The United States as Participant in Public Law Litigation: Recent Developments

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Introduction

The net of public law litigation sweeps deeply, dragging a broader range of interests into court than the customary lawsuit between discrete (or at least well-defined groups of) litigants who seek the adjudication of opposing private interests. Among the most important of the constitutional and practical problems presented by public law litigation is how such litigation can dispose of all the diverse and only partially conflicting interests it affects without compromising the intertwined ideals of the adequate representation of affected interests and the conclusiveness of a judicial decree. To the extent that the broad range of interests at stake in public law litigation puts in issue "the public interest," the United States is an obvious candidate for the role of representing the public interest in public law litigation. This paper examines the current role of the United States as such a public interest representative.

The most straightforward way for the United States to participate in public law litigation is, of course, to initiate the litigation itself. Many agencies of the federal government have express statutory authority to do just this,[1] with the Department of Justice having the most extensive authority of all.[2] Virtually all of these

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For this paper, I have drawn on my experiences as the current "scholar in residence" at the Civil Rights Division of the Department of Justice. The views presented here are mine alone and do not necessarily reflect the policies or perceptions of the Department of Justice. I am much indebted, however, for the generously shared expertise of Brian K. Landsberg, Chief of the Appellate Section of the Civil Rights Division, and of Mary Lynn Walker, Chief of the Special Litigation Section of the Civil Rights Division.

[1] *E.g.*, 15 U.S.C. § 77t(b)(1976)(authorizing the SEC to bring suit to enjoin violation of the Securities Act of 1933); 15 U.S.C. § 78u(e)(1976) (authorizing the SEC to bring suit to enjoin violations of the Securities Exchange Act of 1934).

[2] *E.g.*, 15 U.S.C. § 9 (1976)(power to enjoin violations of the Sherman Act);

suits fall within Professor Chayes' definition of public law litigation,[3] if not within Professor Cogan's competing definition of a "public action."[4] My focus, however, is on civil rights. Civil rights

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33 U.S.C. § 1160 (1976)(power to enjoin violations of the Clean Water Act); 15 U.S.C. § 2071(a)(1976)(power to enjoin violations of the Consumer Product Safety Act).

[3] *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

[4] *See* Cogan, *Some Thoughts on the Meaning of "Public Action" and the Concerns of Public Action Adjudication*, this issue at 215. As I understand it, Professor Cogan's conception of a "public action" — in the "strong" sense at least — is an action in which a new "rule of general applicability" likely to have "a significant effect upon the behavior of a large number of persons" is promulgated in the course of adjudication. *See id.* at 216-18. Thus an action that indisputably would affect numerous non-parties, such as school desegregation litigation, would not necessarily count as a public action in Professor Cogan's strong sense unless it involved some new substantive rule of law rather than the application of an existing (if disregarded) substantive rule of law. Mere enforcement proceedings are within Professor Chayes' definition of public law litigation, insofar as they seek "the vindication of constitutional or statutory policies" as opposed to the particularistic private rights of the adversary parties. *See* Chayes, *supra* note 3, at 1284. While this criterion of public policy is accepted by Professor Cogan as a definition of "public action" in the weaker sense, Professor Cogan's preferred definition restricts the terms to litigation in which the court makes new law by a dialectical process of inquiry into how people *do* in fact behave at present ("legislative facts") and how people *ought* to behave in principle ("legislative values"), such that the values enforced by the authority of the court, and thereby "validated," are incorporated in a "rule of general applicability" specifying how people *must* behave in the future. The mere enforcement of previously "validated" values in a proceeding limited to determining the fact of non-compliance would fail this test.

I question, however, whether the prospective enforcement of existing law, let alone the remediation of past violations, is frequently so mechanistic as to involve no further resolution of facts and values. The "increasing importance of equitable relief" and its balancing of interests, contrary to the mechanistic "winner-takes-all" approach of the common law, are vital to Professor Chayes' case for the distinctive features of his public law model of litigation, whose "centerpiece" is "the decree." Chayes, *supra* note 3, at 1292-93, 1298. Regardless of how settled the law giving rise to liability, the process of implementing that law through a workable and effective decree may still require the sort of legislative conduct which Professor Cogan sees as characteristic of a "public action." *See id.* at 1298-1302.

Although they are far from mutually exclusive, the Chayes and Cogan conceptions of public actions do differ fundamentally in their focus. Professor Cogan is concerned with the legitimacy of judicial lawmaking. Even a paradigmatic private action, such as an automobile tort suit, becomes a public action when a party succeeds in persuading the court to overrule a precedent or decide a novel issue. *See, e.g.*, Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal.

suits lie at the core of our concern over public law litigation as a distinct model of litigation and have important ramifications for the law of civil procedure.[5]

The Attorney General has express statutory authority to bring suits to enforce federal civil rights laws in the fields of education,[6] public facilities,[7] public accommodations,[8] voting,[9] employment,[10] housing[11] and credit.[12] In most instances, the Attorney General also has express authority to intervene in private actions seeking enforcement of these same civil rights laws. Furthermore, the Attorney General has express authority to intervene in private suits to redress discrimination on the basis of "race, color, religion, sex or national origin" in violation of the equal protection clause of the fourteenth amendment.[13]

These scattered grants of express statutory authority do not, however, even begin to exhaust the situations in which participation by the United States might well be the most desirable way

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Rptr. 858 (1975) (principles of contributory negligence disavowed in favor of principles of comparative negligence). Because such a new rule will affect the behavior of the general public, Professor Cogan invites inquiry into whom should participate in the litigation. But this sort of judicial lawmaking is nothing new, and is generally a feature only of courts of last resort. Professor Chayes is more concerned with the legitimacy of active judicial implementation of the law, by intimate participation in the conduct of the trial and detailed involvement in the framing and effectuation of decrees that may restructure basic social institutions. This is a new concern, and one directed at the trial rather than the appellate level of litigation.

For the purpose of identifying cases in which rights of intervention at trial should perhaps be liberalized, I find Professor Chayes' conception of public law litigation the more apposite. Professor Cogan would, I think, ask what difference it makes to bring additional parties into court, what broader "representation" of interests this would achieve, if judicial lawmaking is undemocratic — if judges, not parties, make law. This is a good question, which deserves a better answer than the intuitive one that a court will benefit from representative advice even if its judgment is not constrained by any requirement of representative approval.

[5] "School desegregation, employment discrimination, and prisoners' or inmates' rights cases come to mind as avatars of this new form of litigation." Chayes, *supra* note 3, at 1284.

[6] 42 U.S.C. § 2000c-6(a) (1976).

[7] 42 U.S.C. § 2000b(a) (1976).

[8] 42 U.S.C. § 2000a-5(a) (1976).

[9] 42 U.S.C. § 1971(c) (1976).

[10] 42 U.S.C. § 2000e-6 (1976).

[11] 42 U.S.C. § 3613 (1976).

[12] 42 U.S.C. § 2000h-6 (1976).

[13] 15 U.S.C. § 1691e(h) (1976).

to assure adequate representation of the public interest in public law litigation. No express authority exists permitting the United States to assert the defensive position in *Bakke* that Professor Jones has so cogently argued[14] was not adequately presented. The United States' statutory right of intervention[15] is expressly limited to intervention to defend "the constitutionality of an Act of Congress affecting the public interest."[16] It does not extend to situations where the United States might desire to intervene either to *enforce* the Constitution or some valid congressional act, or to *defend* the legality, under federal law, of affirmative action programs similar to those at issue in *Bakke*[17] and *Weber*.[18]

The lack of express congressional authority, however, does not necessarily preclude the United States from effectively vindicating the public interest. The United States may seek to actively participate in public law litigation through one of three other alternatives. First, the United States can argue that it has inherent or implied authority to *initiate* litigation even absent express statutory authorization. Second, the United States can argue that it has inherent or implied authority to *intervene* in litigation even if it cannot initiate such litigation. Third, the United States can seek to participate in litigation as an *amicus curiae*. In addition, of course, the United States can simply seek new legislation expanding the domain of its express authorization to initiate or intervene in suits to enforce federal law. After first briefly reviewing the troublesome issue of the source of the power to participate, I will survey recent developments on all three litigation fronts which have important ramifications for the United States' role in public law litigation involving civil rights.

I. The Threshold Question of Inherent or Implied Authority to Sue

Whether the United States has the power to initiate or intervene in public law litigation absent specific statutory authority is sometimes said to present a question of "standing."[19] But this

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[14] *See* Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 Harv. C.R.-C.L. L. Rev. 31 (1979); Jones, *Problems and Prospects of Participation in Affirmative Action Litigation: A Role for Intervenors*, this issue at 221.

[15] 28 U.S.C. § 2403 (1976).

[16] *Id.*

[17] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[18] United Steelworkers v. Weber, 99 S.Ct. 2721 (1979).

[19] *See, e.g.*, United States v. Mattson, 600 F.2d 1295, 1297-1300 (9th Cir.

approach confuses the analysis of the problem. The United States, unlike private parties, has no personal interests arising from its status as a political body. In a very real sense, its interests are everybody's interests. Thus, others may not prejudice the United States' "interests" in the same empirical sense that private parties — or entities representing private interests[20] — may have their interests prejudiced. In order to confer "standing," the interests of the private parties must be concretely affected so as to give rise to the requisite "injury in fact."[21] By contrast, any "interest" the United States may have is wholly legal in nature.[22] Thus, the United States' "interest" in redressing federal rights violations of some of its citizens is not a question of fact, but rather is a question of legal theory and, ultimately, of constitutional law.

The United States has sufficient interest in a suit to have "standing" to sue, or more properly *authority* to sue, whenever that conclusion is required by the legal principles which govern the role of the federal executive vis-à-vis the other branches of federal government and the governments of the states. The authority to sue follows obviously enough when Congress has, within the bounds of its constitutional power, statutorily authorized suit by the United States. But it is equally clear that the lack of specific statutory authority does not foreclose the existence of *implied* statutory or *inherent* constitutional authority to sue.

The most famous instance of the "interests" of the United States being deemed sufficiently jeopardized to justify suit with-

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1979). The Supreme Court has recently differentiated the problem of "standing" from the problem whether a particular party has a "cause of action," *i.e.*, "is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." Davis v. Passman, 442 U.S. 228, 239 n.18 (1979). Although I do not think that the *Passman* analysis of when a private litigant has an implied constitutional cause of action to enforce a constitutional right is wholly applicable to the question of the authority of the United States to sue to enforce federal law, that analysis does illuminate the difference between the basically factual issue of standing and the legal issue whether the United States "may, as a matter of law, appropriately invoke the power of the court." *Id.*

[20] *See, e.g.*, Washington State Apple Comm'n v. Hunt, 432 U.S. 333 (1977).

[21] Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72 (1978).

[22] A possible exception to this may be where the "proprietary" interests of the United States as a property owner are involved. If the legal proposition of federal ownership is accepted, on allegation of an infringement of that property interest, an essentially factual question is presented.

out express congressional sanction is *In Re Debs*.[23] In *Debs*, Mr. Justice Brewer, in broad language, found that the United States had inherent authority to initiate suit

> whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights . . .[24]

Debs dealt with inherent authority to sue under the commerce clause; seventy-five years later the case's rationale was extended to civil rights cases. In 1970, Judge Frankel, in *United States v. Brand Jewelers, Inc.*[25] expanded on *Debs* to permit the United States to sue to enjoin the "sewer service" practice of obtaining default judgments in suits against consumers.[26] But *Brand Jewelers* was stranded on the shoals of criticism by the *Harvard Law Review*,[27] and remains today the high water mark of success by the United States in asserting implied or inherent authority to bring public law litigation. While a just-published note in the *Yale Law Journal*[28] may serve to salvage some of the principles of *Brand Jewelers*, the tide of recent judicial authority is to the contrary.

II. Recent Developments

A. Initiation of Suits

In several recent cases the federal courts have proven unreceptive to claims by the United States of implied or inherent authority to *initiate* litigation to redress violations of federal civil rights. These cases were of two varieties. The first involved attempts to sue on behalf of inmates of state mental and penal institutions. The second involved an attempt to correct allegedly unconstitutional police practices in Philadelphia. In both settings the United States was held to lack authority to sue. These rulings cast considerable doubt on the ability of the United States to fill

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[23] 158 U.S. 564 (1895).

[24] *Id.* at 586.

[25] United States v. Brand Jewelers, Inc., 318 F. Supp. 1293 (S.D.N.Y. 1970).

[26] *Id.* at 1295-1300.

[27] Note, *Nonstatutory Executive Authority to Bring Suit*, 85 Harv. L. Rev. 1566 (1972).

[28] Note, *Protecting the Public Interest: Nonstatutory Suits by the United States*, 89 Yale L.J. 118 (1979).

the vacuum of public interest representation in public law litigation by seeking to obtain judicial relief for the benefit of third parties.

The leading case is *United States v. Solomon,*[29] in which the Fourth Circuit affirmed the district court's dismissal of a suit, brought by the United States, seeking redress of unconstitutional conditions in a state mental hospital. The United States contended that the suit was within the scope of the inherent authority of the United States to bring suit, as established innumerous precedents concerning proprietary interests of the United States and impediments to interstate commerce. The Fourth Circuit, however, with the exception of *United States v. Brand Jewelers, Inc.,*[30] found none of the precedents apposite to a suit to redress civil rights violations independently of any effect on interstate commerce. Citing the separation of powers problems posed by executive assertion of authority to sue, which Congress had previously refused to confer by statute,[31] the court found no inherent constitutional power for the executive to bring the suit in question. In addition, it indicated considerable hostility in principle to any expansion of the established contours of implied or inherent executive authority to sue.[32]

The Fourth Circuit's analysis in *Solomon* has since been followed by the Ninth Circuit in *United States v. Mattson,*[33] also affirming a district court's dismissal of a federal suit against unconstitutional conditions in a state mental hospital; by a district court of the Seventh Circuit in *United States v. Elrod,*[34] dismissing claims of unconstitutional conditions in a penal institution; and by a district court of the Third Circuit in *United States v. City of Philadelphia,*[35] dismissing claims of an officially sanctioned pattern and practice of unconstitutional conduct by a municipal police department. In all three cases, arguments of implied or inherent authority to sue were firmly rejected. Of particular interest is the rejection in *City of Philadelphia* of implied

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[29] 563 F.2d 1121 (4th Cir. 1977), *aff'g* 419 F. Supp. 358 (D. Md. 1976).

[30] 318 F. Supp. 1293 (S.D.N.Y. 1970).

[31] United States v. Solomon, 563 F.2d 1121, 1125-29 (4th Cir. 1977).

[32] *Id.* at 1128-29.

[33] 600 F.2d 1295 (9th Cir. 1979), *aff'g* C.A. No. 74-138-BU (D. Mont. Sept. 28, 1976).

[34] No. 76-4768 (N.D. Ill. May 16, 1978), *appeal argued,* No. 79-1394 (7th Cir. Nov. 1, 1979).

[35] No. 79-2937 (E.D. Pa. Oct. 30, 1979).

authority to seek civil injunctive relief as an alternative to the criminal prosecution of police misconduct.[36]

B. Intervention in Pending Litigation

The United States' arguments of implied authority to be a party to civil rights-related public law litigation have recently been accepted, however, in the first court of appeals ruling squarely confronting the power of the United States to *intervene* in such litigation. In *Halderman v. Pennhurst State School and Hospital*,[37] the Third Circuit ruled en banc, and without dissent on this issue,[38] that the district court had properly permitted the United States to intervene in a class action challenging unconstitutional conditions at a state mental hospital.[39] Although the *Halderman* court indicated in dicta its disageement with the separation of powers reasoning of *Solomon*, which rejected claims of inherent executive authority to sue,[40] its ruling was premised on implied authority. This implied authority to intervene was derived from Federal Rule of Civil Procedure 24(b),[41] in conjunction with 42 U.S.C. section 1983 (1976), which expressly authorized the private suit which had initiated the litigation, and with a panoply of federal statutes indicating congressional interest in the protection and assistance of the mentally retarded.[42] The Fifth Circuit has since affirmed the similar reasoning of a district court in permitting the United States to intervene in a prisoner's *pro se* conditions-of-confinement class action.[43]

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[36] The criminal prosecution aspect is expressly authorized by 18 U.S.C. § 242 (1976).

[37] 612 F.2d 84, 92 (3d Cir. 1979).

[38] Six judges joined the majority opinion. Three judges dissented as to the constitutional standard applied by the majority, but did not question the United States' intervention. *See id.* at 116 (dissenting opinion of Seitz, C.J., joined by Aldisert & Hunter, JJ.).

[39] *Id.* at 90-92.

[40] *Id.* at 91-92.

[41] FED. R. CIV. P. 24(b) states, in pertinent part, that: "When a party to the action relies . . . upon any statute or executive order administered by a federal or state governmental officer or agency . . . the officer or agency upon timely application be permitted to intervene . . . ."

[42] Halderman v. Pennhurst State School and Hospital, 612 F.2d 84, 92 (3d Cir. 1979).

[43] Adams v. Mathis, No. 78-2035 (5th Cir. Mar. 17, 1980), *aff'g per curiam on the basis of the district court's opinion*, 458 F. Supp. 302 (M.D. Ala. 1978). Chief Judge Frank M. Johnson, Jr., since elevated to the Fifth Circuit, had ruled

Since the *City of Philadelphia* appeal will be heard by the Third Circuit, we may know soon how serious that court was in its disavowal of *Solomon's* reasoning. In any event, there is now solid appellate authority for permissive intervention by the United States, thus affording an alternative means for the United States to play a full part in assuring the adequate and effective conduct of public law litigation relating to civil rights. But even the intervention horizon is not without clouds. Three justices of the Supreme Court have expressed strong reservations about such intervention.[44] Thus, other avenues to the United States' participation in public law litigation retain their importance.

C. "Litigating Amicus" Status

The final avenue of access by the United States to participation in public law litigation is the status of "litigating *amicus.*" A number of courts faced with massive public law litigation, threatening to exhaust the resources of the original litigants, have permitted,[45] requested[46] and sometimes ordered,[47] the United States to appear as a "litigating *amicus curiae.*"[48] This is, frankly speaking, a bastard form of intervention. Because the United States is not formally a party, concern over its authority to sue is finessed. In a number of cases this status has allowed the United States to conduct virtually all aspects of the litigation, to great effect.[49] The

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that "the United States was authorized to intervene in this action pursuant to Rule 24, Federal Rules of Civil Procedure. The government's standing to intervene is supported by its duty to enforce federal criminal statutes generally applicable to the conduct of the defendants proven at trial. Where, as here, such criminal prosecution would not be effective to prevent constitutional violations, this Court may properly infer the existence of derivative civil jurisdiction." 458 F. Supp. at 308.

[44] Estelle v. Justice, 426 U.S. 925, *rehearing denied,* 429 U.S. 873 (1976) (Rehnquist, J., joined by Burger, C.J. & Powell, J., dissenting from denial of certiorari).

[45] *E.g.*, Larry P. v. Riles, No. C-71-2270 RFP, slip op. at 5, 7 (N.D. Cal. Oct. 16, 1979) (Peckham, C.J.).

[46] *E.g.*, Lora v. Board of Educ., 456 F. Supp. 1211, 1295 (E.D.N.Y. 1978) (Weinstein, J.). *See also* S. REP. No. 96-416, 96th Cong., 1st Sess. 2, 15 n.42 (1979).

[47] *E.g.*, Wyatt v. Stickney, 344 F. Supp. 373, 375 n.3 (M.D. Ala. 1972) (Johnson, C.J.), *aff'd sub. nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

[48] *See generally* H.R. REP. No. 96-80, 96th Cong., 1st Sess. 5 (1979); S. REP. No. 96-416, *supra* note 46, at 10.

[49] *See* H.R. REP. No. 96-80, *supra* note 48, at 15-16; S. REP. No. 96-416, *supra* note 46, at 10, 15-16.

United States has even prosecuted an appeal from a case in which it was a mere litigating *amicus,* although there the issue of its non-party status was not raised on appeal.[50] As litigating *amicus,* the United States has been permitted to frame the issues, conduct discovery, present evidence and cross-examine witnesses.

Litigating *amicus* status is not, however, a complete substitute for full party status. In the final analysis, due to the method and manner of selection, the litigating *amicus* is the puppet of the judge. This is not to say that litigating *amicus* status is not worth the candle; it is but one manifestation of the changes in trial judges' and advocates' roles brought about by public law litigation. These new roles represent a substantial shift from our traditional adversarial system towards the inquisitorial system of the civil law.[51] While I accept this shift to the extent necessary, I believe it should be minimized insofar as it reduces the independence of represented persons in autonomously advocating their views of their interests. Whatever the ultimate role of democratic principles in the judicial process,[52] I assume that the values of popular participation in that process are better served by permitting independent advocates broad access than by expecting the court itself to be a Platonic guardian of the public interest.

While the litigating *amicus* device has proved to be a helpful expedient for expanding the range of interests represented in public law litigation,[53] it would be preferable to restructure the law of intervention so that the representation of collateral interests can proceed with a proper respect for the different roles of advocate and judge. Although I do not oppose allowing judges substantial discretion in deciding to permit intervention,[54] I am concerned about the continuing degree of judicial control over the scope and nature of advocacy which occurs when that advocacy takes place in the context of *amicus* participation, subject to the

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[50] United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969). While the opinion states the status of the United States as an intervenor, *id.* at 226, the brief for the United States clearly states, in its procedural history section, that the only official status of the United States was as a "litigating *amicus.*" Brief for the petitioner United States at 2-3 & n.2. Passage of the 1964 Civil Rights Act during the pendency of the litigation had, however, conferred on the United States express authority to intervene. 42 U.S.C. § 2000h-6 (1976).

[51] *See* Chayes, *supra* note 3, at 1298.

[52] *See supra* note 4, at 219-20.

[53] *See* note 49 *supra.*

[54] *See* Friedenthal, *Increased Participation by Non-Parties: The Need for Limitations and Conditions,* this issue at 259.

court's continuing sufferance. Permissive intervention, as opposed to permission to appear as a litigating *amicus,* involves a single dicretionary decision by the judge to allow a party to intervene. Once intervention is granted, the judge has no more control over the positions taken by the intervenors than over those of the original parties. This is in sharp contrast to the litigating *amicus*, who serves at the sufferance of the judge and who has no appeal as of right should the judge err.

CONCLUSION

If the United States is to fill the vacuum of adequate representation of the public interest in public law litigation, it needs express authority to initiate or intervene in such litigation. The House has passed a bill to do just that in the *Solomon/Mattson* situation,[55] and the Senate has passed a similar bill.[56] The Department of Justice is necessarily somewhat schizophrenic in pursuing such legislation, since any attempt which fails to bear fruit poisons subsequent claims of implied or inherent authority.[57] As of now, however, unless the *Halderman* approach to intervention wins general approval in the other circuits and survives Supreme Court review, only legislation will afford the United States more than piecemeal participation in public law litigation.

The prospects for expansive legislation of this sort are presently quite doubtful. The progress of the proposed legislation to authorize suits on behalf of institutionalized persons has been long and tortuous.[58] There is still an attitude, pervasive in Congress and not unknown in the courts, that states and individuals ought not to be bothered by zealous efforts at the enforcement of federal rights. This attitude, curiously called "federalism" by some,[59] cannot long survive the ascendancy of public law litigation. The path to a more perfect union lies not in needless deference to state

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[55] H.R. 10, 96th Cong., 1st Sess. (1979); 125 Cong. Rec. H3634-52 (daily ed. May 23, 1979) (recording debate, amendments and passage).

[56] S. 10, 96th Cong., 1st Sess. (1979); 126 Cong. Rec. S1954-69 (daily ed. Feb. 28, 1980)(recording debate, passage and transmittal to conference committee).

[57] *See, e.g.,* United States v. Solomon, 563 F.2d 1121, 1125 n.4 (4th Cir. 1977).

[58] *See* S. REP. No. 96-416, *supra* note 46, at 9.

[59] *See, e.g.,* Rizzo v. Goode, 423 U.S. 362, 379-80 (1976). *But cf.* Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation,* 93 HARV. L. REV. 465, 505 (1980) ("*Rizzo* and the recent cases on federalism . . . reveal sensitivity to and are influenced by the strength of the case on the merits.")

autonomy, but in collective action by all branches and levels of government to the end that legal rights become social realities. Public law litigation does not threaten federalism by trading on its central tenet: the supremacy of federal law.[60] Growing social awareness of the power of such litigation to redress widespread violations of law will continue to nourish otherwise fallow federal rights. As the field of public law litigation grows, the courts and Congress alike will, I hope, come to welcome federal participation as a positive and constructive contribution to the threshing of the crop.

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[60] The real question is not whether states are shown respect, . . . but whether their status is such that they are entitled to the final word about the nature of institutional conditions and the pace at which those conditions are brought into compliance with the Constitution. Since *Cohens v. Virginia*, the answer to this question has been no.

Eisenberg & Yeazell, *supra* note 59, at 506 (footnote omitted).