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Susan Poser
University of Nebraska College of Law

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DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT. By *Ross Sandler* and *David Schoenbrod*. New Haven: Yale University Press. 2003. Pp. vii, 280. $30.

I. INTRODUCTION

Democracy by Decree is the latest contribution to a scholarly literature, now nearly thirty-years old, which questions whether judges have the legitimacy and the capacity to oversee the remedial phase of institutional reform litigation.[1] Previous contributors to this literature have come out on one side or the other of the legitimacy and capacity debate. Abram Chayes,[2] Owen Fiss,[3] and more recently, Malcolm Feeley and Edward Rubin,[4] have all argued that the proper role of judges is to remedy rights violations and that judges possess the legitimate institutional authority to order structural injunctions. Lon Fuller,[5] Donald Horowitz,[6] William Fletcher,[7] and Gerald Rosenberg,[8]

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* Associate Professor, University of Nebraska College of Law. B.A. 1985, Swarthmore College; J.D. 1991, Ph.D. 2000, University of California, Berkeley — Ed. I would like to thank Malcolm Feeley for bringing this book to my attention, Norman Poser for his keen eye and helpful comments, and Jason Sutton for his excellent research assistance. I am also grateful for the University of Nebraska College of Law McCollum Summer Research Grant, which helped support the research and writing of this Review.

1. *See* Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 1995 (1999) (stating that Abram Chayes and Owen Fiss, writing in 1976 and 1978 respectively, "set the terms of the scholarly debate").

2. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

3. Owen Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

4. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998).

5. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

6. DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

7. William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982).

among others, disapprove of active judicial involvement in structural remedies on the basis of either lack of legitimacy, lack of capacity, or both. Ross Sandler[9] and David Schoenbrod[10] clearly align themselves with the latter camp. Unlike some commentators, however, they go beyond criticizing the role of courts in these cases and propose specific limitations on judicial authority to provide remedies for constitutional and statutory violations. Their discussion of judicial authority and their criticism of plaintiffs' attorneys is clearly part of a larger agenda aimed at limiting what they consider to be federal overreaching in state and local political affairs.[11] In that sense, *Democracy by Decree* is as much a contribution to the new federalism literature as it is to the debate about institutional reform litigation.

One gets the impression from the book that the passion behind the authors' mission grows out of their personal experiences. The authors describe their own backgrounds as public interest lawyers right out of law school, intent on changing the world. But, they say bluntly, "we were wrong" (p. 31). Ross Sandler began his career as a Root Tilden scholar at NYU law school and then prosecuted environmental cases against polluters as a staff attorney at the Natural Resources Defense Council in the 1970s. In the early 1980s, Sandler began working for local government as a special advisor to New York Mayor Edward Koch and as Commissioner of Transportation in New York City. David Schoenbrod was also a staff attorney for the Natural Resources Defense Council in the 1970s, where he and Sandler sued New York City to enforce the Federal Clean Air Act (pp. 25-31). Schoenbrod's experiences and observations about Congressional delegation to agencies and courts led him to academia where he has been writing about these issues ever since.[12] Ross Sandler and David Schoenbrod are currently law professors at New York Law School, where Sandler directs the law school's Center for New York City Law.

The authors themselves describe *Democracy by Decree* as a book with a mission. The mission, according to Professors Sandler and Schoenbrod, is "to put the remedial decrees issued in institutional reform litigation on a footing that will let judges know when it is appropriate to use them and when it is not, and to direct them to

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8. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

9. Professor of Law, New York Law School and Director, Center for New York City Law.

10. Professor of Law, New York Law School.

11. *See infra* notes 40-43 and accompanying text.

12. DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION ix-x (1993).

use alternatives that will be more effective and more democratic" (pp. 11-12).

If the courts do not choose to impose these limits on remedies voluntarily then the legislature should impose them (p. 12). According to the authors, democracy by decree — by which they mean judicially created public policy in the form of court decrees intended to reform public institutions — stems from the misguided notion that "government can be made more compassionate only if judges impose their will on elected officials" (p. 33).

Democracy by Decree has two great strengths. First, it adds a new and important piece to the institutional reform puzzle by powerfully describing the role of the lawyers, particularly the plaintiffs' lawyers, in the remedial stage of institutional reform litigation. The authors call this group of lawyers the "controlling group" (p. 7; emphasis omitted) and argue that for political, legal, and practical reasons this group is given too much power in directing the course of the litigation and, more significantly, the remedy.

The second and more subtle strength is the authors' acknowledgement that one barrier to successful remedies in institutional reform litigation is the lack of judicial explication regarding the nature of the rights that are intended to be remedied by the court-ordered decrees. Because the judges are not clear about what exactly they intend to remedy through the court-ordered decrees, there is often a real or apparent lack of fit between the legal violation and the remedy imposed. This arguably leads to remedial orders that are overbroad and not necessarily addressed to plaintiffs' protected interests (p. 101).

The greatest weakness of *Democracy by Decree* is that the authors take what they acknowledge to be an extremely complex, "polycentric," problem, and propose an overly simplistic and impractical solution: to tell federal judges to stop fashioning remedies when state and local government officials break the law by violating the rights of individuals (p. 197). Sandler and Schoenbrod acknowledge that some rights, like the right to be free from state-sponsored racial discrimination, should be actively enforced by judges. This acknowledgement leads them to draw incoherent distinctions between the kinds of rights that should be enforced by courts, and the kinds that should not be enforced by them.[13] This solution is ironic since it ignores what I believe even the authors would consider the true source of the problem: Congress's penchant for creating federal rights. While these rights amount to unfunded mandates on state and local governments, they are nevertheless enforceable by private parties in federal court (p. 140). Sandler and Schoenbrod argue that

13. *See infra* Part II.

elected officials, not judges, ought to make social policy in a democracy, but they also acknowledge that the elected officials (in Congress) are responsible for making bad social policy by creating the statutory rights that set democracy by decree in motion. In their words, "[e]lected officials invite judges to take charge of policy making in order to evade responsibility for politically controversial choices" (p. vi). The authors attempt to solve this problem by urging judges to refrain from taking up the invitation. The fact that preventing individuals from obtaining enforcement of the rights conferred on them by their elected representatives is itself antidemocratic does not bother Sandler and Schoenbrod because they view federal overreaching as the ultimate evil, far worse than federal judges not enforcing federal rights.[14]

So what's a judge to do? Sandler and Schoenbrod argue that the judges should "adopt a set of rules effective in limiting the availability, scope, and duration of decrees against government" (p. 11). This set of rules is provided at the end of the book. They leave us with the nagging question of what judges should do if they do not think they can adequately remedy constitutional and statutory violations by working within the confines of these rules.

To accomplish the mission of the book, the authors undertake three tasks with varying degrees of success. First, they describe the current state of institutional reform litigation and analyze a few cases to explain why the remedies take so long and are often considered unsuccessful. Second, the authors discuss the various causes of democracy by decree. Finally, Sandler and Schoenbrod propose a solution intended to improve the processes and outcomes of these cases, focusing particularly on the remedy.

Sandler and Schoenbrod are extremely successful in their first task. Through the description of a few case studies, the authors describe the current state of institutional reform litigation. They discuss one large case study and a few smaller ones, and demonstrate how these cases drag on for years and are not successful. The authors' discussion is accompanied by repeated articulation of their view that the way judges handle these cases constitutes a threat to democratic, representative government.

Sandler and Schoenbrod's analysis of the causes of the remedial problem is equally interesting insofar as the authors point to a variety

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14. *See infra* notes 40-43 and accompanying text. In his study of institutional reform cases, Phillip Cooper concluded that judges

> simply are not in a position to refuse to respond to proper cases instituted by appropriate parties under provisions of statutory or constitutional law. Said one judge, "if you can figure out an escape from it, I'd like to hear it .... If the problem is properly presented, there's no way the judge can avoid deciding it."

PHILLIP COOPER, HARD JUDICIAL CHOICES 328 (1988).

of issues and actors that contribute to unsatisfactory results in institutional reform litigation. In addition to the concentration of power in the controlling group of plaintiffs' lawyers and experts, the authors point to the role of Congress in passing legislation that creates new rights without adequate funding. Sandler and Schoenbrod also discuss the failure of appellate courts to define the nature of the these rights in such a way as to provide guidance to district judges who must create remedies for their violations.

In the third task, the authors fall short of their goal. The new principles proposed for improving the remedial phase of institutional reform litigation are unrealistic and unlikely to be adopted by the federal judges to whom they are addressed. More significantly, there is only a loose fit between these principles and the underlying causes of the problem as articulated by the authors. While Sandler and Schoenbrod discuss the role of Congress in creating too many rights and the failure of the federal appellate courts to define the nature of those rights, their solution does not adequately address those issues. Instead, the authors offer a narrow solution that puts the onus on judges who, even if they are persuaded by the argument, might be shirking their own responsibilities if they followed the authors' prescriptions.

Compounding this lack of fit between the multifaceted problem and the solution, is the biased way in which the authors both describe and analyze institutional reform litigation. Every possible doubt about propriety and motivation is resolved against plaintiffs' lawyers and judges, and in favor of local and state government officials. The authors assert at one point that "[j]udges and plaintiffs do not necessarily want cases to end. They often delight in them" and that the "hidden secret" of these cases is that "they are more interesting, fulfilling, and satisfying to lawyers and judges than almost any other legal work" (p. 217). At another point, the authors state that federal judges "tend to look down their noses at the work-a-day politicians who habituate city hall and the state capitol."[15] The slant of the book thus leads us to the solution proposed (i.e. lawyers and judges need major behavior modification), but only by glossing over the failures of local officials, and by disregarding the many successes of institutional reform litigation.

To their great credit, the authors, unlike others who have criticized the processes and outcomes of institutional reform litigation, have at

15. P. 165. *But see* COOPER, *supra* note 14, at 328 (concluding, based on numerous case studies, that "[t]he notion that the controversial remedial decree cases are simply manifestations of a liberal federal judiciary intent upon playing guardian without regard to the consequences of their wide ranging decisions simply does not withstand empirical analysis," and that judges tend to eschew activism and focus more on the case at hand than on tackling society's ills).

least tried to propose a concrete solution.[16] An exception to this is Professor Susan Sturm, who studied the remedial stage of prison reform litigation, categorized the different approaches judges take towards the creation and implementation of structural injunctions, and proposed a normative framework for structural remedies.[17] So Sandler and Schoenbrod should be commended for seeking solutions and for giving scholars, lawyers, and judges something substantial to chew on.

Part I of this Review considers the authors' description of the history and current state of institutional reform litigation and their proposed solution. Part II focuses on Sandler and Schoenbrod's analysis of the causes of the current state of institutional reform litigation and how it has evolved into what they call democracy by decree. It will explore their proposed solution, particularly the failure adequately to address two major causes of democracy by decree — Congress's romance with unfunded mandates, and the federal courts' refusal to explore the nature of the rights they are adjudicating.

I.

In the first part of *Democracy by Decree*, the authors trace the history of institutional reform litigation from *Brown v. Board of Education*[18] to the present. We arrived at our present situation, they argue, because of an overreaction by Congress and the courts to the South's massive resistance to *Brown*, the Civil Rights Act of 1964, and the Voting Rights Act of 1965. Northern whites and Congress were mobilized by brutal images, broadcast on national television, of the Southern backlash to *Brown* and the civil rights movement.[19]

After successful passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, Congress realized that it had an opportunity to go beyond civil rights legislation and, in Sandler and Schoenbrod's words, "cash-in" (p. 17). Congress began to practice "fiscal federalism" — tying federal money to state and local compliance with federal standards on everything from civil rights, to education, to the environment (p. 19). This is what set the "mass

16. HOROWITZ, *supra* note 6; *see also* Fletcher, *supra* note 7. Donald Horowitz, for example, argues that judges should not be involved in these cases, but does not indicate how a judge should dismiss a case brought before her.

17. *See* Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1406 (1991) (commenting on the failure of the critiques of court involvement in public law remedies to develop "meaningful standards for limiting the court's exercise of remedial power").

18. 347 U.S. 483 (1954).

19. P. 15; *see also* Michael J. Klarman, *How Brown Change Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 82 (1994) (arguing that Northern sympathy for civil rights was inspired by Southern, massive resistance to *Brown*, more than by the *Brown* decision itself).

production of rights" (p. 21), and subsequently institutional reform litigation, in motion. The demanding standards in these unfunded mandates set the States up to fail, thus inviting lawyers to sue in federal court to force state and local governments to comply with federal standards. It also benefited national politicians because they could enact laws that sounded great (who doesn't want cleaner air?), without having to worry about enforcement — the lawyers and judges could worry about that. Sandler and Schoenbrod underscore their point about the "mass production of rights" with a chart that shows the growth of federal regulatory statutes: there were none in the 1950s, nine in the 1960s, and twenty-five in the 1970s.[20] These statutes sought to regulate a wide variety of issues, including water quality, age discrimination, special education, and fair housing (pp. 22-23).

There was a big difference, however, between the civil rights struggles of the 1960s and reaction to the regulatory legislation of the 1970s and beyond. In the latter, according to Sandler and Schoenbrod, the lack of enforcement of federal mandates was not necessarily the result of official resistance. In many cases, like air quality, the authors stress that state officials wanted to comply but could not, in part because the public would not pay for it (p. 30). Yet, as the authors powerfully argue, because the model for failed implementation was official resistance in the context of civil rights laws, it was assumed that when implementation failed in other contexts, it was likewise because of official resistance. This assumption, carried over from a distinct set of circumstances, provided federal judges with a justification for active enforcement of federal mandates because the judges assumed those mandates were not being carried out due to the refusal of local officials. In fact, as Sandler and Schoenbrod persuasively argue, official resistance was more often for fiscal rather than political or philosophical reasons (p. 30).

This is the background against which Sandler and Schoenbrod describe several institutional reform cases gone awry. These cases begin with what Sandler and Schoenbrod call the "legal hook": a starry-eyed public interest attorney, or a clever lawyer from the ACLU, strips down a complex sociolegal problem to a seemingly simple legal issue. For example, in the case of New York City's troubled foster care system, the case was *Wilder v. Sugarman*,[21] and the question was whether there was unconstitutional discrimination in foster placements (p. 4).

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20. Pp. 22-23. The authors mention other factors that led to the growth in federal statutes, including the repercussions of the New Deal and President Roosevelt's "attacking the Supreme Court," p. 21, and the need felt by members of Congress to make a name for themselves by sponsoring rights legislation, p. 24.

21. 385 F. Supp. 1013 (S.D.N.Y. 1974).

Like many before them who have written about institutional reform litigation, Sandler and Schoenbrod focus on a few case studies to illustrate their main points and support their arguments.[22] The main case study of the book is *Jose P. v. Ambach*,[23] which dealt with New York City's overburdened special education system and whether the New York Public School system was in compliance with the federal Education for All Handicapped Children Act (p. 45-97).

It is in the context of this case that the authors introduce what they term the "controlling group" (p. 62; emphasis omitted). The controlling group refers to the individuals involved in negotiating the consent decree in cases brought against state and local governments (p. 62). Sandler and Schoenbrod observe that in institutional reform litigation the judge cedes power to the controlling group, often organized by a court-appointed special master (p. 118). The controlling group, made up of representatives of the parties as well as experts on the substantive issue (special education, in the case of *Jose P.*), is responsible for negotiating the consent decree. The problem with this structure, according to the authors, is that it amounts to the judge ceding power to the plaintiffs' lawyers (pp. 127-28). The plaintiffs' lawyers shape the decree to satisfy their constituents, even on issues not originally involved in the lawsuit and about which there is no evidence of a legal violation. The plaintiffs' lawyers exercise this power by the ever-present, if tacit, threat of running back to the judge or the special master, both of whom harbor the view of official resistance described above. This combination of circumstances gives plaintiffs' lawyers more influence over the final decree than they should have, given that they are neither specialists in the substantive area of the decree nor elected officials responsible for formulating social and fiscal policy.

The result of judges ceding substantial power to the controlling group is that substantive policy is made, or at least highly influenced, by plaintiffs' lawyers rather than by those elected to make policy. The authors give fascinating examples of this, such as the simplicity with which the controlling group defined the term "educational handicap" in the *Jose P.* litigation (p. 68), and the ability of the controlling group to expand the scope of the litigation to include programs and issues outside the scope of the original lawsuit (pp. 80-81, 84, 139). All of this came at the expense of other educational priorities in New York City.

22. *See, e.g.*, COOPER, *supra* note 14; FEELEY & RUBIN, *supra* note 4; HOROWITZ, *supra* note 6.

23. No. 79 Civ. 270 (E.D.N.Y. Feb. 1979).

As one critic of the *Jose P.* litigation quipped, " 'Kids who don't have court orders in their hands are dead meat.' "[24]

The *Jose P.* case study is detailed and informative. Anyone interested in this topic would profit from reading it because it shows how complex, time-consuming, political, and ultimately problematic this type of litigation can be. Sandler and Schoenbrod use this case study to illustrate their main point: that *Jose P.* is just one example of a fundamentally undemocratic process that transfers the power to make public policy from elected officials to a group of private litigants and their lawyers, under the supervision of a life-tenured judge. The controlling group exercises its power in a partisan and narrowly focused way, thus earmarking scarce resources to the advantage of its clients without regard to the collateral effects on other aspects of, and participants in, the system. Commenting on the *Jose P.* litigation, one education expert commented: " 'What you had was a road that was falling apart, and right alongside they were building a superhighway called special education, which provided no end of money.' "[25]

Sandler and Schoenbrod are not simply saying that judges do not have the capacity or legitimacy to create and oversee remedies in institutional reform litigation. They are not just describing cases gone wrong and pointing the finger at overzealous judges in over their heads, as others have.[26] Rather, they are saying that judges have ceded their power to the controlling group, which is more partisan and political than any judge could ever be. Although this observation is not completely novel,[27] it is a more subtle description of the creation and enforcement of consent decrees than many of their predecessors have offered.

After powerfully describing the state of institutional reform litigation, Sandler and Schoenbrod turn their attention to normative issues. The authors discuss the political and practical problems with this system of public policy making, that is, "democracy by decree," in great detail and with great passion. Politically, giving power over public policy to a small group of lawyers and experts flies in the face of representative government if we understand our system to require that elected officials make policy and judges enforce it (pp. 152-53). It

24. P. 91 (quoting Kay Hymowitz, *Special Ed: Kids Go In, But They Don't Come Out*, CITY J., Summer 1996, at 27, 32 (quoting Leonard Hellenbrand, former Budget Dir., New York City Bd. of Educ.)).

25. P. 91 (quoting Joseph Berger, *Costly Special Classes Serving Many with Minimal Needs*, N.Y. TIMES, Apr. 30, 1991, at A1 (quoting Charles I. Schonhaut, former Dean of Education, Long Island University)).

26. HOROWITZ, *supra* note 6.

27. *See, e.g.*, Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Practice*, 1994 WIS. L REV. 631, 647 (observing that it is the lawyers, not the judges, who often control this type of litigation).

disenfranchises voters, who cannot vote the controlling group and special master (or the judge, for that matter) out of office (p. 157). As a practical matter, these cases end up taking years, often without measurable success, and at the expense of other equally deserving social needs.[28] Sandler and Schoenbrod argue that a clear moral imperative like the one that justified the desegregation cases is not always present in these cases because any moral imperative that exists is often competing with other equally important moral imperatives. For example, special education cannot be significantly improved without sacrificing other educational priorities, and environmental justice often comes at the expense of economic growth and efficiency.

In sharp contrast to their disapproving description of lawyers and judges exercising power beyond their proper sphere, is the authors' admiring description of local elected officials. These officials are glorified as faithful public servants who struggle with the policy dilemmas brought on by inadequate funding and do their best to make the right decisions.[29] The authors contend that intervention by the courts "saps the power and responsibility of governmental officials" and "hobbles government" (p. 144).

In order to eliminate democracy by decree, Sandler and Schoenbrod propose that federal district court judges adopt new principles to guide and limit their equitable powers in remedying the statutory rights violations involved in these cases. The goal behind these principles is simple: put responsibility and power for making policy back in the hands of state and local democratically elected officials. The principles presume that there has been a finding of liability against the defendants and are intended to provide guidance to judges during the three stages of the remedial process in institutional reform litigation — framing the decree, managing the decree, and ending the decree (p. 197). The proposed principles are:

1. Judges should stick to the judicial job of protecting plaintiffs from illegal injury. . . .
2. In enforcing rights, judges should to the greatest extent practicable leave policy making to the elected policy makers. . . .
3. In those rare cases in which it is absolutely necessary for judges to involve the court in policy making to enforce rights, judges should subject themselves to checks and balances appropriate to judicial administration of state and local governments. . . .

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28. *See supra* note 25 and accompanying text.

29. *See, e.g.*, pp. 51-53 (describing how public officials were on the verge of fixing the numerous violations of state regulations when a lawsuit by special education advocates interfered).

4. Judges should include an 'end game' in every decree against state and local governments. (p. 197)

These are laudable goals, but, as always, the devil is in the details. One of the themes that emerges in Sandler and Schoenbrod's discussion of these principles is that judges need to shift the power away from the controlling groups and special masters and back to themselves (p. 199). Having reasserted their own power, judges should then give as much deference as possible to the public officials properly vested with authority to make policy (p. 202). Another theme is that defendants in institutional reform litigation will act in good faith if given the chance. Sandler and Schoenbrod urge judges to use injunctive relief as a last resort, only after the defendants have been given ample opportunity to correct their violations on their own; judges should modify decrees whenever the defendants have a "reasonable basis" for modification; and judges should terminate decrees automatically after four years unless the plaintiffs can come forth and explain how that the decree continues to repair old violations, or unless violations are ongoing.[30]

Two assumptions underlie these proposals. One assumption is that there is a clear distinction between proper and enforceable legal remedies for rights violations, on the one hand, and making policy, on the other. Yet the authors never adequately articulate any such distinction.[31] Second, the authors assume that when judges defer to government officials in lieu of crafting a structural remedy, the government officials will act responsibly and change their conduct so as to avoid violating the plaintiffs' rights in the future. The authors assume this despite evidence to the contrary in numerous cases.[32]

II.

Sandler and Schoenbrod identify many factors that contribute to democracy by decree. They describe how Congress has evaded its policymaking responsibility by creating statutory rights without consideration for the trade-offs that enforcement of those rights will require (pp. 110, 155). Sandler and Schoenbrod also point out that the appellate courts have not defined these rights adequately so as to give guidance to trial judges who must craft remedies for their enforcement

30. P. 218. Sandler and Schoenbrod further propose that the decree automatically terminate when the public official responsible for consenting to it leaves office. *See infra* note 43 and accompanying text.

31. *See infra* note 33 and accompanying text.

32. *See infra* notes 44-48 and accompanying text; *see also* Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 810-11 (1990) (noting that the nature of prison organizations makes it impossible for prison officials alone to achieve "institutional self-correction").

(p. 166). These acts and omissions by Congress and the federal appellate courts are significant contributors to democracy by decree because they create a situation where there are myriad rights enforceable in court and no way to articulate limits on the type and extent of the remedies that are necessary or desirable to enforce those rights.

But rather than explore these causes and acknowledge the complexity of any solutions, the authors essentially ignore their own observations and propose a solution — to require judges to limit their own equitable power to create structural remedies — that appears straightforward and uncomplicated. In effect, they treat the existence and role of the controlling group as the disease itself, rather than as one of the serious symptoms of a much more complex and intractable disease. In order to get from a complicated array of causes to a simple solution, the authors make broad generalizations about the motivations of all the actors involved (politicians, judges, and lawyers) and gloss over complex philosophical questions about the nature of rights and their proper role in our democracy.

One major contributor to the growth of institutional reform litigation is the overproduction of rights by Congress (pp. 17-25). The authors include a long and interesting discussion of Congressional rights creation as unfunded mandates, noting that once a policy choice is called a right, the responsibility for its definition and implementation shifts from legislators to lawyers and judges. This shift is facilitated by statutory provisions that allow for enforcement by private citizens (p. 27). These provisions take away the flexibility that must accompany policy choices and give private plaintiffs a trump card over other constituencies with competing claims on state government. Coupled with the observation that judges turn most of the decisions over to the controlling group, the authors make a compelling point that institutional reform litigation takes political decisions out of the hands of elected representatives and puts them into the hands of the controlling group, made up primarily of unelected, unaccountable, partisan lawyers (p. 154). The fault for this overproduction of rights lies squarely with Congress, whose members reap political benefits from creating individual rights (p. 20).

The overproduction of rights sets democracy by decree in motion simply because of the sheer number of new rights enforceable in court. In addition, the nature of those new rights and the remedies they invite further promote judicial overreaching.

The authors contend that most statutory rights created by Congress are "soft rights," which they define as policy choices or aspirations masquerading as rights (p. 140). The authors state that "many rights in modern statutes are aspirations rather than practical possibilities. No one really thinks these soft rights are like traditional rights — not even their beneficiaries" (p. 140). According to Sandler and Schoenbrod, these soft rights are distinguishable from other rights

that ought to be enforceable in court and ought to trump policy choices, such as the right against government discrimination based on race (p. 140).

It is not entirely clear how one is to know when a right is "soft" and when it is "traditional" or "real." One possibility suggested by the authors is that the distinction between "soft" and "real" rights is a function of whether the remedy for a violation of the right requires a negative or positive/structural injunction. For example, the authors state that "with violations of traditional rights, the courts ordered state and local governments to stop acting unlawfully" (p. 109). With soft rights, on the other hand, courts eschew negative injunctions and take up the business of managing state and local government agencies. The authors consider the desegregation cases, which ushered in the era of structural injunctions for rights enforcement, the exception. They consider the right to be free from racial discrimination by the state a real right and argue that "[i]f plaintiffs were thereby getting more than their constitutional due from the courts, there was a certain rough justice to it because many federal judges in the South had previously given them much less" (pp. 101-02).

At another point, however, the authors seem to say that only constitutional rights are real rights, and all other rights are aspirational. They state that "the Constitution includes rights and authorizes Congress to enact statutes necessary to ensure that state and local governments honor them. These are rights, not aspirational goals dressed up as rights" (p. 153). They refine this distinction toward the end of the book by stating that "courts should not enforce [statutory rights against state and local governments] in the same way that they enforce constitutional rights or statutory rights in whose formulation the legislature has taken full responsibility for the policy choices" (pp. 195-96). Sandler and Schoenbrod do not provide guidance, however, on how a judge is supposed to know when a statutory right is one for which the legislature has taken full responsibility.

Characterizing statutory rights in this manner is a key component of Sandler and Schoenbrod's argument. In order to get from the observation that the controlling group has too much power in institutional reform litigation, to their solution — that judges not use their equitable powers to enforce federal, statutory rights — Sandler and Schoenbrod describe statutory rights as insignificant. If the rights being enforced by most structural decrees are not "real" rights, then it is logical and justifiable to impose the kinds of restraints on judges that Sandler and Schoenbrod suggest — restraints such as ending their supervision of a decree once the defendant agency begins to show good faith through systemic change, even if violations to plaintiffs' rights are ongoing (p. 210). By describing these rights as "soft," and suggesting that "[a]s long as rights are honored, everything else,

including how the rights are honored, is a question of policy to be left to elected officials" (pp. 153-54), the propriety of court intervention appears minimal.[33] Their argument reduces to a syllogism: (1) courts enforce rights, (2) most statutory "rights" are not real rights (3) therefore, courts should not enforce most statutory rights.

This discussion of the nature of rights and appropriate remedies is central to the argument in *Democracy by Decree* for a related reason. Sandler and Schoenbrod argue that the controlling group is able to seize power and define overly broad, long-term, remedies that take discretion away from local actors because the courts have not been vigilant about defining what it is that they are remedying. This leads judges to remedy the violation of the right, but then to go farther and try to improve the institution. The authors describe this as the "judicial slide from enforcing rights to making policy in pursuit of aspirational goals" (p. 102).

But the line between stopping the violations and doing policymaking, or ensuring compliance and dictating how to comply, is not as clear as Sandler and Schoenbrod suggest. Large public institutions like schools, prisons, and hospitals violate rights by omissions and respect rights through positive acts, such as creating livable conditions or providing special education. If the plaintiffs can show that the defendants are violating their statutory right to adequate special education, for example, then a negative injunction (stop not giving special education) may not remedy the violation. To dismiss anything beyond a negative injunction as "policymaking," and therefore illegitimate, simply evades the question of how plaintiffs in this context are supposed to enforce their rights.

The authors propose to limit the type and scope of remedies in these cases by suggesting that judges set out the "end game" of the decree at the very beginning, by defining what is realistically acceptable as compliance and good faith by the defendant agency (pp. 219-20). In order to know what will constitute compliance, however, the judge must be able to articulate what interests are protected by the rights that were violated by the defendants, and how the remedy will vindicate those rights.[34] If the rights at issue are really just policy aspirations, however, then they are far more equivocal statements of

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33. At another point, they state that courts used to ensure "compliance with the law," but now they dictate "how to comply with the law," and the latter is a usurpation of the role of elected, public officials. P. 8 (emphasis omitted).

34. JOSEPH RAZ, THE MORALITY OF FREEDOM 249 (1986); Susan Poser, *Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status*, 81 NEB. L. REV. 283, 325 (2002) (arguing that any principled limitations on judicial discretion in the remedial stage of institutional reform litigation must begin with an exploration of the nature of the right at stake); Jeremy Waldron, *Nonsense upon Stilts? — a reply*, *in* NONSENSE UPON STILTS: BENTHAM, BURKE, AND MARX ON THE RIGHTS OF MAN 198 (Jeremy Waldron ed., 1987).

the interests of their beneficiaries than what we usually think of as rights.[35] Thus, if judges adopt Sandler and Schoenbrod's definition of most statutory rights as just policy aspirations in disguise — as presumably the authors would advocate — then these proposals ultimately will end institutional reform litigation, except in extreme circumstances of truly recalcitrant government officials actively refusing to honor long-established, fundamental constitutional rights. One would think that in a democracy, that kind of radical reinterpretation of statutory rights should properly come from our elected officials, not life-tenured judges.

Sandler and Schoenbrod concede the existence of this problem by observing how little guidance there is on the nature of the rights at stake in institutional reform litigation, but avoid addressing the problem by defining their own inquiry as not encompassing questions about the nature of rights. They state that their "focus is on what happens in the twenty-first century after Congress has spoken and judges are asked to empower a controlling group to manage and supervise institutions of state or local government" (pp. 33-34). This allows them to chastise district court judges for failing to follow Supreme Court doctrine,[36] while at the same time avoiding addressing the fact that the Supreme Court has provided little guidance to the lower courts to figure out how to think about the scope of the violation and how to match that to a remedy.[37] The authors concede that the Supreme Court has not created a useful way to enforce its own standards (p. 165), but rather than suggest the Supreme Court itself remedy that problem, the authors argue that district courts have intentionally taken advantage of the lack of standards by engaging in "covert policy making" and "manipulation" (p. 166).

By looking to causes only as far back as the time when a case is brought before a judge and liability has been determined, the authors artificially limit the nature and scope of possible solutions and create the impression that the problems with institutional reform remedies are primarily caused by the trial judges who manage specific cases. Yet it is not clear how a judge can know what constitutes sufficient compliance to end a decree, without knowing what interests Congress intended to protect when it created statutory rights. By limiting the

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35. Jeremy Waldron, *Introduction*, *in* THEORIES OF RIGHTS 14 (Jeremy Waldron ed., 1984) (pointing out that we use the language of rights when the interests that the right is intended to protect are considered to be of more importance and significance than interests that are not designated as worthy of protection through the language of rights).

36. Supreme Court doctrine states that the scope of the violation determines the scope of the remedy and the remedy must be narrowly tailored to cure the violation. *See generally* Robert E. Buckholz, Jr. et al., Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 854 (1978).

37. Poser, *supra* note 34, at 325.

possible range of causes that they will consider, the authors limit the possible range of solutions. Oversimplifying the causes results in oversimplification of the solution.

Throughout the book, Sandler and Schoenbrod characterize facts and events to accommodate the causes they identify and the solution they propose. For example, the authors discuss an incident, drawn from Professor Sandler's own experience, involving public toilets in New York City. They explain how a company that wanted to contract with the city to build coin-operated public toilets hit a roadblock when the director of the Office for People with Disabilities insisted that she would only support the contract if every toilet were wheelchair accessible, which was an economic impossibility (pp. 140-41). Initially, they tell this story to support their statement that "[t]he perversion of court enforcement from rights enforcement to policy imposition is the fault not only of the controlling groups that negotiate the decrees and of the judges that enter them, but also of Congress" (pp. 139-40). The example does support that statement because it shows that Congress often writes statutes that confer benefits without considering all of the implications, and elected and appointed officials, in turn, act politically and do not always do what is best for the general public. But, after discussing the public toilet fiasco, they seem to want to turn it into an example of court-made policy, saying, "When Congress calls a policy choice a right, it shifts important policy-making power from elected officials to plaintiffs' attorneys" (p.142). But there were no plaintiffs attorneys in the example, just a strong interest group with a public official to do its bidding. Yet, the statement quoted above is made without a real shift in the discussion, leaving this reader wondering why it is relevant to a situation involving elected officials (or their appointees) exercising policy choices, and doing it badly.

At times, the *Democracy by Decree* sounds like a rant against politics as usual. The authors describe the battle over curb ramps, something required not by the Americans with Disabilities Act (ADA) itself, but by Justice Department regulations interpreting the ADA. The authors describe how laws and regulations get passed because of interest politics (here, the strength of the lobby for the disabled) and how any decision to spend money in one place will mean less money for something else. But we know that, and certainly judges are not to blame for that. In fact, Professor Schoenbrod is the author of numerous articles and a book that decry the explosion of delegation and argue that it too is antidemocratic.[38] So the authors themselves understand that the solution to this problem is much more complex than they suggest by their proposals. In fact, arguably, if the unfunded

38. *See, e.g.*, SCHOENBROD, *supra* note 12; David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?* 83 MICH. L. REV. 1223 (1985).

mandate problem were solved and Congress stopped "mass producing rights," the power of the courts and the controlling groups would dramatically subside. This left me wondering why they do not admit this and incorporate into their solution some of Schoenbrod's arguments about delegation.

I can think of two possible answers to this question. First, the authors may recognize that it would be pointless to propose solutions to democracy by decree that told Congress how to act. Telling members of Congress to stop passing legislation that gives more rights to individuals would probably prove futile, for reasons that Sandler and Schoenbrod discuss — there is too much potential for political gain from creating unfunded mandates.[39]

The second, and more likely, reason why Sandler and Schoenbrod bring the role of Congress to our attention, and then do not include it in the solution, is that their agenda goes well beyond their concern with remedies in institutional reform litigation. This book is not simply about institutional reform litigation, it is about federalism.[40] The tone of the book, with its glorification of local control and its demonization of Congress, federal judges, and plaintiffs' lawyers, suggests that the authors do not care how or why there is less federal authority, as long as there is less federal authority. Sandler and Schoenbrod's proposals for limited judicial review of violations by state actors of plaintiffs' federal statutory and constitutional rights is, in essence, a proposal for expanded judicial review of federal encroachments on state sovereignty — exactly what proponents of modern federalism have called for.[41] Suggesting that federal judges cease enforcing federal rights is not an argument for more limited judicial review, it is an argument for a different kind of judicial review. In this sense, *Democracy by Decree* is as much a contribution to the new federalism literature,[42] which sanctions searching judicial review of issues of

39. *See supra* note 20 and accompanying text.

40. It appears that David Schoenbrod identifies himself with the federalism movement, as he is listed on the Federalist Society's web page as a media contact. *See* Federalist Society, Journalist's Guide to Legal Experts, *at* http://www.fed-soc.org/Publications/journalistsguide/mediaguide.htm (last visited July 1, 2004) (listing David Schoenbrod as an expert regarding presidential power).

41. Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 158 (2001) (generally approving of judicial review of perceived federal intrusions on state sovereignty); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1312 (1997) (arguing that the Supreme Court has an "institutional obligation" to draw the line "between federal enumerated powers and state sovereignty"). *But see* FEELEY & RUBIN, *supra* note 4, at 20 (arguing that the Framers' federalism concerns are not as salient in the modern bureaucratic state); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 235-237 (2000) (arguing that it is ahistorical to suggest that the Framers intended significant judicial review of federal power).

federal intrusions on state sovereignty, as it is to the scholarly debate about the propriety and effectiveness of institutional reform litigation.

The anti-federal-government theme pervades the book. An example of this is Sandler and Schoenbrod's suggestion that the remedial plan that is part of a consent decree should automatically end when the elected official who signed off on the decree leaves office (p. 214). The authors simply ignore the opportunities for abuse and bad faith that such a rule would produce. Sandler and Schoenbrod present no evidence to support their assumption that in the absence of a court order, or threat of a court order, public officials would voluntarily change large public institutions. Large organizations are extremely resistant to change.[43] Sandler and Schoenbrod suggest numerous times in the book that judges are too quick to approve consent decrees or issue orders that constitute burdensome requirements for local officials, without giving defendants adequate time to comply on their own (p. 205). This suggestion ignores the numerous documented cases where the courts gave the defendants a chance to comply prior to imposing a court order or consent decree but eventually entered an order after they became frustrated with the defendants' recalcitrance.

For example, in *Batchelder v. Geary*[44], the defendant, Santa Clara County, admitted problems with local jails and claimed it was making efforts to improve them. The court expressed faith in the government's expressed intentions to improve the local jails, and therefore abandoned jurisdiction of the case without ordering a remedy. Yet, ten years after the case began, five years after the court had surrendered jurisdiction, and in response to a second case that the plaintiffs brought, the court entered a structural injunction to improve the local jail because ultimately the government failed to correct the deficiencies.[45]

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42. *See, e.g.*, Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 28 (2001) (discussing the "dangers of overweening national power"); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997); Yoo, *supra* note 41 (defending judicial review on grounds of federalism).

43. HERBERT KAUFMAN, THE LIMITS OF ORGANIZATIONAL CHANGE 8 (1971) (arguing that the barriers to change are "acknowledged collective benefits of stability, calculated opposition to change, and inability to change."); W. RICHARD SCOTT, ORGANIZATIONS 63 (1981) (noting that the "necessity of survival can override the morality of purpose."); Arthur L. Stinchcombe, *Social Structure and Organizations*, *in* HANDBOOK OF ORGANIZATIONS 142, 148 (James G. March ed., 1985) (calling organizational resistance to change the "liability of newness").

44. Civ. Action No. 71-2017 (N.D. Cal. March, 1972), *cited in* FEELEY & RUBIN, *supra* note 4, at 112-13.

45. FEELEY & RUBIN, *supra* note 4, at 114-15; *see also id.* at 56-66 (describing *Talley v. Stephens* and *Holt v. Sarver*, related prison cases in which the court found constitutional deficiencies in the prison system and issued suggestions for reform and required periodic updates. The judge finally took over the system in May 1971, five years after the start of the litigation, and only then started requiring specific responses instead of suggestions). *See*

This pattern of court forbearance followed by inaction on the part of government officials is not limited to prison cases. In *Wyatt v. Stickney*[46] the court determined that living standards in a mental hospital violated the due process clause of the Fourteenth Amendment. The judge declined the plaintiffs' request to order minimum standards, and instead provided the state with time to respond. After the State failed to provide a compliance plan within the required ninety days and failed to begin compliance within the court-imposed six-month period, the judge finally issued an order creating a formal remedy process, nine months after the original liability judgment.[47] There are many more cases and case studies documenting the recalcitrance or defiance of public officials in implementing court-ordered remedies.[48]

The authors also fail to acknowledge that the ability of the victims of rights violations to sue may itself be a significant motivator for compliance with federal law, as well as a method of mobilizing other political forces to bring about change.[49] This is particularly strange since Sandler and Schoenbrod provide an example of just such a case in which they were involved. In 1973, they brought a lawsuit on behalf of the Natural Resources Defense Council against New York City, alleging noise pollution from subways. The noise was discovered to be the result of faulty wheel design (p. 31). The authors note that the case was dismissed, but that "the political pressures we set in motion forced politicians to find ways to bring the wheels back into round" (p. 31). But the authors never acknowledge and explore the significance of lawsuits, or the threat of lawsuits, in bringing about beneficial political change.

Interestingly, the one case the authors consider successful involved a competent and responsible state official and a collaborative effort by the lawyers and parties on both sides. That case, *Marisol A. v. Giuliani (Marisol)* (p. 146), challenged New York City's child welfare system.

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generally Sturm, *supra* note 32, at 813 ("Conditions and practices in prisons are notoriously resistant to change despite general agreement that they are inadequate.").

46. 325 F. Supp. 782, 784-85 (M.D. Ala. 1971), *cited in* COOPER, *supra* note 14, at 174-75.

47. COOPER, *supra* note 14, at 174-75, 180-81.

48. *See, e.g.*, HOROWITZ, *supra* note 6, at 259 (describing defendants' refusal to cooperate in remedy implementation); Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 553-54 (1999) (describing judicial deference to defendants' proposed remedy in school desegregation cases); Sturm, *supra* note 32, 807 n.3 ("It is now widely recognized that injunctions are not self-executing; a court's order to eliminate conditions that violate the Constitution rarely results in compliance with the law. The struggle for defendant's acceptance and institutionalization of constitutional and statutory norms takes place through the remedial process.").

49. STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 137 (1974); *cf.* LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988).

According to Sandler and Schoenbrod, the lead defendant, Commissioner Nicholas Scoppetta of the Administration for Children's Services, resisted settlement because he did not want to cede control to the controlling group and face rigid, court-ordered, rules and procedures (p.146). Rather, Commissioner Scoppetta eventually managed to get a consent order that left him with control over his agency. According to Sandler and Schoenbrod, the judge who signed the order stated that he thought the agency did a better job creating a decree than the court could have (p. 149). Although the authors take this as irrefutable evidence that judges should rarely if ever impose their will on government officials because government officials willingly comply with legal mandates, it could as easily be an example of how judges do not need to impose their will on government officials when those officials are responsible and motivated to bring their agencies into compliance with the law. One could conclude that other cases where courts did order structural change involved public officials who were not as cooperative, dedicated, and reasonable as Commissioner Scoppetta.

CONCLUSION

Democracy by Decree is an interesting, informative, and well-written book. Sandler and Schoenbrod struggle valiantly with one of the most difficult issues in our constitutional democracy — reconciling individual rights with the public interest in the context of federal-state competition for political authority. *Democracy by Decree* is also very one-sided, but perhaps that is to be expected from a book whose authors themselves describe it as having a "mission."

The major problem with *Democracy by Decree* is that it is almost as political as the plaintiffs lawyers it describes. The fervor with which the authors try to persuade the reader that the system is broken and can only be fixed by limiting federal judicial power requires a refusal to acknowledge many of the contradictions and logical fallacies that become apparent to the reader. The most obvious example of this is the authors' failure adequately to incorporate two significant causes of these problems — Congress and the federal appellate courts — in their solution. Moreover, in their glorification of local control, they ignore their own observation that when local officials do act responsibly, federal courts are more willing to delegate power to them.[50]

Schoenbrod has written elsewhere about Congress's penchant for passing off its lawmaking responsibilities. Schoenbrod's book, *Power Without Responsibility, How Congress Abuses the People Through*

50. *See supra* Part II (describing the *Marisol* litigation).

Delegation,[51] disparages Congress for delegating its lawmaking powers to federal agencies. Yet, if congressional enactments are taken seriously as policy objectives that must be implemented, then it is no solution simply to tell federal judges to stop implementing them. The solution is much more complicated than Sandler and Schoenbrod admit. One can agree with Sandler and Schoenbrod that Congress has engaged in the overproduction of rights, that this practice has been burdensome for state government, and that litigation to enforce these rights is highly problematic, without concluding that the solution is for federal courts to refuse to enforce those rights. That conclusion can only be sustained if one believes that federal power in any form is the ultimate evil to be avoided, which appears to be the ultimate message of *Democracy by Decree*.

Democracy by Decree is further proof that assessing the propriety and success of institutional reform litigation is akin to figuring out if the glass is half empty or half full. Where the authors see the Clean Air Act Amendments of 1970 and the Americans with Disabilities Act as unfunded mandates, others see cleaner air[52] and improved quality of life for a substantial segment of the population.[53] Where the authors see the failure of many court-imposed structural remedies, others see even more failures of state and local governments to uphold the individual rights, statutory and otherwise, of their citizens. Where the authors see meddlesome, irresponsible federal judges, others see insensitive, recalcitrant politicians. Perhaps most significantly for current times, where the authors see the importance of state and local power over social and political matters, others see the history of the United States as the triumph of national over local politics, particularly when it comes to the individual's rights against state and local government.[54]

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51. SCHOENBROD, *supra* note 12.

52. *See, e.g.*, Daniel H. Cole & Peter Z. Grossman, *When Is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes For Environmental Protection*, 1999 WIS. L. REV. 887, 926 (presenting statistics demonstrating that since 1970, the air has become significantly cleaner and that " 'overall, new cars marketed today are 67 percent cleaner' " (quoting ENVIRONMENTAL. POLICY DIV., LIBRARY OF CONGRESS, 95TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977: A CONTINUATION OF THE CLEAN AIR ACT AMENDMENTS OF 1970, at 2541 (U.S. Senate Comm. on Env't & Pub. Works Print 1978))).

53. David Blank, *Assessing Five Years of Employment Integration and Economic Opportunity Under the Americans With Disabilities Act*, 19 MENTAL & PHYSICAL DISABILITY L. REP. 384, 386-88 (1995) (citing statistics showing substantial increase in integrated employment settings for the disabled after passage of the Americans with Disabilities Act).

54. *See, e.g.*, DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 28 (1995) (discussing the effect that the Civil War Amendments had on the growth of federal power); Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 45 (2001) (arguing that the national civil rights legislation of the 1960s was an

"abrogation of America's remaining federalist commitment to allow distinctly different normative systems to prevail in different states").