{Id.} at 805. Nevertheless, the court of appeals said that “good administration” necessitated specifying the appropriate decree in order to achieve uniformity within the circuit. \textit{Id.}

\footnote{28. If there had arisen significantly dissimilar factual situations calling for variations in the remedy, the Fifth Circuit's approach presumably would have allowed consideration of them. However, the basic remedial approach—freezing—was firmly established.}


\footnote{30. 402 U.S. 1 (1971).}
busing students, the Supreme Court decided on its own that such devices were within the broad and flexible equitable remedial powers of the federal courts.\(^{31}\) The Court counseled deference to the determinations of the district courts in regard to the appropriateness of using particular remedies in individual cases;\(^{32}\) it did not defer to the district courts regarding the power to utilize such remedies in general.

Other examples abound of appellate consideration of whether certain types of remedial approaches may be used. It has frequently been held that antitrust decrees can exceed the scope of the defendant's conduct comprising the violation.\(^{33}\) Courts can order the levying of taxes necessary to operate a constitutional school system.\(^{34}\) They can award retroactive seniority status to remedy discriminatory hiring refusals.\(^{35}\) Injunctions may be issued against state prison commissioners in order to remedy the unconstitutionality of county jail conditions.\(^{36}\) Courts can require divestiture of a merged company to remedy violations of a rule formulated by the Securities and Exchange Commission.\(^{37}\) The list is almost endless. And always the availability of the particular type of remedy is treated as a question for de novo appellate determination.

Such appellate decisions provide little check on district court discretion. Deciding that a remedial approach is available does not indicate when the approach should be utilized or how to choose among available alternatives.

Appellate courts, however, often do restrict choices by announcing rules which eliminate certain remedies from consideration. School desegregation and legislative reapportionment are two areas presenting a virtually infinite number of remedial options. Limitless ways exist of drawing school attendance zones or voting districts in order to remedy constitutional violations.

In each of these areas, the United States Supreme Court has acted to foreclose some alternatives. For example, in school desegregation, *Milliken v. Bradley*\(^{38}\) ruled out interdistrict pupil assignment as a

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31. *Id.* at 15–16.
32. *Id.* at 31.
remedy\textsuperscript{39} for interdistrict constitutional violations.\textsuperscript{40} As to reapportionment, \textit{Sixty-Seventh Minnesota State Senate v. Beens}\textsuperscript{41} ruled out significant court-ordered changes in the number of districts or legislators.\textsuperscript{42} \textit{Milliken} and \textit{Beens} each eliminated one category of remedial alternatives.

Both \textit{Milliken} and \textit{Beens} confined remedial choices to some extent.\textsuperscript{43} The results in both cases are perhaps understandable: the breadth of school and apportionment remedies had increased dramatically, and there may have been a need to curb headstrong district judges. The district courts' remedial approaches may have

\textsuperscript{39} There is language in the plurality opinion in \textit{Milliken} indicating that the Court may have thought it was dealing with the scope of constitutional rights rather than only with the issue of available remedies. \textit{Id.} at 747. But clearly the constitutional right at issue was the right to be treated nondiscriminatorily by the state's public school system. To say that a student has no "right" to attend a school in a different district does not explain the Court's result; a student ordinarily has no "right" to attend any particular school within his own district, yet the Court has approved orders assigning students to particular schools. \textit{See}, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). In \textit{Milliken} Justice Stewart, whose fifth vote was crucial, joined the Court's opinion only after emphasizing in concurrence that it dealt not with substantive constitutional law but only with the appropriate exercise of federal equity jurisdiction. 418 U.S. at 753 (Stewart, J., concurring). Thus \textit{Milliken} deals with remedies, not constitutional rights.

\textsuperscript{40} The Court's rule does not foreclose crossing district lines where a constitutional violation in one district produces a significant segregative effect in another. \textit{Id.} at 744-45.

\textsuperscript{41} 406 U.S. 187 (1972) (per curiam).

\textsuperscript{42} The district court's order changed the number of legislative districts from 67 to 35, reduced the number of senators by almost 50\%, and reduced the number of representatives by almost 25\%. \textit{Id.} at 188. The Supreme Court summarily reversed. The Court said that the numbers of districts or legislators could not be significantly changed unless they occasioned "significant and invalidating population deviations," thus presumably leaving open the possibility that in some circumstances a similar remedy might be approved. \textit{Id.} at 200. However, the possibility seems remote at best. First, it is unclear how the number of legislators or districts could ever itself occasion "significant and invalidating population deviations." Second, in \textit{Beens} the Court acted summarily, without the data on which the district court's decree was based. It was apparently deemed unnecessary to determine the effects of Minnesota's number of legislators and districts. \textit{Beens} thus seems to establish a firm rule against such major size changes.

\textsuperscript{43} Like \textit{Milliken}, \textit{Beens} exhibited some confusion as to whether the issue was one of appropriate remedies or substantive constitutional rights. "We know of no federal constitutional principle or requirement" authorizing the district court's action. 406 U.S. at 198. "[T]he number of a State's legislative districts or the number of members in each house of its legislature raises no issue of equal protection . . . ." \textit{Id.} at 199. Certainly, however, apportionment remedies can properly go beyond minimum constitutional requirements. \textit{Compare} Connor v. Johnson, 402 U.S. 690 (1971) (when district courts fashion apportionment remedies, single-member districts should normally be used) \textit{with} Whitcomb v. Chavis, 403 U.S. 124 (1971) (single-member districts are not constitutionally required absent special showing). As Justice Stewart correctly noted, the issue in \textit{Beens} was remedial discretion rather than substantive constitutional rights. 406 U.S. at 201 (Stewart, J., dissenting).
been misguided, and the Supreme Court's reversals may have led to better results.

Nevertheless, the Supreme Court's approach in *Milliken* and *Beens* provides an irrational and ineffective check on district courts. It is irrational because the Court, in its effort to eliminate the most obtrusive remedies, may have eliminated the remedies which would be least obtrusive in some circumstances. In addition, even if the disapproved remedies would always be more obtrusive, they might in some circumstances be so much more effective in vindicating the constitutional rights at issue that the obtrusiveness would be tolerable. As Justice White noted in his dissent in *Milliken*, the effect of the majority's holding was that "no matter how much less burdensome or more effective and efficient in many respects . . . the metropolitan plan might be, the school district line may not be crossed."44

In *Beens* the Court acted summarily, without all the relevant statistics and maps, without the masters' reports on which the district court relied, and without briefs or oral arguments on the merits.45 With so little information the majority was not in a position to evaluate the burdensomeness or effectiveness of the district court's remedy in the case at hand. It clearly could not evaluate the appropriateness of these factors in every conceivable set of circumstances, yet its rule foreclosed a category of remedial choices from consideration in all future reapportionment cases. The undesirability of the inflexible *Milliken* and *Beens* result is apparent.

The Supreme Court's approach is an ineffective check on district courts because they are left countless remedies among which to choose. The district court in *Milliken* remained free to select from numerous approaches, and by disapproving interdistrict relief the Supreme Court did nothing to supervise that choice. Similarly, the Supreme Court's handling of *Beens* did nothing to restrict the district court's choice among the numerous remaining ways to correct Minnesota's unconstitutional apportionment. In short, the *Milliken* and *Beens* approach may produce undesirable remedial choices in at least some cases without significantly confining district court discretion.46

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44. 418 U.S. at 768 (White, J., dissenting).
46. Of course some rules foreclosing categories of remedies would never lead to undesirable results. Such rules foreclose the use of a remedy the implementation of which would always constitute an abuse of discretion. Using the remedy could be characterized as per se abuse of discretion. The Court may have thought *Milliken* and *Beens* were such cases. However, it is clear that circumstances could exist in which use of the types of remedies employed by the district courts in *Milliken* and *Beens* would be quite reasonable and hence would not constitute an abuse of discretion. The
C. Remedial Guideposts

Federal appellate courts have sometimes limited themselves to announcing broad principles intended to guide rather than dictate district court remedial decisions. Such appellate pronouncements are completely consistent with the traditional abuse-of-discretion review standard; in support of decisions that district courts have or have not abused their discretion, appellate courts quite naturally announce the general principles which guide that determination. Thus no explanation of this appellate function has been offered.47

The use of such remedial guideposts avoids the inflexibility of rules by allowing the relevant circumstances of each case to be considered in formulating the remedy. However, district rather than appellate courts consider the circumstances and formulate appropriate remedies. Consequently, to the same extent that inflexibility is avoided appellate control is lost.

The approach is illustrated by United States v. W.T. Grant Co.48 It will be recalled that the private law system often gives district courts discretion to issue or withhold injunctive relief.49 W.T. Grant involved the issue of whether to allow that same discretion in a public law context. The defendant’s conceded antitrust violation had been voluntarily discontinued pending trial, and the district court refused to issue an injunction.50 The Supreme Court affirmed, saying that a strong showing of abuse would be required in order to reverse the district court’s decision.51 The Supreme Court did, however, announce principles to guide district courts in deciding such cases. It said that defendants bore a heavy burden of showing that there was no reasonable expectation that the wrong would be repeated.52 It further articulated the standard as a “cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.”53 Whether such statements provide any significant guidance

remedies would fall only because of the Milliken and Beens rules. At any rate, even rules of per se abuse leave numerous alternatives from which district courts can choose.

49. See notes 19–20 and accompanying text supra.
50. The district court actually dismissed the case as “moot,” a concededly erroneous view. 345 U.S. at 630. Whatever the terminology employed, however, the effect of the district court’s disposition was to refuse to enjoin illegal conduct which had been voluntarily discontinued.
51. 345 U.S. at 633. Justice Douglas dissented, arguing that since the district court had dismissed the case on the erroneous ground of “mootness,” its discretion had not been exercised at all and was accordingly due no deference. Id. at 638 (Douglas, J., dissenting). The dissent went unanswered.
52. Id. at 638.
53. Id.
at all is open to question. Nevertheless, the amount of guidance is not very great and, as a result, the efficacy of appellate supervision is questionable.\footnote{54}

Guideposts are perhaps even less effective when the issue is not whether to grant equitable relief but what the terms of the relief should be. The school desegregation cases are illustrative. In \textit{Brown v. Board of Education [Brown I]},\footnote{55} the Supreme Court held segregated school systems unconstitutional. Rather than immediately remanding the several cases involved in order to let the district courts initially formulate remedies, an approach often taken when case dismissals are reversed on appeal, the Court scheduled another round of arguments.\footnote{56} In \textit{Brown v. Board of Education [Brown II]},\footnote{57} it announced principles intended to guide the district courts. The Court noted the public and private interests at stake and directed the district courts to take those interests into account in requiring a prompt and reasonable start toward full compliance with the constitutional principles enunciated in \textit{Brown I}.

The Court recognized that additional time might be found necessary once a reasonable start was made, and it placed the burden on the defendants to show "good faith compliance at the earliest practicable date."\footnote{58} The Court also noted the types of administrative problems which could properly be considered.\footnote{60} Finally, it rendered its now infamous statement that what was required was "all deliberate speed."\footnote{61}

Whatever the merits of \textit{Brown II}'s remedial standards as a substantive matter, it is clear that wide latitude remained. Indeed, the Supreme Court expressly recognized that the district courts were left a liberal measure of flexibility.\footnote{62} As previously indicated, such flexibility is accompanied by a loss of appellate control when, as seems to have been the case, appellate courts confine themselves to announcing guidelines.\footnote{63} Nothing in \textit{Brown II} suggested the Court would go further in guiding the district courts, and the traditional

\footnote{54. The amount of guidance would be greater if appellate courts illustrated the application of the principles on a case-by-case basis. However, the abuse-of-discretion review standard prevents any such illustration.}

\footnote{55. 347 U.S. 483 (1954).}

\footnote{56. \textit{Id.} at 495.}

\footnote{57. 349 U.S. 294 (1955).}

\footnote{58. \textit{Id.} at 300.}

\footnote{59. \textit{Id.}}

\footnote{60. \textit{Id.} at 300-01.}

\footnote{61. \textit{Id.} at 301. In one of the cases, Gebhart v. Belton, 349 U.S. 294 (1955), the Court upheld the order of the Supreme Court of Delaware that the plaintiffs be immediately admitted to a previously all-white school. \textit{Id.} at 301.}

\footnote{62. 349 U.S. at 300.}

\footnote{63. \textit{See} note 47 and accompanying text \textit{supra}.}
abuse-of-discretion review standard would leave those courts free to choose among the myriad remedial approaches consistent with Brown II’s broad outline.

The freedom left district courts by the Brown II approach is best illustrated by another landmark school desegregation case, Swann v. Charlotte-Mecklenburg Board of Education. Unlike the situation in Brown II, where the district courts had dismissed the claims and therefore had not reached the question of remedies, the district court in Swann had entered an expansive and complex decree. Thus, where it would have been possible for the Court in Brown II to supervise the remedies more extensively after their formulation by the district courts, it was clear in Swann that whatever control the Supreme Court was going to exercise would have to be exercised at that time. Nevertheless, the Court confined itself to announcing principles differing in substance but not in appellate technique from those announced in Brown II. Swann undoubtedly helped channel district court discretion, but wide leeway remained.

The “guideposts” approach, then, provides only a marginal appellate role in formulating remedies. However, the approach does manage to avoid intolerable inflexibility. As the Swann Court expressly noted, the variations from one school case to the next make it impossible to lay down rigid rules governing all situations. If prescribing rules or establishing guideposts were the only alternatives available to federal appellate courts, then in the many areas where rules cannot sensibly be utilized those courts would have to settle for the very limited input which guideposts provide.

But rules and guideposts are not the only alternatives. Though they were the only techniques utilized for controlling remedies in traditional private adjudication, there is no reason why federal appellate courts cannot review public law remedies more extensively.

64. 402 U.S. 1 (1971).
65. For example, the Supreme Court could have extensively controlled the Brown remedies by carefully scrutinizing the eventual decrees without deferring to the district court's discretion. See generally notes 121-57 and accompanying text infra.
66. It was of course possible that the Swann remedy would resurface in the Supreme Court following modification or implementation, but the basic structure of the decree was finally approved in the Court's 1971 opinion. That basic structure had been chosen by the district court; appellate control was minimal.
67. The same is true of other cases announcing general remedial principles. See, e.g., United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 726 (1944) (antitrust decree should include those features which reasonably tend "to dissipate the restraints and prevent evasions"); Green v. County School Bd., 391 U.S. 430, 438 (1968) (school desegregation plan may not fail "to provide meaningful assurance of prompt and effective disestablishment of a dual system").
68. 402 U.S. at 29.
Indeed, they have often done so. I turn now to analysis of some of the techniques which have been used.

D. Scrutinizing the District Court's Decisionmaking Process

One way federal appellate courts have sought to narrow the discretionary range which survives the announcement of rules and guideposts is through careful scrutiny of the district court's decisionmaking process. As the courts have sometimes recognized, it makes no sense to defer to a district court's discretion where it has not in fact been exercised. The next logical step is to withhold deference unless it is determined that the district court correctly understood the guiding principles and gave appropriate consideration to the available alternatives.

That approach was taken in Davis v. Board of School Commissioners, a school desegregation case. The lower court's student assignment plan was challenged. The Supreme Court noted that the lower court had unjustifiably felt constrained to treat one section of the city separately from the rest of the school system. The possible use of busing and split zoning had not been adequately considered. Given those flaws in the decisionmaking process, the Supreme Court did not invoke the abuse-of-discretion review standard but rather reversed. On remand the appropriate alternatives were to be given due consideration.

The Supreme Court noted in Davis that the record made it clear that inadequate consideration had been given the several alternatives. The implication may be that the Court would have been less willing to reverse and remand if the record had been less clear as to what

70. 402 U.S. 33 (1971).
71. The challenged plan had been formulated by the court of appeals, not the district court. The court of appeals had not deferentially reviewed the original district court order, but had applied a heightened review standard under which an appellate court makes a de novo determination of the adequacy of a remedy to vindicate a plaintiff's underlying rights. See generally notes 97-120 and accompanying text infra. That the Supreme Court was reviewing the remedial choice of a court of appeals does not affect the analysis, however; the same approach could be taken in reviewing district court decisions.
72. 402 U.S. at 38.
73. Id. See also Medley v. School Bd., 482 F.2d 1061 (4th Cir. 1973), cert. denied, 414 U.S. 1172 (1974) (reversing district court school desegregation decree where inadequate consideration was given to split zoning and busing).
74. 402 U.S. at 38.
had and had not been considered. Any such result would be undesirable. A district court should not be able to evade appellate review by obscuring the grounds of its decision.

In analogous cases reviewing administrative decisions, the Court has not let the ambiguity of the record defeat review.75 Instead, it has insisted that the basis of the administrative decision be made clear. For example, in *Phelps Dodge Corp. v. NLRB*76 the Board had ordered the reinstatement of several workers who had been discriminatorily fired. The Supreme Court upheld the Board's power to issue such an order but remanded the case to the Board for "a clear indication that it has exercised [its] discretion."77 The Court said that the "administrative process will best be vindicated by clarity in its exercise."78 There is no apparent reason why the same is not true of the judicial process.79 Just as the Court required the NLRB to give the basis of its order, federal appellate courts could require district courts to state the bases of their orders.80

Such an approach should be adopted.81 District court discretion

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76. 313 U.S. 177 (1941).
77. *Id.* at 197.
78. *Id.*
79. Indeed, in an important respect public law cases are more like administrative proceedings than like traditional private lawsuits. In a traditional private lawsuit, the only significantly affected interests are those of the parties before the court. The parties' self-interest provides some assurance that the relevant considerations will be brought to the court's attention. In public law cases and administrative proceedings, on the other hand, the results affect many people other than the parties. Significantly affected interests should be represented whenever possible. Inevitably, however, representation will often be less than perfect. The processes provide no inherent assurance that the decisionmaker will take all the appropriate considerations into account. Hence it makes sense to require courts, like agencies, to explain their decisions in public law cases.
80. The technique of requiring decisions to be explained can be criticized as providing a limited check on the agencies. However, the technique should prove more fruitful when applied to district courts. First, appellate courts exercise greater control over the substantive remedial principles applied by district courts than over those applied by agencies, a difference which becomes much greater as appellate courts adopt the various approaches for substantively controlling remedies discussed below. *See* notes 83–157 and accompanying text *infra.* Second, in some instances district courts may be less likely than agencies to have a definite remedial orientation, thus making it less probable that on remand a district court will merely uncritically reenter its original order.
81. Several opinions adumbrate such an approach. In *Whitcomb v. Chavis*, 403 U.S. 124 (1971), the Supreme Court vacated the district court's reapportionment decree, noting that the district court had "entered judgment without expressly putting aside on supportable grounds" several alternatives. *Id.* at 160. However, it was clear that the Court disapproved the district court's remedy as a substantive matter; the quoted language suggesting a requirement of expressed reasoning may have been inadvertent.
need not be undercut to any extent; if on remand the district court remains convinced that its earlier result is the most desirable one, it can reenter the same decree. The district court would be compelled to reconcile its result with the governing principles, but no one would contend that a decision which could not be so reconciled should be upheld. The only other requirement would be an indication that the district court had indeed exercised its discretion and consciously rejected the other available alternatives. There is no reason to defer to a district court decision which cannot meet these standards. 

In addition to its effect on the allocation of roles between district and appellate courts, the requirement that district courts explain their decisions serves another function. The process of formulating opinions may affect the results reached by the district court.82 Thus even if there were no appellate review at all, district courts might reach different remedial results if reasoned opinions were required. The praise accorded the practice of rendering opinions in other areas is equally deserved in the remedial field. An approach to appellate remedial control which requires district courts to issue opinions will have significant beneficial side effects. 

In summary, requiring district courts to explain their remedial choices will: (1) eliminate unjustifiable deference to discretion which has not in fact been exercised; (2) increase appellate control slightly by reducing district court evasion of guiding principles; (3) enhance the reliability of the district courts' exercise of discretion by ensuring a full and well-considered treatment of the issues; and (4) otherwise leave the the district courts' discretion intact. The first three of these effects are clearly desirable, and the approach should be embraced whether or not appellate courts decide to disturb the present scope of discretion allowed the district courts. I turn now to several approaches which do not leave the district court's discretion intact. 

E. Presumptively Preferred Remedies 

An approach which makes some substantive abridgment of the district court's discretion involves the delineation of presumptively preferred remedial choices. The approach falls somewhere between the establishment of rules requiring particular remedies for given

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82. "Any judge can testify to the experience of working on opinions that won't write with the result that his conclusions are changed because of his inability to state to his satisfaction the reasons upon which they depend." J. Landis, The Administrative Process 106 (Greenwood Press ed. 1974).
rights and the announcement of broad guiding principles. Unlike the approach requiring the use of particular remedies, the presumptively preferred remedy need not be utilized; where the situation calls for a different remedy the presumption is overcome and the district court is free to adopt the other remedy. But unlike the guiding principles approach, district courts are not merely told what factors to consider and what goals their remedies should seek to accomplish, but rather are told what remedy should be chosen absent unusual circumstances justifying the use of a different remedy.

The presumptively preferred remedy can be illustrated by the handling of one aspect of the legislative reapportionment cases. In framing reapportionment decrees, district courts must decide where to draw district lines and whether to utilize single-member or multimember districts. The latter decision is now governed by a presumptive preference for single-member districts.

The presumption was first announced in 1971 in Connor v. Johnson, where the Supreme Court hastily granted a stay of a district court plan which prescribed multimember districts. The Court said that "when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter." The Court did not say single-member districts were always required, but limited itself to holding them generally preferable.

The presumptive rather than binding nature of the preference for single-member districts was underscored in 1973 in Mahan v. Howell. The Supreme Court upheld the use of a multimember district where the time pressure caused by an impending election had forced the district court to act before acquiring sufficient information for the formulation of a plan using only single-member districts. The Court said multimember districts were not always insupportable.

The presumption applies to plans formulated by district courts, not to those formulated by the states themselves. Where states opt for multimember districts they need not be set aside absent special findings. See Whitcomb v. Chavis, 403 U.S. 124 (1971).

83. See generally notes 23–28 and accompanying text supra.
84. See generally notes 47–68 and accompanying text supra.
85. The presumption applies to plans formulated by district courts, not to those formulated by the states themselves. Where states opt for multimember districts they need not be set aside absent special findings. See Whitcomb v. Chavis, 403 U.S. 124 (1971).
86. 402 U.S. 690 (1971).
87. Id. at 692.
88. Any ambiguity on this score was subsequently cleared up. On remand the district court did not read the Court's ruling as a flat requirement that single-member districts be used; instead it referred the proceedings to a master for a determination of whether using single-member districts was feasible. On a subsequent appeal the Supreme Court expressly approved that approach. Connor v. Williams, 404 U.S. 549, 551 (1972).
and that given these "unique factors"—the time pressure and lack of information—the district court's order should be upheld.90

The presumptive preference approach provides meaningful guidance to district courts. They know that in most cases the preferred remedy should be utilized, and despite uncertainty as to just what circumstances justify abandoning the presumption, there are surely many instances where the issue is not in doubt. To the extent that district court choices are guided, appellate control is achieved.

The effectiveness of the appellate role is largely determined by the standard of review applied to the district court's decision in any particular case as to whether the presumption is overcome. If the district court's decision is reviewed only under the deferential abuse-of-discretion standard, as the Court intimated in Mahan,91 then the appellate role will not be very effective. But a much more stringent review standard was staked out in Chapman v. Meier.92 The Court there reversed a district court reapportionment plan using multimember districts and called for the expeditious reinstatement of single-member districts unless the district court could articulate such unique factors as would justify multimember districts.93 At the very least the Court meant to require the articulation of reasons for departing from the presumption; the further clear implication was that the Court would carefully scrutinize the articulated reasons.94 The use of a heightened review standard for the decision not to apply the presumption95 greatly enhanced the appellate control achieved by the presumptive preference approach.

90. Id. at 333.
91. Id. at 332-33 (district court's use of multimember district was "within the bounds of the discretion confided to it").
93. Id. at 21.
94. The implication was underscored in East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). The district court entered a reapportionment plan using a multimember district. The court of appeals reversed on constitutional grounds. Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc). The Supreme Court refused to reach the constitutional issues raised by the court of appeals. Instead, it invoked the presumptive preference for single-member districts. Rather than remanding for district court consideration of whether the presumption was overcome, the Supreme Court determined that it was not.
95. The Court's willingness carefully to scrutinize the proffered reasons for departing from a presumptively preferred remedy was further exhibited in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). There the Court held that applicants for employment who were denied positions in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1970), were entitled to an award of the seniority they presumptively would have earned but for the wrongful treatment, "in the absence of justification for denying that relief." 424 U.S. at 767. The Court then scrutinized and rejected the district court's announced reasons for refusing the seniority relief.
Even with such heightened, particularized review, though, the approach is narrowly circumscribed. Effective supervision over the choice between single- and multimember districts is achieved, but the other aspects of reapportionment decrees are unaffected. District courts remain free to choose where to draw the district lines, a remedial decision of at least as great importance as the choice between single- and multimember districts. Though some relatively simple remedial problems might be amenable to the use of presumptive preferences as to all aspects of the decision, reapportionment and numerous other complex remedial problems are not. The drawing of legislative district lines cannot be sensibly governed by presumptive preferences, nor can the drawing of school attendance zones, the correction of unconstitutional prison conditions, or the remedying of myriad other violations. Just as the inevitable diversity of the situations to be remedied limits the usefulness of remedial rules establishing right-remedy interlocks, so it also limits the usefulness of presumptive preferences. Some effective appellate control is achieved, but pervasive appellate control can be obtained only by some other approach.

F. Particularistic Review of the Adequacy of a Remedy

The appellate approaches discussed heretofore share a common feature: they do not call for comprehensive appellate consideration of the appropriateness of the chosen remedy in the particular circumstances. Yet, as has often been emphasized, sensible equitable remedies for the most part must be tailored to the facts of individual cases. Some degree of remedial generalization is possible, but there are large areas where molding decrees to the unique circumstances will inevitably be required. So long as choosing the proper decree remains the exclusive province of district courts, significant appellate control will not be achieved.

The appellate role has not always been so narrowly confined. Appellate courts have often undertaken particularistic review of remedial choices. One approach for doing so involves an inquiry into

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96. See, e.g., Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946) (presumptively preferred remedy for use of misleading tradename is to require qualifying language rather than to eliminate tradename).

97. The presumptive preference approach does require appellate consideration of the particular circumstances where heightened scrutiny is applied to district court departures from the presumption. Even there, however, particularistic review is limited to the remedial scheme generally.

the adequacy of the chosen remedy, in the particular situation, to vindicate the right on which the plaintiff's suit is based. This section analyzes that approach. The other approach is broader, involving an inquiry into the appropriateness of the remedy not only from the viewpoint of vindicating the plaintiff's underlying right, but in light of all of the other implicated interests as well. That approach is analyzed in the next section.

The adequacy approach is illustrated by many of the school desegregation cases. Plaintiffs challenging a district court desegregation decree have rarely been met by deference to the district court's discretion as to the choice of remedies. Instead, appellate courts have framed the issue as whether the chosen remedy is adequate to vindicate the plaintiffs' constitutional rights. Appellate consideration of that question has been plenary.

The approach is typified by Green v. County School Board. The Supreme Court in that case invalidated the district court's freedom-of-choice plan for desegregating the schools of New Kent County, Virginia. The Court carefully avoided any general pronouncement disapproving freedom-of-choice plans, resting its holding instead on a particularized analysis of the New Kent County situation. The Court did not rely on the district court's analysis of the sufficiency of the plan, and it did not speak of "abuse of discretion."

The Court undertook no explanation of why the issue was appropriate for de novo appellate consideration. If the contention had been that the freedom-of-choice plan was itself unconstitutional, then the question would have been a question of substantive constitutional rights rather than merely a question of the appropriate remedy for earlier constitutional violations. Such a question of constitutional rights—a clear "question of law"—would have called for plenary appellate review. The Court, however, refrained from labeling the plan unconstitutional, choosing instead to invalidate it as "insufficient."

The Court emphasized the former statutorily-mandated pattern of racial segregation and the school board's history of re-


100. 391 U.S. 430 (1968).

101. Id. at 439-41.

102. Id. at 441.

103. See note 17 supra.

104. 391 U.S. at 441.
calcitrance toward *Brown v. Board of Education*.\textsuperscript{105} It announced remedial principles, stressing that a school board must come forward with a plan promising "realistically to work now."\textsuperscript{106} The emphasis on how to remedy dual school systems rather than on what types of school systems are or are not constitutional indicates that the issue was seen as one of appropriate remedies rather than underlying rights.\textsuperscript{107}

Nor can the Court's de novo treatment of the issue be explained by saying that the adequacy of a remedy to vindicate underlying rights is always a question for the appellate court. Appellate courts have often counseled deference to district courts on the question of the adequacy of chosen remedies.\textsuperscript{108} *Green* and various other school desegregation cases\textsuperscript{109} mark a departure from traditional review standards.\textsuperscript{110}

105. *Id.* at 437-38.

106. *Id.* at 439 (emphasis in original).

107. That is clearly the correct framing of the issue. The unconstitutionality of the New Kent County school system was established by *Brown v. Board of Educ.*, 347 U.S. 483 (1954) [*Brown I*]. While it is true that at some point the taint of statutorily mandated segregation can be eradicated, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31-32 (1971), New Kent County clearly had not reached that point. Given the undoubted constitutional violation, the analysis is not furthered by inquiring whether the district court's plan was or was not constitutional. Remedies often go beyond the minimum which would have been constitutional if originally undertaken by the school authorities. For example, no one would contend that a state which had not otherwise discriminated would be required to bus students across town in order to avoid being held in violation of the Constitution, yet remedies for preexisting violations often include such a requirement. Conversely, remedies need not immediately go as far as would be required to avoid an original constitutional violation. *See*, e.g., *Brown v. Board of Educ.*, 349 U.S. 294, 300-01 (1955) [*Brown II*]. Analysis is sharpened by distinguishing two separate issues: whether there has been a violation, and if so how to remedy it.


109. *See*, e.g., cases cited note 99 supra.

110. The reason for heightened review does not seem to have been the danger of district court resistance to the Supreme Court's school desegregation mandates. That danger is presumably no greater than the danger of resistance to the Supreme Court's establishment clause mandates, yet in *Lemon v. Kurtzman*, 411 U.S. 192 (1973) [*Lemon II*], the Court rejected a claim that the district court's establishment clause remedy was inadequate, citing the district court's broad discretion. Moreover, the Supreme Court has undertaken de novo review of the adequacy of chosen remedies in several antitrust cases where the danger of district court resistance to Supreme Court mandates seems no greater than in other areas. *See*, e.g., United States v. *Loew's*,
To conclude that the reasons for using the approach have not been explained is not to condemn it. An appellate approach which ensures remedial adequacy is to be applauded. The question, of course, is not whether to utilize adequate remedies but what court can best determine when a remedy is adequate. Even assuming, though, that the district court is better able to make that assessment, appellate review of the adequacy of the chosen remedy can in no way lead to the implementation of inadequate remedies. Such review is one-way review: district courts are required to adopt more stringent remedies when their choices are deemed insufficient, but they are not required to cut back on their chosen remedies when appellate courts conclude that less stringent remedies would have sufficed. Therefore, the approach can only increase the frequency with which remedies are in fact adequate. The approach assures a useful and meaningful appellate role.

Nevertheless, the district courts are left wide discretion. There are usually numerous adequate remedies for vindicating a given right, and appellate review of remedial adequacy provides no supervision of the choice among them. The appellate role is limited and falls short of providing effective and pervasive remedial control. Choosing remedies remains largely the province of district courts.

It is arguable that it is enough for appellate courts to ensure that rights are adequately protected and that remedial choices are otherwise properly left to the district courts. The issue of how much control


111. The relative adequacy of various remedial alternatives cannot be precisely determined, of course, and it is possible that an appellate court might erroneously opt for a "more stringent" remedy which in fact turns out to be less adequate. However, when plaintiffs successfully urge disapproval of a remedy, the likelihood that their proposed substitute, or any other remedy subsequently adopted, will be less adequate to vindicate their rights is surely small.

112. "Adequate" could never be defined so stringently as to eliminate the remaining district court discretion by requiring use of "the very most effective remedy for vindicating the underlying rights." As the school cases indicate, such an approach would be wholly unacceptable. For example, the school desegregation remedy which would be "the very most effective to vindicate the underlying rights" might include ordering the construction of a complete set of school buildings at more desirable locations, drastic measures to alter the area's housing patterns, and replacement of all school administrators. Even if such high levels of "adequacy" were established, there would be wide bounds within which choices would have to be made. Someone would have to choose where to locate the new school buildings. Someone would have to choose exactly how to alter drastically the area's housing patterns. Someone would have to choose replacements for the school officials. If the appellate role is confined to reviewing the adequacy of a remedy, those choices are left within broad limits to the district court. When the definition of "adequacy" is reduced to a reasonable standard, the area of choice left to the district court becomes far greater.
appellate courts should exercise will be addressed later.\textsuperscript{113} It should be noted, however, that appellate courts do not ensure that all rights are adequately protected merely by reviewing the adequacy of a remedy to vindicate the rights which underlie the plaintiffs' claims. Other rights besides those of the plaintiffs are almost always involved. In a school desegregation case, for example, the remedy usually determines which schools students attend and affects the character of those schools. In doing so the remedial choice affects important interests of students and parents, interests not involved in the liability phase of the lawsuit.\textsuperscript{114} These interests have constitutional overtones, as indicated by such decisions as Meyer \textit{v. Nebraska}\textsuperscript{115} and Wisconsin \textit{v. Yoder}.\textsuperscript{116} In addition, important interests of the state are involved; the public fisc may be greatly affected,\textsuperscript{117} and remedial decrees are also likely to implicate principles of federalism which the Court has often heralded.\textsuperscript{118} A school desegregation remedy which is adequate to vindicate the plaintiffs' right to nondiscriminatory treatment may not be the most feasible accommodation of these other interests. Accordingly, appellate review of the adequacy of the remedy chosen to vindicate the plaintiffs' underlying rights does not automatically safeguard the other interests at stake.

Indeed, if appellate courts limit themselves to reviewing the adequacy of a remedy to vindicate the plaintiffs' underlying rights, the result may be to discourage district courts from taking very seriously the accommodation of other interests. One-way review encourages district courts to adopt broad remedies. Dissatisfied plaintiffs can obtain de novo appellate consideration of the adequacy of their remedy, as the plaintiffs did in \textit{Green}. Reversal is thus a substantial possibility. Dissatisfied defendants, on the other hand, can obtain appellate review only under the deferential abuse-of-discretion standard. For example, in \textit{Swann v. Charlotte-Mecklenburg Board of Education}\textsuperscript{119} the Supreme Court, after deciding that the remedial

\textsuperscript{113} See notes 158-87 and accompanying text infra.
\textsuperscript{114} Members of plaintiff classes also have interests, other than those involved in the liability phase of the suit, which are affected by remedial choices.
\textsuperscript{115} 262 U.S. 390 (1923).
\textsuperscript{116} 406 U.S. 205 (1972).
\textsuperscript{119} 402 U.S. 1 (1971).
measures adopted by the district court were within the broad and flexible equitable remedial powers of the federal courts, rather uncritically concluded that their use in that particular case did not constitute an abuse of discretion.\textsuperscript{120} In combination, \textit{Green} and \textit{Swann} indicate that district court judges can insulate themselves from reversal by giving little attention to interests other than the rights plaintiffs seek to vindicate in the lawsuit. Because of this, the substance of remedial choices may well be affected in an undesirable manner.

In sum, the approach provides a useful and meaningful appellate role, but fails to establish any control over a wide range of district court discretion and builds a substantive bias into the system which may result in undesirable remedial choices.

\textbf{G. Particularistic Review of the Appropriateness of a Remedy}

The final approach which appellate courts have used for controlling public law remedies is the most extensive. It involves the full, particularistic redetermination of the appropriateness of the chosen remedy. The appellate court scrutinizes the chosen remedy not only to determine its adequacy to vindicate the right on which plaintiff's suit is based, but also to determine whether the remedy reaches the most desirable accommodation of all the interests involved. The appellate court determines for itself whether the chosen remedy is the one which should be utilized.\textsuperscript{121}

A notable example is \textit{Hartford-Empire Co. v. United States.}\textsuperscript{122} The defendants there were held to have violated the antitrust laws by suppressing competition in the glass machinery and manufactured glassware industries. The district court entered a complex 46-page decree,\textsuperscript{123} retaining a receiver who had been appointed pendente lite to administer Hartford's affairs and imposing various conditions on

\begin{itemize}
  \item \textsuperscript{120} It may have been evident that the district court's chosen remedy accommodated the various interests as well as could be done by an effective desegregation order. However, nothing in the Court's opinion indicates that easy affirmance will be accorded only those district court orders which it is evident will strike a desirable accommodation of the various interests. Rather, \textit{Swann} seems to indicate that district court orders will be uncritically upheld against defendants' assertions that the remedies are unnecessarily broad, except in the rare case where the remedy violates a rule eliminating a category of alternatives. \textit{See Milliken v. Bradley}, 418 U.S. 717 (1974).
  \item \textsuperscript{121} The district court's remedy is of course not totally disregarded. Where the choice between the district court's remedy and some alternative is a matter of indifference to the appellate court, the district court's remedy will be upheld. Beyond that, the district court's choice may have virtually no effect or may be controlling only on details.
  \item \textsuperscript{122} 323 U.S. 386 (1945).
  \item \textsuperscript{123} \textit{Id.} at 392. In addition to the 46-page decree the district court entered a 160-page opinion, and the record in the Supreme Court spanned 16,500 pages.
\end{itemize}
defendants' businesses. The Supreme Court undertook a detailed, paragraph-by-paragraph review of the decree. It concluded that the receivership was "not necessary to the prescription of appropriate relief" and accordingly declared that it should be terminated. The Court did not purport to take the district court's views into account at all. Similarly, the Court meticulously analyzed the other specific provisions of the decree and made numerous detailed changes. It altered both significant provisions and provisions of comparative triviality, making each of its changes on the basis of its own original judgment without relying on the district court to any degree.

The Supreme Court did not explain why it undertook such a careful, particularized review. The reason does not seem to have been disapproval of the district court's excessive harshness to the defendants, for although the vast majority of the Supreme Court's changes favored the defendants, one significant change went further in granting the government relief than the district court had gone. Moreover, although Hartford-Empire is notable for the depth of the Supreme Court's inquiry into an extremely complex remedial scheme, it is by no means the Court's only searching, non-deferential review of an antitrust decree. Such review has been undertaken both where the district court's decree went too far and where it did not go far enough.

124. Id. at 410-35.
125. Id. at 411.
126. Id. at 410-35.
127. The dissent challenged not only the wisdom of the majority's changes as a substantive matter but also the propriety of the scope of review utilized. Justice Rutledge lamented that it was not the Supreme Court's business to rewrite the decree. Id. at 441 (dissenting opinion).
128. On a subsequent motion for clarification or reconsideration, the Court rejected the contention that it had no authority to modify the district court's decree. The Court invoked "the unquestioned power of an appellate court in an equity cause" and said further that "in suits under the Sherman Act, it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching importance to the judgment of a single judge, without review of the relief granted or denied by him." Hartford-Empire Co. v. United States, 324 U.S. 570, 571 (1945). The Court did not discuss why, given the power to modify the decree, the standard of review was so high.
129. The district court had imposed restrictions on a trade association which the defendants had used in effecting their illegal practices. The Supreme Court concluded that it would be better to order the association's dissolution, noting that the district court's order had already destroyed much of its usefulness and that detecting improper uses of the association would be difficult. 323 U.S. at 428.
130. See Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948); Standard Oil Co. v. United States, 221 U.S. 1 (1911).
The Court has adverted to the need for greater scrutiny in expediting Act appeals because of the absence of intervening court of appeals consideration of the cases. But that alone does not explain the Court's heightened review, for the traditional abuse-of-discretion standard has never been thought to apply only to the second appellate level. Courts of appeals have generally relied on district court determinations in the same manner the Supreme Court has; to say that the Supreme Court's position in expediting Act appeals is analogous to that of a court of appeals does not explain its departure from deferential review standard. Moreover, the Supreme Court also hears direct appeals in other areas and it has not attempted to distinguish standards of review based on whether or not there has been intervening consideration by a court of appeals.

The Court has also adverted to the public interest in antitrust decrees as warranting careful appellate scrutiny. The public interest in other public law cases is often at least as great, and in many such cases appellate review has been cursory. Perfunctory review has even been exhibited in antitrust cases, usually without any mention of the line of cases applying a higher standard. In the rare instances where the Court has acknowledged the inconsistency of its approaches, it has not undertaken any explanation but has merely announced which approach it deems appropriate in the case at bar.

Whatever the reasons for the Court's heightened scrutiny, the approach is no longer reserved solely for antitrust decrees. For example, the Court has indicated its willingness to review reapportionment decrees with much greater care than an abuse-of-discretion approach would call for. The Court's earliest decisions reviewing reapportionment decrees involved claims that the decreed apportionment schemes were themselves unconstitutional. In deciding such questions

134. See, e.g., Montano v. Lee, 401 F.2d 214 (2d Cir. 1968); J.M. Fields of Anderson, Inc. v. Kroger Co., 330 F.2d 686, 687 (5th Cir. 1964); Bowles v. Montgomery Ward & Co., 143 F.2d 38, 43 (7th Cir. 1944).
of substantive constitutional rights—in contrast to questions of which of various constitutionally acceptable remedies to implement—the Court of course made its own analysis. Thus, when appellants in *Swann v. Adams*141 questioned the constitutionality of the district court’s reapportionment plan, the Supreme Court decided on its own that the plan was unconstitutional. No deference was accorded the district court.

More recent apportionment appeals have challenged the appropriateness, rather than the constitutionality, of the district courts’ choices. However, the Court’s willingness to use a non-deferential review standard has continued. In *Whitcomb v. Chavis*,142 the district court held the use of a multimember legislative district for Marion County, Indiana, to be an unconstitutional deprivation of the voting rights of the district’s ghetto residents. It also held the entire state to be unconstitutionally apportioned. It entered a reapportionment decree eliminating every multimember district in the state and correcting the impermissible population disparities.143 The Supreme Court sustained the district court’s holding that Indiana’s statewide apportionment was unconstitutional but rejected the holding that the Marion County multimember district was itself unconstitutional.144 The Court went on to say that even if the district court had been correct in concluding that the use of a multimember district for Marion County unconstitutionally infringed the voting rights of ghetto residents, its broad decree could not be sustained.145 The Court suggested several alternatives which the district court could have adopted, such as using single-member districts for the ghetto area while leaving the remainder of Marion County as a multimember district, or leaving the entire district intact while requiring a certain number of the district’s representatives to be residents of the ghetto.146 The Court did not explain why the evaluation of such options was not a matter for the district court’s discretion. In addition, the Court hinted at its willingness to review district court reapportionment plans to an even greater extent, saying its failure to pass on the details in the case at hand resulted from the need for revision of the plan in light of the intervening 1970 census.147

The courts of appeal have also sometimes refused to rely on district court resolutions of remedial issues. In *Rhem v. Malcolm*,148

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141. 385 U.S. 440 (1967).
143. *Id.* at 139.
144. *Id.* at 160, 161.
145. *Id.* at 160–61.
146. *Id.* at 160.
147. *Id.* at 141. See also *Chapman v. Meier*, 420 U.S. 1 (1975).
148. 507 F.2d 333 (2d Cir. 1974).
the Second Circuit vacated the district court's decree directed at remedying unconstitutional conditions in the Manhattan House of Detention for Men (the "Tombs"). In January 1974, the district court had held the jail conditions unconstitutional, and in March 1974 it had ordered the city to submit a remedial plan. The city failed to do so, and in July the court ordered the Tombs closed within a month, saying its order would be reconsidered if the city submitted a plan.149 The court of appeals said the district court's order clearly would not have been an abuse of discretion if entered in January, and it noted that the city had really known since January that it would be required to formulate a plan.150 Nonetheless, the court of appeals did not simply uphold the district court's order but proceeded to prescribe a more appropriate approach. The court said that rather than ordering the Tombs closed unless the city submitted a plan, "the order should be framed to close the prison to detainees or to limit its use for detainees to certain narrow functions by a fixed date, unless specified standards are met."151 The court listed several examples of the types of provisions it deemed acceptable and remanded the case to the district court with instructions that the parties be given further opportunity to offer suggestions.152 Though many of the specifics were left to the district court, it was clear that the court of appeals had undertaken a de novo review of the appropriateness of the original order.

The examples of heightened review discussed above disposed of cases in different ways. In *Hartford-Empire Co. v. United States*,153 the Supreme Court disapproved some of the district court's provisions and prescribed the provisions to be used as substitutes.154 In *Whitcomb v. Chavis*155 and *Rhem v. Malcolm*,156 on the other hand, the appellate courts, rather than prescribing specific substitutes, broadly outlined several alternatives from which the district courts could choose. The *Hartford-Empire* approach results in the implementation on remand of the remedy the appellate court deems appropriate. The *Whitcomb* and *Rhem* approach calls the district court's discretion back into play on remand, but the appellate court

149.  *Id.* at 339.
150.  *Id.* at 340.
151.  *Id.*
152.  *Id.* at 341.
154.  Even in prescribing specific provisions the Court's approach was incremental, i.e., it built on the district court's foundation rather than starting anew.
156.  507 F.2d 833 (2d Cir. 1974).
maintains effective control so long as it will again make its own assessment of the appropriateness of the newly chosen remedy. The Hartford-Empire approach is more direct, but both approaches yield effective control over remedial choices.

IV. The Desirability of Extensive Appellate Review

A. The Traditional Allocation of Rules Between District and Appellate Courts

The question that I have deferred until now is whether extensive appellate control of remedies is desirable. It is useful to begin an analysis of that issue with a review of the traditional division of responsibility between federal district and appellate courts.

Ultimate responsibility for deciding "questions of law" is assigned to appellate courts, and primary responsibility for deciding "questions of fact" is assigned to district courts. Despite its obvious fuzziness the law-fact distinction is for the most part a serviceable guide. Two notions may underlie this allocation of functions. First, it may be based on institutional competences: district courts observe the witnesses and may, therefore, be able to resolve factual disputes more reliably than appellate courts. Second, the allocation may be based on the relative importance of the disputed issues: decisions on questions of law become part of a body of precedent and thus often have widespread, enduring ramifications extending beyond the adjudicated controversy; decisions on questions of fact purportedly affect only the parties to the particular litigation. The greater importance of decisions on questions of law is presumably thought to necessitate assigning ultimate responsibility for them to appellate courts.

Neither of these factors, the importance of the disputed issues nor institutional competences, supports assigning ultimate responsibility for choosing public law remedies to district courts. By definition public law remedies affect the public. It is clear that the result in any particular case impacts upon many persons other than the parties to the lawsuit. Public law remedies often affect whole communities.

157. The extent of the control depends on the extent to which on a subsequent appeal the appellate court would be willing to make its own assessment of the remedies. The Whitcomb and Rhem cases undertook de novo consideration of the appropriateness in the particular circumstances of the district courts' general remedial approaches; if the district courts adopted the suggested general approaches on remand, it is unclear whether the appellate courts would have reverted to the abuse-of-discretion review standard. If they did, the level of appellate control would be significantly less than in Hartford-Empire.

158. See note 17 supra.

159. See note 9 supra.
Moreover, public law remedies may become part of a body of precedent and, like other decisions on questions of law, influence the results in future cases.\textsuperscript{160} Public law remedial decisions are thus at least as important as the routine decisions on questions of law which are submitted to appellate courts every day. Just as the importance of questions of law warrants plenary appellate review, the often greater importance of public law remedial decisions also warrants plenary review.\textsuperscript{161}

Turning to relative competences, the only clear institutional advantage of district courts is their ability to observe the witnesses. No matter how valuable demeanor evidence may be in assessing factual disputes, though, it is of very little significance in choosing remedies. At the remedy stage the facts are far less controversial than the inferences to be derived from the facts and the significance to be accorded them. The cold record is likely to be as helpful as observing the hearings. Indeed, when district courts proceed on the basis of documentary evidence and masters' reports, they have no greater access to demeanor evidence than appellate courts. In short, the availability of demeanor evidence should not affect the allocation between district and appellate courts of the responsibility for choosing remedies.

There is another aspect of institutional competences which might be thought to warrant deference to district court remedial choices. The district court is likely to achieve much greater familiarity with the whole case, especially in complex and protracted litigation. The appellate court sees only the tip of an iceberg. Thus the problem is posed: complex cases are often the most important and affect the most people, thereby calling for greater appellate control; but at the same time complex cases may be the ones that appellate courts are least capable of assessing reliably.

\textsuperscript{160} Fashioning remedies will of course never become merely an exercise in applying precedent. The need to mold decrees to particular circumstances limits the role of precedent to guiding, not determining, remedial decisions. But the guidance can be significant. See, e.g., Kilgarin v. Hill, 386 U.S. 120, 121 (1967) (summarily upholding aspect of remedy on basis of precedent); Hartford-Empire Co. v. United States, 323 U.S. 386, 429 (1945) (rejecting antitrust decree provision on basis of precedent); Bowman v. County School Bd., 382 F.2d 326, 329 (4th Cir. 1967) (remanding for entry of faculty desegregation order at least as extensive as particular decree issued by another court).

\textsuperscript{161} It has even been suggested that the importance of public law cases warrants appellate redetermination of the facts. Developments in the Law—Injunctions, 78 Harv. L. Rev. 994, 1070 (1965). The arguments for remedial review are stronger than those for factual review in two fundamental respects. First, unlike findings of fact, remedial decisions contribute to a body of precedent and affect future cases; they are thus more important. Second, the district court observes the witnesses, making its findings of fact more reliable than an appellate court's.
The depth of the dilemma should not be overstated. Even if appellate court assessments are indeed less reliable, it does not follow that total deference should be accorded the district courts. It would be enough for appellate courts to proceed cautiously, maintaining an awareness of their limitations and giving due regard to the conclusions of the district courts. An appellate court could still inject its own judgment: (1) where seeing the "whole picture" seems less important; (2) where the district court's decision appears inappropriate whatever the "whole picture" might reveal; and most importantly, (3) where broad policies seem to call for a basically different approach than that taken by the district court. Hence, even accepting a harsh view of appellate competences, greater review is called for than the traditional abuse-of-discretion standard provides.

Moreover, there is no reason to accept the harsh view of appellate competences. It is no doubt true that district courts will inevitably have greater familiarity with complex cases than appellate courts can hope to acquire, but there is no reason to suppose that complete familiarity with every facet of a case is necessary or even helpful to a complete assessment of remedies. Appellate courts do not act in a vacuum. They begin with the district court's findings of fact and conclusions of law, and are often provided with the district court's explanation of its decree. With that background the briefs and arguments can highlight the significant factors from which the appellate court should work. At its best that system should permit the appellate court to develop a firm grasp of the case. The appellate court will perhaps never be able to deal intelligently with all the details of a complex decree, but it will not be called upon to do so. Only the more significant aspects of the decree are the ones as to which appellate review is important, and the parties will almost always emphasize those aspects and insure appellate court familiarity with them. Acquiring the requisite knowledge of a case will of course require a significant commitment of time and effort by the appellate court; it is not impossible, however.

163. The system will work best if participation is not limited to parties. Rather, all significantly affected interests should be represented.
164. The Supreme Court has on occasion dealt with the details of a complex decree. See, e.g., Hartford-Empire Co. v. United States, 323 U.S. 386 (1945). However, extensive and meaningful appellate review can normally be achieved by focusing on the basic structure and significant aspects of a decree.
165. Which aspects of a decree are "significant" may not be self-evident, but this does not create a problem. So long as all appreciably affected interests are represented in the appellate process, see note 163 supra, the court need not itself determine the "significant" aspects of the decree. Instead, the court can simply rely on the parties and amici.
It should be noted that the factor of institutional competences does not cut only one way. First, the district court's greater familiarity with the case may be a disadvantage as well as an advantage. The court's tremendously intense, sometimes almost personal, involvement may lead to a mind-set which makes objective and sensitive consideration of new evidence and alternatives virtually impossible. The district court may lose its sense of perspective. Moreover, the appellate court has institutional competences the district court may lack. It adjudicates public law cases in not just one area but in many, developing thereby a broader outlook. The appellate court thus achieves a better command of overall policy objectives and how they relate to remedies. These institutional competences favor extensive appellate review of remedies, and they go far to offset the institutional advantage provided by the district courts' greater knowledge of particular cases.

In sum, there is no reason to suppose that appellate courts are not fully competent extensively to review remedial choices. Appellate review will bring to bear competences that district courts lack. The greater familiarity with complex cases which district courts are likely to achieve may sometimes lead appellate courts to exercise caution and to keep in mind their relative disadvantage, but it certainly does not justify abandoning extensive review. In view of the great importance of public law remedial choices, the factors underlying the traditional allocation of roles point toward allocating ultimate responsibility for those choices to the appellate courts.

B. The Effect on Appellate Resources

There remains, however, another issue. Although it is arguable that any shortage of judicial resources should not be allowed to foreclose access to a judicial forum, a more practical analysis requires the consideration of whether our limited appellate resources can sustain the required commitment.

It is unlikely that increasing the level of appellate scrutiny will significantly increase the percentage of cases which are appealed. Most public law cases are appealed anyway, usually on the liability issue and often on the remedy issue as well. The prospect of heightened

166. A less rigid argument is that the scarcity of judicial resources should not foreclose extensive appellate remedial review unless such review would be a less valuable use of resources than the uses to which appellate resources are currently devoted. Cf. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 410-11 (1971) (Harlan, J., concurring).

167. The reason remedies are often appealed is that, as previously indicated, some renderings of remedial issues are always seen as subject to plenary appellate review. See generally notes 23-46 and accompanying text supra. If either party claims that some
appellate scrutiny might lead parties to appeal from more orders in the same case and thus increase the number of appeals, but the separate appeals could easily be consolidated in most instances. Therefore, any incremental burden imposed on appellate courts will result not from additional appeals but only from expansion of the issues involved in existing appeals.

Several of the approaches which have been used for supervising remedial choices require little if any additional resources. This is especially true of the procedural approach which requires district courts to indicate that they have exercised their discretion in line with existing guidelines and have adequately considered the available alternatives. Once a case is before an appellate court on the issue of liability so that the judges are generally familiar with it, little of their time is required to review the district court's opinion for compliance with these guidelines. Similarly, announcing remedial rules or pre-

remedial rule should govern the case, the appellate court will reach a de novo determination of the issue. That such claims are not often successful does not prevent them from being made. Moreover, even when appellate review is filtered through the abuse-of-discretion standard there is some slight chance that the district court decision will be set aside. Such a slight chance of success would not warrant taking an appeal in a typical private lawsuit, but the tremendous importance of many public law cases makes it worthwhile to take an appeal if there is any chance at all of success. Indeed, the moral and philosophical overtones of some public law cases might induce parties to fight on even where the chance of success is negligible. That phenomenon, in combination with the high level of uncertainty as to the governing law, leads to the almost automatic appeal of public law cases on the issues relating to liability.


169. Indeed, some reexamination of the rules regarding appealability might be appropriate. Though each separate order comprising the overall remedy is currently an appealable order, see note 168 supra, it might be preferable to create some mechanism for treating such orders collectively. Such a system would be consistent with the rationale of the final order rule, i.e., avoiding piecemeal review. However, as 28 U.S.C. § 1292(a)(1) (1970) recognizes, there is an interest in securing immediate review of orders which might have irreparable or at least highly obtrusive consequences. Some compromise of the conflicting policies is in order.

In the meantime, the ability to consolidate appeals should prove a serviceable tool. Counsel would be required to file a notice of appeal each time an objectionable order is entered, but the separate appeals need not consume more appellate resources than would a single appeal from a combined order. In addition, any calendaring problems could be handled by existing devices; stays and expedited appeals would continue to be available as needed.

170. See generally notes 69-82 and accompanying text supra.

171. It is well established that any remedial rules will be subject to plenary appellate review. See notes 23-24 and accompanying text supra. As to rules, the issue is not which level of courts will announce them; rather the issue is whether controlling remedies through rules is a rational and effective approach. In most circumstances it is not.
sumptive preferences does not require greater appellate court knowledge of cases than those courts possess already. The burden on appellate resources should not affect the decision whether or not to utilize these approaches.

In many public law areas extensive control can only be achieved by particularistic review. Such review generally requires the appellate court to become better acquainted with the decree and the underlying factual situation than is necessary for disposing of the issue of liability. Thus there is a drain on appellate resources, but it could be minimized by the appellate court's building incrementally from the district court's decree rather than formulating a new remedy from the ground up.

This procedure minimizing the appellate burden is illustrated by two particularistic review cases discussed earlier. In Whitcomb v. Chavis, the Supreme Court disapproved the district court's reapportionment decree using exclusively single-member districts. The Court did not mold a substitute decree—a step which would have required a considerable increase in the time the Court devoted to the case—but instead mentioned several approaches the district court should consider on remand. Similarly, in Rhem v. Malcolm, when the Second Circuit disapproved the district court's decree it remanded the case for consideration of various suggested alternatives.

Particularistic review will be even more effective and less burdensome if district courts are required to explain their remedial choices. Such explanations focus the inquiry, allowing the appellate court to start from the district court's analysis. Points on which the persuasiveness of the district court's opinion cannot be shaken can be disposed of rather summarily. Wasted appellate scrutiny can therefore be eliminated.

It might be objected that such an incremental approach will consume rather than save appellate resources because it may require repeated appeals in the same case. The district court's decree on remand may result in a second appeal; if the appellate court again

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172. The effectiveness of the presumptive preference approach turns on the scope of review of district court decisions that the presumption is overcome. See notes 91–95 and accompanying text supra. If the scope of review is high, the appellate court may have to become more familiar with a case than would otherwise be required.
173. See notes 97–98 and accompanying text supra.
175. Id. at 160.
176. 507 F.2d 533 (2d Cir. 1974).
177. Id. at 341.
178. As previously indicated, such a requirement should be imposed whether or not particularistic review is undertaken. See notes 79–82 and accompanying text supra.
disapproves the decree there will be another remand and later perhaps yet another appeal. At least theoretically the process could continue forever. In practice, however, the problem is unlikely to be very significant. An appellate court sensitive to the district court's problems will be able to provide sufficient guidance to minimize the risk of repeated reversals.

Indeed, rather than leading to repeated appeals a system of particularized review might eventually result in fewer appeals. Candid remedial discussion will develop a body of experience upon which district courts can draw in formulating remedies and appellate courts can draw in reviewing them. The precedential value of the decisions\textsuperscript{179} may make it clear in some instances that an appeal would be unfruitful.\textsuperscript{180} At any rate the body of experience will make it easier to dispose of appeals. In addition, the initial burden which the formulation of remedies imposes upon district courts will be reduced.

The conclusion seems justified that widespread particularistic review could be undertaken without causing any devastating increase in the appellate workload.\textsuperscript{181} Of course, it could be argued that we should disapprove even the undramatic drain on appellate resources which would be occasioned. Our courts are already overburdened, the argument would run, and in the name of conserving judicial resources we have often opted for the certainty of clear rules rather than balancing the equities of each case in search of a few better results. However, the inaptness of the analogy should be emphasized. If we decide to eschew particularistic remedial review it will not be in favor of a rule deemed to reach the desirable result in most cases. Rather, it will be in favor of ad hoc district court decisions. Certainty will not be provided, and the number of lawsuits being litigated will not be reduced. Therefore, the resulting tolerance of at least some undesirable outcomes cannot be justified by the societal advantages usually associated with choosing the certainty of rules over the sometimes greater reliability of individualized determinations. The argument for disapproving particularistic review must rest squarely on the notion that additional review is not worth the resources consumed. Striking that balance requires an analysis of the importance of appellate review.

\textsuperscript{179} See note 160 \textit{supra} and cases cited therein.

\textsuperscript{180} Usually, however, the importance of a public law decree and the moral or philosophical overtones of the contested issues will produce an appeal even where the result is only slightly in doubt. See note 167 \textit{supra}. Nevertheless, the pressure to appeal will be greatly reduced after one round, and well-articulated appellate decisions will minimize the incidence of multiple appeals.

\textsuperscript{181} Indeed, as previously indicated, particularistic review has already been undertaken in various cases. See generally notes 121–57 and accompanying text \textit{supra}.
C. The Importance of Appellate Review

I have already emphasized the enormous importance of public law remedial decisions. Although full appellate review is traditionally accorded decisions of such widespread importance, it is perhaps not self-evident that that should necessarily be so. It is submitted that a meaningful appellate role—announcing rules or guideposts of presumptive preferences where those techniques are useful, scrutinizing district court explanations of their decisions, and frequently undertaking some level of particularistic review—should be developed. Two sets of concerns underlie this submission. First, public law remedies rank among the most controversial decisions rendered by modern courts. Appellate review can enhance the authoritativeness of the decisions and help make the judicial role effective in practice as well as in theory. Second, it requires no elaboration that decisions of such importance should be as reliable as possible, and appellate review can help maximize their reliability. 182

The first reaction of a lay person to an adverse judicial ruling is often a vow to fight the decision “all the way to the Supreme Court.” The lay person may know little of the relevant substantive law and virtually nothing of judicial procedure, but he knows he can appeal and he knows the final word is that of the Supreme Court. While it is true that an appellate court’s wholly deferential affirmation of the district court’s exercise of discretion might, nonetheless, be seen by the laity as an authoritative appellate pronouncement, it would be disingenuous to suggest that we should settle for such fraudulent authoritativeness in regard to decisions of such importance. Authoritativeness is enhanced by appellate review, and the review should be meaningful review. 183

182. “Reliable” here means “correct,” i.e., substantively the best remedy which could be implemented in the lawsuit. It is obviously impossible to state unequivocally which one remedy is the best in most public law cases. To the extent a best remedy can be determined, however, the judicial system should be structured so as to assure that it is the one implemented.

183. Another reason appellate review enhances authoritativeness is that it increases the number of judges who have approved the remedy. The three-judge court requirement, 28 U.S.C. § 2281 (1970) repealed, Act of Aug. 12, 1976, Pub. L. No. 94-381, was enacted out of a concern that one federal judge should not have the power single-handedly to invalidate an entire state statute. See generally P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 967–68 (2d ed. 1973). Even before the institution of three-judge courts, though, the actions of the single judge were eventually subjected to plenary appellate review. On the other hand, the effect of public law remedies on the state may be every bit as devastating as the invalidation of a statute. Nevertheless, not only can a single judge usually implement such a remedy, but his decision is often insulated from meaningful appellate review. The heavy criticism which has been leveled at the three-judge court
More importantly, appellate review increases the reliability\textsuperscript{184} of remedial decisions. As previously indicated, appellate courts possess some institutional advantages over district courts which increase the reliability of their decisions. First, an appellate court has a fresh perspective and thus can correct any tendency of the district court to develop tunnel vision from long exposure to the case. Second, an appellate court may have a broader perspective and a better command of general policy goals. A system of extensive appellate review which builds incrementally from the district court's foundation utilizes the institutional advantages of both courts and accordingly secures more reliable results.

Greater reliability would result from extensive appellate review even if appellate courts had no institutional advantages to inject into the process. A system of appellate review would produce a body of remedial experience and precedent. Remedies would still be molded to particular circumstances, but the reasoned explanations of earlier results and the greater uniformity in general approaches resulting from appellate review would significantly decrease the ad hoc nature of the process.\textsuperscript{185} Here as elsewhere, ad hoc decisions are much more suspect than decisions which comport with a general body of law.\textsuperscript{186}

One of the most cherished maxims of our system of government is that it is a government of laws, not of men.\textsuperscript{187} The maxim is less than completely accurate, of course, but it embodies an important truth. Decisions which must be reconciled with a structure of

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\textsuperscript{184} See note 182 supra.

\textsuperscript{185} Theoretically at least, district court remedial decisions could develop into a body of precedent just as appellate decisions do. But district court remedial decisions, if not subjected to appellate review, often will not contain the elaboration of reasoning and the description of the underlying situation necessary to enable them to be used most effectively by subsequent courts. Moreover, district court decisions do not bind other district courts, and without appellate review there is no method for resolving conflicts. Meaningful appellate review is essential to the effective development of a body of precedent.

\textsuperscript{186} "Our scheme of ordered liberty is based, like the common law, on enlightened and uniformly applied legal principle, not on ad hoc notions of what is right or wrong in a particular case." J. Harlan, Thoughts at a Dedication: Keeping the Judicial Function in Balance, in The Evolution of a Judicial Philosophy 289, 291–92 (D. Shapiro ed. 1969). See generally McGautha v. California, 402 U.S. 183, 248–87 (1971) (Brennan, J., dissenting). See also Railway Express Agency v. New York, 335 U.S. 106, 112 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.").

\textsuperscript{187} The expression perhaps first found its way into the United States Reports in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
established norms are more likely to be substantively just than are essentially ad hoc decisions.

Public law remedial decisions are enormously important, for they touch the lives of almost everyone and affect some persons more personally than any other governmental action. A sensible system of appellate review would help transform remedial decisions from ad hoc choices into parts of an established legal structure. The role of individual judges would continue to loom large, but to a far greater extent than now public law remedial decisionmaking would be government by laws, not by men.

V. CONCLUSION

The uncritical transfer of remedial review standards from the private law system into the public law system greatly diminishes appellate control over remedies. Despite the announced review standards, however, appellate courts have often used various approaches for supervising remedies more closely. The cases in which they have done so demonstrate that an effective appellate role can be maintained. But the failure to confront the issue has prevented an analysis of the strengths and weaknesses of the several appellate techniques. They vary in effectiveness and in the drain which they impose on appellate resources.

Because public law remedial decisions are enormously important and often very controversial, it is crucial that they be authoritative and substantively reliable. It is essential to their reliability and authoritativeness that meaningful appellate review be provided. While a case can be made for consistently undertaking full, particularistic review, it is at least clear that courts should consciously pick and choose among the several appellate techniques in order to maximize the effectiveness of the appellate role.