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THE SUPREME COURT, DEMOCRACY AND INSTITUTIONAL REFORM LITIGATION

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In an unexpected portion of its unanimous 2004 opinion in *Frew v. Hawkins*,¹ a challenge by Texas officials to an institutional reform consent decree, the U.S. Supreme Court broke new ground in the effort to protect democratic control of state and local government as well as rights. The Texas officials wanted to get out from under the consent decree. The Supreme Court refused, but in its opinion the Court criticized unnecessarily rigid consent decrees, cautioned judges that consent decrees may undermine democracy and flexibility in government, and admonished judges to be more flexible when officials ask to modify the terms of existing consent decrees.² The press ignored the opinion or presented it as a boost for public interest plaintiffs using courts to reform state and local social programs.³ Yet, the opinion actually points in the opposite direction, telling federal courts to refrain from intruding on the policymaking prerogatives of governors, mayors, and their legislative counterparts unless necessary to protect rights.

Abram Chayes, in his ground breaking article, *The Role of the Judge in Public Law Litigation* published in 1976, recognized that consent decrees have an undemocratic nature that must neverthe-

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1. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004).

2. *Frew*, 540 U.S. at 439-42.

3. A search of the *New York Times*' Web site turned up no articles pertaining to *Frew v. Hawkins* (search conducted July 22, 2004). The *Wall Street Journal* reported that the Court had rejected the defendants' immunity argument, but not that it had made it easier to modify decrees. See Robert S. Greenberger, *Consent Decrees May be Enforced on State Officials*, WALL ST. J., Jan. 15, 2004, at A6. *Newsday* got the case entirely wrong, reporting that "the U.S. Supreme Court made it more difficult yesterday for state officials to renege on court-approved promises." *Court: States Can't Renege*, NEWSDAY, Jan. 15, 2004, at A16.

less be tolerated as an inevitable and undesirable feature of institutional reform litigation.⁴ Chayes concluded that the anti-democratic consequences were acceptable because the outcomes as he saw them had been good, and because judges who would be in charge of reforms would be restrained by institutional factors within the judicial culture, such as the general expectation as to competence and conscientiousness, professional traditions, and accepted canons of office.⁵

More than a quarter century later, it is clear that the judges are not really in charge and the outcomes are sometimes strikingly bad. Under many consent decrees, effective control of the state or local governmental institution is shifted from elected officials to an ad hoc group of lawyers that writes and administers the judicial regime—we call them the “controlling group.” Consent decrees are plagued by unintended consequences, yet are difficult to modify in light of experience and changing circumstances. It is not unusual for consent decrees to control a state or local agency for 20 or 30 years, and even then, there may be no end in sight.⁶ It was to these concerns that the Supreme Court turned in *Frew v. Hawkins*.

I. THE *FREW V. HAWKINS* LITIGATION

Frew v. Hawkins began in 1993 when private lawyers filed a suit alleging that Texas officials failed to give children their due under the Early and Periodic Screening, Diagnosis and Treatment Program of the federal Medicaid statute.⁷ Plaintiffs’ lawyers and state officials drafted a decree that dictated how the Texas officials would provide health care for the more than 1.5 million children who might qualify for Medicaid. The decree was submitted to the district judge on consent and he signed it. The consent decree was, as the Supreme Court later put it, “a detailed document about 80 pages long that orders a comprehensive plan for implementing the federal statute. In contrast with the brief and general mandate of the statute itself, the consent decree requires the state officials to

4. 89 HARV. L. REV. 1281 (1976).

5. *Id.* at 1313-16.

6. We have described these issues in our book, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003) [hereinafter *DEMOCRACY BY DECREE*].

7. 42 U.S.C. §§ 1396a(43), 1396d(r).

implement many specific procedures.” There was no judicial finding that the state had violated the statute.⁸

In 1998, lawyers for the plaintiff class went back to the judge to complain that Texas failed to live up to some particulars of the decree. The Texas officials responded that the state was complying with the statute, but the plaintiffs’ lawyers argued that this was not enough since the decree had added many other duties. The district judge ruled that the state must comply with the decree, even if it were in compliance with the statute, and ordered the officials to come up with a yet more detailed plan.⁹ Such a plan would have to be negotiated with the plaintiffs’ lawyers, a process that would further tighten their control exercised in the name of the court.

Instead of negotiating, the Texas officials appealed, taking the unprecedented position that the Eleventh Amendment to the U.S. Constitution immunized them from enforcement of the extra obligations in the consent decree. The Supreme Court has interpreted the Eleventh Amendment to allow suits against state officials that violate federal law,¹⁰ but the Texas officials claimed that their compliance with the federal statute, although not the federal decree, rendered them immune. The Fifth Circuit agreed with the Texas officials’ immunity argument and refused to enforce the decree,¹¹ but the Supreme Court took the case and, in an unanimous opinion, reversed, holding that once the Texas officials had agreed to the consent decree, it was fully enforceable. Justice Anthony Kennedy, writing for the Court, reasoned that since such decrees can lawfully be entered, they can be enforced: “Federal courts are not reduced to approving consent decrees and hoping for compliance.”¹²

This holding disposed of the case, but the Court extended its opinion with an additional section, wholly dictum, to discuss another issue: what should judges do when an expansive decree exceeds statutory requirements and so lets private lawyers dictate to

8. *Frew*, 540 U.S. at 434-37. While the district court did not find Texas in violation of the federal statute, it did certify the plaintiff class, which then led to the negotiations and the consent decree.

9. *See Frew v. Gilbert*, 109 F. Supp. 2d 579, 665-78 (E.D. Tex. 2000).

10. *See Ex parte Young*, 209 U.S. 123 (1908).

11. *See Frazar v. Ladd*, 300 F.3d 530, 537, 540-44, 550-51 (5th Cir. 2002).

12. *Frew*, 540 U.S. at 440.

elected officials? The Court, agreeing with the amicus briefs filed by the attorneys general of nineteen states, wrote that “enforcement of consent decrees can undermine the sovereign interests and accountability of state governments.” Although officials consent to the entry of decrees in the first place, they tie not only their own hands, but those of their successors in office into the indefinite future. The upshot, the Court stated, is that “[i]f not limited to reasonable and necessary implementations of federal law, remedies outlined in consent decrees. . . may improperly deprive future officials of their designated legislative and executive powers” and lead “to federal court oversight of state programs for long periods of time even absent an ongoing violation of federal law.”¹³

The Court then identified the proper response to decrees that exceed requirements of federal law: grant motions by governmental defendants to modify them. This, the *Frew* opinion stated, they could do, because *Rufo v. Inmates of Suffolk County Jail*,¹⁴ the Court’s 1992 opinion, held that in institutional reform cases “district courts should apply a ‘flexible standard’ to the modification of consent decrees when a significant change in facts or law warrants their amendment.”¹⁵ The *Frew* dictum then went on at length to describe the deference that district judges owe elected officials in considering their motions for modification.¹⁶

We wondered why the Court included such extended dictum on modification if all it was doing was restating the standard from *Rufo*. The reason, we suggest, is that the modification standard set out in *Rufo* had in practice proved too inflexible and *Frew* presented an opportunity to reshape it. Consent decrees rarely get to the Supreme Court because, by consenting, officials waive their right to appeal. If their successors in office are later charged with violating the decree, the collateral bar rule prevents them from challenging the validity of the decree in the enforcement proceeding. Officials may, however, move to modify the decree, but the *Rufo* standard itself makes it hard to succeed.¹⁷ The Texas officials attempted to get around these impediments by invoking the Elev-

13. *Id.* at 441.

14. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992).

15. *Frew*, 540 U.S. at 441.

16. *Id.*

17. *See infra* text accompanying notes 30-32.

enth Amendment, a strategy that the Court demolished. As weak as the Texas officials' case was, it nonetheless brought before the Supreme Court a consent decree in an institutional reform case, and in the twelve years since it had published the *Rufo* opinion the Court had not heard another case where reconsideration of the standard for modification was even tangentially relevant.¹⁸ The Court, we suggest, seized the opportunity to revise its 1992 opinion in *Rufo*.

The *Frew* dictum presents this discussion as a restatement of *Rufo*, but *Frew* in fact stakes out a new position that should make it easier for governmental officials to obtain judicial approval when they seek to modify and terminate an existing consent decree.

II. *RUFO V. INMATES OF SUFFOLK COUNTY JAIL* AND ITS LIMITS

In 1971, Suffolk County, which includes Boston, housed its prisoners awaiting trial in the Charles Street Jail under conditions that did not meet constitutional standards. The prisoners sued in federal court, the judge ruled for them, and in 1973 the judge ordered the end of double bunking prisoners in cells and the closing of the jail by 1976. The county failed to meet the deadlines, but the parties in 1978 consented to a decree that included a commitment to end double bunking and a promise to construct a new jail with cells designed for single occupants. In 1989, after much delay and two modifications, just as the new jail was about to be opened, the county sheriff sought another modification to allow double bunking at the new jail on the theory that the Supreme Court had in the interim made clear that single bunking is not constitutionally re-

18. A search of the Supreme Court database from *Rufo* to *Frew* for the terms "Rufo" or "consent decree" brought up only five cases in which the Supreme Court dealt with consent decrees that had been entered against governmental defendants. *Lawyer v. Dep't of Justice*, 521 U.S. 567 (1997), and *City of Dallas v. Dallas Fire Fighters Ass'n*, 526 U.S. 1046 (1999), dealt with challenges to the entry of decrees by persons who had not consented to their entry; they did not deal with the modification, enforcement or termination of consent decrees. *Martin v. Hadix*, 527 U.S. 343 (1999), dealt with attorney's fees. *Miller v. French*, 530 U.S. 327 (2000), dealt with whether the automatic stay provision of the Prison Litigation Reform Act was constitutional. *Agostini v. Felton*, 521 U.S. 203 (1997), overruled a prior Supreme Court decision upon which the decree in the case had been based and, on the basis of that overruling, ordered that the decree be vacated. *Agostini* provided no occasion to reconsider *Rufo* because the Court ruled that *Rufo* itself dictated the vacation of the decree.

quired. The district court judge refused to allow the modification, and the court of appeals affirmed. The Supreme Court took the case and in *Rufo v. Inmates of Suffolk County Jail*, reversed, with six Justices agreeing that the trial judge had evaluated the modification motion by the county sheriff on too rigid a standard. The Court sent the motion back to the trial court, and in doing so set out a new, less rigid standard for modification of consent decrees.

The prior standard governing a motion for the modification of a consent decree dated from 1932, and held that “Nothing less than a clear showing of grievous wrong evoked by new and unforeseen circumstance should lead us to change what was decreed after years of litigation with the consent of all concerned.”¹⁹ This was a very tough standard designed to give finality to settlements. *Rufo* discarded the grievous wrong standard in institutional reform cases and looked instead to whether an “unforeseen” change in the factual circumstances had the effect of making compliance with the decree substantially more onerous. Otherwise, the decree could be changed only in extraordinary circumstances.²⁰

In reasoning why a new standard was needed, the Court in *Rufo* distinguished private disputes settled by agreement from consent decrees in institutional reform cases. The Court wrote that in institutional reform cases decrees may remain in place for a very long time, a factor that increases the likelihood of changed circumstances, and that the obligations imposed by decrees affect not only the parties, but also the public at large.²¹

19. *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932). This statement regarding the *Swift* opinion suffices for the purposes of this essay, but the story is actually more complicated. As *Rufo* observed, a showing of grievous wrong caused by unforeseen circumstance was not the only way to get a decree changed, even under *Swift*. *Rufo*, 502 U.S. at 378-80. See also *Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 246-48 (1991). For a more complete account of *Swift* and its aftermath, see David I. Levine, *The Latter Stages of Enforcement of Equitable Decrees: The Course of Institutional Reform Cases After Dowell, Rufo, and Freeman*, 20 HASTINGS CONST. L. Q. 579 (1993).

20. *Rufo*, 502 U.S. at 384. “If it is clear that a party anticipated changing conditions that would make performance of the decree more onerous but nevertheless agreed to the decree, that party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b).” *Id.* at 385.

21. *Rufo*, 502 U.S. at 380-81.

Rufo's unforeseen circumstances requirement calls for a factual inquiry into the circumstances and knowledge of the parties at the time that they made their deal. It is a near cousin of the common law contract doctrine that excuses non-performance as a result of supervening impracticability.²² The contractual analogy is apt because the Supreme Court had written elsewhere that plaintiffs had the right to specific performance of the terms of the decree.²³

Rufo bears other indicia of contractual thinking. It states that a modification to a consent decree should be tailored to resolve the problems created by the change in circumstance and should not strive to rewrite a consent decree so that it conforms to the "constitutional floor."²⁴ The effect of this principle is to preserve the initial bargain to the extent practicable. The Court also stated that the trial court must not defer to state and local officials in deciding whether a modification is warranted.²⁵ Deference is of course required when judges review how officials exercise their discretionary powers, but not in enforcing contracts.

None of these indicia of contractual thinking got into the *Rufo* opinion by accident. The unforeseen circumstances requirement was the main issue over which the justices split in *Rufo*. Two Justices wanted a more restrictive requirement—that the changes be unforeseeable as well, thus charging the parties with knowledge of all future events that reasonably prudent litigants settling a case would foresee.²⁶ The parallel requirement that the modification be tailored to the change in circumstance was itself the subject of a separate section of the opinion.²⁷ The demand that the trial judge not defer to defendant officials, although dealt within a footnote, was

22. See RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

23. See *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 607 (1984). Similar contract thinking is reflected in the Supreme Court's standard for terminating decrees that is geared to compliance with the decree rather than compliance with the law that it is ostensibly meant to enforce. See *Dowell*, 498 U.S. at 249-50.

24. *Rufo*, 502 U.S. at 391.

25. *Id.* at 393 n.14 (forbidding deference in deciding whether modification is warranted, but requiring deference in crafting the terms of any modification that is warranted).

26. *Rufo*, 502 U.S. at 406-09.

27. *Rufo*, 502 U.S. at 391-93.

the subject of an exchange between the majority and the concurrence.²⁸

Rufo did make it somewhat easier for defendant officials to modify decrees, but the contract principles upon which it was built put severe limits on the ability of officials to gain relief from decree provisions unnecessary to protect plaintiffs' rights, even when those provisions might seem unwise in light of experience and the changing wishes of voters.

Without agreement from plaintiffs' attorneys, officials faced substantial litigation obstacles in order to secure modifications even with a change of circumstances that met the unforeseen test. For example, in a case involving eviction procedures from public housing in New York City, the parties litigated for 18 months whether the advent of crack cocaine was sufficiently different from ordinary cocaine and heroin to meet the *Rufo* test of an unforeseen circumstance, and whether the proposed plan to evict crack dealers who used their public housing apartments for the sale of crack was suitably tailored to the new circumstance.²⁹ In a Massachusetts consent decree case involving the incarceration of sexual offenders, it took four years and three trips to the First Circuit to work out the modifications. The First Circuit in the last of the three opinions expressed the hope that the parties could work things out without more "heroic" litigation over further modifications of the 26-year-old consent decree.³⁰ In *Rufo* itself, the district court on remand from the Supreme Court denied the modification that would have allowed double bunking after intensive litigation involving several months of discovery, an evidentiary hearing and briefing, and a day of oral argument. The judge ruled that the sheriff's proposed modification was not suitably tailored to the problem presented by the substantial increase in the number of prisoners.³¹

28. *Id.* at 393 n.14; *Id.* at 398-99 (Stevens, J., dissenting). Justice Blackmun joined Justice Stevens in dissent.

29. *See Escalera v. New York Housing Authority*, 924 F. Supp. 1323 (S.D.N.Y. 1996).

30. *See King v. Greenblatt*, 52 F.3d 1 (1st Cir. 1995); *remanded to* 127 F.3d 190 (1st Cir. 1997); *aff'd*, 149 F.3d 9, 12 (1st Cir. 1998). The consent decree finally terminated in 1999. *See King v. Greenblatt*, 53 F. Supp. 2d 117 (D. Mass. 1999).

31. *See Inmates of Suffolk County Jail v. Rufo*, 148 F.R.D. 14 (D. Mass. 1993). A year later, after more litigation, the judge allowed a partial modification on double bunking. *See Inmates of Suffolk County Jail v. Rufo*, 844 F. Supp. 31 (D. Mass. 1994).

III. *FREW'S GLOSS ON RUFO*

Frew, in contrast to *Rufo*, omits any mention of contract thinking. There was no statement that there must be an unforeseen change, that the modification must be tailored to the change, or that the trial judge need not defer to defendant officials on whether to modify.

Were these omissions accidental, or do they presage a shift to a new approach to modifications of consent decrees in institutional reform cases? We think that they do presage a shift. The Justices instruct trial judges to ensure that “state officials with front-line responsibility for administering the [federal] program be given latitude and substantial discretion.”³² The reason is that “a state . . . depends upon successor officials, both elected and appointed, to bring new insights and solutions to problems of allocating revenues and resources.”³³ This formulation would seem to allow a newly elected official to secure a modification based on considerations that were in fact foreseen by the predecessor who consented to the decree, but which the successor now evaluates differently.

Justice Kennedy wrote that “*Rufo* rejected the idea that the institutional concerns of government officials were ‘only marginally relevant’ when officials moved to amend a consent decree, and noted that ‘principles of federalism and simple common sense require the [district] court to give significant weight’ to the views of government officials.”³⁴ In the penultimate sentences of the Court’s opinion, Justice Kennedy concluded by stating that “The basic obligations of federal law may remain the same, but the precise manner of their discharge may not. If the State establishes reason to modify the decree, the court should make the necessary changes; where it has not done so, however, the decree should be enforced to its terms.”³⁵

IV. *FREW AND DEMOCRATIC ACCOUNTABILITY*

This last statement by Justice Kennedy is consistent with one of the most basic principles of municipal law that holds that neither a

32. *Frew*, 540 U.S. at 442.

33. *Id.*

34. *Id.* at 441-42.

35. *Id.* at 442.

government nor its officials may contract away the power to govern. As Justice Brennan wrote on another occasion,

One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent. Crucial to this end is the assurance that new legislators will not automatically be bound by the policies and undertakings of earlier days. . . . [N]othing would so jeopardize the legitimacy of [our] system of government that relies upon the ebbs and flows of politics to "clean out the rascals" than the possibility that those same rascals might perpetuate their policies simply by locking them into binding contracts.³⁶

An exception is made so that government may make enforceable contracts of a proprietary nature, such as to purchase supplies or borrow money, but the decrees in institutional reform cases clearly fall on the government side of the governmental-proprietary line because their avowed purpose is to change how government functions.

It is possible to understand in retrospect how the courts came to think of consent decrees against government in contract terms, and why it may now be edging away from that way of thinking. The classic opinion to cite for the proposition that consent decrees are, in part, a contract came in an antitrust case against a large private corporation.³⁷ In such a case, there could be no concern with government contracting away its governmental powers because, obviously, the defendant was not a government. A private corporation is unlikely to consent to a decree broader than what a judge would impose as necessary to vindicate plaintiffs' rights. The cases where institutional reform litigation took root, however, involved school desegregation and prison conditions in which officials often resisted constitutional rights. Faced with such resistance, a trial judge's last concern would be that the defendants would consent to

36. *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting).

37. *See United States v. ITT Continental Banking Co.*, 420 U.S. 223, 235-37 (1975). *See also United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971).

a decree that went beyond the constitutional floor.³⁸ To allow easy modification of deals that defendants struck in cases tinged by massive resistance would be to invite yet more resistance. It often took years to pin officials down on a plan to correct their ways. If they could change those plans in the name of having thought up a better way to comply with the law, defiant officials would have yet another way to further postpone compliance.

Rufo came out of this line of cases. It was about the rights of inmates, the violation was constitutional, and the defendants had been uncooperative. The lower court found that the county jail fell short of constitutional standards, but, for years afterwards, the defendants failed to remedy the violation.³⁹ *Rufo* thus had an odor of official resistance to the minimal obligations of constitutional law. By the time *Rufo* had reached the Supreme Court, the resistance had abated and the defendants were in the midst of building a new jail designed to bring them into compliance. The Court nevertheless saw itself as adopting a standard for all institutional reform cases, and the justices who took the toughest line on modification placed the most emphasis on the history of resistance in the case.⁴⁰

Frew, on the other hand, looked at the intersection between democracy and institutional reform litigation in a much different factual setting. In *Frew*, the alleged violations were statutory and the defendants generally cooperative. State officials had agreed to a program that satisfied the plaintiffs' lawyers without the court finding a violation. Although the defendants subsequently did not comply with some provisions of the decree, Texas was, according to the Fifth Circuit, spending more than any other state on outreach programs, was unaware of even a single individual who had requested health services and not subsequently received them, and was in compliance with the statute itself.⁴¹

The *Frew* dictum reads as if attuned to this different setting. Justice Kennedy wrote that overly rigid management of consent de-

38. Not everyone on the defendants' side sought to resist; as Malcolm Feeley and Edward Rubin point out, some prison officials seized upon the litigation to increase funding. See MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 62-63 (1998).

39. *Rufo*, 502 U.S. at 372-76.

40. *Id.* at 407-09.

41. See *Frazar*, 300 F.3d at 533, 548.

crees may improperly deprive future office holders of their designated legislative powers. It may also lead to overly long federal court oversight of state programs and to the ignoring by federal judges of institutional concerns by state and local officials, as well as to an insufficient recognition of the latitude and discretion required by state officials who are managing the program. These, *Frew* says, are all concerns properly considered by a judge sitting in equity.⁴²

Frew shifts from an approach in which contract considerations are used to pin down recalcitrant state and local officials to a new approach where officials have broad discretion so long as they work in good faith to vindicate plaintiffs' rights. But, what test does *Frew* put in place of unforeseen circumstance and modifications tailored to them? *Frew* does not say. In this, the *Frew* dictum is similar to Justice O'Connor's concurring opinion in *Rufo*. She concurred in sending the case back to the trial court for a reconsideration of the motion to modify the consent decree because she believed that the district court judge had impermissibly restricted his discretion. Yet, she thought that the new standard as articulated by the majority in *Rufo* would in the end also be too restrictive since it relied on a formula rather than the sound discretion of the judge overseeing the decree.⁴³

The *Frew* approach is more consistent with the realities of most institutional reform litigation today. In contemporary cases, the emphasis is on enforcing statutory and regulatory rights rather than constitutional ones. Dozens of federal statutes have launched hundreds of federal agency regulations imposing thousands of court enforceable mandates on state and local government. Given the number and specificity of these mandates and their tendency to set aspirational standards for state and local government, it is no great trick for private advocates to discover some aspect of a large state or local program that falls short, be it Medicaid, special education, environmental protection, or foster care.⁴⁴

Governors and mayors thus have few defenses to a lawsuit charging them with illegally neglecting service to their constituents.

42. *Frew*, 540 U.S. at 441.

43. *Rufo*, 502 U.S. at 395-99.

44. See discussion in DEMOCRACY BY DECREE, *supra* note 6, at 17-28.

Some might argue that the violations occur because state and local officials set taxes too low or fail to act high-mindedly. Others might argue that the violations occur because the rights reflect opportunism in Congress rather than society's sense of priorities. No sensible person could argue, however, that the violations typically occur because of the kind of massive resistance that marked the early school desegregation cases. The majority of southern voters opposed the objective of desegregation while, in contrast, the majority of voters everywhere favor the objectives of the new federal rights. That is why Congress enacts them, often with the support of the very mayors and governors who end up in court as violators.

Enforcing such rights presents difficult judicial choices because it is often not obvious how or when the state or local government could comply. Trial judges thus urge the parties to work it out. The result is that plaintiffs' attorneys, government's attorneys, and officials in direct charge of the program meet around a large table. This "controlling group" agrees on a plan for running the program and presents it to the judge whose signature turns it into a consent decree. The plan tends to track the ideas of the controlling group about how to run the program and need not stick precisely to the requirements of federal law. The plan, as in *Frew* itself, often requires benefits in excess of the federal rights and usually dictates how the program shall deliver whatever benefits are required. Officials in charge of the program tend to welcome the opportunity to write such requirements into the decree because the decree then lets them shoehorn more money and authority away from governors, mayors, and legislatures. Governors and mayors generally share the goals of the litigation; they desire to avoid being labeled as lawbreakers and to be seen instead as problem solvers. They cannot reliably be depended upon to withhold consent from decrees that set out obligations in excess of, or different from, the federal statute, or which imposes details of compliance and milestones that would under other circumstances be left to the managers of the program. In some cases officials use the consent decree process to shift to their successors the most burdensome changes.⁴⁵

45. The logic compelling officials to consent in institutional reform cases is discussed in *id.* at 122, 167-74.

The result may be fine for the governor or mayor consenting, but not for their successors in office and their constituents. The well-intentioned plans written into the decrees rarely work exactly as planned or they may bring about consequences that were foreseen, but, upon reflection, would be better avoided.⁴⁶ Yet, at least until *Frew*, the Supreme Court's standard for modification made any change difficult if not impossible. Defendants often need plaintiffs' consent to modify the decree. Plaintiffs' lawyers can use the threat to litigate to exact new obligations. Decrees that begin at fifty or eighty pages grow in length to hundreds and even thousands of pages, and thus become increasingly difficult to escape.⁴⁷ That was the course upon which Texas was headed in *Frew* until the Fifth Circuit and the Supreme Court, each in its own way, intervened.

Frew closes a gap in the jurisprudence that governs remedies in institutional reform cases. The Supreme Court has long permitted state and local officials broad flexibility when designing the original consent decree.⁴⁸ Officials could at the start extend obligations, substitute new ones, or eliminate statutory obligations altogether. Prison cases, it is not too much of an exaggeration to say, may start by challenging brutality and end with decrees specifying the square footage of cells, the temperature of food in the dining room, and the availability of television and movies.⁴⁹ But when it came to modifying these same obligations, the *Rufo* test proved less flexible, resulting in a loss of democratic accountability. With *Frew*, that gap is gone.

Still it will be hard for judges to follow the guidance of *Frew*. The way in which modification motions usually present themselves appear to call for a toughness by the judge not demanded at the

46. See, e.g., *Rufo*, 502 U.S. 367 (1992) (involving bunking of prisoners); *Alliance to End Repression v. City of Chicago*, 119 F.3d 472 (7th Cir. 1997) (involving restrictions placed on FBI when investigating alleged terrorist groups).

47. See, e.g., *Benjamin v. Fraser*, 161 F. Supp. 2d 151 (S.D.N.Y. 2001) (involving a prison reform case that was settled in 1978 with a consent decree of 52 pages that grew over the next 25 years to more than several hundred pages; the consent decree was partially terminated pursuant to the Prison Litigation Reform Act. See *Benjamin v. Fraser*, 343 F.3d 35 (2d Cir. 2003)).

48. See *Local No. 93, Int'l. Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986).

49. See, e.g., *Benjamin v. Fraser*, 161 F. Supp. 2d 151 (S.D.N.Y. 2001).

time of the initial consent. In the initial negotiations, every effort is made to reach agreement to avoid litigation. Later, judicial flexibility disappears and in its place appears a hardness and desire to hold the defendants' feet to the fire. As former federal judge Marvin Frankel said concerning his role as a special master at the beginning of an institutional reform case involving special education, "My job was to get an agreement," because in complex cases, "you rely on the parties to work it out."⁵⁰ But Special Master Frankel was much less flexible three years into the case when the consent decree's complex plan for evaluating, placing, and teaching 100,000 children with special needs proved difficult, costly, and largely unworkable, and produced many unwanted side effects. He then wrote that "[t]he time has come, it is now believed, for defendants either to comply with the judgements or to confront the familiar consequences of noncompliance. . . . Demanding respect for their expertise, defendants ought to get it. Promising compliance, they ought to achieve it or face contempt charges."⁵¹

The *Frew* dictum, made in a context of a motion for contempt, speaks to this reality by instructing judges and litigants that they are not to forget the values associated with local democracy and flexibility, nor the difficult reality or costs of social change. Judges walk a fine line when affirmatively dictating how government will deliver its services. The *Frew* dictum, if followed, shifts the judicial balance toward democratic values and away from contractual rigidity.⁵²

50. Interview with Judge Marvin E. Frankel in New York, N.Y. (Mar. 8, 1999). Judge Frankel served as the court-appointed special master in *Jose P. v. Ambach*, No.79 Civ. 270 (E.D.N.Y. 1979).

51. *Jose P. v. Ambach*, Special Master Rep. No. 12, at 5-6 (Sept. 7, 1982).

52. At least one court appears to read *Frew* as commanding more deference when state officials seek to modify a consent order. In *Alliance to End Repression v. City of Chicago*, 356 F.3d 767 (7th Cir. 2004), Judge Posner, writing for the panel, cited *Frew* in reversing a district court's award of fees to plaintiffs' counsel who had opposed modification of a fifteen-year-old consent decree. Judge Posner, quoting *Frew's* discussion concerning the potentially anti-democratic nature of consent decrees, wrote that plaintiffs had "no duty—statutory, contractual or ethical—to oppose modification." Plaintiffs' opposition to the modification "verged on the unreasonable" because "the circumstances out of which the class action suit had arisen had changed dramatically when modification was sought. The decree in its original form had accomplished its purpose and had become obsolete. There would have been no ignominy to the plaintiffs' acceding to the modification." *Id.* at 773-74. In contrast, in denying a motion for modification, the Ninth Circuit extensively cited the holding of *Frew* that decrees that go beyond

V. A PERSONAL RESPONSE TO THE SHIFT FROM CONTRACT TO DEMOCRACY

We had been following the *Frew* litigation and had mentioned the lower court decision in our book, *Democracy by Decree*, as an example of a consent order that was broader than the right it enforced.⁵³ We had no faith that the Texas officials' Eleventh Amendment attack on the authority of a federal court to enforce such an order, but we did suspect that the decision to be made by the Supreme Court might have an impact on federal courts growing control of state and local programs through long-lasting and rigid consent decrees.

Our book was published a year before the Supreme Court's decision and was written without benefit of the Court's dictum, but in it we made a similar argument against judicial control broader than necessary to enforce rights. We contended in our book that consent decrees not only shift control from democratically elected officials to the controlling group, but also in many cases do more harm than good. Because of their breadth and rigidity, decrees often have unwanted side effects.⁵⁴ We acknowledged that courts were obligated to enforce rights, but suggested new rules to minimize the adverse effects on democracy and government programs. Our suggestions concerned the way courts review and approve consent decrees, consider applications by officials to modify decrees, and prepare the way to terminate consent decrees within a reasonable period of time.⁵⁵

While the Supreme Court's dictum in *Frew* has been ignored in the legal academic and popular literature, our book with its similar reasoning was not. It provoked substantial comment in scholarly publications, newspapers, and other periodicals.⁵⁶ In surveying

the requirements of federal law are enforceable against state officials, but ignored the dictum easing modification. See *Jeff D. v. Kempthorne*, 365 F.3d 844 (9th Cir. 2004).

53. *DEMOCRACY BY DECREE*, *supra* note 6, at 110.

54. *Id.* at Chapters 4, 5 & 6.

55. *Id.* at Chapters 8 & 9.

56. See, e.g., Susan Rose-Ackerman, Book Review, 118 *POL. SCI. Q.* 679, 680-81 (Winter 2003-04); Matthew J. Franck, *Coercion by Consent*, *CLAREMONT REVIEW OF BOOKS*, Summer 2004, at 55; Jonathan Kay, *Soft rights*, *COMMENTARY*, Jan. 2003, at 62; George C. Leef, *The Imperial Bench*, *REGULATION*, Fall 2003, at 69; Thomas J. Main, *Closed Doors, Open Season*, *WALL. ST. J.*, Dec. 31, 2002, at D4; Susan Poser, *What's a Judge to Do? Remediating the Remedy in Institutional Reform Litigation*, 102 *MICH. L. REV.* 1307 (2004); Charles F.

these responses, most striking to us was that all of the writers accepted our description of how institutional reform litigation works in practice, including our point that the controlling group led by the plaintiffs' lawyers aggregates power far in excess of that needed to protect rights. Susan Rose-Ackerman found convincing our account of a process "that flies in the face of democratic accountability at the state and local level."⁵⁷ Susan Poser, although critical of some of our recommendations, applies such words as "subtle," "persuasively," and "powerfully" to our description. She concludes that we "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."⁵⁸

Some commentators also found merit in our recommendations. Rose-Ackerman, for example, found them by and large "sensible."⁵⁹ A reviewer in the *Washington Post* praised the book's viewpoint, calling it "refreshing."⁶⁰ Some commentators, however, attacked some of our suggestions in terms that could have been equally addressed to the Supreme Court's pronouncement in *Frew*. The attacks came on three fronts: (1) any restrictions on the use of consent decrees to advance social agendas would leave rights unprotected; (2) restrictions on the use of consent decrees presume an unwarranted trust in state and local officials; and (3) restrictions, if any, should be aimed at Congress rather than well-intentioned lawyers and judges.

Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004); Jonathan Shapiro, *Do We need Less Activism from the Bench or More? Four New Books Judge the State of Our Judiciary*, WASH. POST, Mar. 9, 2003, at T06; Ilya Somin, *Democracy & Judicial Review Revisited: The New Old Critique of Judicial Power*, 7 GREENBAG 287 (2003); Mark Tushnet, "Sir, Yes, Sir": *The Courts, Congress, and Structural Injunctions*, 20 CONST. COM. 189 (2003); Ross Weiner, *The Corrosive Consent Decrees*, LEGAL TIMES, May 5, 2003, at 33; George Will, *Judges and Soft Rights*, NEWSWEEK, Feb. 28, 2005, at 70; David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA. L. REV. 1015 (2004).

57. Rose-Ackerman, *supra* note 56, at 680-81.

58. Poser, *supra* note 56, at 1318.

59. Rose-Ackerman, *supra* note 56, at 681.

60. Shapiro, *supra* note 56.

A. *Rights Would Not Go Unprotected*

This first criticism is the one most powerfully urged by those supporting institutional reform litigation. Danny Greenberg, former head of New York City's Legal Aid Society, declared our book to be "dangerous" because it might lead to a judicial abandonment of the poor and defenseless.⁶¹ Susan Poser charged that we "tell federal judges to stop fashioning remedies when state and local government officials break the law by violating the rights of individuals."⁶² Mark Tushnet, in his agitated attack on the book, accused us of rolling back federal rights.⁶³ Such criticism misreads—indeed, wildly misreads—our position, and would, if directed at the Supreme Court's dictum in *Frew*, equally miss the mark.

The Supreme Court emphatically held that judges are not free to ignore rights. That was the precise holding of *Frew* as the Court unanimously brushed aside arguments by Texas officials that they benefitted from a constitutional shield against judicial enforcement of court orders. It was the Court's resounding rejection of the Texas position that led it to discuss how judges should proceed when officials, who are bound to comply with federal rights, seek to modify a consent decree designed to achieve those rights. Here the Supreme Court spoke both emphatically and didactically: defer to the state and local officials as they maneuver within their legal options to achieve statutory rights, and do not tie them to duties and dates of a contractual nature that earlier groups of plaintiffs and defendants wrote into the consent decree.

We made a similar proposal in *Democracy by Decree*, urging that modifications be allowed whenever the state and local officials have a good reason to change how they will honor plaintiffs' rights.⁶⁴ Like the analysis in *Frew*, we suggested reasons why *Rufo*'s unforeseen

61. Daniel Greenberg, Remarks during Panel on Institutional Reform Litigation and Consent Decrees, Federal Bar Council (Nov. 6, 2003).

62. Poser, *supra* note 56, at 1309.

63. Tushnet, *supra* note 56.

64. DEMOCRACY BY DECREE, *supra* note 6, at 213-14. We made another proposal for building flexibility into court enforcement of rights—that remedial obligations, but not the finding of liability, can be changed when a new chief executive takes office. *See id.* at 214. Poser reads us as calling for ending the remedial obligation. Poser, *supra* note 56, at 1321. But our proposal came in the section on modification, not termination, and we meant that the decree be amended rather than ended.

circumstances test for modifying consent decrees in institutional reform cases was too strict and that deference should be granted to the officials charged with achieving plaintiffs' rights.

There are difficult situations. Suppose that Congress or a federal agency acting under Congressional authority commands that a program be completed by a deadline that most localities could not meet. An example that we explored in *Democracy by Decree* involved the installation of curb ramps under the Americans with Disabilities Act. No large city in the country fully complied with the curb ramp requirement. To have met the date would have wildly and unrealistically reallocated capital resources, and even then would have failed. Or another example: a congressional command that local governments achieve adoption for foster care children within fifteen months, a highly worthy goal, but one of great difficulty and individual complexity.⁶⁵

We called such rights "soft rights" because no court could insist on literal compliance. Faced with a suit to enforce soft rights, judges cannot ignore the right, but they also cannot enforce it precisely as written. So judges pass that buck to the controlling group.⁶⁶ Our recommendation for dealing with soft rights in this situation was that the court should enter a judgement of violation, but consider not issuing an affirmative decree. The effect of declaring a violation but not issuing an affirmative decree would be to remand to the political branches the question of what is practical, possible, and desirable to achieve the soft right, exactly where such questions belong. As we wrote in our book, "if the body that promulgated the impossible requirement—be it a legislature or an agency—wants the courts to do more, it will have to make the necessary hard choices."⁶⁷

Our point is that federal judges should enforce choices made by Congress and federal agencies (within whatever constitutional limits there may be on delegation to agencies). But judges should not step in to supplant state and local officials where Congress and the agency have, as a practical matter, failed to make the choices or particularize exactly how state and local officials are to achieve the

65. DEMOCRACY BY DECREE, *supra* note 6, at 205.

66. *Id.* at 236.

67. *Id.* at 118–19.

right. Otherwise, courts would be creating rights rather than enforcing them.

Poser claims we have failed to offer a judicially manageable test to distinguish soft rights from hard rights.⁶⁸ We defined “soft rights” in terms of the well-recognized distinction between rights and aspirations; “[w]e ‘honor’ rights, and in the general case, completely; we ‘pursue’ aspirations and, in the general case, attain them only partially because they are idealistic.”⁶⁹ We continued by observing that “A right is, after all, a right. Soft rights, on the other hand, cannot ordinarily be fully achieved.”⁷⁰ The result is that soft rights “are enforced only to the extent that the controlling group or the judge thinks it makes sense to do so in view of society’s competing priorities.”⁷¹ Poser overlooks our actual definition of soft rights, and writes as if our definition was our discussion of why soft

68. Poser, *supra* note 56, at 1319-20. Poser offers another reason why she thinks we advocate under enforcement of rights: she imagines that we flatly oppose the entry of decrees imposing positive duties when needed prophylactically to protect rights. As she puts it:

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. *Id.* at 1320.

Her reading of us is bizarre. As we state, “[j]udges who stick to enforcing rights will still have to consider taking hold of policy. Elected officials do not always obey simple, prohibitory injunctions” DEMOCRACY BY DECREE, *supra* note 6, at 204. We also say that “judges should abstain from dictating the means to vindicate rights when defendants show that they will work in good faith to meet their legal obligations.” *Id.* at 205 (emphasis in original). Our point is that trial judges should make their prophylactic decrees as narrow as possible consistent with protecting rights, but in no way precludes positive, prophylactic orders. It would be strange if our position were any different because one of us (Schoenbrod) is recognized as providing a leading justification for including prophylactic provisions in injunctive relief. See Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFFALO L. REV. 301, 303 n.5, 304 n.9, 333-35 & 371 (2004).

69. DEMOCRACY BY DECREE, *supra* note 6, at 100. See, e.g., James A. Henderson, Jr. & Richard A. Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429 (1978).

70. DEMOCRACY BY DECREE, *supra* note 6, at 103.

71. *Id.* at 103.

rights are more difficult to enforce than traditional ones.⁷² We have a judicially manageable test, but she failed to engage it. The *Frew* case itself presents an example of a soft right. The federal statute was brief, general, and aspirational.

We distinguished between soft rights and traditional rights to clarify why consent decrees, managed by a controlling group of lawyers, can be so pernicious. If the federal statute, as in *Frew*, sets an aspirational goal involving the health of 1.5 million children in Texas, than filling in the blanks on how to achieve that federal goal is no simple business. It is policymaking at the highest level since it is the specific plans, programs and milestones written into the decree that drive the agency programs and expenditures. And it is these requirements that do the most harm in undermining state and local democracy.

Those who support consent decrees uncritically cannot allow the distinction between soft rights and traditional rights to stand unchallenged.⁷³ They want soft rights to be treated in the identical way that the courts treat traditional rights, but there are differences. One reason is that soft rights are usually positive, while almost all

72. Poser, *supra* note 56, at 1318-20.

73. Charles F. Sabel and William H. Simon in *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1078 n.175 (2004), argue that broad decrees are necessary for plaintiffs interests to be heard. They write that we “argue that stakeholder participation is dominated by lawyers with little effective accountability to their putative clients. [Sabel and Simon] find this argument implausible. It is specifically contradicted by many case histories recording substantial and meaningful stakeholder participation.” Thus far we have a battle of anecdotes, theirs against ours. They go on to argue that:

[i]t is true that stakeholders in these cases are commonly underorganized and vulnerable and that there are many failures of professional loyalty and accountability. However, Sandler and Schoenbrod’s implication that structural litigation reduces the effective participation of plaintiff class members is counterintuitive. If we assume that stakeholders are so poorly organized and vulnerable that they cannot hold accountable the lawyers purporting to represent them, there is no reason to expect that they would do better in the general electoral or administrative processes.

Id. Our position may be counter-intuitive to them, but is backed by a literature arguing that success in court is usually a lagging indicator of growing political support as advocacy organizations shift resources from litigation to political advocacy. See DEMOCRACY BY DECREE, *supra* note 6, at 150-52. Sabel and Simon fail to note that members of a plaintiff class don’t get to vote for their attorneys, but do get to vote for their legislators and do get to fire their attorneys in individual litigation. Of course, there are classes, such as prisoners and mental patients, that are typically denied the vote. Yet, the rights that protect them are predominately constitutional rather than statutory in origin.

constitutional rights and many common law and statutory rights are negative. Another reason is that no one may know with certainty how government will be able to achieve the right set out in the statute, not the experts, not the officials, and not the plaintiffs' attorneys. The judicial failure to distinguish soft rights from traditional rights, however, has resulted in the emergence of consent decrees managed by controlling groups that have lasted twenty or thirty years or more without ever fully achieving their initial aspirational goals.

Our definition of soft rights is judicially manageable and is, in any event, surely much more manageable than a rigid attempt to compel governmental agencies to achieve aspirational goals where there are no clear political or legislative directions, or even a consensus on how the officials might achieve compliance. As Judge Edward R. Becker stated in commenting approvingly on our book and its concept of soft rights, "the courts, instead of the representative branches, end up making policy choices, such as how much of the city's depleted budget must be spent on curb cuts over the next two years."⁷⁴

B. State and Local Officials Cannot be Trusted, Therefore Broad Consent Decrees are Warranted

In *Frew*, Justice Kennedy wrote that state officials "must be presumed to have a high degree of competence in deciding how best to discharge their governmental responsibilities,"⁷⁵ and that the Court in its earlier *Rufo* opinion had "rejected the idea that the institutional concerns of government officials were 'only marginally relevant' when officials moved to amend a consent decree. . . ."⁷⁶ The Court's statements carefully balanced deference to local democracy with the judicial power to enforce rights; it plainly was not an uncritical endorsement of state and local officials. The Court underscored the balance it sought by stating that while judges should defer to state and local officials, those officials must nonetheless comply with federal law as well as consent decrees that bind them, at least until they secure appropriate modifications.

74. Edward R. Becker, *Of Laws and Sausages*, 87 JUDICATURE 7, 10 (2003).

75. *Frew*, 540 U.S. at 442.

76. *Id.* at 441.

Any suggestion of deference to state and local elected officials elicits a strong reaction from the proponents of consent decrees. Poser and Tushnet,⁷⁷ for example, misread our position in *Democracy by Decree* to be that state and local officials should be free to do as they please. The misreading comes, we believe, from our disputing the typecasting in which the “white hats” are worn by public interest lawyers, federal judges, and the legislators in Congress, and the “black hats” are worn by state and local officials who fail to live up to statutory goals. Poser reads us as turning this typecasting on its head, making the state and local officials into heroes and the lawyers and judges into villains.⁷⁸ We do attack the typecasting, but do not go nearly as far as she suggests.

The conventional assignment of stereotypical roles made sense in the context of massive resistance to desegregation, but not today when it comes to enforcement of federal statutory rights. The legislators claim hero status on the cheap by setting the pie-in-sky aspirational standards enforceable against state and local officials in

77. For example, Poser in her review of our book claims that we assume “that in the absence of a court order, or threat of a court order, public officials would voluntarily change large public institutions” and that they “will act in good faith if given the chance.” As should already be plain, we along with Justice Kennedy in the *Frew* opinion say that state and local officials should be given a chance to show they will work in good faith to honor rights, not that they will; if they don’t, they should be subjected to a strict order. As *Frew* stated, while “the basic obligations of federal law may remain the same. . . the precise manner of their discharge may not. If the State establishes reason to modify the decree, the court should make the necessary changes; where it has not done so, however, the decree should be enforced according to its terms.” *Frew*, 540 U.S. at 442. Ironically, it is the defenders of democracy by decree who place unwarranted trust on elected officials. It is their position that officials will resist overly intrusive decree provisions. But, as we explain, these officials are often only too anxious to consent in order to get their legal problems off the front pages, gain leverage on funding, and shift the more onerous obligations to their successors in office. See *DEMOCRACY BY DECREE*, *supra* note 6, at 122, 167-74. The reality of how consent decrees get written is a complete answer to those who, like David Zaring, argue that the consent aspect of consent decrees solves the undemocratic aspects of institutional reform litigation. See, e.g., Zaring, *supra* note 56, at 1033.

78. Poser, *supra* note 56, at 1311 (“Every possible doubt about proprietary and motivation is resolved against plaintiffs’ lawyers and judges, and in favor of local and state government officials.”). See also *id.* at 1316. In fact, however, we criticize state and local officials on a number of scores, including caving in to consent decrees that are bad for their constituents and their successors and sometimes resisting compliance to the point where an intrusive injunction is necessary to protect rights. See *DEMOCRACY BY DECREE*, *supra* note 6, at 122-23, 167-74 & 204-05.

federal court. The legislators, and often the federal agencies to which they delegate, duck out of the inevitable, hard choices about the extent to which it really makes sense to achieve these goals in light of limited resources and the competing claims upon them. The upshot is that the federal legislators stand for the public's desire for the benefits, the state and local officials stand for the public's resistance to the sacrifices needed to deliver the benefits, and the controlling group gets to make the policy choices. As a by-product of vaunting themselves as rights-creating heroes, members of Congress cast state and local officials as rights-defying villains.

This assignment of roles is phony because both sets of politicians represents a public that wants the political process to consider the costs as well as the benefits of policy choices. Those choices should be made by elected officials and their appointees rather than the lawyers in the controlling group.

Mark Tushnet disagrees. For him, because Congress has in effect handed off power to the courts, that is the end of the argument: "the judicial decrees do no more than pit the expression of one democratically responsible body—Congress (and the President)—against some others—governors and state legislatures, mayors and city councils. You can't get any purchase from democratic theory on how that sort of conflict should be resolved."⁷⁹ Abram Chayes anticipated Tushnet's would-be argument in his article, *The Role of the Judge in Public Law Litigation*, and dismissed it as a

formalistic analysis [that] does not begin to capture the complexities of the way the legislature operates and of its relations with the courts. In enacting fundamental social and economic legislation, Congress is often unwilling or unable to do more than express a kind of general policy objective or orientation. Whether this be legislative abdication or not, the result is to leave a wide measure of discretion to the judicial delegate. The corrective power of Congress is also stringently limited in practice. Only a very few judicial aberrations will cross the threshold of political urgency needed to precipitate congressional action.⁸⁰

79. Tushnet, *supra* note 56, at 190.

80. Chayes, *supra* note 4, at 1314.

A point that we add to those made by Chayes is that, by making the hard choices that Congress ducks, the courts enable Congress to continue to pass the sweeping, aspirational statutes that put power in the hands of the controlling groups.⁸¹

Tushnet's fallback is that, whatever its faults, democracy by decree might not be worse than the alternative. As he puts it, "the interesting question is how one political process compares to the other, in terms of democratic accountability and policy effectiveness. Sandler and Schoenbrod sketch the political process involving courts, but say almost nothing, at least directly, about the alternative."⁸² To the contrary, we say a great deal about the comparison, pointing out, for example how foster care improved in New York City when the court refused to continue the controlling group process, and how more than twenty years of court supervision of New York City's special education program produced awkward and harmful results in the view of educators who were nonetheless rebuffed by a judge who was determined to enforce a lengthy and rigid consent decree.⁸³ Also, our analysis of democratic accountability is explicitly posed in comparative terms.⁸⁴ The burden, it seems to us, is on Tushnet and those who advocate the unrestricted use of consent decrees because they are propounding a theory of judicial review in which the role of the courts is not only to protect rights, but to take on whatever other policy objectives that plaintiffs' lawyers negotiate into decrees.

C. *The Democracy Problem in Institutional Reform Litigation is Caused by a Hyperactive Congress, not the Well-intentioned Lawyers and Judges*

The *Frew* opinion accepted, as we did in *Democracy by Decree*, that Congress as a national legislature may, within its constitutional authority, establish social programs to be implemented by the states. The Supreme Court, also as we did in *Democracy by Decree*, focused on how a judge should manage the remedial stage of institutional reform litigation when the defendants are state officials

81. See *DEMOCRACY BY DECREE*, *supra* note 6, at 17-25.

82. Tushnet, *supra* note 56, at 192.

83. *DEMOCRACY BY DECREE*, *supra* note 6, at 45-97, 144-49, 193-94.

84. *Id.* at 154-61. Although democratic accountability of ordinary government "is far from perfect, democracy by decree makes it worse." *Id.* at 154.

who bear the burden of complying with the federal statute, or as Justice Kennedy put it when a “decree in effect mandates the State, through its named officials, to administer a significant federal program”⁸⁵

Defenders of the status quo in institutional reform litigation note that the rights in question start with Congressional legislation, and then make the debater’s point that therefore any effort at reform should be directed at Congress, thus taking the onus off the judges and lawyers who control consent decrees.⁸⁶ It is hard to take seriously such comments, since those who make them often fervently advocate federal legislation and federal social programs; they would be the first to reject efforts to reduce federal authority. We of course see the logic of attacking federal legislation, but that diversion was not our topic in *Democracy by Decree*, nor was it the Supreme Court’s topic in *Frew*. In an academic setting one might speculate about cabining Congress’s appetite for social legislation, but actual efforts to reinvigorate the commerce clause, the nondelegation doctrine, or other potential constitutional limits on Congress have had at most only limited success. In our book, we take these limits as they now are (largely unenforced) for the simple, but powerful reason that it is a long shot that the Supreme Court will do much with these doctrines, at least in the near term, and in the meantime courts are faced with institutional reform cases.

In writing *Democracy by Decree* we relied on our own experience both as plaintiffs attorneys and, while serving in government, as defendants bound by old consent decrees. For the book we also explored some positive examples where things had gone differently. One case we relied on was the foster care litigation in New York City where an experienced federal district judge, tired with his prior fruitless, rigid consent order, permitted the City officials to advance their own reform plan without instructions from either plaintiffs’ counsel or the court, and with the promise of termination of direct court supervision after two years based on sustained good faith ef-

85. *Frew*, 540 U.S. at 442.

86. See, e.g., Poser, *supra* note 56, at 1321-23. See also Tushnet, *supra* note 56, at 203. Even Susan Rose-Ackerman, who is generally approving of *DEMOCRACY BY DECREE*, writes that our “largely persuasive critique of current practice” in the creation of rights by Congress should have prompted us to urge the courts to confront the practices in Congress. Rose-Ackerman, *supra* note 56, at 681.

forts at meeting legal responsibilities. The decree in fact did terminate on schedule even though the City was still far short of 100% compliance with the array of federal, state, and local legal obligations encrusting its foster care responsibilities.⁸⁷ Those reform efforts have continued to this day.⁸⁸

We also based some of our proposals on one provision in the Prison Litigation Reform Act⁸⁹ that required that federal prison condition decrees, even those entered on consent, be strictly limited to curing violations of rights, and that they terminate promptly when no longer needed to protect such rights. It was under this provision that the *Rufo* consent decree was finally terminated in 1997. The provision lets courts protect rights, without letting them do what they shouldn't do—make policy when not necessary to protect rights. Congress has, in effect, shifted institutional reform litigation in the prison reform arena from contract to democracy.

87. See *Marisol A. v. Giuliani*, 185 F.R.D. 152 (S.D.N.Y. 2000), *aff'd sub nom.* *Joel A. v. Giuliani*, 218 F.3d 132 (2d Cir. 2000).

88. Sabel and Simon, *supra* note 56, at 1093 n.222, argue that our description of this case shows that courts can readily discern defendants who want to fix the problem and thereby avoid entering unnecessarily intrusive decrees. See also Tushnet, *supra* note 56, at 197-99. Sabel and Simon, as well as Tushnet, fail to engage our argument that the *Marisol* case is the exception that proves the rule. See *DEMOCRACY BY DECREE*, *supra* note 6, at 146, 167-74. It is exceptional because defendants stuck with a losing case generally prefer to cave in than take responsibility.

Sabel and Simon similarly miss the forest for the tree in reacting to another case we describe, this one involving a decades old decree controlling New York City's multi billion dollar special education program. Sabel & Simon, *supra* note 56, at 1085-86. They report, and accurately so, that we criticized a state regulation enforced by the decree that set a short deadline for school systems to evaluate and place students named as possibly needing special education. The evaluation process diverted resources from helping students to much superfluous paperwork. They then assert, and wrongly so, that our discussion of this point belies our argument that courts in entering institutional reform cases should stick to enforcing rights and not use the decree to try to improve public policy in other ways. The state regulation was ill-advised, but the decree made it worse by requiring that the evaluation be done in a much more expensive way than required by any statute or regulation. Our point is not that all statutes and regulations are good, but rather that it is bad to allow the controlling group to use the court to, in effect, enact its own statutes and regulations.

89. Pub. L. No. 104-134, 110 Stat. 1321 (1996). See also *Miller v. French*, 530 U.S. 327 (2000) (upholding the constitutionality of the stay and termination provisions). The legislative history of the Prison Litigation Reform Act is set out in our book, *DEMOCRACY BY DECREE*, *supra* note 6, at 183-92.

Our book urged the courts themselves to institute a broader range of reforms to cover the full spectrum of institutional reform cases.⁹⁰

We have tried to see institutional reform litigation in a new light in line with contemporary realities. Our severest critics, such as Danny Greenberg and Mark Tushnet, are still battling against the past where officials outwardly resisted constitutional rights, attacked the judges for doing their jobs, and demanded that the courts stay out of the business of government altogether. They seem to hear in any analysis of how institutional reform consent decrees are actually managed the hoary attacks on activist judges for overstepping their role.

Judges have not been too active, in our view, but rather that they've been too passive in allowing the controlling group to borrow the powers of the court to run public policy. When Abram Chayes in 1976 introduced the topic of institutional reform litigation to the legal academic world, he noted that the contents of the decrees were based on trial and error, and that the whole business was an experiment that bears watching.⁹¹ Now, almost thirty years later, the experiment has been run, but the experimental spirit has for some hardened into an orthodoxy. Not only are the decrees difficult to change in light of experience, at least until the Supreme Court spoke in *Frew*, but, for these critics, any suggestion for the reform of institutional reform litigation to protect democratic values is itself dangerous. To such reaction, the unanimous reaffirmation of democratic values by the Supreme Court in *Frew* is a rounded response.

90. DEMOCRACY BY DECREE, *supra* note 6, at 193-221.

91. Chayes, *supra* note 4, at 1313.