

NATIONAL RULEMAKING THROUGH TRIAL COURTS: THE BIG CASE AND INSTITUTIONAL REFORM

David Zaring^{*}

This Article reconceptualizes institutional reform lawsuits—big cases involving the structural reform of local government entities such as prisons and housing authorities—as the nodes of a nationwide network capable of generating national standards of administration for disparate local institutions. The repeat-playing litigators, parties, and experts who participate in this network facilitate the adoption of common standards by preferring familiar remedies, by valuing interoperability between cases, and by succumbing to the inertial momentum that this can create. The Article also analyzes the sort of law created by the spread of standards, which is low on reasoned elaboration and high on best-practices-style copying. The Article contrasts this view of institutional reform litigation, which focuses on the connections between lawsuits, instead of on the judge or the parties to a particular lawsuit. The Article then draws on the literature of international regulatory cooperation to situate this phenomenon, which, consistent with that literature, it dubs “transjudicial administration.”

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^{*} Acting Assistant Professor, New York University School of Law. Thanks to Francesca Bignami, Rachel Barkow, Matt Bodie, Peggy Davis, Malcolm Feeley, Barry Friedman, Carolyn Frantz, Andrea Gacki, Reinier Kraakman, Chris Kutz, Jae Lee, Anne-Marie Slaughter, Margo Schlanger, Nelson Tebbe, the many litigators who agreed to be interviewed for the Article, and the participants in the NYU Lawyering Faculty Workshop.

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INTRODUCTION

There is a traditional story about the creation of uniform federal law through the courts, and it depends on appellate review. The story is: Higher courts announce rights of general applicability, and lower courts follow them when applying the rules to the factual situations presented by particular cases.¹

In this Article, I argue that the traditional account does not apply to some of the most important cases that the federal courts handle. In institutional reform litigation, cases in which courts oversee schools, prisons, housing authorities, and other government institutions, uniform federal law is rarely imposed vertically, by appellate tribunals, but is much more likely to spread horizontally from trial court to trial court.

It is a system of law application that, as a self-sufficient generator of legal standards that operates in tandem with more traditionally understood central lawgivers, such as Congress or the Supreme Court, is worth some attention.² The system operates through information exchanges between district courts, which tailor their remedies based not on guidance from the courts of appeal—often, little such guidance exists—but by comparison

1. See, e.g., Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1113 (2003).

2. After all, as Yoav Dotan has observed in his excellent study of Israeli high court settlement practice during the first Palestinian Intifada, "[f]inal court decisions are like the tip of the iceberg. It is hard to tell the shape and magnitude of an iceberg by looking only at its tip." Yoav Dotan, *Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice During the Intifada*, 33 LAW & SOC'Y REV. 319, 358 (1999).

with, and analogy to, remedies implemented by other district courts in similar circumstances. This information is not exchanged through the review of reported decisions—little of that sort of guidance exists either—but rather, is exchanged by repeat players who participate in multiple cases, most commonly as counsel or expert witnesses, as well as defendants involved in multiple lawsuits, and even judges. A richer picture of this story of horizontal links between institutional reform lawsuits includes academics, funders, and standard-setting organizations.

In evaluating what to make of this phenomenon—call it transjudicial administration³—it is instructive to situate it in the context of two trends in the legal literature, and to evaluate it prescriptively. One thing that an understanding of the phenomenon does is to provide new insights into a long-standing, but still active debate about how institutional reform litigation operates. The debate turns on whether institutional reform litigation is a product of particularly empowered and functionally isolated judges, or whether it is a party-driven phenomenon. I review this debate and discuss some of the implications of a theory of transjudicial administration.

I then sketch the system's origins, that is, the particular institutional background that made it possible for transjudicial administration to develop, and subsequently I turn to its mechanisms or reasons why similar standards might spread across jurisdictions. As I demonstrate, there are both functional and structural reasons why standards spread across networks of institutional reform cases. I survey actual examples of the system, focusing on the way institutional reform litigation has generated national rules for public housing authorities (PHAs) and correctional institutions. Next, I discuss some of the implications of the system, arguing that institutional reform litigation is both part of a broader trend and the generator of a unique kind of law, one that is more selected from menus of options than reasoned from larger principles. I contrast this actual picture of the law generated by transjudicial administration with the view of Owen Fiss, who suggests that the cases represent judicial articulations of the higher values and fundamental principles of the polity.⁴ I also situate it in a larger context of administrative cooperation that stretches not just to courts, but to agencies, affecting the law generated both domestically and internationally,

3. I adopt this term from Anne-Marie Slaughter's typology of international judicial interaction. See Anne-Marie Slaughter, *A Typology of Transjudicial Communications*, 29 U. RICH. L. REV. 99 (1994).

4. See Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 12 (1979).

and discuss some of the leading writers of this trend in the literature. Finally, I consider some prescriptive implications of the system.

I. INSTITUTIONAL REFORM LITIGATION: A BRIEF OVERVIEW

Institutional reform cases are paradigmatic exercises of judicial power in the public sphere and have been for the last half-century. Beginning with *Brown v. Board of Education*,⁵ hundreds of schools, and, eventually, thousands of other government institutions that were sued for constitutional and federal statutory violations came under the dominion of injunctions and consent decrees.⁶ Prisons,⁷ child welfare agencies,⁸ mental retardation institutions,⁹ and city housing authorities¹⁰ are among the many local

5. 349 U.S. 294, 300–01 (1955) (inviting district courts to retain jurisdiction 'over desegregation cases in order to "fashion[] and effectuat[e] . . . decrees . . . guided by equitable principles," as well as to "consider the adequacy of any plans the defendants may propose" and "to effectuate a transition to a racially nondiscriminatory school system"). The power to enjoin local government officials was established long before *Brown*. See, e.g., *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738 (1824) (holding that when appropriate in an equity case, a court may enjoin a state officer from executing a state law in conflict with a federal law).

6. Nor has institutional reform litigation been a solely federal phenomenon. Consider the recent wave of state court cases, based on state statutory and constitutional claims designed to reform school district funding practices. See ADVOCACY CENTER FOR CHILDREN'S EDUCATIONAL SUCCESS WITH STANDARDS, FINANCE LITIGATION [hereinafter FINANCE LITIGATION] (noting that such lawsuits have now been filed in forty-five of fifty states), at <http://www.accessednetwork.org/litigation/index.htm>.

7. Between 1964 and 1995, prisons in forty-one states and three federal territories, including the entire correctional systems of ten states and jails in all fifty states, were subjected to court orders. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 13 (1998). The ACLU's National Prison Project alone entered into agreements with twenty-two states. Press Release, ACLU, 14 Years Later, State Prison Monitoring in Hawaii to End (Sept. 16, 1999), at <http://www.aclu.org/Prisons/Prisons.cfm?ID=8314&c=121&subsiteID=14>.

8. "As of 1996, class action lawsuits had been filed in 31 states, with 36 consent decrees overseeing the operations of child welfare and foster care systems." Emerich Thoma, *If You Lived Here, You'd Be Home Now: The Business of Foster Care*, http://www.ipt-forensics.com/journal/volume10/j10_10_10.htm; see also SUSAN GLUCK MEZEY, PITIFUL PLAINTIFFS: CHILD WELFARE LITIGATION AND THE FEDERAL COURTS 8–14, 165–69 (2000) (presenting a model of child welfare litigation derived in part from the lawsuit to reform the Illinois Department of Children and Family Services in the 1990s).

9. For a recent review of the literature on mental retardation institutional reform cases, see Robert D. Miller, *The Continuum of Coercion: Constitutional and Clinical Considerations in the Treatment of Mentally Disordered Persons*, 74 DENV. U. L. REV. 1169, 1196 n.148 (1997). For an evaluation of the problems of implementation of court-ordered reform in mental retardation institutions, see Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977). One expert in mental retardation institutional reform cases has concluded that "[i]t is amazing they all have a similar life span. I can predict almost how long they run and downsize; it takes from 8 to 15 years." Shirley Downing, *Arlington Costs Have Soared With Case's Demands*, COM. APPEAL, June 23, 2002, at A1 (quoting mental retardation facility expert witness Rick Campbell).

government institutions that have been subjected to extended periods of judicial supervision. Nor have comparable institutions operated by the federal government been immune to long-running consent decrees.¹¹

The scholarly study of these cases gave rise to a rich academic literature noting substantial differences between what was termed institutional reform litigation¹² and more traditional understandings of the lawsuit.¹³ Institutional reform litigation, posited by Abram Chayes and others, empowered the judge, focused on remedy not liability, and created a forward-looking relationship involving both the court and the litigants, rather than a backward-looking resolution by a court regarding a dispute between litigants.

Hundreds of school districts and prisons continue to operate under judicial supervision.¹⁴ The first school case—*Brown*—only recently ended,

10. For an in-depth study of eight such cases, see URBAN INSTITUTE, *URBAN INSTITUTE BASELINE ASSESSMENT OF PUBLIC HOUSING DESEGREGATION CASES* (2000), at http://www.huduser.org/periodicals/rrr/rrr_7_2000/0700_3.html. See also Florence Wagman Roisman, *Long Overdue: Desegregation Litigation and Next Steps to End Discrimination and Segregation in the Public Housing and Section 8 Existing Housing Programs*, 4 CITYSCAPE 171, 194–96 (1999) (recounting the history of public housing authority consent decrees).

11. In fact, the occurrence of such an obligation is frequent enough to warrant a statement of policy in the *U.S. Attorneys' Manual*, in which the Department of Justice has instructed its lawyers to “ensure that the terms of the consent decree DO NOT obligate the government to expend funds beyond your office’s litigation budget or beyond the current fiscal year” absent “explicit statutory authority” or “prior approval from the Executive Office for United States Attorneys.” U.S. ATTORNEYS’ MANUAL § 3-8.130 (Oct. 2003) (setting forth procedures for the approval of consent decrees), at http://www.usdoj.gov/usao/eousa/Foia-reading_room/usam. More anecdotally, the government agencies subject to non-Title VII consent decrees range from HUD to the Department of Veterans Affairs (VA) and many places in between. See, e.g., *Nehmer v. Veteran’s Admin.*, 284 F.3d 1158, 1160 (9th Cir. 2002) (discussing the history of the VA consent decree entered pursuant to the Veterans’ Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984)); URBAN INSTITUTE, *supra* note 10 (discussing eight consent decrees to which HUD is or was a party).

12. The Supreme Court has used the term as shorthand for a “consent decree that arguably relates to the vindication of a constitutional right.” *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 n.7 (1992). I use the term in a slightly broader manner here, although consent decrees in constitutional litigation play an important part in my analysis. I also consider here, albeit somewhat briefly, the less common remedies imposed by judges (instead of by consent) and pursuant to state law or federal statutory requirements (as opposed to exclusively pursuant to federal constitutional law); although I focus on consent remedies pursuant to constitutional violations. See *infra* notes 65–67 for an explanation of why.

13. Abram Chayes’ pathbreaking article on institutional reform litigation compared the phenomenon to what he envisioned to be a traditional understanding of the lawsuit (which he attributed in part to Lon Fuller). See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1285–1304 (1976) [hereinafter Chayes, *Role of the Judge*]; see also Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 5 (1982). Two of the other early classics include Fiss, *supra* note 4, and Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979).

14. See Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1189–91 (2000) (noting that 10 percent of all school districts in the South are currently under

as did the most prominent prison case—the multibillion dollar *Ruiz v. Estelle*¹⁵—in 1999 and 2002, respectively.¹⁶ Moreover, the first of the public housing desegregation cases, *Gautreaux v. Chicago Housing Authority*,¹⁷ which was filed in Chicago in 1966, is still active.¹⁸ Although some people have come to believe “that institutional reform litigation has been throttled by the Supreme Court” and is now “over and done with,”¹⁹ it nevertheless remains a vibrant and active part of the law, governing a variety of different types of local institutions.

For example, a wave of consent decrees in the mid-1990s has placed some of the largest public housing authorities in the country under judicial supervision.²⁰ Moreover, the Department of Housing and Urban Development (HUD) has been authorized to pursue similar relief in the case of “troubled” housing authorities.²¹ Forty-five states are either facing

court supervision). Recently, 265 prisons reported court orders concerning conditions of confinement, while eighty-two institutions reported population cap court orders. CAMILLE GRAHAM CAMP & GEORGE M. CAMP, *THE CORRECTIONS YEARBOOK: ADULT SYSTEMS* 75 (2001). Furthermore, 141 reported court orders involved monitors or special masters. *Id.*

15. The earliest reported decision in the *Ruiz* litigation is *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part, vacated in part*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1982).

16. The *Brown* litigation ended in 1999. See *Brown v. Unified Sch. Dist. No. 501*, 56 F. Supp. 2d 1212 (D. Kan. 1999). Carl Reynolds recounts the end of the *Ruiz* case in *The Final Chapters of Ruiz v. Estelle*, *CORRECTIONS TODAY*, June 1, 2002, at 108. *Hutto v. Finney*, 437 U.S. 678 (1978), the first comprehensive prison reform case, ended in 1982. Feeley and Rubin trace its precedents back to 1965. See FEELEY & RUBIN, *supra* note 7, at 55–79 (chronicling the *Hutto* litigation, which involved the Arkansas prison system).

17. Two of the earliest reported decisions in the *Gautreaux* litigation are *Gautreaux v. Chi. Hous. Auth.*, 296 F. Supp. 907, 908 (N.D. Ill. 1969), and *Gautreaux v. Romney*, 448 F.2d 731, 733 (7th Cir. 1971).

18. For a description of the recent developments in the litigation, see *Chicago Resurrects Gautreaux Assisted Housing Program*, J. HOUSING & COMMUNITY DEV., Mar. 1, 2002, at 12; see also *Gautreaux v. Chi. Hous. Auth.*, No. 66C1459, 1999 WL 1023916, at *1 (N.D. Ill. Nov. 8, 1999).

19. As Ross Sandler and David Schoenbrod put it (although they disagree), in ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 10 (2003). The *New York Times* has observed that “[s]purred by Supreme Court decisions at the start of the 1990s, lower courts have lifted desegregation orders in at least three dozen school districts in the last 10 years.” Greg Winter, *Schools Resegregate, Study Finds*, N.Y. TIMES, Jan. 21, 2003, at A14. “Institutional reform litigation generally has decreased since the mid-1970s,” one observer has concluded, although not at the same rate for all issue areas. Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 295 (1989).

20. The Department of Housing and Urban Development (HUD) recently commissioned a study of eight such cases to which it is a party. See URBAN INSTITUTE, *supra* note 10. Congress has also authorized HUD to pursue judicial receiverships in the case of “troubled” housing authorities.

21. See 42 U.S.C. § 1437d(j) (2000). For a discussion of the receivership remedy, see Lynn E. Cunningham & Dennis Foley, *Receivership as a Remedy for Poor Agency Performance*, 29 CLEARINGHOUSE REV. 1034 (1996).

lawsuits designed to reform public school funding or have changed their funding practices in response to such suits.²² One out of every ten school districts is under a consent decree.²³ Meanwhile, over four hundred correctional institutions operate under court orders.²⁴ As a consequence, vast numbers of government institutions throughout the country continue to be subject to the supervision of district courts. In fact, this year the Court once again reaffirmed the constitutionality of this supervision, noting that “[o]nce entered, a consent decree may be enforced” by the trial court overseeing it.²⁵

II. THE TRADITIONAL MODELS OF UNDERSTANDING INSTITUTIONAL REFORM

In this part of the Article, I review and reconceptualize the scholarly literature on institutional reform litigation, pointing out intersections in the way the phenomenon has been conceptualized in the academy and the way it has been handled by the appellate courts. Although the writers I examine adopt very different normative positions on the rightness or wrongness, let alone legality, of institutional reform litigation, they can be roughly sorted into two descriptive camps, which derive from a dichotomy first identified by Margo Schlanger.²⁶ Some commentators, following the lead of the scholars who initially recognized institutional reform litigation as something new, think of the phenomenon as a reinvention of the roles of the judge. I call them unilateralists. These unilateralists were followed by revisionists who thought that institutional reform lawsuits empowered the parties more than the judge. I call these revisionists multilateralists. I discuss the unilateralist and multilateralist approaches with reference to two recent books on institutional reform litigation, one of which adopts the former perspective, and the other the latter.²⁷ Finally, I suggest that one functional

22. These lawsuits are brought in state court, as opposed to federal court. See *FINANCE LITIGATION*, *supra* note 6.

23. See Parker, *supra* note 14, at 1189–91.

24. See CAMP & CAMP, *supra* note 14, at 75. Moreover, one-quarter of all jails and over half of the largest jails also report at least one of their facilities to be under court order. See *id.* at 38. But see BUREAU OF JUSTICE STATISTICS, 2000 CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES 9 (2003) (concluding that there were, in 2000, 357 prisons subject to court orders), at <http://www.ojp.gov/bjs/pub/pdf/csfccf00.pdf>.

25. Frew *ex rel.* Frew v. Hawkins, 124 S. Ct. 899 (2004).

26. See Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 2031 (1999) (reviewing FEELEY & RUBIN, *supra* note 7).

27. My review of the literature is, of course, selective. Among the writers I do not address are those Law and Society scholars who have also written about institutional reform litigation. Their project is more overtly concerned, at least in part, with the difficulties

reason for the different approaches may lie in the different questions that writers in the two traditions hope to answer. Unilateralists are frequently engaged in questions of constitutional structure and wonder where to fit institutional reform litigation within that structure. In contrast, multilateralists are more likely to rely on theories of administration to describe what actually happens in these cases.

A. The Unilateralist Model

Institutional reform litigation was initially defined with reference to what it was not. Abram Chayes, who wrote the first article conceptualizing institutional reform litigation, contrasted institutional reform cases with five “defining features” of the traditional “conception of civil adjudication.”²⁸ The traditional conception featured: (1) a bipolar lawsuit, (2) facts that had happened in the past (the “litigation is retrospective”), (3) interdependence of right and remedy (relief “derived more or less logically from the substantive violation”), (4) a self-contained episode, in which “entry of judgment end[ed] the court’s involvement,” and (5) a “party-initiated and party-controlled” process.²⁹

Chayes argued that none of these factors were present in the new “public law” model of adjudication. In an institutional reform case, one could see “the demise of the bipolar structure,” and the “pretty thorough[]” disconnection of right and remedy, requiring that “[t]he form of relief,” rather than “flow[ing] ineluctably from the liability determination,” be “fashioned ad hoc.”³⁰

But perhaps most importantly, Chayes thought that these institutional reform cases shifted power from the parties who invited the lawsuit to the judge who supervised the remedy. “[I]n actively shaping and monitoring the decree, mediating between the parties, [and] developing his own sources of expertise and information, the trial judge has passed beyond even the role of legislator and has become a policy planner and manager.”³¹ Chayes concluded that the way these new cases changed the nature of judging was

that process creates for the representation of the plaintiffs affected by the institution subject to suit. For examples, see Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999 (1988); Stuart A. Scheingold, *The Dilemma of Legal Services*, 36 STAN. L. REV. 879 (1984) (reviewing JACK KATZ, *POOR PEOPLE’S LAWYERS IN TRANSITION* (1982)).

28. Chayes, *Role of the Judge*, *supra* note 13, at 1282–83. Chayes attributed this vision of what adjudication should look like to Lon Fuller.

29. *Id.* (emphasis omitted).

30. *Id.* at 1289, 1293–94.

31. *Id.* at 1302.

their most notable feature—the new “role of the judge” even appeared in the title to his article.³² As he explained, the judge had become the “dominant figure in organizing and guiding the case,” as well as “continuing involvement in administration and implementation” of relief.³³ This privileging of the judge encapsulates the unilateralist model of institutional reform litigation, which assesses the phenomenon as an example of what happens when trial judges act in a particularly empowered way.

Malcolm Feeley and Edward Rubin have written the most comprehensive recent analysis of institutional reform litigation that falls within the tradition of the unilateralist model. They define what the judges did in these cases as “judicial policy making,”³⁴ a concept that accepts Chayes’s premise that it is the judge who is the principal actor in institutional reform litigation.³⁵

In Feeley and Rubin’s view, institutional reform litigation happens when judges sense a shared *Weltanschauung*,³⁶ requiring that something be done to change a broken government institution—and they mean institution quite generally, such as the “institution” of southern prisons.³⁷ Thus, when judges conclude that their own desire to engage in institutional reform is shared by other judges, they will venture an order that renders what is happening in the institution illegal. In “articulating a new rule,” judges will be mindful of the tension between their own particular belief in the need for reform (to which their colleagues appear to subscribe), and the expectations of their role, which ordinarily would require them to follow precedent (and therefore, presumably, would not permit them to radically change the law they use to declare the government institution illegal).³⁸ Judges will, in announcing their decisions, seek to “coordinate their own . . . efforts with those of other judges.”³⁹

32. The title of the article was *The Role of the Judge in Public Law Litigation*. See *id.* at 1281.

33. *Id.* at 1284.

34. FEELEY & RUBIN, *supra* note 7, at 171–203, 232–55. Edward L. Rubin & Malcolm M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617 (2003).

35. Others have reviewed the book in greater detail than I do here. See, e.g., Daniel A. Farber, *Stretching the Adjudicative Paradigm: Another Look at Judicial Policy Making and the Modern State*, 24 LAW & SOC. INQUIRY 751 (1999) (book review); Stephen P. Garvey, *Did Making Over the Prisons Require Making up the Law?* 84 CORNELL L. REV. 1476 (1999) (book review); Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751 (1999) (book review); Schlanger, *supra* note 26.

36. Literally translated from German, *Weltanschauung* means “world view.” WEBSTER’S NEW COLLEGIATE DICTIONARY 1321 (150th Anniversary ed. 1981). It is “a comprehensive conception or apprehension of the world esp. from a specific standpoint.” *Id.*

37. FEELEY & RUBIN, *supra* note 7, at 367.

38. *Id.* at 354.

39. *Id.*

Once a new rule has been announced, judges are then faced with the task of rule implementation. This requires them to engage in an incremental process of reform constrained by the role expectations of the courts.⁴⁰ “[T]his does not mean that there exist some specific legal rules, or even principles behind a rule, that prescribe the decision that the judge ultimately reaches.”⁴¹ Instead, judges’ necessary articulation of their policy decisions through some doctrinal lens and the limits of the process of implementation describe and confine the reach of the institutional reform case—although not always by much. The implementation stage of judicial policymaking, for example, “consists of the approaches and techniques that are available to all policy makers in the modern, administrative state.”⁴²

Other scholars have also accepted the unilateralist description of the way institutional reform litigation looks, but have come to different conclusions about its appropriateness. Some were only willing to endorse district court oversight of institutional reform remedies if the courts could overcome a “presumption of illegitimacy” by closely adhering to Supreme Court precedent and by linking the clearly established liability of the defendant institution to the need for injunctive relief.⁴³ Other, more conservative observers reacted more harshly. They thought that institutional reform litigation warped the judicial role by requiring judges to “engage in activities . . . very different from the normal process of adjudication.”⁴⁴ Some found the “judiciary’s assertion of inherent remedial power”⁴⁵ over state institutions to be “inconsistent with the text, structure, and original understanding of the Constitution.”⁴⁶ Meanwhile, others came to a similar conclusion about the prospect of a judge supervising federal government programs. They argued that the imposition of judicial remedies on federal institutions that “deny[]

40. *Id.* at 355–56.

41. *Id.* at 355.

42. *Id.* at 321.

43. William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 692 (1982). Fletcher developed an analytical framework designed to resolve when a district court should overcome the presumption; it turned on the legitimacy of a constitutional rule of liability formulated by the Supreme Court requiring intervention in an entire category of cases; and the legitimacy of judicial intervention by the district court when the application of a rule of liability in a particular case requires the restructuring of a state institution.

Id.

44. John Choon Yoo, *Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1137 (1996).

45. *Id.* at 1123.

46. *Id.* at 1166.

future executive officials the policy-making authority vested in them by the Constitution and laws" was also illegal.⁴⁷

Feeley and Rubin, on the other hand, believe that the constraints of role are constraint enough for the judicial supervision of government institutions. Besides, "policy making is an intrinsic or in-dwelling element of the judicial process."⁴⁸ Accordingly, although they find institutional reform litigation normatively unproblematic, they suspect that it will "continue to exist[]" even if met with the "disapproval" of commentators.⁴⁹

The unilateralist analysis is not confined to the academy. The Supreme Court has never concluded that institutional reform litigation is unconstitutional, as conservative unilateralists have urged.⁵⁰ However, when the Court has criticized district courts for engaging in the practice, it has often suggested that the judges supervising the cases have gone too far. Sometimes, judges exceed their judicial competence: "[T]he judiciary is 'ill equipped'

47. Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies From Political Change*, 1987 U. CHI. LEGAL F. 295, 298.

48. FEELEY & RUBIN, *supra* note 7, at 358.

49. *Id.* at 3; see also Rubin & Feeley, *supra* note 34, at 664 ("As government officials imbricated in the complex, fragmented American political system, they not only share similar public experiences and the same pragmatic perspective with other government officials, but they also operate under the same sorts of constraints."). Feeley and Rubin's defensive normative justification of institutional reform litigation responds to three typical criticisms of the institutional reform phenomenon. In their view, the role of the judge in institutional reform cases has been characterized as inconsistent with principles of federalism, the separation of powers, and the rule of law. Feeley and Rubin contend that none of these doctrines should, if properly understood, preclude judges from presiding over long-running institutional reform cases. FEELEY & RUBIN, *supra* note 7, at 20–22. To them, federalism, if it stands for a separate sphere of authority of states into which federal officials may not intrude, is a doctrine blind to the reality of the current administrative state and antiquated since the Civil War. See, e.g., *id.* at 176. While this may be the case, they recognize that a national government might choose to delegate certain tasks to local units within the government to encourage experimentalism, to incite competition between regulatory regimes, or to foster a sense of closeness between the people of a locality and the officials who provide the educational services, day-to-day security, or punishments for certain crimes within the locality. The decision to do so is a question of appropriate policy, and not one rooted in the legal inability of the federal government to centralize the administration and performance of those tasks. Moreover, Feeley and Rubin note that judges have for a long time made policy, such as antitrust policy, from the barest wisps of congressional delegation. Doctrine has to come from somewhere, they suggest, and if it isn't created by the legislature, it will be created by judicial precedents that make policy. "We must acknowledge the wholesale creation of new legal doctrines and abandon the notion that the rule of law involves fidelity to any preexisting legal principles." *Id.* at 23. They contend that if Congress and administrative agencies are permitted to act in this regard, it is difficult to understand why judges may not. *Id.*

50. To the contrary, the Court this year reaffirmed the constitutionality of the consent decrees that are the ordinary product of institutional reform litigation. See *Frew ex rel. Frew v. Hawkins*, 124 S. Ct. 899 (2004) (holding institutional reform consent decrees consistent with the Eleventh Amendment immunity of states).

to deal with the difficult and delicate problems of prison management.”⁵¹ Moreover, “[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.”⁵²

While the Supreme Court has not determined institutional reform litigation to be unconstitutional, the Court has frequently concluded that judges have inappropriately disempowered local officials in these cases. In the context of school desegregation, it has reminded district courts that the “ultimate objective” of a remedy is to “return school districts to the control of local authorities.”⁵³ In the prison litigation context, it is now clear that a remedy must be “developed through a process that . . . give[s] adequate consideration to the views of state prison authorities” (and also that an order may not be “inordinately” or “wildly . . . intrusive”), although the Court has not defined the adequacy of the consideration required.⁵⁴ The idea is that institutional reform remedies do not give adequate consideration to the views of government officials—a view that multilateralists would dispute, as we shall see.

At this point perhaps it is worth making two observations about the unilateralist tradition in institutional reform litigation scholarship. The first is that the legitimacy questions being asked and answered by Feeley and Rubin are the sorts of federal courts questions that have been around since the beginning of the discipline. In fact, Henry Hart and Herbert Weschler’s textbook inventing the subject was published two years before the decision in *Brown II*,⁵⁵ the case that began the institutional reform era.⁵⁶ Unilateralists

51. *Thornburgh v. Abbott*, 490 U.S. 401, 407–08 (1989).

52. *Turner v. Safley*, 482 U.S. 78, 84–85 (1987).

53. *Freeman v. Pitts*, 503 U.S. 467, 489 (1992).

54. *Lewis v. Casey*, 518 U.S. 343, 362 (1996). The Court explained that “[o]ne need only read the order” to establish that the district court judge had become too intertwined in the “minutiae” of prison operations in *Lewis*. *Id.* This Article does not enter the thicket of how to establish effective appellate supervision over district courts in institutional reform cases, except to note that doing so is very difficult. Diver suggested long ago that the efforts of appellate courts “to define the limits of federal judicial power on the basis of the nature or importance of the governmental function with which a trial judge has interfered or the impact of his decree upon an agency’s ‘internal affairs’ . . . have proved unsatisfactory.” Diver, *supra* note 13, at 91. Other cases are no different. The Court urged trial judges to use their “common sense” before modifying a consent decree. *Lewis*, 518 U.S. at 391. Furthermore, the language of *Lewis* suggests the difficulty the court has had in devising guidelines. The “test” appears reminiscent of Justice Potter Stewart’s famous dictum about pornography: “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

55. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (*Brown II*).

56. The first edition of Henry M. Hart and Herbert Weschler’s *The Federal Courts and the Federal System* was published in 1953.

are grappling with the sort of countermajoritarian difficulty that Barry Friedman describes as an “obsession” of theorists of constitutional structure.⁵⁷ If Chayes’s pathbreaking article set the tone for what this exercise of power was, criticisms about the descriptive accuracy of the Chayes model have not come from the unilateralist tradition. That group has instead debated whether institutional reform remedies are a good and legal thing in light of the fact that those remedies are creatures of the lone trial judge. What distinguishes Feeley and Rubin from the other authors in this tradition is their lack of ambivalence about the attractiveness of the judicial role.⁵⁸ To them, institutional reform litigation is judicial administration without the doubt.

The second observation is that here—as in a number of other areas—defenders of institutional reform litigation are beginning to justify its supposedly countermajoritarian tendencies by demanding a real-world, comparison with supposedly majoritarian institutions.⁵⁹ Thus, the question Feeley and Rubin ask is not whether institutional reform litigation is democratic or not, but rather, democratic as compared to what? Agencies, after all, have their own set of democratic deficits, as well as a litany of judicial, legislative, and executive tasks to perform, and most lawyers have come to accept their place in the federal structure.⁶⁰ This is a good, pragmatic question, but the answer from the unilateralists is somewhat unsatisfying. Comparing undemocratic judging to undemocratic agencies and adjudging the former not so bad by comparison is thin gruel.

57. Barry Friedman dates the obsession not to 1953 or 1954, but to 1957, when Learned Hand delivered a series of lectures at Harvard Law School expressing “profound skepticism about the propriety of judicial activism, if not judicial review altogether.” Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 197 (2002).

58. As Feeley and Rubin explicitly acknowledge. FEELEY & RUBIN, *supra* note 7, at 320 n.* (contrasting their argument with that, of, inter alia, Chayes, in contending that “the judges’ activist stance in imposing remedies was legitimate” and that “their equally activist stance in fashioning legal rights was also legitimate”).

59. See, e.g., Friedman, *supra* note 57, at 166 (criticizing scholars for assuming, “without argument, that legislative bodies are democratically legitimate, and that most of what judicial review is aimed at is overturning the decisions of such bodies [T]his understanding of judicial review ignores an entire body of scholarship questioning as an empirical matter whether either of these assumptions is true”); cf. Andrew Moravcsik, *In Defence of the “Democratic Deficit”: Reassessing Legitimacy in the European Union*, 40 J. COMMON MARKET STUDS. 603 (2002) (arguing that the EU is not undemocratic compared to realistic alternatives).

60. FEELEY & RUBIN, *supra* note 7, at 327 (“The administrative agency itself represents a mixture, or indeed a merger, of all three functions, and the control and supervision of that agency demands the participation of all three branches.”); see also Rubin & Feeley, *supra* note 34, at 644 (“Because institutional roles already overlap to a considerable extent, because these institutions are staffed by people with similar attitudes and backgrounds, and because these individuals are aware of their institutional limitations, there is no necessary reason why courts cannot be sensitive to public view”)

More can be said in defense of these lawsuits, particularly if one adopts a broad view of what judges do in institutional reform cases. A better argument than the idea that “everybody does it” would focus on the way institutional reform litigation mobilizes interested parties, and, perhaps more importantly, on the connections outside of the case on which these parties draw when they are mobilized. In fact, the localized participation of stakeholders through litigation may be more democratic than rulemaking by national bureaucrats that are only loosely supervised by Congress.⁶¹ But this observation is one that most of those in the unilateralist tradition miss—with the notable exception of Chayes, who in the 1970s realized that institutional reform litigation “permits a relatively high degree of participation by representatives of those who will be directly affected by the decision,” even if, in the end, those representatives operated in a milieu that featured a heavy judicial hand.⁶²

B. The Multilateralist Model

To Ross Sandler and David Schoenbrod, institutional reform litigation is “a negotiating process between plaintiffs’ attorneys, various court-appointed functionaries, and lower-echelon officials.”⁶³ This understanding—the case as a medium for agreement—is the second of two traditional paradigms under which I analyze institutional reform litigation. I call it the “multilateralist model” of institutional reform litigation. The multilateralist model devolves authorship of the institutional reform remedy downward, from the judge alone to the judge plus other participants in the institutional reform process. Multilateralists conceptualize institutional reform lawsuits as independent, ad hoc committees convened in a courtroom and composed of stakeholders in a government institution—the officials who run it, the people most affected by it, and their lawyers and experts.

But the multilateralist sense of what is good or bad about the way parties control the cases suggests that something larger is at work as well. For, as it turns out, many of these theorists understand institutional reform litigation

61. See *infra* Part III.

62. Chayes, *Role of the Judge*, *supra* note 13, at 1308. The approach also may come close to being an actual version of administration through collaboration, an aspiration of the negotiated regulation (reg-neg) process. Cf. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 7 (1997) (stating that reg-neg successes “are promising because they are more likely than the traditional rule-making process to be sites at which regulatory problems are redefined, innovative solutions devised, and institutional relationships rethought in ways that are likely to increase both quality and legitimacy”) (emphasis omitted).

63. SANDLER & SCHOENBROD, *supra* note 19, at 7.

with reference to the tropes and theories through which other forms of government action are understood. Critics of institutional reform litigation, for example, invoke the specter of rent seeking, the overrepresentation of narrow interests, and other negative externalities. To them, institutional reform litigation is a version of public choice in action. Supporters of such litigation, by contrast, seem more inclined to understand the phenomenon through republican and pluralist lenses. In their opinion, the participation of interested parties in cases can reveal a better way of managing the institution, and, sometimes, bestow the benefits of participation in the process on stakeholders.

Appreciating institutional reform litigation as simply another form of government action, understandable through the usual heuristics through which government administration is analyzed, is, in my view, a persuasive analytical approach. Most helpfully, it establishes the groundwork for recognizing in these cases a phenomenon typical of all interactions between low-level bureaucrats: horizontal collaboration through networks of officials and private parties that exist alongside the more vertical, hierarchical structures into which they are more formally fitted.⁶⁴ But before exploring these networks in detail, it is worth discussing the various insights the multilateralist understanding of institutional reform litigation has developed.

Multilateralists begin with the doctrinal insight that institutional reform remedies are usually implemented through consent decrees designed by the parties, over which judges have limited power and, often, less inclination to reject. As the Supreme Court has put it, to be approved, an agreed-upon remedy need only “spring from and serve to resolve a dispute within the court’s subject-matter jurisdiction[,] . . . com[e] within the general scope of the case made by the pleadings, and . . . further the objectives of the law upon which the complaint was based.”⁶⁵ Consent decrees are almost always

64. See *infra* Part III.

65. Local Number 93, *Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (citations omitted); see also *Frew ex rel. Frew v. Hawkins*, 124 S. Ct. 899 (2004). The remedy need not be one envisioned by federal law to be approved by a federal court. See *Suter v. Artist M.*, 503 U.S. 347, 354 n.6 (1992) (“[P]arties may agree to provisions in a consent decree which exceed the requirements of federal law.”); see also *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 389 (1994); *Int’l Ass’n of Firefighters*, 478 U.S. at 525 (“A federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.”). If the doctrine favors settlement, the parties generally do as well. See Schlanger, *supra* note 26, at 2011 (“The ordinary litigation incentives favoring settlement operate strongly for parties and judges in structural reform cases.”); see also Diver, *supra* note 13, at 78 (“In view of the strategic orientation of many defendants and the interest of courts in promoting settlement, one should not be surprised to discover that a large number of the institutional cases end in consent orders”).

approved, and most observers think that most institutional reform remedies involve consent.⁶⁶ Many multilateralists handled these lawsuits in practice, and accordingly are familiar with this process.⁶⁷

Multilateralists have emphasized, to varying degrees, the importance of the plaintiff, defendant, and other local actors in the lawsuit.⁶⁸ One has characterized the judge as a power broker who negotiates and supervises deals between the parties from a position of authority,⁶⁹ but not too much

66. See Schlanger, *supra* note 26, at 2012 n.71 (“Observers and participants all seem to agree that settlements are very prevalent.”) (citing support); Marshall Miller, Note, *Police Brutality*, 17 YALE L. & POL’Y REV. 149, 176 (1998) (predicting a high settlement rate for police brutality cases).

67. The authors on whom I principally rely all handled the cases in practice; I make no claims, of course, to a statistically representative sample. See PROFILE OF MARGO SCHLANGER, <http://www.law.harvard.edu/faculty/schlanger> (Schlanger “spent three years as a trial attorney in the Civil Rights Division of the United States Justice Department, working primarily on cases involving civil rights violations by jails, prisons, and police departments”); CURRICULUM VITAE OF COLIN DIVER, http://web.reed.edu/president/Diver_curriculum_vitae.html (Diver spent three years as “Special Counsel to the Mayor, City of Boston, MA”); PROFILE OF SUSAN STURM, http://www.law.columbia.edu/faculty/full_time_fac?&main.find=S (Sturm spent four years in private practice specializing in discrimination cases, was a Karparkin Fellow at the American Civil Liberties Union, and a consultant to the Edna McConnell Clark Foundation on prison litigation); Susan Sturm, Note, “Mastering” *Intervention in Prisons*, 88 YALE L.J. 1062, 1062 n.5 (1979) (Sturm also worked for a special master before law school, an experience that informed her note); SANDLER & SCHOENBROD, *supra* note 19, at 28 (Schoenbrod and Sandler litigated on behalf of the NRDC). I also handled institutional reform suits on behalf of federal government defendants. I served as a litigator in the Civil Division of the Department of Justice from 1997 to 2002, where I handled some institutional reform cases, including portions of the *Walker* litigation discussed *infra* Part III.B.3. I also served as a special counsel for HUD for six months in 1999. None of the views expressed in this Article, of course, should be taken to be representative of the policies and practices of either department. I find it interesting, although certainly not dispositive, that none of these authors teach Federal Courts. Neither Diver nor Sandler list Federal Courts on their résumés as courses they teach. See CURRICULUM VITAE OF COLIN DIVER, *supra*; PROFILE OF ROSS SANDLER, <http://www.nyls.edu/pages/397.asp>. Nor do Schoenbrod and Schlanger, although they do teach constitutional law. See PROFILE OF MARGO SCHLANGER, *supra*; PROFILE OF DAVID S. SCHOENBROD, <http://www.nyls.edu/pages/398.asp>. Sturm indicates that her “[p]rincipal areas of teaching and research include employment discrimination, workplace regulation, race and gender, public law remedies, and civil procedure.” PROFILE OF SUSAN STURM, *supra*. It may be that Federal Courts teachers are more likely to pay attention to the role of the judiciary in the federal system, and therefore to institutional reform remedies as governance by a judge, as opposed to a legislator or executive.

68. Colin Diver and Susan Sturm are two prominent examples, as Schlanger has recognized. See Schlanger, *supra* note 26, at 2009 n.54 (discussing Diver’s contribution); *id.* at 2031 (discussing Sturm’s contribution). Sturm has recently written about the way she envisions courts participating in employment disputes, which in some cases also form the basis for institutional reform remedies: “Regulatory patterns have thus emerged that locate formal law within a broader institutional context, de-center the role of courts in addressing complex social problems, and forge on-going, dynamic relationships between government, workplaces, and mediating organizations and actors.” Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 296.

69. Diver, *supra* note 13, at 46, 64 (describing the trial judge as a “political powerbroker” who “relies upon a . . . model of social adjustment, grounded essentially in exchange”).

authority: "The judge comes to rely, for his influence, far more on exchange than on coercion, and, for his mode of operation, far more on bargaining than on adjudication."⁷⁰ Another posits that judges "generally act[] by following a path proposed by plaintiffs' counsel and by building on the foundation laid at trial."⁷¹ Accordingly, "no consent judgment is the pure result of judicial decisionmaking."⁷² A third views the case as an exercise in which "stakeholders participate directly in an informal but structured process of exchanging information, brainstorming, and attempting to reach consensus."⁷³ A fourth contends that although judges may be consulted many times over the course of the implementation of an institutional reform remedy, "the courts are less involved [in freeform] . . . because the norms that define compliance at any one moment are the work not of the judiciary, but of the actors who live by them."⁷⁴

Although these scholars disavow "a theory of complete control by strategic litigators,"⁷⁵ they urge a greater emphasis on "the goals, resources, and actions of many groups and actors, filtered through the rules of litigation."⁷⁶ Ross Sandler and David Schoenbrod espouse a particularly strong variant of this view. They conclude that the idea that "judges control institutional reform litigation" is simply a "misperception."⁷⁷

Sandler and Schoenbrod's recent book, *Democracy by Decree*, usefully fleshes out the critical variant of the multilateralist perspective on institutional reform litigation. It describes the institutional reform process as a political one that favors small cliques of "the powerful and the knowledgeable" over the rest of the body politic.⁷⁸ These winners include legislators who pass unrealistic but popular mandates while leaving the hard work of implementation to others, the "controlling group" of litigants and lawyers who negotiate remedies that bind the hands of local governments, and local officials who leverage institutional reform settlements to circumvent oversight by state and local legislatures.⁷⁹

70. *Id.* at 45–46.

71. Schlanger, *supra* note 26, at 2015–16.

72. *Id.* at 2013.

73. Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981, 1007–08 (1993).

74. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1020 (2004).

75. Schlanger, *supra* note 26, at 2032.

76. *Id.* at 2036.

77. SANDLER & SCHOENBROD, *supra* note 19, at 6.

78. *Id.* at 7.

79. *Id.*

Sandler and Schoenbrod characterize the statutory rights⁸⁰ that give rise to the lawsuits they study as “soft rights” that “cannot ordinarily be fully achieved” and that therefore require a balancing against competing priorities.⁸¹ This balancing does not happen in institutional reform cases because courts, after an initial finding of liability, tend to leave the conduct of the case to the control group, which operates “without boundaries,” privately and informally, “mak[ing] up the law as it goes along.”⁸² As Sandler and Schoenbrod argue, “most decrees are not the work product of judges,” who “routinely sign without chang[ing] decrees negotiated” by the parties, in part because they “wish[] to avoid personal responsibility for solving thorny policy problems.”⁸³

The result, they contend, is a headless horseman, in which public policy is implemented without the participation of judges or elected officials.⁸⁴

80. Somewhat disingenuously, they study statutorily based institutional reform litigation in the most depth, while giving little attention to lawsuits rooted in claims of constitutional injury. In this way, Sandler and Schoenbrod duck many of the most difficult questions presented by institutional reform cases. The first institutional reform cases—*Brown* and its progeny—were based on constitutional claims. So are the most significant prison and housing authority cases. But Schoenbrod and Sandler have very little to say about violations of constitutional rights. *Id.* at 11 (“We express no opinion on how to interpret the Constitution.”). If courts are to play a role in, say, ensuring equal protection, should that role be renegotiated upon the ascent of any new local chief executive to power, which is one solution to overlong institutional reform cases suggested by Sandler and Schoenbrod? *Id.* at 214. Sandler and Schoenbrod’s focus on statutory cases means that they do not have to answer this difficult question or the issues that *Caroline Products* presents. Indeed, the simplest way to effectuate the world that Sandler and Schoenbrod want to create would be to have Congress amend § 1983 to make it clear that the statute does not provide an independent cause of action for claims based on violations of federal statutes.

81. *Id.* at 103.

82. *Id.* at 123.

83. *Id.* at 6–7. This is a theme elsewhere in Schoenbrod’s work. See David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1244 (1985) (stating that absent a nondelegation doctrine with bite, “[t]he making of choices becomes less visible and responsibility more attenuated”).

84. What, then, is to be done? V.I. LENIN, *WHAT IS TO BE DONE?* (Joe Fineburg & George Hanna trans., Victor J. Jerome ed., Int’l Pubs Co. 1969) (1902). One of the strengths of Sandler and Schoenbrod’s contribution lies in the number of specific solutions they propose. For example, if judicial accountability is the problem, mandating findings of fact on the injury done to the plaintiffs as “an initial step in the remedial process” could create a record that can restrict the type of relief the parties urge on the court. SANDLER & SCHOENBROD, *supra* note 19, at 199–200. Requiring judges at the outset of a decree to “announce an ‘end game’ for terminating the decree,” although perhaps easier to say than to do, seems useful for similar reasons. *Id.* at 219. Moreover, their suggestions concerning the management of a decree are quite practical. Sandler and Schoenbrod suggest that control group negotiations should be subject to open meeting laws and that decrees lasting longer than eight years should be reassigned to a new judge “to ensure impartiality” while “any trial for contempt should be assigned to a separate judge.” *Id.* at 216–17. Both proposals would increase the transaction costs of operating consent decrees, but also would go some distance towards addressing the problem of secrecy and informality in decree implementation. Less concrete is Sandler and Schoenbrod’s suggestion that a “decree should be

Exhibit A, to them, is the two-decade-and-counting litigation in New York City over the school district's failure to meet the requirements of the federal Education for All Handicapped Children Act and its state correlative.⁸⁵ The litigation has morphed into an Americans with Disabilities Act suit,⁸⁶ coincided with an increase in the city's special education budget from \$434.4 million in 1980 to \$2.6852 billion in 2000,⁸⁷ and outlasted four mayors and nine school chancellors,⁸⁸ even though "no government official or institution has taken responsibility for what happened."⁸⁹ Sandler and Schoenbrod tell other stories, too, including the one about the dormant twenty-two-year-old tenant selection decree that was used to delay "rapid eviction of proven drug dealers" from public housing at the height of the crack epidemic,⁹⁰ and the one about the Philadelphia jail population caps that led to a "blood-chilling crime wave" in which defendants released early because of the consent decree "were charged with 79 murders, 959 robberies, 2215 drug-dealing crimes, 701 burglaries, 2748 thefts, 90 rapes, 14 kidnappings, 1113 assaults, 264 gun-law violations, and 127 drunk-driving incidents."⁹¹

The polycentric lens is a useful one through which institutional reform litigation may be viewed, but Schoenbrod and Sandler's criticisms of the phenomenon are not entirely persuasive. For example, they do not explain why the "consent" aspect of a consent decree fails to solve some of the undemocratic aspects of institutional reform litigation. To be sure, consent decrees permit elected officials to bind their successors,⁹² but the same is

promptly terminated when the threat to plaintiffs' rights cease," even if the letter of the decree has not yet reached compliance. *Id.* at 218. One wonders if it really makes sense for courts to plunge into the difficulties of periodic determinations of rights violations and threat levels, and then, presumably, to recalibrate remedies either upward or downward, rather than to simply police the consent contract for compliance. Furthermore, although Sandler and Schoenbrod urge courts to enter a consent decree "only if it goes no further than necessary to protect plaintiffs from illegal injury" and "to the greatest extent practicable, [to] leave policy making to the elected policy makers" it is difficult to understand how, precisely, these imprecise dictates are to be implemented. *Id.* at 200, 204. Finally, permitting decrees to be modified "whenever defendants have a good reason to change how they will honor plaintiffs' rights" is a mysteriously flexible bonus to bequeath on defendants, many of whom have been charged in the past with consent decree malingering. *Id.* at 213. The same goes for a rule providing that "the remedial obligations in consent decrees, but not the underlying judgment of liability, should be construed to last only as long as the consenting chief executive remains in office." *Id.* at 214.

85. *Id.* at 45–46.

86. *Id.* at 84.

87. *Id.* at 95.

88. *Id.* at 106–07.

89. *Id.* at 94.

90. *Id.* at 128–29.

91. *Id.* at 186.

92. As Michael McConnell has noted disapprovingly. McConnell, *supra* note 47, at 311–17.

true of any contract with lock-in effects. By providing stability and certainty, consent decrees need not necessarily always be pernicious.⁹³

Second, one wonders about the strikingly extreme nature of government by locality endorsed in *Democracy by Decree*. Sandler and Schoenbrod prefer it to the plain language of federal statutes, arguing that courts “must allow leeway” and “be tentative in enforcing” rights created by Congress.⁹⁴ In this way, they go even further than opposing national standards as a general matter of policy or because of a preference for local experimentation. Their opposition to national standards—even if Congress has, in its wisdom and within its powers, legislated them—creates its own set of countermajoritarian problems.⁹⁵

93. This is, after all, why we have constitutions. See Eric Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1670–73 (2002) (listing five advantages for lock-in “familiar from the literature on constitutionalism”); cf. Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217, 228 (2000) (arguing that supporters of the European Convention of Human Rights hoped to “lock-in” these standards, even at the cost of flexibility to states); Posner & Vermeule, *supra*, at 1666 (“[L]egislatures should be allowed to bind their successors, subject to any independent constitutional limits in force. The rule has no deep justification in constitutional text and structure, political norms of representation and deliberation, efficiency, or any other source.”). Nor is Sandler and Schoenbrod’s apparent preference for federalism examined. They say that federalism “has validity” and that “courts exonerate the politicians in Washington from blame for the messes they create by commandeering state and local governments” when they should be letting localities come up with their own solutions to problems of implementing soft rights. SANDLER & SCHOENBROD, *supra* note 19, at 16, 34.

94. SANDLER & SCHOENBROD, *supra* note 19, at 108. Sandler and Schoenbrod suggest that state and local official should be entitled to the same deference federal agencies receive when implementing federal laws. *Id.* at 213–14. Sandler and Schoenbrod appear to prefer this deference to the plain language of agreed-to obligation—“when state and local officials wish to make a midcourse correction, judges stop talking management and start enforcing the contract written into the decree,” they contend. *Id.* at 178.

95. Moreover, the design of their study—anecdotes about train wreck lawsuits, with a detailed study of one in particular—raises questions of representativeness rather common to critiques of institutional reform litigation (and not necessarily avoided by this Article). I’m partial to the Ruiz prison litigation in Texas because of its multibillion dollar tab and the numerous book-length studies it generated. But it is not clear that it is a model for all prison cases. See, e.g., BEN M. CROUCH & JAMES W. MARQUART, *AN APPEAL TO JUSTICE: LITIGATED REFORM OF TEXAS PRISONS* (1989); JOHN J. DI IULIO, JR., *GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT* (1987); FEELEY & RUBIN, *supra* note 7, at 80–95; STEVE J. MARTIN & SHELDON EKLAND-OLSON, *TEXAS PRISONS: THE WALLS CAME TUMBLING DOWN* (1987). As for the cost of the Ruiz case, see Alan Sayre, *Appeals Court Takes up Texas Prison Reform*, HOUS. CHRON., Nov. 7, 2000, at 21 (“After Justice agreed with Ruiz in 1981, the state spent billions of dollars on new prisons and improvements.”); Mike Ward, *Shiny New Prisons Conceal Same Old Poison: Inmate Who First Sued for Reform Says Atmosphere Inside Still Creates Hatred*, AUSTIN AM.-STATESMAN, Mar. 6, 1999, at A1 (setting the cost of compliance with the court’s order at a minimum of \$1 billion). I also find the Century Freeway litigation in Los Angeles to be similarly memorable, featuring, as it did, a judge who held onto the case sixteen years after being promoted to the Ninth Circuit. See Lance Wilfred Shoemaker, *The Use of*

But if Sandler and Schoenbrod's conclusions about institutional reform litigation are disputable, their multilateralist approach is more defensible. Their critical variant of the approach is rooted in the well-established skeptical tradition of understanding government action through public choice theory.⁹⁶ A public choice theorist might suspect that small groups particularly interested in the supervision of a government institution would be more likely to involve themselves in an institutional reform lawsuit because it is often worth more to them, per capita, to agree on a rent-granting judicial outcome than it is for the larger public to organize to prevent them from obtaining these rents. Sandler and Schoenbrod's concerns about the "control group" reflect these considerations.⁹⁷ Courts have, on occasion, suggested that they, too, are worried about the occurrence of this sort of breakdown in the cases that come before them. Justice Lewis Powell, for example, once accused the parties in a desegregation case of having "joined forces apparently for the purpose of extracting funds from the state treasury."⁹⁸ Judge Frank Easterbrook has suspiciously explained that a consent decree should not be used as "a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them."⁹⁹

Equitable Tools in Freeway Construction Litigation, 28 TRANSP. L.J. 15, 36-43 (2000) (providing an overview of the case). The state named an interchange of the completed freeway after the judge. "At the July 2002 dedication, Assembly Speaker Robert Hertzberg commented, 'Judge Pregerson's mother . . . might be thinking, 'To honor my son you could have built a statue . . . [I]nstead, a freeway interchange you pick?'" Robert S. Wolfe, *Where the Law Was Made in L.A.*, 26 L.A. LAW. 18, 30 (Mar. 2003). But these anecdotes can easily be mistaken for paradigmatic examples of institutional reform litigation. Are they really? Sandler and Schoenbrod do not make a case for their representativeness.

96. Sandler and Schoenbrod do not cite public choice theorists, however. For an overview of that theory, see Jonathan R. Macey's classic article, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227-33 (1986); see also Stephen P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 34-56 (1998); David Zaring, *Federal Legislative Solutions to Agricultural Nonpoint Source Pollution*, 26 ENVTL. L. REP. 10128, 10131 (1996).

97. Cf. Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291, 343 n.308 (1988) (recognizing that "the parties to the proposed decree will not be inclined to point out illegality").

98. *Milliken v. Bradley*, 433 U.S. 267, 293 (1977) (Powell, J., concurring); see also *Missouri v. Jenkins*, 495 U.S. 33, 76 (1990) (Kennedy, J., concurring) (making a similar observation about the Kansas City desegregation litigation).

99. *Kasper v. Bd. of Election Comm'rs*, 814 F.2d 332, 341-42 (7th Cir. 1987); see also *United States v. City of Miami*, 2 F.3d 1497, 1507 (11th Cir. 1993) ("[E]xperience teaches us that on some occasions public employers prefer the supervision of a federal court" to confronting political decisions.); *Arthur v. Nyquist*, 712 F.2d 809, 813 (2d Cir. 1983) (noting the "attempts of school boards throughout the country, operating under desegregation decrees, to secure additional funding ostensibly . . . needed to carry out court-ordered remedies"). In the famously long-lasting Alabama mental retardation litigation, the superintendent in charge of the government institutions at issue believed that the court's orders allowed him to "stand up" to employees and politicians

Sandler and Schoenbrod's story about delegating government power down until its exercise is hidden, unchecked by the electorate, and exercised in large part by the unelected and self-interested, is a nice fit with this sensibility.¹⁰⁰

Unlike Sandler and Schoenbrod, other multilateralist theorists more supportive of institutional reform litigation view the phenomenon through the lens of doctrines often contrasted with the public choice view of regulation: civic republicanism and pluralism.¹⁰¹

Civic republicans believe that government can produce, through a deliberative process, a range of possible remedies designed for efficiency "and the protection of the disadvantaged—while simultaneously adhering to the original belief in the governmental process as one of deliberation oriented to the public good rather than to a series of interest group tradeoffs."¹⁰² This dialectical, good-oriented approach has been discerned in the negotiatedness of institutional reform remedies by Susan Sturm. She has concluded that civic republicanism can inform the development of a normative basis for "a remedial process that aspires to values of participation and reasoned decisionmaking."¹⁰³ In an institutional reform case, "participation [by stakeholders] serves the instrumental value of enhancing the prospect of a reasoned and accurate decision"¹⁰⁴ as well as "an integrative function by defining the community that is responsible for implementing the remedy."¹⁰⁵

Pluralists, like public choice theorists, posit that "private parties are the key to understanding what public decisions-makers do."¹⁰⁶ However, they are less skeptical than public choice theorists about the outcomes of publicly made decisions subjected to the competition of diverse parties with different interests. Indeed, the "public interest [is] best served by a political system in which many participants compete[] on roughly equal terms."¹⁰⁷

opposed to reform. Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338, 1368 (1975) (quoting Comm'r of Ala. Bd. of Mental Health Stonewall Stickney).

100. See *supra* note 97.

101. See Croley, *supra* note 96, at 65–86 (providing an overview of pluralism and civil republicanism).

102. CASS SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* app. c at 12 (1990).

103. Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1382 (1991).

104. *Id.* at 1392.

105. *Id.* at 1393.

106. Croley, *supra* note 96, at 32.

107. Edward Rubin has, in fact, been identified with this school of pluralism. See Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1 (1991). However, I do not characterize him as a pluralist, or neo-pluralist here only because his vision of the institutional reform litigation process focuses more on judicial action than on the input of the parties into structural injunctions.

So the comparatively public process of institutional reform litigation can meet pluralist aspirations for the appropriate use of government, provided that the judicial process is a relatively open and fair one. Colin Diver is an example here. He claims to be a “throwback to the apolitical days of . . . Legal Process,” a school that has been identified with pluralism.¹⁰⁸ He thinks that institutional reform litigation is “a bargaining game played by a small number of players according to predefined rules,” a description consistent with the pluralist view of law creation as a negotiated process between groups with different interests.¹⁰⁹ In this view, institutional reform litigation might appropriately be employed as a tool of government policy provided that the process of negotiation and powerbroking is a fair one.

What these interpreters of institutional reform litigation have recognized, if not always very explicitly, is that administration of a government institution through a lawsuit is just another form of administration, and is therefore susceptible to justification or critique through the usual evaluative tools of administrative law. Multilateralists recognize that institutional reform cases have constituencies and that the way these constituencies are mobilized can have a significant effect on what happens in the case. But they do not explore the constituencies themselves in much detail. That gap can be rectified by thinking of the cases in their context: a horizontal series of networks in which government officials participate, collaborate, and learn from one another, as well as from private parties and stakeholders, as they manage disparate institutions.

III. HOW TRANSJUDICIAL ADMINISTRATION WORKS

There is a third fruitful way of looking at institutional reform litigation, one that takes elements from, but fundamentally reconceptualizes, both the unilateralist and polycentric analyses of the phenomenon (it probably owes more to the multilateralists). While those understandings turn on an interpretation of how a typical case proceeds, it is also useful to take a larger look at the contacts created across institutional reform cases. In doing so, we

108. Colin S. Diver, *Sound Governance and Sound Law*, 89 MICH. L. REV. 1436, 1449 (1991) (book review). For a recent article associating legal process with pluralism, see Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 29 FLA. ST. U. L. REV. 189, 266 (2001). See also Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 518 (1997) (discussing how legal process adherents justified the role of the courts in the context of political theory that at “the time emphasized pluralism”).

109. Diver, *supra* note 13, at 65.

can see how the ad hoc, local, and task-specific relationships created in these cases have national effects.

Thus, we see the nationalization of institutional reform not exclusively in the way judges administer these cases, or in the way parties collaborate (or fail to collaborate) once the lawsuit has been filed, but also in the way that both judges and parties collaborate across lawsuits through networks of institutional reform. Networks, to be sure, are trendy terms with a number of theoretical glosses. At bottom, though, they are “nothing more than a collection of objects connected to each other in some fashion.”¹¹⁰ In my model of transjudicial administration, each institutional reform case is such an object. The cases are the nodes on these networks. The links between the nodes lie in information exchanges between participants in litigation and repeat players who appear across cases. Below I explain why these networks might be particularly salient in institutional reform litigation, describe the connections between the nodes on the network, and then explore what the network model might mean.¹¹¹

A. Theory

There are both functional and structural reasons why standards spread across networks of institutional reform cases. The structural reasons are related to the particular legal doctrines that guide institutional reform cases and notably limit appellate supervision over district court action, and I discuss them in the next subpart.¹¹² The functional reason offers a solution to the problem of barely cabined discretion for participants in the cases.¹¹³ The Supreme Court has emphasized that “breadth and flexibility are inherent in equitable remedies,” such as those contained in structural reform injunctions.¹¹⁴ But operationalizing relief based on underspecific violations of law is often exceedingly difficult. What combination of safeguards and services must a prison offer to ensure that its inmates do not suffer

110. DUNCAN WATTS, *SIX DEGREES: THE SCIENCE OF A CONNECTED AGE* 27 (2003).

111. I use the plural as opposed to the singular intentionally. While it is likely that every case on the institutional reform network could ultimately be linked by a repeat player or an information exchange to all of the others on the network, I don't mean to suggest that the phenomenon operates with monolithic precision. And, of course, the links between cases in particular issue areas of institutional reform—school finance, for example, or public housing desegregation—are more closely linked to one another than to cases outside the issue areas.

112. See *infra* Part III.B.

113. See, e.g., SANDLER & SCHOENBROD, *supra* note 19, at 192.

114. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (affirming a complex remedial order in the school district context); see also *Hutto v. Finney*, 437 U.S. 678, 700 (1978) (affirming a complex remedial order in the prison context).

“cruel and unusual punishment?”¹¹⁵ What constitutes “equal protection”¹¹⁶ for a public housing authority that oversees thousands of tenants and units across a large city?

Consider the dilemma that answering these sorts of abstract questions creates for players in institutional reform lawsuits. Unconstrained by doctrine, agreement on a remedy becomes difficult without heuristics that can cabin the discretion afforded to the remedial determination. The horizontal system of remedies helps to solve this problem by providing available go-bys that limit the universe of choices. Confronted with a wide range of remedial options, players in institutional reform cases rationally save costs through the adoption of “off the shelf” remedial schemes.¹¹⁷

In addition to the attractiveness of these sorts of templates, another reason for the spread of horizontal standards lies in what economists call “virtual network effects.” Network effects can affect a market when the utility of a product to one consumer increases the more other consumers use the product.¹¹⁸ Virtual networks exist when goods provide value to a consumer that “increases with the number of additional users of identical and/or interoperable goods” but “need not be linked to a common system as are the constituents of a communications network.”¹¹⁹ For example, users of a particular word-processing program benefit when other users use the same program, making it easy to exchange files.¹²⁰

In transjudicial administration, virtual network effects may be adduced from the benefits to repeat players of legal standards with which they are familiar. For example, repeat-playing litigators might benefit from reporting standards that require defendants to provide the court and other parties to the case with similar information across jurisdictions, making the reports

115. U.S. CONST. amend. VIII.

116. U.S. CONST. amend. XIV, § 1.

117. See Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 60 (2002).

118. As two law and economics scholars have put it, “a network effect exists where purchasers find a good more valuable as additional purchasers buy the same good.” Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 483 (1998); see also Robert B. Ahdieh, *Making Markets: Network Effects and the Role of Law in the Creation of Strong Securities Markets*, 76 S. CAL. L. REV. 277, 296 n.73 (2003) (“The relatively high network value and low inherent value of such goods implies that, once consumers perceive that a de facto standard has been established, tipping will occur very quickly.”).

119. Lemley & McGowan, *supra* note 118, at 491. Telephones are examples of “actual network goods.” *Id.* at 488. The more people who purchase telephones connect to a network, the more valuable the telephones already on that network become, as the calling options available to those already on the network increase. *Id.* at 488–89.

120. *Id.* at 491 (identifying computer software as the “paradigm example” of virtual networks).

received easier to understand and process.¹²¹ Thus, prison litigators may find it easier to participate in injunctive cases if they pursue a relatively standard set of remedies from case to case.¹²² In this way, "networks appear to promote convergence" across jurisdictions not subject to each other's laws "through a decentralized, incremental process of interaction and emulation."¹²³

Thinking of decentralized transjudicial administration this way also provides insight into the outcomes the system produces based on the network-like way that standards spread throughout the system.

First, it suggests that inertia may push some policies to the fore through this system, but not necessarily because they are optimal. Mark Lemley and David McGowan observe that first movers in markets subject to network effects are frequently able to establish the dominant standard in those markets because coalescing around any standard may be more efficient for consumers in the market, even if the first mover's standard is not a particularly efficient one.¹²⁴ The classic example here is the QWERTY keyboard, which, it has been posited, is less efficient than the Dvorak keyboard (the QWERTY keys are not arranged to ensure that the most-used keys are placed in the "home row" position; the Dvorak keys are), but nonetheless has become the common standard for keyboards because it came first. Coordinating a change to a more efficient keyboard design presents an insolvable series of collective action problems to would-be reformers.¹²⁵

The first-mover advantage comparison in institutional reform litigation is the test case, which frequently forms the basis for remedial convergence. For instance, the first-in-time *Gautreaux* litigation's scattered-site housing provisions¹²⁶ inspired many imitators, even though the construction of signifi-

121. Perhaps for this reason, reports are common features of institutional reform remedies. See, e.g., *Benjamin v. Jacobson*, 124 F.3d 162 (2d Cir. 1997) (referencing a reporting requirement imposed on New York City pursuant to a consent decree); Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 731 (describing "[p]eriodic reports by defendants" as typical provisions of consent decrees); Martha I. Morgan et al., *Establishing Education Program Inadequacy: The Alabama Example*, 28 U. MICH. J.L. REFORM 559, 576-77 (1995) (describing the report schedule in Alabama-wide institutional reform litigation).

122. As we shall see, the Civil Rights Division regularly enters into cookie-cutter consent decrees across jurisdictions. See *infra* notes 197-198, 227-228, and accompanying text.

123. Raustiala, *supra* note 117, at 52.

124. "[B]eing the first seller in a market may confer an important advantage over later entrants." Lemley & McGowan, *supra* note 118, at 495.

125. See Lemley & McGowan, *supra* note 118, at 495.

126. This housing was meant to replace the housing offered in Chicago's large and dysfunctional projects, exemplified by the now demolished Robert Taylor homes. See generally

cant amounts of that housing has proven to be extremely difficult—more difficult than the provision of rental vouchers (usually dubbed “Section 8 vouchers”¹²⁷) to public housing tenants who can use the vouchers to move to dispersed rental units scattered across an urban area.¹²⁸ Similarly, the Arkansas prison litigation spelled the death knell for the existence of inmate-trusties and plantation prisons in those southern jurisdictions that retained the practice; these institutional reform lawsuits all resulted in provisions requiring the elimination of the practices.¹²⁹ Are these early standards the work of judges and their spread to other cases the work of parties? In a recent article, Chuck Sabel and William Simon have suggested as much.¹³⁰ My model does not require that the question be answered definitively, but it does suggest that the source of law that spreads need not be limited to one set of actors in the institutional reform system. While the endorsement of a particular approach to, say, housing reform offered by a respected judge or two might cause other interested actors in the system to press for its adoption elsewhere, adoption could be pressed by expert witnesses, or by agreement among a group of repeat-playing counsel.¹³¹

Test cases do not always create national standards.¹³² Nevertheless, the networks of transjudicial administration better explain how early standards

NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (1994).

127. Congress established the Section 8 Housing Program under the Housing and Community Development Act of 1974. See 42 U.S.C. § 1437f (2000). The statute was passed “[f]or the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing.” *Id.* § 1437f(a). The program has since been amended; HUD now describes it as a program offering “housing choice vouchers,” which “allow very low-income families to choose and lease or purchase safe, decent, and affordable privately-owned rental housing.” HOUSING CHOICE VOUCHERS, at <http://www.hud.gov/offices/pih/programs/hcv/index.cfm>. The “Section 8” name is attributable to Section 8 of the revised United States Housing Act of 1937.

128. See *infra* notes 166–175 and accompanying text; see also Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 319–24 (2002). On the other hand, Owen Fiss has recently argued that *Gautreaux’s* resettlement approach ought to be nationalized. OWEN FISS, *A WAY OUT* 31–34 (2003). He estimates the cost of this program at \$50 billion per year. See *id.* at 45.

129. See *infra* notes 219–235 and accompanying text; see also FEELEY & RUBIN, *supra* note 7, at 47.

130. Sabel & Simon, *supra* note 74, at 7.

131. *Id.*

132. Professional organizations, for example, may offer standards for government institutions after test cases have established that the field may be subject to court supervision. Sometimes national standards spread this way rather than from the test case. The American Correctional Association (ACA) and similar entities are examples here. The ACA issues standards designed to overcome allegations of cruel and unusual punishment, and, indeed, has a program to certify state prisons as consistent with those standards—one of the advantages of accreditation being, in the ACA’s words, “aid in the defense of frivolous lawsuits.” FEELEY & RUBIN, *supra* note 7, at 166, 370 (“The ACA has assiduously promoted these standards, and indeed used them as ways to gain professional recognition and institutional stature.”); see also AMERICAN

can spread than do traditional stories of judicial lawmaking, which suggest that the development would occur when a standard is endorsed by the Supreme Court or a plurality of an appellate tribunal—an endorsement that, in the area of reform remedies, rarely is made with bite.

Of course, transjudicial communication may not be a necessary precondition for the harmonious application of federal rules. The Supreme Court may announce a rule for all trial courts to apply, which may lead to harmonious implementation.¹³³ Or a particular trial court may announce an institutional reform remedy that other trial courts adopt, without the network link of a repeated player or informal communication, but through the more traditional means of having read a published report of the decision.¹³⁴ Moreover, disparate trial courts could converge on a particular approach through this traditional method of publicity and learning. School-funding litigation may be a variant of institutional reform litigation that develops in this way.¹³⁵

However, a single standard will not always occur even in identifiable cases of the phenomenon. As Kal Raustiala has noted:

[T]he more a network is virtual rather than actual, the more likely there are to be multiple standards. But network effects do imply that convergence on one or more standards is likely and this convergence is likely to be relatively sticky. Once actors in a network setting adopt a standard, switching to a new standard requires extensive and costly, and hence rarely achieved, collective action.¹³⁶

CORRECTIONAL ASSOCIATION, ACCREDITATION AND STANDARDS, http://www.aca.org/standards/faq.asp#overview_benefits. Schlanger has recently observed that “the American Jail Association features legal training at all of its conferences,” although she has not found a similar priority placed on legal liability in prison administrator conferences. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1684 (2003).

133. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (lending the Supreme Court’s imprimatur to busing remedies); Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History Lesson in the Salience of Intra-racial Conflict*, 151 U. PA. L. REV. 1913, 1928–29 (2003) (“As a result of *Swann*, federal district court judges ordered school systems across the South to use the tools legitimated in the case—specifically busing and rezoning—to achieve pupil integration.”)

134. See, e.g., *Holt v. Sarver*, 309 F. Supp. 362, 367 (E.D. Ark. 1970). See *infra* notes 219–235 and accompanying text for my take on the means through which some of the remedial provisions in *Holt* spread to other jurisdictions.

135. I am told that states have modeled their remedies on leading cases from other states. For examples of the way these cases still have network aspects, see *infra* notes 238, 244–248 and accompanying text.

136. Raustiala, *supra* note 117, at 67.

B. Doctrinal Preconditions

The formal flexibility granted district courts in institutional reform cases does not necessarily exist in other areas of the law, where standardization, if it exists, is more likely to come from binding appellate articulations of the law. Three preconditions place unique limits on the quality and the capability of vertical supervision of institutional reform cases, which I define here to be the supervision of cases by appellate tribunals (the difficulties of supervision of cases by Congress, another central authority, are perhaps more self-evident). The implication of these doctrinal limitations is that institutional reform litigation is a particularly likely arena for the spread of national standards through the model that I have set forth. An important manifestation of this process is the way in which this is manifested is the way that the handcuffing of appellate review incentivizes consent remedies, which in the end foster the adoption of horizontal standards.

1. Right-Remedy

The authority of a district court to fashion equitable relief is very broad, for, as the Supreme Court has put it, “breadth and flexibility are inherent in equitable remedies,”¹³⁷ although it has counseled, rather unspecifically, that in the constitutional context “[t]he nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation.”¹³⁸ By contrast, the Constitution is an unspecific document and the difficulties associated with giving its often felicitous turns of phrase concrete remedial meaning are legion. Nor are the statutes that can give rise to institutional reform cases—most notably Title VII—particularly specific.¹³⁹

137. *Swann*, 402 U.S. at 15 (affirming a complex remedial order in the school district context); see also *Hutto v. Finney*, 437 U.S. 678, 700 (1978) (affirming a complex remedial order in the prison context).

138. *Missouri v. Jenkins*, 515 U.S. 70, 88–89 (1995) (citation and internal quotation marks omitted); see also *United States v. Virginia*, 518 U.S. 515, 547–48 (1996) (“A remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of [discrimination].”) (internal quotations marks and citation omitted); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 389 (1992). As many commentators have observed, it is particularly difficult to know, in the real-world and messy context of many institutional reform cases, when the remedy has actually rectified the right. See *infra* note 162; see also Hugh Joseph Beard, Jr., *The Role of Res Judicata in Recognizing Unitary Status and Terminating Desegregation Litigation: A Response to the Structural Injunction*, 49 LA. L. REV. 1239, 1284–87 (1989) (offering the perspective of a conservative former Justice Department official on the problem of squaring right with remedy).

139. Title VII provides only that it is unlawful “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

Therefore, the link between specific remedy and broadly worded right is extremely difficult to elucidate, as illustrated by my earlier examples discussing the difficulties inherent in tailoring the remedy to the nature and scope of a violation of the Eighth or Fourteenth Amendments.¹⁴⁰ Operationalizing responses to these broad constitutional phrases is exceedingly difficult, and appellate courts have left the effort to do so to the remedial discretion of trial judges.¹⁴¹

2. Standard of Review

The doctrinal privileging of trial court judges is also rooted in the abuse of discretion standard applied to review of their remedial determinations, limiting the abilities of appellate courts to undertake searching inquiries of trial court remedies.¹⁴² Justice O'Connor has noted that "[d]etermining what is 'equitable' is necessarily a task that entails substantial discretion," particularly in an institutional reform case, "where the District Court must make complex decisions requiring the sensitive balancing of a host of factors."¹⁴³

individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2000). "Title VII prohibits employment discrimination on the basis of race, sex, color, religion, or national origin, and it does so in rather general terms." Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 888. Other common statutory bases for institutional reform of government institutions include the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12209, and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1487 (2000). See, e.g., *Emma C. v. Eastin*, 2001 WL 1180636 (N.D. Cal. Oct. 4, 2001) (holding a school district in contempt for failing to abide by a consent decree entered pursuant to IDEA). The remedial determination for violation of employment statutes are easier to make, however, although in institutional reform cases, defendants have on occasion agreed to a complex mix of employee training, reporting, promotions, damages, and other requirements.

140. See *supra* notes 115–116 and accompanying text.

141. See *infra* notes 142–143 and accompanying text.

142. See, e.g., *Jenkins*, 495 U.S. at 54 (exhibiting that judicial allocation of the costs of a segregation remedy are reviewed for abuse of discretion); *Milliken v. Bradley*, 433 U.S. 267, 281 (1977); 11 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2857 (2d ed. 1995); CHRISTOPHER A. GOELZ & MEREDITH J. WATTS, *FEDERAL NINTH CIRCUIT CIVIL APPELLATE PRACTICE* § 7:436 ("As a general rule, a district court's equitable relief order is reviewed for *abuse of discretion*."); Fletcher, *supra* note 43, at 660 ("Only when there has been an abuse of discretion can the appellate court correct the trial judge.")

143. *Rufo*, 502 U.S. at 393 (O'Connor, J., concurring). A number of appellate courts have emphasized Justice O'Connor's concurring opinion in evaluating the propriety of motions to modify the injunctive relief. See, e.g., *Juan F. v. Weicker*, 37 F.3d 874, 878 (2d Cir. 1994); *Kindred v. Duckworth*, 9 F.3d 638, 641 (7th Cir. 1993); *Heath v. DeCourcy*, 992 F.2d 630, 633 (6th Cir. 1993); *Jacksonville Branch NAACP v. Duval County Sch. Bd.*, 978 F.2d 1574, 1578 (11th Cir. 1992). The inclination to privilege the district court's remedial determinations is not only well-founded in precedent, but also guided in these cases by a sense that their factual

3. Final Judgment

Active institutional reform litigation is notoriously hard for appellate courts to review because decisions making the entire case ripe for review are hard to come by. Typically, lawsuits seeking systemwide relief are often not disposed of in a single decree,¹⁴⁴ and postjudgment orders on the implementation of the remedy often focus on particular aspects of the relief, rather than on relief as a whole.¹⁴⁵ The *Walker*¹⁴⁶ litigation to desegregate the Dallas Housing Authority can show just how removed from the action an appellate court can be. Since 1992, the court of appeals has reversed the district court's postliability orders—and ruled against the plaintiffs—on each of the five occasions it has been presented with an appeal.¹⁴⁷ But these reversals have neither brought the case to a close nor stopped the implementation of relief in *Walker*.¹⁴⁸ Nor, of course, is *Walker* unique. The remedial orders issued in the still ongoing *Jenkins* litigation to desegregate Kansas City's school district have been reviewed by the Supreme Court twice—and both times were reversed.¹⁴⁹

complexity makes appellate review particularly difficult. The first effort made by the Fifth Circuit to review *Ruiz* seems to have been made with a sense of awe at the scope of the case. See *Ruiz v. Estelle*, 650 F.2d 555, 567, 569 (5th Cir. 1981) (listing "159 days of trial, during which 349 witnesses testified and some 1565 exhibits were received in evidence" and, later, noting again the "enormous size of the record in this case (159 days of trial and untold pretrial motions and arguments), [and] the length of the district court's opinion (spanning 126 pages of the Federal Supplement)").

144. See Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 845 (1978) (surveying a wide variety of institutional reform cases).

145. See *id.* Note also that different panels of appellate judges handle the appeals at different times, meaning that appellate judges tend to be consistently unfamiliar with the record, which says nothing of the trial judge's conduct in the case. One appellate judge accordingly suggested that appellate judges sit in on "critical arguments" presented to the trial court to gain a better understanding of the case. Frank M. Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 CAL. L. REV. 983, 996 (1979).

146. *Walker v. City of Mesquite*, 313 F.3d 246 (5th Cir. 2002); *Walker v. City of Mesquite*, No. 98-10765 (5th Cir. Jan. 14, 2000); *Walker v. City of Mesquite*, 169 F.3d 973 (5th Cir. 1999); *Walker v. City of Mesquite*, 129 F.3d 831 (5th Cir. 1997); *Walker v. City of Mesquite*, No. 94-10446 (5th Cir. Oct. 11, 1994).

147. See cases cited *supra* note 146.

148. The Urban Institute has concluded that the defendants in *Walker* "have taken steps to implement the elements of the consent decrees and remedial orders against them" since 1995; and moreover, that "the very process of attempting to implement the court-ordered remedies has fundamentally changed the" Dallas Housing Authority." URBAN INSTITUTE, *supra* note 10, at 3-63, 3-70.

149. See *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Missouri v. Jenkins*, 495 U.S. 33 (1990). The plaintiffs did successfully win one case concerning interest payments and compensation of paralegals and support personnel under the Civil Rights Attorneys Fees Awards Act, 42 U.S.C. § 1988. See *Missouri v. Jenkins*, 491 U.S. 274, 285-88 (1989).

Moreover, appeals of partial relief orders do not stay the implementation of other aspects of the remedy. Appeals of partial orders thus present litigants with the unattractive prospect of disputing the authority of a court to require one part of a comprehensive injunction while remaining subject to the court's authority for other parts of the remedy.

4. Conclusion: Incentivizing Consent

Because it is difficult to resort to another court for relitigation of a remedial determination, and because, when appeal is possible, those determinations are reviewed deferentially, institutional reform litigants face powerful incentives to agree on a remedy rather than waiting for the district court to impose one. If they do so, the result is a consent decree, from which there is ordinarily no appeal, further limiting the ability of appellate courts to opine on remedial schemes.¹⁵⁰

The remedy thus often locks parties into long-term relationships with each other. A final doctrinal observation worth making is that once parties agree to a remedial scheme, it is surpassingly difficult to extract themselves from the scheme, even if the court modifies the relief in a manner not to their liking.¹⁵¹ Modification or vacatur of all federal court judgments, including consent decrees, is governed by Rule 60(b) of the Federal Rules of Civil Procedure,¹⁵² which leaves the decision to relieve a party from a final judgment to the district court's equitable discretion.¹⁵³

150. Parties sometimes include in consent decrees the right to appeal a particular aspect of the remedy, or the initial liability determination. If they do so, then they retain the right to at least one appeal.

151. Although the case of *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992), made it somewhat easier. Pursuant to that case, modification of a consent decree in an institutional reform case is appropriate "when changed factual conditions make compliance with the decree substantially more onerous, . . . when a decree proves to be unworkable because of unforeseen obstacles, . . . or when enforcement of the decree without modification would be detrimental to the public interest." *Id.* at 384.

152. Rule 60(b) provides, in relevant part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or . . . [for] any other reason justifying relief from the operation of the judgment.

FED. R. CIV. P. 60(b). While the Federal Rules, although designed by the courts, are enacted by Congress, the Supreme Court has noted that Rule 60(b) "does not provide a new remedy at all, but is simply the recitation of pre-existing judicial power." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 234-35 (1995); see also Tobias, *supra* note 19, at 286-87 (opining that the general flexibility and permissiveness of the Federal Rules of Civil Procedure "afforded a congenial

C. How Transjudicial Administration Works: Two Case Studies

In this subpart, I examine two cases of transjudicial administration, and then in the next subpart I provide a broader survey of the roles of the players in the system.¹⁵⁴ I do so to provide an empirical foundation for the theoretical propositions of this Article. By examining the way that institutional reform litigation has impacted federal housing and prison policy, I demonstrate how the system of administration through trial courts has played an active role in the administration of that policy. Furthermore, the two empirical cases show how transjudicial administration varies across issue areas. In housing regulation, HUD plays an important role that complements, and occasionally overlaps with, regulation through courts. In prison regulation, the federal courts have operated without a complementary executive regulator. My broader survey suggests other areas in which transjudicial networks play an important role and provides examples of the way that repeat players participate more broadly in these cases.

1. Deconcentrating Public Housing

The structural reform of public housing authorities has a rich history and an active present. Today, *Gautreaux v. HUD*, the first of the public housing desegregation cases filed in Chicago in 1966, is still active.¹⁵⁵

environment in which public law litigation could flourish" in part because "equity underlies numerous procedural measures employed in public law litigation, particularly when judges fashion a remedy in institutional litigation").

153. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 238 (1997) (indicating that the "trial court acted within its discretion in entertaining the motion" to relieve a party from a final judgment due to a change in law); 11 WRIGHT ET AL., *supra* note 142, § 2863 (stating that a motion for relief from a final judgment "speaks to the sound discretion of the court"). One commentator has suggested that "[t]he trial judge . . . will be the primary decisionmaker regarding the release of jurisdiction," which is "appropriate because the trial judge has supervised the entire process of implementation and is in the best position to determine whether he has done all in his power to assure maximum compliance with the decree." Lloyd C. Anderson, *Release and Resumption of Jurisdiction Over Consent Decrees in Structural Reform Litigation*, 42 U. MIAMI L. REV. 401, 412-13 (1987).

154. My account of transjudicial administration has been influenced by international legal scholarship on regulatory collaboration across borders. I have written in this field, see David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281 (1998), and my thinking has been influenced in particular by the theoretical and empirical work done by Anne-Marie Slaughter and Kal Raustiala. See Slaughter, *supra* note 3 (drawing upon her prior body of scholarship); Raustiala, *supra* note 117 (discussing transnational regulatory collaboration). Slaughter and Raustiala's empirical methods are models for my approach in this part.

155. For a description of the recent developments in the litigation, see *Chicago Resurrects Gautreaux Assisted Housing Program*, *supra* note 18; *Gautreaux v. Chi. Hous. Auth.*, No. 66C1459, 1999 WL 1023916, at *1 (N.D. Ill. Nov. 8, 1999).

Moreover, a wave of consent decrees in the mid-1990s has placed some of the largest public housing authorities (PHAs) in the country under judicial supervision.¹⁵⁶ Congress has also authorized HUD to pursue structural injunctions to reform "troubled" housing authorities and, in 1998, required it to do so within a specified time.¹⁵⁷

These injunctions have affected a broad array of PHA functions. Remedies based on the constitutional term "equal protection" have specified methods of tenant selection,¹⁵⁸ constrained the ability of housing authorities to site new units,¹⁵⁹ affected their ability to demolish old ones,¹⁶⁰ and forced the hiring of "mobility counselors" who urge tenants to move to different parts of town.¹⁶¹

156. HUD recently commissioned a study of eight such cases to which it is a party. See URBAN INSTITUTE, *supra* note 10; see also Craig Flournoy & Bruce Tomaso, *Cisneros Recharting HUD Path: Vidor, Dallas Decisions Signal New Stance on Bias*, DALLAS MORNING NEWS, September 19, 1993, at 1A (reporting on an announcement by the HUD secretary that "instead of obstructing civil rights actions, . . . HUD will work with fair-housing advocates across the country to negotiate settlements that achieve desegregation"). See also, e.g., Schuck, *supra* note 128, at 319-22 (discussing the scattered-site housing orders in the *Gautreaux* litigation against the Chicago Housing Authority); Timothy L. Thompson, *Promoting Mobility and Equal Opportunity: Hollman v. Cisneros*, 5 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 237, 252 (1996) (discussing the scattered-site housing decree in the *Hollman* litigation against the Minneapolis Housing Authority).

157. See 42 U.S.C. § 1437d(j) (2000). For a discussion of the receivership remedy, see Cunningham & Foley, *supra* note 21, at 1034. See also Independent Agencies Appropriations Act of 1999, Pub. L. No. 105-276, 112 Stat. 2461 (rewriting 42 U.S.C. § 1437d(j)(3) to require HUD to go to federal court to impose receiverships on PHAs defined as "troubled" by the department for over one year). For a discussion, see Lynn E. Cunningham, *Washington, D.C.'s Successful Public Housing Receivership*, 9 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 74, 77 (1999).

158. See, e.g., Walker v. HUD, 734 F. Supp. 1231, 1235 (N.D. Tex. 1989) (describing a "one offer, one refusal tenant selection and assignment plan" that the Dallas Housing Authority agreed to implement); *Gautreaux v. Chi. Hous. Auth.*, 304 F. Supp. 736, 738-39 (N.D. Ill. 1969) (describing, in the first and longest running public-housing reform case, a tenant selection plan agreed to by the Chicago Housing Authority).

159. See, e.g., *Gautreaux*, 304 F. Supp. at 739 (describing the site selection procedures of the consent decree).

160. See, e.g., *Velez v. Cisneros*, 850 F. Supp. 1257, 1278 (E.D. Pa. 1994) (entering liability finding, which was later followed by a consent decree, constraining the ability of the Chester Housing Authority to demolish public housing units); *Project B.A.S.I.C. v. Kemp*, 776 F. Supp. 637, 641 (D.R.I. 1991) (preventing the demolition of a project by Providence Housing Authority with a consent decree constraining demolition later entered); *Tinsley v. Kemp*, 750 F. Supp. 1001, 1003 (W.D. Mo. 1990) (depending in part on the "constructive demolition" of a project by the Kansas City Housing Authority with a consent decree constraining demolition later entered).

161. See, e.g., URBAN INSTITUTE, *supra* note 10, at v (listing seven such cases); Joseph Seliga, Comment, *Gautreaux a Generation Later: Remediating the Second Ghetto or Creating the Third*, 94 NW. U. L. REV. 1049, 1066 n.95 (2000) (citing Bd. of Sch. Dirs. v. Thompson, No. 84-C-877 (E.D. Wis. 1987) (providing mobility counseling to existing Section 8 voucher holders in the settlement agreement)); see also William P. Wilen & Wendy L. Stasell, *Gautreaux and Chicago's Public Housing Crisis: The Conflict Between Achieving Integration and Providing Decent Housing for Very Low-Income African Americans*, 34 CLEARINGHOUSE REV. 117, 125 (2000) (discussing the

In many cases, these very specific policy initiatives have been agglomerated with a variety of new policies and programs that, when considered together, would, it was hoped, provide relief to plaintiffs injured by violations of the much less specific Equal Protection Clause.¹⁶² In addition, the decrees have required PHAs to perform new bureaucratic tasks. Consent decrees requiring housing authorities to take on new policing roles are an example.¹⁶³

What is interesting about these cases is that they have established a number of standards that are not required by HUD regulations or by congressional fiat, but that nonetheless enjoy widespread application in disparate housing authorities across the country. Two examples that are informative and consistent with the larger policy of deconcentrating poverty first appeared in the judicial decrees that were a product of housing reform litigation, but have since been adopted by the other branches of the federal government.

In the Quality Housing and Work Responsibility Act of 1998, Congress articulated a national objective of "facilitating mixed income communities and decreasing concentrations of poverty in public housing."¹⁶⁴ HUD has since required public housing authorities to "develop and apply a

influential mobility counseling plan created pursuant to the *Gautreaux* consent decree); Thompson, *supra* note 156, at 253–54 (describing mobility counseling provisions of the Minneapolis Housing Authority consent decree); Ciara Carolyn Torres, Note, *Housing in the Heartland*, 17 NAT'L BLACK L.J. 98, 101 (2003) (same); Roisman, *supra* note 10, at 180 n.17 (noting that, following *Gautreaux*, "mobility programs were created through litigation in Cincinnati; Dallas; Memphis, Tennessee; Yonkers, New York; New Haven and Hartford Connecticut (under threat of litigation); and elsewhere").

162. See *supra* notes 137–141 and accompanying text. The general problems of tailoring the remedy to the right in institutional reform litigation have escaped few observers. See, e.g., Fiss, *supra* note 4, at 11; Chayes, *Role of the Judge*, *supra* note 13, at 1288–1302; see also PETER H. SCHUCK, *SUING GOVERNMENT* 27–28 (1983) ("Rights-talk, the abstract, elevated discourse of absolute principle, cannot always be translated into remedy-talk, the technocratic argot of utility, trade-off, and means-end rationality."); Diver, *supra* note 13, at 50 ("Pronouncing rights, however, does nothing to illuminate the remedy."). Owen Fiss described this process as one where "[t]he judge tries to give meaning to our constitutional values in the operation of these organizations." Fiss, *supra* note 4, at 2. Fiss did not envision a rapid process. See *id.* at 6–7. As Susan Sturm has noted in the context of prison litigation, "[t]he constitutional prohibition against cruel and unusual punishment is essentially a negative doctrine, prohibiting certain practices and conditions, but containing no affirmative normative vision of prison practices." Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 872–73 (1990).

163. The Chicago Housing Authority obtained limited authority to search the units of its tenants through a consent decree with the ACLU. For a description, see Ginny Kim, Note, *Unconstitutional Conditions: Is the Fourth Amendment for Sale in Public Housing?*, 33 AM. CRIM. L. REV. 165, 170 (1995) (explaining that the consent decree "permitted housing inspections and restricted access to buildings, but limited apartment searches to visual inspections of unoccupied units").

164. Pub. L. No. 105-276, tit. V, 112 Stat. 2461, 2514–670 § 502(b) (codified as amended in scattered sections of 42 U.S.C.) (1999). For an overview, see Terry A.C. Gray, *De-Concentrating Poverty and Promoting Mixed-Income Communities in Public Housing: The Quality Housing and Work Responsibility Act of 1998*, 11 STAN. L. & POL'Y REV. 173, 176–78 (1999).

policy that provides for deconcentration of poverty and income mixing" in most public-housing developments.¹⁶⁵

However, two means to that end—mobility programs and the construction of "scattered-site" units—have spread to housing authorities across the country through judicial decrees, rather than through congressional statutes or HUD regulations.

a. Mobility Programs

Mobility programs are designed to facilitate the movement of public-housing residents from large and often aging projects, which are generally located in poor urban areas, to other parts of town or to the suburbs.¹⁶⁶ These programs first appeared in *Gautreaux*, the first of the major housing authority consent decrees.¹⁶⁷ The remedy in *Gautreaux* required HUD to provide the Chicago Housing Authority (CHA) with Section 8 vouchers for use in resettling as many as 7100 families to areas of Chicago and its surrounding suburbs that had substantially lower concentrations of African Americans than the city's projects.¹⁶⁸ Along with these vouchers, *Gautreaux*'s remedy authorized the hiring of mobility counselors who identified landlords willing to participate in the program and assisted plaintiff class members by notifying them of vacancies, counseling them about the implications of moving to primarily white neighborhoods, and taking them to visit available units.¹⁶⁹ In the ensuing two decades, some 5000 families were resettled in predominantly non-African American areas of Cook County.¹⁷⁰

165. 24 C.F.R. § 903.1 (2001). This rule took effect on January 22, 2001. To be sure, HUD pursues a number of objectives other than deconcentration in its oversight of PHAs. But some of the concrete ways that it has encouraged PHAs to meet this mandate are by using deconcentration as a factor in the department's evaluation of PHAs, and by permitting PHAs to increase the level of reimbursement available to Section 8 voucher holders. Telephone Interview with HUD official (Oct. 20, 2003) (on file with author).

166. See Michelle Adams, *Separate and [Un]equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 447 (1996) (discussing the purpose of the programs); see also *Hills v. Gautreaux*, 425 U.S. 284, 305–06 (1976) (upholding a liability finding and some remedial provisions).

167. *Gautreaux v. Landrieu*, 523 F. Supp. 665 (N.D. Ill. 1981).

168. See *id.* at 669; see also Seliga, *supra* note 161, at 1064–66 (discussing *Gautreaux*'s mobility requirements).

169. James E. Rosenbaum & Shazia Rafiullah Miller, *Certifications and Warranties: Keys to Effective Residential Mobility Programs*, 27 SETON HALL L. REV. 1426, 1429 (1997) (describing the mobility counseling programs created by the decree).

170. See Margery Austin Turner, *Moving out of Poverty: Expanding Mobility and Choice Through Tenant-Based Housing Assistance*, 9 HOUSING POL'Y DEBATE 373, 373–77 (1998) (discussing results of the *Gautreaux* program and its descendants in Chicago), available at http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_0902_turner.pdf; see also RICHARD K. GREEN

Mobility programs like those created in *Gautreaux*, involving the provision of vouchers to project residents, counseling on housing opportunities available outside of the project, and, in some cases, assistance with rental applications and security deposits, were adopted in other cases across the country. A 1984 consent decree required the Cincinnati Housing Authority to reserve forty Section 8 certificates per year for families who wished to move to an area where their race constituted less than 40 percent of the population.¹⁷¹ It also funded a “fair housing organization” to recruit landlords to the program and to provide transportation and counseling to prospective tenants.¹⁷² In 1987, a Milwaukee “fair housing organization,” created out of a consent decree in a school desegregation case, provided similar counseling to minority families.¹⁷³ Hartford’s public housing authority assumed the responsibility for mobility counseling on its own, pursuant to its consent decree in 1988. The Dallas Housing Authority’s mobility counseling program is similarly run through its own auspices pursuant to the consent decree binding it in the *Walker* housing litigation, settled in 1994.¹⁷⁴ As of 2001, consent decrees in Allegheny County, Buffalo, Minneapolis, New Haven, and Omaha all provided for a geographically restricted set of Section 8 certificates and the provision of mobility counseling to encourage African American plaintiffs to move out of segregated housing projects and into less segregated areas of these cities and their surrounding areas.¹⁷⁵ HUD has conducted its own mobility program experiments, but it has not nationalized a mobility program, preferring instead to leave such a move to the courts.¹⁷⁶

& STEPHEN MALPEZZI, A PRIMER ON U.S. HOUSING MARKETS AND HOUSING POLICY 173 (2003) (summarizing the impact of the mobility counseling program).

171. See Corinne Anne Carey, *The Need for Community-Based Housing Development in Integration Efforts*, 7 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 85, 97 (1997) (discussing the Cincinnati, Milwaukee, and Hartford decrees); Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 J. LAND USE & ENVTL. L. 89, 119–20 (1998).

172. See Carey, *supra* note 171, at 97; Seitles, *supra* note 171, at 119–20.

173. See Carey, *supra* note 171, at 98; Seitles, *supra* note 171, at 120–21.

174. See Carey, *supra* note 171, at 98–99; *Walker v. HUD*, No. 3:85-CV-1210-R, 1997 WL 33177466, at *31 (N.D. Tex. Oct. 6, 1997).

175. See *infra* note 195 and accompanying text.

176. HUD’s Movement to Opportunity Program has compared the outcomes for low-income families randomly assigned to three groups: “[A] group that must move to low-poverty areas, a Section 8 group that can move anywhere (but tended to move to high-poverty areas), and a control group that is not given Section 8 certificates (and tended not to move).” James E. Rosenbaum et al., *Lake Parc Place: A Study of Mixed-Income Housing*, 9 HOUSING POL’Y DEBATE 703, 708 (1998), available at http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_0904_rosenbaum.pdf.

b. Scattered-Site Public Housing

The PHA's creation of scattered-site housing (small groupings of apartment units or housing in less segregated areas) pursuant to their consent decree obligations has proven to be a difficult remedy to implement effectively. Today, both Congress and HUD have endorsed the replacement of concentrated projects with scattered-site housing, despite the difficulties institutional reform players have experienced in overseeing the implementation of the policy.

As with mobility counseling, the development of the policy in favor of scattered-site housing spread from *Gautreaux*.¹⁷⁷ The 1969 judgment order in that case required the Chicago Housing Authority to construct three new units of public housing in a predominantly white area for every one unit built in a predominantly African American area.¹⁷⁸ The order also provided that CHA "shall not concentrate large numbers" of housing units in any particular location without court approval.¹⁷⁹

These scattered-site units have proven to be extremely difficult to build, in the face of community opposition against the importation of "projects," even small ones, into their neighborhoods.¹⁸⁰ The result in Chicago has been a rather vigorous program of judicial involvement. When this three-to-one ratio proved to be too onerous, the mandate was changed to a one-to-one match in 1980.¹⁸¹ When this new ratio in turn proved to be too onerous, the court placed CHA's scattered-site development program under a receivership.¹⁸² A subsequent consent decree in Chicago, affecting residents of the now-demolished Henry Horner Homes, waived the scattered-site requirement as to them.¹⁸³

177. The original requirements for the provision of scattered-site public housing in non-African American neighborhoods is set forth in *Gautreaux v. Chicago Housing Authority*, 304 F. Supp. 736, 737-40 (N.D. Ill. 1969).

178. *Id.*

179. *Id.* at 739.

180. See Seliga, *supra* note 161, at 1069, Schuck, *supra* note 128, at 320-23.

181. See *Gautreaux v. Landrieu*, 4 F. Supp. 2d 757, 758 (N.D. Ill. 1998); *Gautreaux v. Chi. Hous. Auth.*, 498 F. Supp. 1072, 1073 (N.D. Ill. 1980).

182. See *Gautreaux v. Chi. Hous. Auth.*, 178 F.3d 951, 952 (7th Cir. 1999) (describing the receivership). Daniel Levin and Habitat Company, a real estate brokerage, development, and management company, acted as the court-appointed receiver for Chicago's scattered-site program. See Carolyn Hoecker Luedtke, *Innovation or Illegitimacy: Remedial Receivership in Tinsley v. Kemp Public Housing Litigation*, 65 MO. L. REV. 655, 680 n.165 (2000).

183. As Seliga explains:

The consent decree provides Section 8 rental vouchers or scattered-site units for residents of each unit that is demolished. It also gives residents two additional options. First,

Nonetheless, despite these setbacks in Chicago, the establishment of scattered-site housing has been required pursuant to court orders and consent decrees in Omaha, Cleveland, Milford, Connecticut, and Cincinnati, with varying degrees of success.¹⁸⁴ Scattered-site replacement housing has also been agreed upon pursuant to a consent decree in Dallas, although an appellate tribunal has urged the parties in the case to determine whether a mobility program emphasizing the use of Section 8 certificates obviates the need for such housing in predominantly white parts of the city.¹⁸⁵

Other PHAs have resolved litigation over the demolition and replacement of concentrated projects by agreeing to construct scattered-site housing in addition to lower-density housing on old project sites. The Minneapolis Housing Authority did so pursuant to its *Hollman v. Cisneros*¹⁸⁶ consent decree.¹⁸⁷ The Kansas City Housing Authority was being run by a court receivership when it demolished an old project and replaced it with low-density and scattered-site housing.¹⁸⁸ Allegheny County's PHA (the county including Pittsburgh) moved black families from seven projects to seven suburban communities.¹⁸⁹ New Haven's PHA demolished 366 public housing units located in

residents could select replacement units on the Near West Side, part of the Limited Area under *Gautreaux*. Second, residents of the Horner Annex, composed of 367 units, were given the option of rehabilitation or demolition. The *Gautreaux* plaintiffs agreed to waive their rights to raise any issues relating to segregated housing that would result from the rehabilitation.

Seliga, *supra* note 161, at 1070 (footnotes omitted).

184. See Settlement Agreement, *United States v. Hous. Auth. of Milford* ¶ 2.4 (D. Conn. Oct. 5, 1998) (No. 396 CV 01118), available at <http://www.usdoj.gov/crt/housing/documents/milfordsettle.htm>; Carey, *supra* note 171, at 99, 118 n.189; Florence Wagman Roisman & Hilary Botein, *Housing Mobility and Life Opportunities*, 27 CLEARINGHOUSE REV. 334, 339-44 (1993).

185. See *Walker v. City of Mesquite*, 169 F.3d 973, 987 (5th Cir. 1999) (finding Section 8 programs to be more narrowly tailored than a remedial order "calling for the construction or acquisition of units of public housing in 'predominantly white' areas"); *Walker v. HUD*, 734 F. Supp. 1231, 1244 (N.D. Tex. 1989) (describing the Dallas Housing Authority's agreement to create "scattered-site" housing and concluding that it had failed to meet its obligations).

186. *Hollman v. Cisneros* (1992) (No. CV4-92-712). *Hollman* was settled before an opinion was issued. For procedural details, see Torres, *supra* note 161, at 98 n.1, 99 n.2, 100 nn. 17-18, 101 nn. 24-33.

187. See Torres, *supra* note 161, at 102. The group of residents who were relocated from the Hollman site included 519 families with 1297 children. Kevin Diaz, *First Wave of Residents Resettles From Projects*, STAR TRIB., Aug. 24, 1997, at 10A. Most of them were resettled elsewhere in Minneapolis or in the suburbs surrounding the city. See MINNEAPOLIS PUBLIC HOUSING AUTHORITY, *HOLLMAN VS. CISNEROS PUBLIC HOUSING LAWSUIT 10 YEARS LATER, 1992-2002: MPHA IMPLEMENTATION UPDATE 3-6*, at <http://www.mphaonline.org/object-dsp/pdf/Hollman%2010%20Year%20Update.pdf>.

188. Luedtke, *supra* note 182, at 682-84.

189. *Last Money From Discrimination Case Goes Toward Community Projects*, PHILA. INQUIRER, June 9, 2003, at A7.

primarily black areas pursuant to its consent decree, but was only able to obtain twenty-six single-family homes in white communities to replace them.¹⁹⁰

The development of scattered-site housing requirements imposed by courts preceded HUD's and Congress's embrace of deconcentration by decades.¹⁹¹ Through its HOPE VI program (HOPE is an acronym for "Homeownership and Opportunity for People Everywhere") enacted in 1992, Congress authorized the granting of funds to revitalize severely distressed or obsolete public-housing developments in a variety of ways, including, as the *Gautreaux* court explained, the development of "replacement units [for obsolete public housing] . . . through a combination of Section 8 vouchers, new construction, renovation, and other acquisitions."¹⁹² Pursuant to HOPE VI, any demolished housing units must "be located in up to 3 separately defined areas containing the community's most severely distressed projects."¹⁹³ However, the statute does not so limit the locations in which replacement units may be built.¹⁹⁴ Mobility programs and scattered-site housing can be understood as programs created through institutional reform litigation designed to deconcentrate public housing. Although the other branches of government have endorsed the deconcentration policy, the programs appeared first in consent decree cases. There was no particular reason why mobility programs had to be part of a remedy ensuring equal protection to public housing residents. What is clear is that institutional reform players across the country followed the lead of *Gautreaux* and implemented these programs. Consider the following tabular survey of eight PHAs subject to judicial supervision. The table identifies a common menu of solutions that may be found in current public housing consent decrees to which HUD is a party.

190. See Roisman & Botein, *supra* note 184, at 348.

191. See Michael H. Schill, *Distressed Public Housing: Where Do We Go From Here?*, 60 U. CHI. L. REV. 497, 552 (1993) (arguing for scattered-site developments and private Section 8 vouchers as a substitute for aging concentrated projects).

192. *Gautreaux v. Chi. Hous. Auth.*, 178 F.3d 951, 954 (7th Cir. 1999). For an overview, and a critical perspective of the HOPE VI program, see Note, *When Hope Falls Short: Hope VI, Accountability, and the Privatization of Public Housing*, 116 HARV. L. REV. 1477 (2003).

193. 42 U.S.C. § 1437l (repealed 1998).

194. *Id.*

TABLE 1
SUMMARY OF PUBLIC HOUSING DESEGREGATION
CONSENT DECREE TERMS¹⁹⁵

Location	Allegheny County	Buffalo	Dallas	East Texas	Minneapolis	New Haven	New York	Omaha
Changes to tenant selection and administrative procedures	x	x	x	x		x	x	x
Public Housing Demolition and/or replacement	x	x	x		x	x ¹		x
Physical improvements to public housing	x		x	x				
New Section 8 Certificates								
geographic restrictions	x	x		x	x	x		x
unrestricted	x	x	x		x		x	
Mobility counseling	x	x	x	x	x	x		x
Creating housing opportunities	x	x	x	x	x			
Community development around public housing	x	x	x	x				x
¹ New Haven includes new project-based Section 8 developments to be constructed.								

As our theory predicts, we also see a number of repeat players in public-housing litigation that provide links between the cases. First, and most notably, there is HUD itself, which often serves as a defendant, and occasionally as a plaintiff in these cases, including *Gautreaux* and all the cases listed in the attached table. As such, its lawyers, both in-house and from the Department of Justice, are familiar with consent decrees across the country and often use injunctive provisions borrowed from one case in other cases. Almost identical nondiscrimination language

195. See URBAN INSTITUTE, *supra* note 10, at v.

has been entered for consent decrees governing the cities of Pooler, Georgia, and Jacksonville, Florida.¹⁹⁶ The same goes for marketing plans designed to make public-housing-eligible residents aware of public-housing opportunities, which have appeared, in similar design, in recent consent decrees for Pooler, Milford, and Parma, Ohio.¹⁹⁷ Finally, some courts have turned to HUD's performance assessment system for standards to apply to housing authorities subject to court order even when HUD is not a party to the case.¹⁹⁸

Other repeat players include the counsel who bring these cases. The National Housing Law Project, founded in 1968, has played a coordinating

196. Compare the following consent decrees for Pooler and Jacksonville, respectively:

1. In accordance with the laws of the United States, the City agrees that it will not:
 - a. deny or otherwise make unavailable a dwelling because of race or color;
 - b. discriminate in the terms, conditions or privileges of the sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race or color;
 - c. coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right protected by the Fair Housing Act;
 - d. interfere with the funding, development or construction of any Affordable Housing because of race or color; or
 - e. discriminate on the basis of race or color in any aspect of the administration of its zoning process relating to residential property.

Settlement Agreement & Dismissal Order, *United States v. City of Pooler*, ¶ 8 (S.D. Ga. June 16, 2003) (No. CV401-263), available at <http://www.usdoj.gov/crt/housing/documents/poolersettle.htm>;

1. The Defendants shall not:
 - a. Deny or otherwise make unavailable a JHA or City subsidized dwelling because of race or color;
 - b. Discriminate in the terms, conditions or privileges of the sale or rental of a JHA or City subsidized dwelling, or in the provision of services or facilities in connection therewith, because of race or color;
 - c. Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right protected by the Fair Housing Act; or
 - d. Segregate, confine, or concentrate subsidized dwellings in any particular census tract, neighborhood, or area in Duval County, including, but not limited to Northwest Jacksonville.

Consent Order, *United States v. Jacksonville Hous. Auth.*, ¶ 8 (M.D. Fla.) (No. 3:00-CV 1165-J-25A), available at <http://www.usdoj.gov/crt/housing/documents/jaxsettle.htm>.

197. Compare Settlement Agreement, *United States v. Hous. Auth.*, ¶ 29 (D. Conn. Oct. 5, 1998) (396 CV 01118), available at <http://www.usdoj.gov/crt/housing/documents/milfordsettle.htm>; Settlement Agreement & Dismissal Order, *United States v. City of Pooler*, ¶ 24 (N.D. Ga. n.d.) (No. CV401-263), available at <http://www.usdoj.gov/crt/housing/documents/poolersettle.htm>; *with* Agreement & Dismissal, *United States v. City of Parma*, ¶¶ 11-12 (N.D. Ohio 1996) (No. C73-439), at <http://www.usdoj.gov/crt/housing/documents/parmasettle.htm>.

198. Sabel & Simon, *supra* note 74, at 1064.

and assisting role to plaintiffs'-side housing lawyers and advocates.¹⁹⁹ Moreover, many other impact lawyers handle multiple numbers of these cases, including the Lawyers' Committee for Civil Rights, the ACLU, and others.²⁰⁰ On the defendants' side, some D.C. firms advise public housing authorities on, inter alia, their desegregation obligations.²⁰¹

Finally, some standards have been set by professional organizations in institutional reform cases. In public-housing litigation, some courts have looked to the Uniform Housing Code promulgated by the International Conference of Building Officials.²⁰² These repeat players serve as the means through which common policies towards public housing have spread across jurisdictions. Even apart from HUD's participation as a litigant in these cases, consider Alexander Polikoff, lead counsel for the *Gautreaux* plaintiffs. He has served as director of the Illinois Civil Liberties Union and on the board of the repeat-playing ACLU;²⁰³ his organization has, in addition, filed a second institutional reform suit against the CHA.²⁰⁴

2. Bureaucratizing Correctional Institutions

The history of prison reform litigation is a rich and controversial one, and, as with housing reform, it has required the development of very specific policies designed to remedy breaches of a broad constitutional text.²⁰⁵

199. See NATIONAL HOUSING LAW PROJECT, WHAT WE DO, at <http://www.nhlp.org/html/about/whatwedo.htm>.

200. For their own views on the work these organizations do in housing litigation, see LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, HOUSING, LENDING, AND COMMUNITY DEVELOPMENT PROJECT, at <http://www.lawyerscomm.org/projects/housing/litigation.html>; AMERICAN CIVIL LIBERTIES UNION, RIGHTS OF THE POOR, at <http://www.aclu.org/PoorRights/PoorRightslist.cfm?c=151>.

201. See NIXON PEABODY, LLP, AFFORDABLE HOUSING (representing state and local authorities in, among other things, fair housing and constitutional litigation), at http://www.nixonpeabody.com/pa_detail.asp?ID=37; RENO & CAVANAUGH, PLLC (large public housing authorities), at <http://www.renocavanaugh.com>.

202. See INTERNATIONAL CONFERENCE OF BUILDING OFFICIALS, at http://www.icbo.org/About_ICBO/. For a description of how this worked, see Sabel & Simon, *supra* note 74.

203. See THE CHICAGO REPORTER, ALEXANDER POLIKOFF PROFILE, at <http://www.chicagoreporter.com/1998/03-98/0398polik.htm>.

204. The new lawsuit, as Polikoff's public interest organization puts it, "alleges that CHA failed to provide adequate relocation assistance and effective social services to families displaced by public housing demolition." BUSINESS AND PROFESSIONAL PEOPLE FOR THE PUBLIC INTEREST, BPI FILES LAWSUIT AGAINST CHA, at http://www.bpchicago.org/pht/pubs/cha_lawsuit.html. It was filed by the National Center on Poverty Law, the Chicago Lawyers' Committee for Civil Rights Under Law, and the Business and Professional People for the Public Interest. *Id.*

205. I focus, if not exclusively, on the state level prison institutional reform cases here, rather than the jail reform cases directed at correctional facilities run by cities, counties, and other local authorities.

Judges trying to reform the "cruel and unusual" practices of prisons have involved themselves with questions regarding the appropriate levels of medical care,²⁰⁶ prison menus,²⁰⁷ and the size and design of jail cells.²⁰⁸ Courts, with the Supreme Court's blessing, presided over the development of hearing rights and the bureaucratization of prison discipline.²⁰⁹ These reforms have been implemented without congressional oversight, and Congress has reversed none of them, although in 1996 it did attempt to make judicial supervision of correctional institutions more difficult.²¹⁰ In light of the breadth and effect of prison reform procedures, the study of the phenomenon has engaged a prominent number of scholars, including Feeley and Rubin,²¹¹ Susan Sturm,²¹² Margo Schlanger,²¹³ John Dilulio,²¹⁴ and many others.²¹⁵ The findings of these and other scholars, when combined with a

206. See, e.g., *Ruiz v. Estelle*, 503 F. Supp. 1265, 1391 (S.D. Tex. 1980) (reforming the medical care available in Texas prisons); Michael Cameron Friedman, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 VAND. L. REV. 921, 940-46 (1992) (discussing various ways prison medical care has been reformed, both through institutional reform cases, and through individual prisoner cases). Institutional reform litigation is not the only means for reform of prison medical care. The "deliberate indifference" standard set forth in *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976), came from an individual prisoner suit under § 1983. See *id.*

207. For a description of some of these cases, and a warning that they can easily be exaggerated, see Honorable Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 521-22 (1996).

208. To cite two well known examples, in *Pugh v. Locke*, 406 F. Supp. 318, 332 (M.D. Ala. 1976), the district court concluded that, inter alia, forty square feet per single occupancy cell and a working toilet constituted a "minimum constitutional standard for inmates of [the] Alabama Penal System." *Id.* at 332. In *Miller v. Carson*, 392 F. Supp. 515 (M.D. Fla. 1975), the Court revised its per-holding cell population restriction to account for a particular cell that happened to be larger than others. *Id.* at 517.

209. The importance of institutional reform litigation in the transformation of prison discipline should not be overstated, however. Although the *Ruiz* case, in addition to other southern prison reform cases, affected the disciplinary constraints on prison officials, much of the bureaucratization of these procedures was done pursuant to individual damage actions and habeas decisions. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974) (approving judicial review of procedures in Nebraska state prison for the deprivation of good time credits towards early release, individual damage action); James E. Robertson, "Catchall" Prison Rules and the Courts: A Study of Judicial Review of Prison Justice, 14 ST. LOUIS U. PUB. L. REV. 153, 159-67 (1994) (summarizing some judicially created standards for prison discipline).

210. In 1996, Congress enacted the Prison Litigation Reform Act, which, inter alia, required regular findings by district courts that injunctions over prisons and jails were narrowly tailored to remedy the injury at hand. See 18 U.S.C. § 3626 (2000).

211. See FEELEY & RUBIN, *supra* note 7.

212. See Sturm, *supra* note 67.

213. See Schlanger, *supra* note 26.

214. See DILULIO, *supra* note 95.

215. See *supra* note 95 for a partial survey of the literature on prison litigation in the State of Texas.

review of the way the cases developed, show how horizontal links between the cases played a crucial role in the standardization of certain prison practices.

Here too, we find evidence of the development of national standards without the work of a central national authority.²¹⁶ Although neither the Supreme Court nor Congress issued proclamations that put plantation-style prison farms out of business, those institutions no longer exist.²¹⁷ Judicial administration has also removed the system—in which an armed prison inmate serves as a guard over other prisoners—from the correctional milieu.²¹⁸ An examination of the disappearance of the trusty system is a useful demonstration of the horizontal links between these cases.

The judicial campaign against prisoner-guards began in 1970 in Arkansas, where the district court noted that “armed trusties guard rank and file inmates and trusties perform other tasks usually and more properly performed by civilian or ‘free world’ personnel.”²¹⁹ The court, though reluctant “to order the elimination of the trusty guard system, or a commencement of a general phase out of the system,” stated that “the system [was] going to have to be overhauled.”²²⁰ Next, a Mississippi district court concluded that, as for that state’s penitentiary, the “evidence [was] replete with instances of inhumanities, illegal conduct and other indignities visited by inmates who exercise authority over their fellow prisoners.”²²¹ The court ordered the immediate elimination of the state’s trusty system.²²² Subsequently, the supervisors of the Louisiana State Penitentiary, another institution that used prisoner-guards, elected not to contest the judicial finding that its prisoner-to-security personnel ratio was too high and agreed to eliminate the prisoner-guard

216. FEELEY & RUBIN, *supra* note 7, at 145 (“So many separate and uncoordinated federal courts moved in the same uncharted direction . . . with no centralized control or guidance.”).

217. *Id.* at 166–70.

218. *Id.* at 79; *Holt v. Sarver*, 309 F. Supp. 362, 367 (E.D. Ark. 1970) (describing the Arkansas trusty system); Ben M. Crouch & James W. Marquart, Ruiz: *Intervention and Emergent Order in Texas Prisons*, in *COURTS, CORRECTIONS, AND THE CONSTITUTION* 94, 99–100 (John J. Dilulio, Jr., ed., 1990) (describing the building tender system in Texas prisons).

219. *Holt*, 309 F. Supp. at 367. For an overview, see Rubin & Feeley, *supra* note 34, at 647–59.

220. Rubin & Feeley, *supra* note 34, at 384–85.

221. *Gates v. Collier*, 349 F. Supp. 881, 889 (N.D. Miss. 1972); see also Matthew Mancini, Book Review, 42 AM. J. LEGAL HIST. 444, 445 (1998) (reviewing DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996)) The review describes Mississippi’s Parchman Farm as a place where prisoners lived

under the gun of armed fellow prisoners called “trusty shooters,” who would receive a pardon, no questions asked, if they shot and killed an escaping inmate—and where they worked the “long lines” chopping to a pace set by an inmate caller under the overall supervision of a white driver on a mule.

Id.

222. *Gates*, 349 F. Supp. at 898.

practice.²²³ The final jurisdiction in which the prisoner-guard played an important role was Texas: The Texas Department of Corrections agreed in 1981 to drastically limit the roles that its prisoners could play in inmate supervision.²²⁴

The disappearance of the prisoner-guard from prisons can serve as one example of how a standard spread across jurisdictions without a binding appellate ruling disposing of the question. District courts may, of course, have been persuaded by the opinions of other judges about the appropriateness of the prisoner-guard institution, because the cases declaring their end were all reported (although the Louisiana and Texas defendants agreed to eliminate the practice, rather than being ordered specifically to do so). But there are other reasons to suspect the spread of a consensus. First, there were the repeat players: the penologists and the Department of Justice's Civil Rights Division. As the Arkansas court that first held prisoner-guards to be unconstitutional noted, penologists condemned the practice, and the majority of American prisons eschewed it.²²⁵ The Civil Rights Division, meanwhile, participated in each of the subsequent cases involving the practice and in each case took a position against it.

Did a broader network of repeat players develop to implement these and all the many other reforms implicated by the various prison lawsuits? The answer is yes. Prison lawyers, prison experts, standard setters, and the Civil Rights Division appeared in case after case, and these repeat players came to similar conclusions about which specific remedial standards were appropriate to impose upon prisons and jails. For example, Judge Justice, the judge who oversaw the Texas prison litigation, asked an Alabama judge how to get the Civil Rights Division involved in his case (he received a model order that he successfully used for this purpose) and requested that a lawyer he had met at a conference with experience in the field take the case on behalf of a pro se plaintiff.²²⁶

Common standards continue to spread across jurisdictions, and not because of judicial opinions. In the burgeoning field of women's prison litigation,

223. *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977); see also Wilbert Rideau & Billy Sinclair, *Prisoner Litigation: How It Began in Louisiana*, 45 LA. L. REV. 1061, 1066 (1985) ("A brutal army of shotgun-toting convict guards called 'khaki backs,' numbering as many as 600, drove the inmates until they dropped from exhaustion and killed them when they tried to rebel or escape.").

224. *Ruiz v. McKaskle*, 724 F.2d 1149, 1152 (5th Cir. 1984) (recounting the "Stipulated Modification [that] provided for a . . . method of dismantling the 'building tender' system").

225. The court said that "[t]he use of trusty guards is universally condemned by penologists." *Holt v. Sarver*, 309 F. Supp. 362, 373 (E.D. Ark. 1970).

226. See William Wayne Justice, *The Origins of Ruiz v. Estelle*, 43 STAN. L. REV. 1, 5-6 (1990).

the Civil Rights Division has entered into settlement agreements with states requiring an almost identical set of standards to ensure that prisoners are “free from sexual misconduct and unlawful invasions of privacy.”²²⁷ The decrees governing Arizona’s and Michigan’s prisons, for example, require almost identical initiatives regarding the prisons, “policies and procedures,” “pre-employment screening,” “staff training,” “inmate education,” and investigation of, and proactive search for, examples of sexual misconduct.²²⁸

Prison cases also became the specialty of both plaintiffs’ and defendants’ counsel. Plaintiffs’-side law firms, of course, appeared, and continue to appear, in cases across the country. On its own, the ACLU’s National Prison Project entered into prison case agreements with twenty-two states,²²⁹ while the NAACP’s Legal Defense Fund was, and continues to be, deeply involved in numerous prison reform lawsuits.²³⁰ Even apart from the government lawyers who developed expertise by defending particular institutions over long periods, or by appearing on behalf of a number of different defendants, there is also some evidence of the development of a private defense counsel prison litigation bar. For example, Philadelphia turned to outside counsel to obtain relief from the jail population cap consent decree that Sandler and Schoenbrod credit with commencing a “blood-chilling crime wave”; that law firm now claims an expertise in that sort of representation.²³¹

These groups frequently collaborated with one another on a common approach to cases, which meant that plaintiffs in prison reform cases often approached different lawsuits in a similar way. As Schlanger has noted,

227. See settlement agreements in *United States v. Arizona*, available at <http://www.usdoj.gov/crt/split/documents/azsa.htm>, and in *United States v. Michigan*, available at <http://www.usdoj.gov/crt/split/documents/michigansa.htm>. The same phrase is used in the introduction to both settlement agreements.

228. The quoted terms are identical in the two settlements; the paraphrases are almost identical. See *supra* note 227.

229. See Press Release, *supra* note 7.

230. See NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, WHERE WE STAND 4–5 (Oct. 2000) (summarizing the Legal Defense Fund’s school desegregation cases), available at http://www.naacpldf.org/pdfdocs/ldf_information_book.pdf. As for the Legal Defense Fund’s prison reform efforts, Judge Justice, the judge presiding over the Ruiz litigation in Texas, recognized that William Bennett Turner “was already deeply involved in institutional reform litigation through his work for the NAACP Legal Defense Fund,” and was impressed enough with his work to invite him to represent the plaintiffs in the case. Justice, *supra* note 226, at 4–5. There are, of course, many other institutions devoted to impact litigation, and they all appear in numerous lawsuits. See, e.g., LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW (setting forth the ongoing housing litigation), at <http://www.lawyerscomm.org/projects/housing/litigation.html>; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (setting forth the legal initiatives recently pursued by the fund), at <http://www.maldef.org/legal/index.htm>.

231. See *supra* note 91 and accompanying text; see also HANGLEY, ARONCHICK, SEGAL & PUDLIN, THE GOVERNMENT PRACTICE, at http://www.hanglely.com/prac_gove.htm.

"Whatever their organizational home, the repeat plaintiffs'-side prison litigators shared information and strategy, both informally and formally."²³²

Finally, as with PHAs, prisons often found themselves scrutinized in reference to the standards promulgated by organizations such as the American Correctional Association (ACA) which issued a Manual of Correctional Standards that "became a leading resource for the federal courts in the prison reform cases."²³³ The ACA issues standards that courts could impose on prisons deemed to be unconstitutional, and, indeed, has a program to certify state prisons as consistent with those standards—one of the advantages of accreditation being, in the ACA's words, "aid in the defense of frivolous lawsuits."²³⁴ Nor should the national standards represented by the Federal Bureau of Prisons during this era be ignored. The judges who oversaw the early prison cases may have been convinced that the federal standards presented to them by plaintiffs' counsel were the appropriate baseline for a national constitutional floor.²³⁵

D. A Broader Survey of the Players

In this part, I undertake a broader survey of the number and type of players involved in institutional reform networks. I do not claim a scientifically comprehensive survey. Instead, this broader view is meant to offer—by way of example—a more anecdotal empirical picture of the participants in the system of transjudicial administration.

1. Lawyers

Sometimes an overlap of counsel establishes links between the case nodes through which learning and standards can be transmitted. Frequently, plaintiffs and defendants litigate institutional reform cases by enlisting lawyers with national practices or particular experience who can bring a broader perspective to case-specific and local lawsuits. For example, one D.C. firm with branch offices across the country has created an education

232. Schlanger, *supra* note 26, at 2020.

233. FEELEY & RUBIN, *supra* note 7, at 163; *see also id.* at 370 ("[T]he ACA has assiduously promoted these standards, and indeed used them as ways to gain professional recognition and institutional stature.").

234. AMERICAN CORRECTIONAL ASSOCIATION, *supra* note 132. Of course, many of the frivolous lawsuits the ACA means to forestall are individual suits for damages, rather than institutional reform cases. *See also supra* note 132.

235. I am indebted to Malcolm Feeley for reminding me of this point. *See also* Feeley & Rubin, *supra* note 34, at 658–59.

practice group that, among other things, represents school districts faced with desegregative obligations.²³⁶ Legal Services contractors also frequently participated in institutional reform cases until Congress attempted to preclude them from filing such lawsuits in 1996.²³⁷

These organizations not only appear in case after case, but also interact with one another outside the cases, thus building links between cases that are not just based on repeat players, but that are frequently institutionalized in meetings, conventions, and associations. School reform and school-funding equity litigators, for example, meet annually to discuss strategy.²³⁸ As Schlanger notes, “the repeat plaintiffs’-side prison litigators shared information and strategy, both informally and formally [through] . . . the National Resource Center on Correctional Law and Legal Services, a ‘backup center,’ which could provide legal services lawyers with advice and model pleadings.”²³⁹ Moreover, local defendants meet in state or national conventions, often to address the strategies for compliance with consent decrees based on constitutional and federal statutory obligations,²⁴⁰ and sometimes to discuss ways to minimize the burden of compliance.²⁴¹

236. Hogan & Hartson’s education practice group “has handled cases involving federal civil rights, including the liability, remedy and unitary status phases of desegregation cases, and voting rights matters. The firm has represented school districts pursuing reform, including through litigation, of state school finance provisions for elementary and secondary education.” HOGAN & HARTSON, at <http://www.hhlaw.com/site/index.asp?file=/practice/contentlist.html>. More generally, the National School Board Association has created a Council of School Attorneys, for public and private attorneys who specialize in school representation, including desegregation issues. See NATIONAL SCHOOL BOARD ASSOCIATION, COUNCIL OF SCHOOL ATTORNEYS, at http://www.nsba.org/site/page_cosa.asp?TRACKID=&CID=81&DID=213.

237. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 1321–55. In addition to Legal Services lawyers, some private firm plaintiffs’-side attorneys try to make a living off of institutional reform litigation—although frequently in cases directed at the hiring practices of government agencies and rooted in Title VII or its state corollaries. See, e.g., CLASSACTIONSTRATEGY.COM (indicating that they are a law firm specializing in Title VII suits against federal agencies), at <http://www.classactionstrategy.com>.

238. On February 27–28, 2003, the Advocacy Center for Children’s Educational Success with Standards held its third annual conference on education adequacy in Alexandria, Virginia. The conference, *Education Adequacy: Strategies for Achieving Reform in Difficult Times*, was co-sponsored by the National School Boards Association and attended by “almost 100 attorneys, policy people, advocates, and others from 27 states and the District of Columbia.” ADVOCACY CENTER FOR CHILDREN’S EDUCATIONAL SUCCESS WITH STANDARDS, at <http://www.accessednetwork.org/conference03.htm>. For an overview of lawsuits challenging state methods of funding public schools, from a plaintiff’s perspective, see <http://www.accessednetwork.org/litigation/index.htm>.

239. Schlanger, *supra* note 26, at, 2020.

240. The National Association of Attorneys General, for example, meets annually to discuss, inter alia, best practices for responding to legal challenges. See NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, at http://www.naag.org/issues/issue-civil_rights.php. This is one aspect of the mission of the Council of Large Public Housing Authorities, as well. See COUNCIL OF LARGE PUBLIC HOUSING AUTHORITIES, MISSION STATEMENT, at <http://www.clpha.org>. On a

Finally, and perhaps least tangibly, the informal friendships developed by like-minded people in similar legal occupations facing similar legal problems can create connections between the parties to cases. Counsel for defendants who have defended institutional reform cases, for example, frequently meet other counsel with similar practices.²⁴² This is the “everybody knows everybody else” phenomenon, familiar to many law school professors, and a factor, if an informal, difficult-to-quantify one, for lawyers in the institutional reform litigation bar.²⁴³

2. Consultants

Nor, of course, are litigators the only repeat players. There has also been a developing class of what I call institutional reform consultants, some who advise judges, others who work for plaintiffs or defendants, and still others who participate in case after case without actually playing a litigating role.

Thus, a small group of nationally recognized school finance experts bring their particular perspectives to funding equity cases across the country.²⁴⁴ James Guthrie, for example, a professor at Vanderbilt University, has

more local level, the Texas State Bar Association started a School Law Section in 1973 that at first consisted almost entirely of defendants, but later evolved to include plaintiffs'-side and employee-side lawyers. See STATE BAR OF TEXAS, HISTORY OF THE SCHOOL LAW SECTION, at http://www.schoollawsection.org/about_body.html. The National Council of School Attorneys has recently released an analysis of efforts to end court supervision in desegregation cases that “suggest[ed] several benefits of unitary status that accompany the removal of judicial oversight and the return to plenary local control.” TIMOTHY R. WINSHIP, TOWARD UNITARY STATUS: MAKING GOOD FAITH EFFORTS TO REMEDY PAST DISCRIMINATION 4 (July 2002), available at <http://www.nsba.org/site/docs/10700/10693.pdf>.

241. One New York government lawyer thus advised a conference of lawyers, insurers, and professors that “where you have a case where it looks like it’s going to go on for a while, and there is some liability, you should be making offers of settlement pursuant to Rule 68 of the Federal Rules of Civil Procedure, . . . if it’s an injunctive case.” Thomas W. Bergdall, *Limiting the Cost of Litigation*, 44 SYRACUSE L. REV. 875, 877 (1993); see also Patricia E. Salkin, *Introduction to Symposium, Municipal Liability*, 44 SYRACUSE L. REV. 829 (1993) (describing participants in the conference).

242. By way of comparison, consider, in this regard, the common approach taken by Israeli government lawyers handling appeals by Palestinians to the country’s high court. Dotan, *supra* note 2, at 242–44.

243. As Robert Keohane and Joseph Nye argue in a rather different context, as a result, these officials may come to “define their roles partly in relation to their transnational reference group rather than in purely national terms . . . [R]egularized patterns of policy coordination can therefore create attitudes and relationships that will at least marginally change policy or affect its implementation.” Joseph S. Nye, Jr. & Robert O. Keohane, *Transnational Relations and World Politics: An Introduction*, 25 INT’L ORG. 329 (1971).

244. Rochelle Stanfield explains:

Various colleagues of Odden’s—at the University of Wisconsin, at Guthrie’s firm in Tennessee and at the Denver-based consulting firm of Augenblick and Myers—have

testified in a large number of these cases;²⁴⁵ Allan Odden, a professor at the University of Wisconsin, has served as a special master and an expert witness in them as well.²⁴⁶ Both professors, along with their associates, have created mathematical and economic models for assessing the “adequacy” of school funding. Odden and Guthrie, and a few others, urge their models upon those courts that have determined that school districts must receive adequate funding under state law, as a remedy to ensure that they do so.²⁴⁷ Comparable examples exist across the spectrum of institutional reform cases. Feeley and Rubin note that in the prison reform context, “[i]n case after case, the same small handful of nationally known experts [are] called upon to serve as witnesses, to advise the court, and to act as special masters or compliance officers.”²⁴⁸

Some businesses have developed an expertise in advising government defendants on how to handle institutional reform cases (or how to change their policies to avoid them).²⁴⁹ Guthrie, for example, “is the chairman of the board of a private management consulting corporation . . . which specializes in education finance and litigation support.”²⁵⁰

Other consultants either finance these cases or kibitz about them. The Ford Foundation, for example, has funded public interest law firms for decades.²⁵¹ Meanwhile, law schools and law professors play a role, for example, by organizing seminars and conferences that bring together stakeholders in institutional

constructed different mathematical and economic models to come up with formulas for “adequate” school financing. The Wyoming Supreme Court has adopted Guthrie’s approach, while the Ohio state government has given the nod to the Augenblick and Myers method.

Rochelle L. Stanfield, *Making Money Matter*, NAT’L J., May 25, 1998, 1998 WL 2089218 ; see also Telephone Interview with school funding equity litigator (July 9, 2003) (on file with author).

245. See JAMES W. GUTHRIE, FACULTY BIOGRAPHY (setting forth Guthrie’s professional accomplishments), at <http://peabody.vanderbilt.edu/faculty/lpo/guthrie.htm>.

246. See ALLAN ODDEN, FACULTY BIOGRAPHY (setting forth Odden’s professional accomplishments), at <http://www.wcer.wisc.edu/cpre/staff/>; THE MERROW REPORT, WHO PAYS? BATTLING OVER SCHOOL FINANCE WITH STEVE BLOCK & ALLEN ODDEN (same), at http://www.pbs.org/merrow/tmr_radio/pgm20/guests.html#2.

247. See Stanfield, *supra* note 244.

248. FEELEY & RUBIN, *supra* note 7, at 368.

249. See, e.g., PENNHURST GROUP, INSTITUTIONAL REFORM LITIGATION (claiming that “Pennhurst Group staff [have] . . . been involved in one way or the other in most of the Institutional Reform Litigation throughout the United States”), at <http://www.pennhurstgroup.com/serv03.htm>; NATIONAL COUNCIL ON CRIME AND DELINQUENCY, RELIEF FROM CORRECTIONAL SYSTEM DECREES (“NCCD has a substantial track record in helping over 20 states and local governments achieve compliance with court mandates and stipulations.”), at <http://www.nccd-crc.org/nature/relief.htm>.

250. GUTHRIE, *supra* note 245.

251. Paul Craig Roberts, *Where Democracy Needs to Be Rescued*, WASH. TIMES, Feb. 10, 2003 at A19 (“In 1963, the Ford Foundation funded the first public interest law firm.”).

reform cases.²⁵² Consider, in this regard, North Carolina Law School's symposium titled "The Resegregation of Southern Schools? A Crucial Moment in the History (and the Future) of Public Schools in America."²⁵³ As the conference organizers put it, "More than 500 individuals, consisting of scholars, civil rights advocates, policymakers, lawyers and school administrators" attended the conference, including lawyers for the NAACP, school desegregation plaintiffs, employees of the Educational Testing Service, and academics, as well as others.²⁵⁴ The American Education Research Association similarly holds an annual meeting that is attended by lawyers interested in school finance and desegregation litigation and education academics: its 2004 Annual Meeting assesses the impact of *Brown*.²⁵⁵

3. Professional Organizations

Many observers have noted the difficulties involved in devising detailed remedies in institutional reform cases with only the guidance of exceedingly broad constitutional or statutory phrases.²⁵⁶ Parties and judges accordingly

252. For example, John A. Powell, a professor at the University of Minnesota Law School and former legal director of the ACLU, has created the Institute on Race & Poverty "to create scholarship, commentary and dialogue to increase the understanding and support of those unfairly constrained by race and poverty." INSTITUTE ON RACE AND POVERTY, IRP MINNESOTA HOMEPAGE, at <http://www1.umn.edu/irp>. Harvard University's Civil Rights Project is designed to play a similar role. See <http://www.civilrightsproject.harvard.edu/aboutus.php>. And of course, some professors serve as the experts who testify in institutional reform cases, making them both observers of, and participants in, the process. See, e.g., <http://www.hhs.utoledo.edu/criminaljustice/fac-staff.html> (profiling Vincent Nathan, who filed suit "on behalf of plaintiff classes in several major class actions in New York, California, and Wisconsin concerning conditions of confinement and the use of force in maximum and super-maximum security prisons"). Harvard Graduate School of Education professor Gary Orfield

has been a court-appointed expert in school desegregation cases in St. Louis, Los Angeles, San Francisco, and Little Rock and has been called to give testimony in civil rights suits on desegregation, fair housing, affirmative action and financial aid for college, testing, and other issues by the U.S. Department of Justice and many civil rights, legal services, and educational organizations.

http://www.civilrightsproject.harvard.edu/aboutus/fullbio.php/record_id=6/.

253. Symposium, *The Resegregation of South Schools? A Crucial Moment in the History (and the Future) of Public Schooling in America*, 81 N.L. L. REV. 1375 (2003). The symposium issue includes contributions from Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, and from Wendy Parker, *The Decline of Judicial Decision Making: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623. See also Salkin, *supra* note 241.

254. Information on the number and background of symposium attendees available at <http://nclrev.unc.edu/cocoon/nclrev/symposia/resegregation.html>; the symposium announcement and additional information available at <http://www.law.unc.edu/centers/civilrights/2002conf.html>.

255. AMERICAN EDUCATIONAL RESEARCH ASSOCIATION 2004 ANNUAL MEETING, at <http://www.aera.net/meeting/am2004/call04/theme/>; see also Telephone Interview, *supra* note 244.

256. See *supra* notes 137-141 and accompanying text.

often look beyond legal texts for standards that can form the basis for a remedy (or as an indictment or a defense of the reasonableness of the policies of the defendant institution).²⁵⁷ Sometimes they find these standards in the publications of professional associations.

These organizations exist across the wide spectrum of school desegregation cases. For example, the National Association of School Boards provides members with “advice on how to make student-assignment policy decisions that best serve the educational goals of local school officials while minimizing the legal risks.”²⁵⁸ Moreover, numerous other professional organizations have issued standards applicable to prison reform cases, including the American Medical Association and the National Association of Heating, Refrigeration, and Air Conditioning Engineers.²⁵⁹ Here again, an informal link—the ad hoc resort to the standards of a professional organization as a standard for adequate reform—can create a common outcome among discrete cases.²⁶⁰

4. The Executive Branch

So, too, can the federal executive branch play a role in a wide variety of institutional reform cases, be it by financing, coordinating responses to, or participating in the lawsuits.

Finance. Until recently, the government provided funding for many of the organizations that brought these lawsuits.²⁶¹ Beginning in the 1960s, the federal subsidies were nothing less than seed money for institutional reform litigation networks. By 1967, the Office of Economic Opportunity had provided funding for three hundred legal services organizations and a dozen national law reform centers.²⁶² This funding took on particular importance before fee-shifting statutes passed in the 1970s and 1980s made it more likely that the lawsuits themselves could help to sustain a plaintiffs’

257. See, e.g., *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 860 (5th Cir. 1966) (declaring a need for “uniform standards in court-supervised desegregation” of the 128 school districts subject to litigation in the district courts in Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas between 1956 and 1966), adopted in relevant part, 380 F.2d 385 (5th Cir. 1967) (en banc); cited in Schlanger, *supra*, note 26, at 1994 n.4.

258. EDWIN C. DARDEN ET AL., FROM DESEGREGATION TO DIVERSITY: A SCHOOL DISTRICT’S SELF-ASSESSMENT GUIDE ON RACE, STUDENT ASSIGNMENT, AND THE LAW, at https://secure.nsba.org/pubs/item_info.cfm?ID=493.

259. FEELEY & RUBIN, *supra* note 7, at 371.

260. The imposition of professional standards in school districts, prisons, housing authorities, and the like, has bureaucratizing effects that change the nature of administration of the institution. *Id.* at 162–63, 370, 373–74.

261. See Roberts, *supra* note 251.

262. See *id.*

bar.²⁶³ Moreover, the source of the money, and the attendant oversight by the government of the use of its funds, created a link between the disparate organizations it financed.

Coordination. The executive branch can also play a coordinating role, developing ways for potential defendants in institutional reform cases to talk to one another. For example, the Department of Justice's National Institution for Corrections has developed a number of on-line networks where information about prison, jail management, and best practices can be shared.²⁶⁴

Participation. Another way the executive branch has played a role in institutional reform networks is through active intervention and participation. Litigators from the Civil Division of the Department of Justice defend institutional reform suits if the federal government plays a role as a sole or codefendant, while litigators from the Civil Rights Division often intervene in certain suits on the plaintiff's side. It is worth considering these roles in some detail.

Because federal agencies cannot defend themselves in court, they must use litigators from the Civil Division to do so.²⁶⁵ Lawyers from that branch accordingly see institutional reform cases in different issue areas all the time and have developed expertise about how to handle them.²⁶⁶ Moreover, while a particular judge, plaintiff, or federal defendant may be unfamiliar with the possible types of relief that could be included in a consent decree, Civil Division lawyers—even apart from the informal knowledge that can be gleaned from colleagues—have a formal process that to some degree centralizes control over settlement, for which approval of the head of the division or his supervisors must be obtained. Both the Code of Federal Regulations and the *U.S. Attorneys' Manual* limit the terms to which line attorneys of the division may agree.²⁶⁷ At its most extreme, the phenomenon can suggest that the strategy of federal agencies in institutional reform

263. Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1276–79.

264. See NATIONAL INSTITUTE OF CORRECTIONS, at <http://www.nicic.org>.

265. See 28 U.S.C. § 516 (2000) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General."); 28 C.F.R. § 0.45 (2003) (setting forth the criteria for determining whether a case is to be handled by the Civil Division).

266. See *supra* note 11.

267. 28 C.F.R. § 0.160 sets forth the criteria for determining whether a settlement may be approved by the Assistant Attorney General in charge of the Civil Division, or by the Associate or Deputy Attorneys General. Of course, client approval for settlements is also ordinarily obtained.

lawsuits may, at times, be more coordinated through the Civil Division litigator than through the agency defendant.²⁶⁸

The Civil Rights Division plays a similarly important role, albeit from the plaintiff's, rather than the defendant's side, in certain specific areas of institutional reform, including correctional facilities and public housing authorities. Indeed, consent decrees in which the division has participated have generated almost identical standards for prison-housing authorities across the country, as we have seen.²⁶⁹ The division is charged with the protection of the constitutional and federal statutory rights of persons confined in certain government institutions, such as prisons and nursing homes.²⁷⁰ In fiscal year 2002 the division monitored consent decrees over publicly operated mental retardation facilities in seven jurisdictions, mental health facilities in four jurisdictions, fifty-two juvenile correctional facilities, jails in eleven jurisdictions, and prisons in five jurisdictions.²⁷¹

The Civil Rights Division has also sued a number of police departments, placing them under consent decrees to ensure compliance with the Police Misconduct Provision of the Violent Crime Control and Law Enforcement Act of 1994,²⁷² and has participated in cases in which government institutions have agreed to court orders based on disability access and housing discrimination.²⁷³ The division also provides technical assistance to institutions subject to a consent decree "typically . . . through expert consultants" that advise jurisdictions on practices that have worked for other jurisdictions.²⁷⁴

Schlanger deems the Civil Rights Division's participation in prison reform cases to have been an important contributor to national standards. "[P]rior to 1980, the Department of Justice was either plaintiff, plaintiff-intervenor, or amicus . . . in more than ten of the largest and most comprehensive prison

268. Nor is the Civil Division alone. The Department of Justice's current antitrust enforcement policy places a ten-year sunset clause in any standard consent decree. U.S. DEPT. OF JUSTICE, ANTITRUST DIVISION MANUAL, IV 55-56 (3d ed. 1998), available at <http://www.usdoj.gov/atr/foia/divisionmanual/ch4.pdf>.

269. See *supra* notes 227-228 and accompanying text.

270. See 42 U.S.C. §§ 1997-1997a (2000). The Civil Rights and Institutionalized Persons Act, however, limits the Civil Rights Division's jurisdiction in prison and jail cases *only* to constitutional claims. In other custodial contexts, however, the division may bring claims based on violations of the federal statutory rights of those in custody.

271. ACTIVITIES UNDER THE CIVIL RIGHTS OF INSTITUTIONAL PERSONS ACT, FISCAL YEAR 2002, at 10-12, available at <http://www.usdoj.gov/crt/split/documents/cripa02.pdf>.

272. See Miller, *supra* note 66.

273. The Civil Rights Division's recent housing litigation efforts are summarized at <http://www.usdoj.gov/crt/housing/filings.htm>.

274. FISCAL YEAR 2002 REPORT TO CONGRESS PURSUANT TO 42 U.S.C. § 1997f, at 19-21, at <http://www.usdoj.gov/crt/split/documents/cripa02.pdf>.

cases (four of which had desegregation components) and in a number of jail cases.²⁷⁵ In these cases, the department often pushed comprehensive reform on local and state defendants, urging a standard approach to inmate housing assignments, among other issues.²⁷⁶

Other departments in the executive branch can create links between cases simply by serving as defendants in a number of them, and by developing a policy toward institutional reform cases that they followed each time they are sued. HUD's approach to institutional reform cases in the mid-1990s is an example here.²⁷⁷

5. The Judiciary

The collaborative process within the judiciary itself has been another factor in the nationalization of outcomes in these local cases. Links can occur through institutionalized channels, as is the case with the annual judicial conferences held in each federal circuit. The focus of these conferences is on efficient judicial administration, but they also form an institutionalized venue for judges to compare notes on the appropriate handling of cases.²⁷⁸ As Judge Justice, the judge who presided over the epic *Ruiz* prison litigation in Texas, once observed:

I attended the Fifth Circuit Judicial Conference each year, where I always met with my friend, Judge Frank M. Johnson, Jr. Judge Johnson had already spent several years dealing with the Alabama prison litigation . . . and Judge Johnson told me that I would be well-advised to involve the United States in the litigation . . . he told me that he had ordered the Department of Justice to appear as *amicus curiae*. I asked Judge Johnson to provide me with a copy of the order he had entered, and using it as a model—or, as we call it in East Texas, a “go-by”—I issued the same kind of order in *Ruiz*.²⁷⁹

Moreover, trial judges can themselves become repeat players in institutional reform litigation, creating links across cases in a way comparable to the role played by the ACLU or the Civil Division. Consider Judge Dean

275. Schlanger, *supra* note 26, at 2024.

276. *Id.* at 2025.

277. See *supra* notes 195–198 and accompanying text.

278. *Report of the Special Committee to Evaluate the Judicial Conference of the Seventh Federal Circuit*, 86 F.R.D. 579, 581 (1980) (noting the occasion when the Seventh Circuit Judicial Conference resulted in the suggestion “to the judges and lawyers assembled [that there were] better ways of handling individual [equal opportunity] cases”).

279. Justice, *supra* note 226, at 5–6.

Whipple of the U.S. District Court for the Western District of Missouri, who protested in 1992:

For heavens sake, I don't want to run [the Kansas City Housing Authority]. I am looking after foster care now. I have got juvenile detention, and I've got jail overcrowding. My goodness, if I start running HUD, all I [haven't] got is City Hall and County Government.²⁸⁰

Judge Whipple got to run the housing authority that year—and for much of the rest of the decade—as well as, for brief periods, the school district.²⁸¹ It cannot be said that Judge Whipple's exercise of authority over so many institutions is unprecedented. Judge Justice's friend Judge Frank Johnson desegregated a number of Alabama's government institutions, reformed its mental retardation facilities, and presided over its prison litigation.²⁸² Judge Justice himself has supervised Texas's prisons and East Texas's public housing authorities.²⁸³

Indeed, as Sandler and Schoenbrod observe, disappointingly, supervision of an important institutional reform case can be one of the highlights of a trial judge's career.²⁸⁴ Some judges use the highlights of one institutional

280. Special Master's Report on the Status of Housing Authority's Compliance With Consent Decree, *Tinsley v. Kemp*, 750 F. Supp. 1001 (W.D. Mo. 1990) (No. 89-0023-CV-W-1).

281. See Luedtke, *supra* note 182, at 698-99; see, e.g., *Jenkins v. Missouri*, 965 F. Supp. 1295 (W.D. Mo. 1997); see also Ellen Borgersen & Stephen Shapiro, G.L. v. Strangler: A Case Study in Court-Ordered Child Welfare Reform, 1997 J. DISP. RESOL., at 189, 195-96 (describing Judge Whipple's oversight of Kansas City's foster care program). To make a somewhat facetious comparison, during 1992, Justice Clarence Thomas, then the most junior Justice on the Supreme Court, wrote ten opinions, three of which resolved bankruptcy appeals. See *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249 (1992); *Holywell Corp. v. Smith*, 503 U.S. 47 (1992). Justice Thomas has been adjudged to be the "least influential" conservative Justice that term. Richard G. Wilkins, et al., *Supreme Court Voting Behavior: 1993 Term*, 22 HASTINGS CONST. L.Q. 269, 307 (1995). In their annual statistical study of Court voting behavior, Richard Wilkins and his co-authors measure "who votes most often with the majority in close [that is, 5-4] cases." *Id.*

282. As Barry Friedman has noted, Judge Frank M. Johnson, Jr. "desegregated Alabama's schools and numerous of its public institutions," reformed the state's mental retardation facilities, and presided over structural reform of its prisons. Barry Friedman, *Right and Remedy*, 43 VAND. L. REV. 593, 599 (1990) (book review).

283. Judge Justice's merits decision against HUD may be found in *Young v. Pierce*, 628 F. Supp. 1037 (E.D. Tex. 1985), and his initial merits decision against the Texas Department of Corrections in *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980).

284. Sandler and Schoenbrod single out Judges Eugene Nickerson and Stanley Weigel as examples of this, the latter of whom was eulogized in the *New York Times* as having "Acted to Improve Prisons." SANDLER & SCHOENBROD, *supra* note 19, at 97, 218, 267 n.37 (citing Wolfgang Saxon, *Judge Stanley Weigel*, 93, *Dies, Acted to Improve Prisons*, N.Y. TIMES, Sept. 4, 1999, at A11). Consider also in this regard the praise trial judge gave to Judge Joseph Tauro upon his retirement from the chief judgeship of the federal district court in Massachusetts:

At a minimum, brief mention ought to be made of his management of the institutional litigation involving the Belchertown State Institution for the Mentally Retarded, see

reform case to inform their conduct in other cases, importing levels of scrutiny that they have applied in one institutional reform case into other cases involving similar constitutional or statutory claims, such as those based on the Equal Protection Clause.²⁸⁵

IV. IMPLICATIONS OF TRANSJUDICIAL ADMINISTRATION

In this part, I discuss some of the implications of transjudicial administration. I contend that institutional reform litigation is both part of a broader trend and yet unique at the same time. I contrast this actual picture of the law generated by transjudicial administration with the view of Owen Fiss, who suggests that the cases represent judicial articulations of higher principles implicated by the Constitution. I then situate the actual picture in a larger picture of administrative cooperation that stretches not just to courts, but also to agencies, and that affects the law generated both domestically and internationally. Finally, I consider some prescriptive implications of the system.

A. Form of Law

The design of this national rulemaking system affects the sort of law it promulgates. The horizontal networks in institutional reform litigation are not the place to look for a reasoned basis for decisions, partly because their products do not particularly embrace reasoning. Institutional reform law does not consist of principles announced and then justified, but rather of a list of requirements selected and adopted from case to case. The better analogy is to the sort of "best practices" work described in a meeting of regulators and offered up for cross-jurisdictional adoption.²⁸⁶

Consider a typical institutional reform remedy. It proceeds largely through consent, and is entered by the district court either pro forma, there being no objection, or with a few findings that the remedy will redress the

Ricci v. Okin, 537 F. Supp. 817 (D. Mass. 1982) (and subsequent decisions in the same case), a case that has proved a nationally-studied model of sensitive, sound, and politically-astute judicial activism.

Ronald A. Cass et al., *Tribute To Honorable Joseph L. Tauro*, 81 B.U. L. REV. 1, 8 n.9 (2001).

285. See *supra* notes 137–141 and accompanying text.

286. Popular domestically, "best practices" convergence is also a vigorous international phenomenon. See Zaring, *supra* note 154, at 295, 300–01; Boris Kozolchik, *The "Best Practices" Approach to the Uniformity of International Commercial Law: The UCP 500 and the NAFTA Implementation Experience*, 13 ARIZ. J. INT'L & COMP. L. 443 (1996).

wrong done to the plaintiff.²⁸⁷ In these findings, cases are rarely cited and legal analyses are rarely long and involved.

Instead, a court-ordered remedy ordinarily lists the steps that the parties agree to take to resolve the lawsuit and indicates that once those steps are taken, the claim will be deemed to have been resolved. It is result oriented, with a series of practical requirements imposed that other participants in the networks can either adopt or not adopt for their own purposes. Frederick Schauer has defended judicial opinion writing that takes the form of rules.²⁸⁸ Institutional reform litigation results in a particularly extreme version of this sort of opinion writing. Rarely containing lengthy adducements of remedies from constitutional principles, the law made through institutional reform litigation instead tends to take the form of lists of requirements for the defendant, along with a carefully drafted release once these requirements have been met. I argue that this form of law creation follows from the horizontal nature of the institutional reform discourse, in which courts adopt the remedies of other courts, usually through the form of an agreed-upon document negotiated by the parties and signed by the judge. Rather than being reasoned from precedent, the contents of these documents are adopted from other comparable cases, as the similarity of consent decrees across cases attests.²⁸⁹

I contrast this story with a different one of what judges are doing when they oversee government institutions. Owen Fiss described this process as one where “[t]he judge tries to give meaning to our constitutional values in the operation of these organizations.”²⁹⁰ To him, “[t]he structural reform cases that play such a prominent role on the federal docket provide another occasion for continuing judicial involvement. In these cases, courts seek to safeguard public values by restructuring large-scale bureaucratic organizations.”²⁹¹

This story of what judges should be doing with institutional reform cases contrasts sharply with what, in fact, they are doing. Even Fiss has recognized the fact that most injunctions generally get implemented through consent decrees.²⁹²

These decrees often serve as templates for one another—more akin to “best practices” models adopted by administrators than to a form of judicial

287. See Schlanger, *supra* note 26 at 2010–13; see also notes 65–66 and accompanying text.

288. Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995).

289. See *supra* notes 196–197 and accompanying text.

290. Fiss, *supra* note 4, at 2.

291. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1083 (1984).

292. See *id.* at 1082–85.

expression closer to the Fissian ideal.²⁹³ I have already compared the cookie-cutter prison decrees to which the Civil Rights Division has been a party.²⁹⁴ The mobility counseling and scattered-site housing requirements in public-housing decrees do not come with a declaration in favor of poverty deconcentration or an explicit linkage between the policies and the requirements of the Equal Protection Amendment.²⁹⁵ These remedies simply do not feature the sort of elucidation of principles that Fiss values. Common standards in these cases spread through the unelaborated and undefended adoption of particular remedial terms, not through reasoned adducement. Judges do not receive the opportunity to “explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: [Judges] interpret those values and . . . bring reality into accord with them.”²⁹⁶

My final claim, then, is that the alternative nature of national rule-generation through institutional reform litigation creates an alternative form of “judicial” decisionmaking, one that does not emphasize reasoning from agreed-upon principles, but rather comparison with, and adoption of, useful remedial requirements across networks.

B. Networks Across Administrations

These sorts of networks are not limited to institutional reform litigation. The authority exercised by trial judges and institutional supervisors interested in retaining control or enhancing authority over local institutions through the remedial process, may be part of a larger phenomenon in which lower-level government officials accrete and wield power by exercising it informally and innovatively in networks with one another and with private parties.²⁹⁷ We find, for example, regulators engaged in informal international

293. See *supra* note 227 and accompanying text; Kozolchyk, *supra* note 286, at 1447.

294. See *supra* note 227 and accompanying text.

295. See *supra* note 158–162 and accompanying text.

296. Fiss, *supra* note 291, at 1085.

297. In this sense, judges are not so different from the “street level bureaucrats” (such as teachers, prison guards, and mental health professionals) that they often supervise in institutional reform cases in that “those with the greatest discretion are at the bottom of the organizational structure.” Malcolm M. Feeley and Roger A. Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature*, in *COURTS, CORRECTIONS, AND THE CONSTITUTION*, *supra* note 218, at 12, 15; see also SETH LIPSKY, *STREET LEVEL BUREAUCRATS* 1–14 (1983) (coining the term). Joel Handler has noted that “as contemporary research in organizational sociology and implementation has shown, discretion in most bureaucracies, especially at the field level, cannot be sharply reduced or even controlled well.” Handler, *supra* note 27, at 1060.

collaborations as a means of both solving international problems and of augmenting and extending their domestic authority.²⁹⁸ Central bankers have agreed to establish identical requirements on the amount of money that the world's banks must hold in reserve.²⁹⁹ They, securities regulators, and insurance regulators have also agreed on the core principles of supervision of financial institutions.³⁰⁰ Judges have engaged in a process of dialogue with one another that Jenny Martinez, following Anne-Marie Slaughter, contends has created both a culture and a system of judging—an “international judicial process.”³⁰¹ Slaughter herself has shown that other judges have based innovative decisions in human rights law on the nonbinding decisions of judges in foreign jurisdictions, concluding that “judicial cross-fertilization” appears to be increasing.³⁰² The most recent and prominent manifestation of this type of horizontal judicial dialogue may be found in *Lawrence v. Texas*,³⁰³ which turned to a decision of the European Court of Human Rights (as well as to a British statute and the European Convention of Human Rights) to help it discern the current state of western practice in the treatment of homosexual conduct.³⁰⁴

C. Prescriptive Implications

It is often difficult to care whether something is a good or bad thing when it exists and will continue to exist.³⁰⁵ Descriptively, institutional reform

298. See Zaring, *supra* note 154, at 319.

299. The text of the 1988 Basle Capital Accord may be found at <http://www.bis.org/publ/bcbs04a.htm>.

300. The Basle Committee's *Core Principles for Effective Banking Supervision* were promulgated in 1998, and may be found at <http://www.bis.org/publ/bcbs30a.htm>. The securities regulators' agreement on the *Objectives and Principles of Securities Regulation* was also finalized in 1998, and may be found at <http://www.iosco.org/pubdocs/pdf/IOSCOPD82-English.pdf>. The insurance supervisors' *Insurance Principles and Standards* were collected in 2002, and may be found at <http://www.iaisweb.org/framesets/pas.html>. See also Zaring, *supra* note 154.

301. Martinez explains:

As a sociological matter, these institutions are increasingly linked by a common culture—over time, the same people often move from one court to another as judges or lawyers, carrying with them shared notions of what courts do and a commitment to a shared ideal of the rule of law.

Jenny S. Martinez, *Towards An International Judicial System*, 56 STAN. L. REV. 429, 436 (2003)

302. See Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1111 (2000).

303. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

304. *Lawrence*, 123 S. Ct. at 2481 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) & ¶ 52). Justice Breyer has also cited the European Court of Human Rights in his opinions. See *Foster v. Florida*, 123 S. Ct. 470, 472 (2002) (Breyer, J., dissenting) (citing *Soering v. United Kingdom*, 11 Eur. Ct. H.R. (ser. A), pp. 439, 478, ¶ 111 (1989)).

305. FEELEY & RUBIN, *supra* note 7, at 30.

litigation has played an important and much overlooked role in the devising of national standards—and it is likely to continue to do so. As Margo Schlanger has demonstrated, even in the contested context of correctional institutional reform, congressional efforts to reduce the level of judicial supervision have only been partly successful thus far.³⁰⁶

The better view is that institutional reform litigation is an alternative to federal bureaucracy. It is however, a limited alternative—one capable only of creating a national regime where disparate local institutions exist and are subject to constitutional and federal statutory requirements when a right to sue has clearly been established. But when these circumstances exist, administration through institutional reform litigation may be thought of as administration through a federal/local partnership, in which the federal role is played by the court and court officials, and the local role by the supervised government institution with the participation of other stakeholders.

Lawmakers are accordingly faced with a policymaking choice. They can delegate the enforcement of federal rights to national bureaucracies, or, if they prefer, they can delegate the enforcement to networks of trial courts. Of course, they may decide to create a hybrid scheme of rights implementation, and we see such a scheme in public housing, where HUD regulates and funds programs in tandem with court oversight over various public housing authorities.³⁰⁷ When should lawmakers prefer judicial administration to agency administration? The answer to that question is complex and contingent. But if presented with the choice, some factors that might influence the decision include the following: cost bearing, precision, openness, and expertise mobilized.

Cost Bearing. Bureaucratic oversight of local government institutions requires the staffing of an agency of overseers and regulation promulgators. In many instances, the ability of these administrators to affect local governance will depend in part on the availability of federal funding: a carrot, in addition to the stick of, say, a Civil Rights Division lawsuit or a federal agency investigation. Institutional reform litigation passes these costs down to the local institutions defending the lawsuits, the plaintiffs involved in the case, and, of course, the time of management required by the court systems. Institutional reform litigation networks accordingly make sense in a setting where it would be preferable to delegate the costs of administration to local government, rather than to the federal government.

306. Schlanger, *supra* note 132, at 1694–97.

307. See *supra* Part III.

Precision. Here too, legislators must decide between the possible precision of an announced national regulatory standard and one that appears through the institutional reform networks, over which they are likely to have less formal control. Transjudicial administration is not subject to the Administrative Procedure Act, while the regulatory efforts of national bureaucracies are.

Openness. Both administration—with publication in the Federal Register—and implementation of consent decrees—with judicial hearings—are open processes. However, they are open in different ways. Consent decrees are, as Sandler and Schoenbrod note with regret, devised in a relatively private context, and courts are not obligated to respond to public comment.³⁰⁸ A legislature deciding whether to permit institutional reform in a local government issue area must decide whether this privacy is appropriate or not.

Expertise Mobilized. Finally, a decision about whether to administer local institutions through courts or agencies depends in part upon the sort of expertise in administration it is deemed desirable to mobilize. National bureaucracies have particular approaches to, say, housing or prison policy, while special masters, expert witnesses, and stakeholders might have very different perspectives and qualifications.

CONCLUSION

In this Article, in addition to presenting a theory about a set of cases that form the subject matter of transjudicial administration, I also want to problematize, but not condemn the phenomenon. No form of administration of hundreds of disparate institutions across similar issue areas is easy. The usual problems of administration from a Washington-based bureaucracy apply. And courts may be able to step in where agencies cannot.³⁰⁹

In sum, there are two interrelated aspects to these networks—a big picture—worth considering. The first requires us to think about the place of institutional reform litigation as a national phenomenon. If we understand it as a widespread series of horizontal links between cases, we can see it as an alternative to the centralization of these standards through Congress or the Supreme Court. Institutional reform litigation can create trends and links across cases that may result in the widespread adoption of common

308. SANDLER & SCHOENBROD, *supra* note 19, at 113–38.

309. Feeley and Rubin think this is the story of the prisons. See Rubin & Feeley, *supra* note 34, at 631–33.

approaches to governance that, if patchy in spots, would look to any outside observer like national standards. This is standardization from below: the centralization of decentralized practices by widespread adoption and repeated application by repeat players.

If this first claim sounds like a big one—that courts regulate us in part through the nonhierarchical harmonization of standards rather than by application of standards promulgated by central authorities—my second claim is designed to lighten its import. Institutional reform litigation networks are, rather than being unique, a particular aspect of a commonplace phenomenon. Internationally and domestically, from weighty matters of constitutional interpretation to the best practices involved in fire prevention, government officials administer their bailiwicks not just by following orders from above, but also by collaborating with their peers and other stakeholders. Institutional reform litigation exemplifies how one such government institution, lower courts as a whole, provides a nexus for this sort of collaboration. But there are many others. The nature of this collaboration may have long been unexplored, but it is by no means unique.