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# I Love You, Big Brother

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## Book Review

### I Love You, Big Brother

JUDICIAL POLICY MAKING AND THE MODERN STATE:

HOW THE COURTS REFORMED AMERICA'S PRISONS.

By Malcolm M. Feeley† and Edward L. Rubin††.

Cambridge: Cambridge University Press, 1998. Pp. iii, 490. \$69.95 cloth.

*Reviewed by Neal Devins†††*

#### INTRODUCTION

The image of the judge as social crusader increasingly seems a relic of times past. Over the past several years, left-leaning political scientists, law professors, and interest groups have made clear that courts should steer clear of policy making. For some, courts lack the capacity to change the world through their edicts and, as such, policy making is a "hollow hope."<sup>1</sup> For others, elected officials are more apt to embrace progressive causes than are judges.<sup>2</sup>

Judicial policy making has, moreover, always been a whipping boy for traditionalists. Most notably, judicial policy making must overcome the so-called countermajoritarian difficulty—that is, the presumption that the democratic character of legislation, in and of itself, warrants judicial

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1. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1992). Under this account, courts should either steer away from social reform altogether or, alternatively, issue "minimalist" decisions that encourage popularly elected officials and the people to sort out the Constitution's meaning. The most visible explication of this argument is CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

2. The American Civil Liberties Union and National Abortion Rights Action League, for example, have both dubbed Congress their "court of last resort." W. John Moore, *In Whose Court?*, NAT'L J., Oct. 5, 1991, at 2400 (quoting Leslie A. Harris, American Civil Liberties Union Chief Legislative Counsel in Washington); see also National Abortion Rights Action League "Supreme Court Alert" (June 27, 1991), quoted in LOUIS FISHER AND NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 7 (2d ed. 1996); Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241, 251-66 (1993). Of course, the 1994 Republican takeover of Congress may have tempered this enthusiasm. Nonetheless, left-leaning academics still embrace constitutional interpretation outside the courts. See MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

restraint.<sup>3</sup> Correspondingly, traditionalists argue that it is simply wrong for judges to see themselves as social reformers, overturning governmental action because it is inconsistent with their vision of good public policy. These arguments are more than academic platitudes. Ever since Richard Nixon's efforts to undo the Warren Court, the Republican party has embraced them.<sup>4</sup>

That the Republican party's complaints and the more recent attacks launched by the left both sound a similar theme, of course, does not mean that anything approaching a consensus has been reached on, say, the successes and failures of the Warren Court. Nevertheless, this confluence of traditionalists and progressives bodes ill for judicial policy making. In particular, while there once was a raging debate among academics, interest groups, and elected officials about the propriety of court ordered institutional reform,<sup>5</sup> the question today is whether someone will defend judicial policy making at all.<sup>6</sup>

Enter Malcolm Feeley and Edward Rubin. In *Judicial Policy Making and the Modern State*, Feeley and Rubin serve up a nuanced and emphatic defense of judicial policy making. More than any other work on this subject, they offer a provocative and comprehensive explanation of why judicial policy making is legitimate. In part, by calling attention to how agency policy making represents a fundamental break from federalism and separation of powers protections, Feeley and Rubin forthrightly argue that these structural constraints cannot stand in the way of policy making by

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3. The classic work on this subject is ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962). Over the years, nearly all scholars have embraced Bickel's legislature-centered vision, including theorists who defend an expansive interpretive role for the courts. See Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 761-62 (1997).

4. Party platforms routinely condemn judicial policy making, arguing that "[i]t is not a judicial function to reorder the economic, political, and social priorities of our nation. The intrusion of the courts into such areas undermines the stature of the judiciary and erodes respect for the rule of law." *Text of the 1984 Republican Party Platform*, reprinted in 1984 CONG. Q. ALMANAC 41-B, 55-B. Ronald Reagan's first attorney general, William French Smith, likewise rebuked the judiciary, charging that "[n]ot only are unelected jurists with life tenure less attuned to the popular will than regularly elected officials, but judicial policy making also is inevitably inadequate or imperfect policy making." William French Smith, *Urging Judicial Restraint*, 68 A.B.A. J. 59, 60 (1982).

5. For a sampling of arguments attacking institutional reform litigation as inconsistent with the judicial role, see DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978); and Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). The classic defenses of institutional reform litigation include Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); and William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982).

6. Of course, some academics still wax nostalgic about the achievements of the Warren Court—hoping against hope that the judiciary will once again embrace that brand of compassionate jurisprudence. See, e.g., Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989).

unelected officials, including judges. According to this account, to "demand that courts continue to be constrained by these structural principles, particularly when other branches have abandoned them [wrongly] excludes the courts from the modern governmental process" (p. 343).

Moreover, building upon a handful of case studies on prison reform litigation, Feeley and Rubin set out to eviscerate traditionalist arguments that judicial policy making allows unelected and unaccountable judges to set policy according to their *individual* senses of right and wrong. Specifically, although judicial policy making involves the creation of new legal doctrine, it is bound by judge-created "coordinating ideas"—precedential standards that limit what courts can and cannot do (pp. 241-48). In Feeley and Rubin's estimation, prison reform litigation exemplifies how courts devise such coordinating ideas and, in so doing, honor the rule of law.

Feeley and Rubin's account is truly ambitious and undoubtedly will be a force to reckon with in the next wave of academic discourse over judicial policy making. Nevertheless, for all its innovations, *Judicial Policy Making* is ultimately unconvincing. First, assuming that agency policy making is legitimate, the court-agency analogy is far from perfect. Judicial interpretations of the Constitution are not subject to the same types of democratic controls as agency interpretations of statutes. With life tenure and some degree of political insulation, judges do not relate to other parts of the government in the same way that agencies do. Moreover, in making the court-agency analogy, Feeley and Rubin read too much into too little—a single nongeneralizable case study on prison reform litigation.

Second, the saga of prison reform litigation provides inadequate support for the proposition that coordinating ideals serve as a sufficient rule-of-law constraint on judicial policy making. The notion that lower court judges worked in tandem to develop nationwide standards requires more proof than Feeley and Rubin deliver. Without such proof, there is simply too great a risk that the rule-of-law argument will operate as a smokescreen—concealing the fact that judges, freed to make policy, will focus on doing so and not on the de facto limits lower court judges in other jurisdictions place on them.

Third, while Feeley and Rubin convincingly demonstrate that federal court judges played a critical policy-making role in prison reform litigation, *Judicial Policy Making* gives short shrift to the contextual nature of these decisions. Although recognizing that judicial decision making does not occur in a vacuum, Feeley and Rubin understate the critical role that both federal and state actors played in shaping the scope and sweep of prison reform litigation. To put it another way, rather than showing how courts operate as freestanding policy makers, the evidence *Judicial Policy Making* uncovers is a testament to how courts and elected officials participate in constitutional dialogues with each other.

Feeley and Rubin's failure to emphasize this connection between courts and elected government is unfortunate but understandable. The question they ask is whether policy making is a legitimate judicial function, not whether other parts of the government figure into judicial decision making. With that said, there is a direct link between the contextual nature of judicial decision making and the propriety of judicial policy making. Specifically, courts ought to engage in policy making in part because the Constitution is made more vital and durable by ongoing dialogues among the elected government, the courts, and the people. While this type of policy making may not be as far reaching as Feeley and Rubin envision, it is nevertheless a critical component of our constitutional order.

# I

## FEELEY AND RUBIN'S MODERN STATE JUSTIFICATION FOR JUDICIAL POLICY MAKING

Big government operates as *the* baseline from which Feeley and Rubin assess the propriety of judicial policy making. Their central claim, that "policy making should be recognized—by judges and observers of judges—as an ordinary and a legitimate mode of action" (p. 6), is tied to the reality of the administrative state. For example, in explaining why federalism and separation of powers protections do not stand in the way of judicial policy making, Feeley and Rubin contend that these doctrines rest on "normative arguments . . . inapplicable in our nationwide administrative era" (p. 341). As to the permanence of the administrative era, Feeley and Rubin think that "[w]e are much more likely to turn the clock back 500 million years by bombing ourselves into protoplasmic slime than we are to turn it back 120 years to the preadministrative era" (p. 341).

This "modern state" justification for judicial policy making is extraordinarily relativistic. For Feeley and Rubin, if agency heads can legislate and adjudicate without violating the separation of powers, courts too should be able to make and implement policy. A rising tide, after all, raises all boats. On this point, Feeley and Rubin reject suggestions that agencies, unlike courts, are somehow democratically accountable. They dismiss arguments that agencies operate within the statutory boundaries set by law makers both because agency heads often have substantial discretion to implement state and federal programs (pp. 330-31), and because law makers "represent nothing but their own desire to get reelected" (p. 331) and therefore lack democratic legitimacy. Furthermore, according to this account, the actions of agency heads, "while enormously important to the citizenry,



are too numerous and frequently too technical for the legislators or the chief executive to monitor" (p. 333).<sup>7</sup>

Feeley and Rubin likewise see federalism objections to judicial policy making as outdated. Highlighting "the national character of our policy" (p. 201), they dismiss traditionalist claims that judicial oversight of state institutions is constitutionally problematic. Moreover, as was the case with their separation of powers analysis, Feeley and Rubin deem federalism as anathema to the administrative state. Specifically, "[b]ecause the modern administrative state is based on the idea that the government protects liberty, it cannot rely on the structured inefficiency that federalist theory contemplates to protect citizens from government oppression" (p. 194). Rather, invoking the modern state as a metaphor for a nationalist melting pot of ethnic, cultural, economic, and ideological identities, Feeley and Rubin conclude that "the United States has one political community, and that political community is the United States" (p. 199).<sup>8</sup> Under this view, federal court judges are key players in advancing the nation state, bringing a national morality and a national perspective to local communities (p. 203).<sup>9</sup>

In understanding how federal court judges impose nationwide standards on the states, Feeley and Rubin focus their energies on prison reform litigation. Through this microanalysis, they build much of their theory of judicial policy making (p. 4). Most significantly, they use prison reform litigation as a lens to understand whether judicial policy making makes use of the same techniques as agency policy making and, more importantly, whether judicial policy making is consistent with the judiciary's obligation to abide by the rule of law.

The choice of prison reform seems obvious. Forty-eight of America's fifty-three jurisdictions (the fifty states, Puerto Rico, the Virgin Islands,

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7. Feeley and Rubin also tackle traditionalist claims that judicial policy making is inconsistent with the Framers' design. Noting that "courts have always performed a multiplicity of functions that involve social control and policy implementation," they suggest that the modern activist judiciary is grounded in the long-standing traditions of equity jurisprudence, traditions that were well known to the Framers. MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* 328 (1998). For a parallel account, see Eisenberg & Yeazell, *supra* note 5. For a competing account of the Framers' vision, see Nagel, *supra* note 5; John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1141-66 (1996).

8. This argument parallels Edward L. Rubin & Malcolm M. Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994). For scholarly commentary that takes issue with this argument, see Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2212-28 (1998).

9. As to whether local judges can transcend local inores to advance nationalist objectives, see J.W. PELTASON, *FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION* (1961) (highlighting the dilemma that district court judges faced in balancing their commitment to a nationalist Supreme Court with their allegiance to the segregationist culture of the South).

and the District of Columbia) have had one or more aspects of their prison facilities declared unconstitutional (pp. 39-42). Not surprisingly, court decisions have run the gamut, "covering such diverse matters as residence facilities, sanitation, food, clothing, medical care, discipline, staff hirings, libraries, work, and education" (p. 41). Moreover, because judges frequently employ structural injunctions to oversee these initiatives, prison reform litigation represents "the complex process by which grievances are perceived and articulated, and by which law is mobilized, applied, reconceived, and understood" (p. 29). Or, as one reporter puts it, judges overseeing prison reform cases become so entrenched in policy making that they are "the real governors" of their states.<sup>10</sup>

Prison reform is telling for another reason. Rather than following some Supreme Court-dictated script, federal district judges were the writers, directors, and stars of these prison reform dramas. For Feeley and Rubin, the fact that so many courts were engaged in this enterprise is critically important. Specifically, in arguing that judicial decision making follows the same "modalities" as agency policy making,<sup>11</sup> Feeley and Rubin call attention to the myriad ways that district judges worked with state officials and other interests to advance their reform agenda. The stories of district court judges also loom large in Feeley and Rubin's claim that rule-of-law constraints limit judicial policy making. Claiming that doctrine "is not an individual idea" (p. 226) but an idea that "ultimately prevails as a means of integration for the majority of judges" (p. 227), Feeley and Rubin suggest that district judges communicating through their written opinions have developed self-limiting standards that permeate prison reform decision making.

This rule-of-law argument, like their arguments concerning the separation of powers and federalism, is largely rooted in Feeley and Rubin's belief that nationwide policy making is the stuff of modern government. Judicial policy making, for example, is legitimated by the fact that "policy making was the dominant approach to modern governance and thus a valid mode of action for the judiciary" (p. 217). In other words, "the power and discretion of government [must] expand[]," for "the administrative state has changed our views about the pace and scope of doctrinal innovation generally" (p. 249). When it comes to prisons, Feeley and Rubin think the judiciary's predominance is both inevitable and appropriate. With Congress unwilling to create "a large, well-funded bureaucratic

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10. See *The Real Governor*, TIME, Jan. 26, 1976, at 65 (discussing Judge Frank Johnson's oversight of institutional reform litigation in Alabama).

11. These modalities include program initiation, experimentation with alternative solutions, negotiation with affected parties, the promulgation of rules, and much more. See FEELEY & RUBIN, *supra* note 7, at 356.

agency . . . , the task of wielding the modern state's administrative power fell to the judiciary" (pp. 190-91).<sup>12</sup>

## II

### THE ORDINARY AND THE EXTRAORDINARY OF PRISON REFORM LITIGATION

Feeley and Rubin's microanalysis of prison reform litigation attempts to develop a theory of judicial policy making around a single example. But what if prison reform litigation is atypical? Moreover, what if Feeley and Rubin's assessment of the facts of prison reform litigation is subject to an alternative interpretation? This Part will explore these matters and suggest that Feeley and Rubin's microanalysis, along with their broader claim about how courts craft policy, is vulnerable to attack.

Before turning to these matters, let me make explicit something that was implicit in the prior section, namely, that Feeley and Rubin's analysis is premised on the inevitability of the administrative state, and with it, the appropriateness of using the administrative state as a normative benchmark from which to build their theory of judicial policy making. No doubt, the administrative state is here to stay. But to say that there is an administrative state is not enough. For those who believe that the "post-New Deal administrative state is unconstitutional and its validation by the legal system . . . a bloodless revolution," Feeley and Rubin's argument is a nonstarter.<sup>13</sup> To answer these critics of modern government, Feeley and Rubin must explain why it is that the administrative state is itself legitimate.

Feeley and Rubin offer no such explanation. At most, pointing to public choice and postmodern scholarship, they question whether elections distinguish agency policy making from the work of legislators (pp. 330-31).<sup>14</sup> This analysis, however, snacks of moral relativism. That is, agency policy making is legitimated by the fact that elections do not legitimate legislative policy making.<sup>15</sup> Along the same lines, it is not enough to say

12. On the question of whether prisoners are a "discrete and insular minority" deserving special judicial protection, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 97, 173-76 (1980) (highlighting class-based application of the death penalty). For their part, Feeley and Rubin call attention to the plight of prisoners, especially prisoners victimized by Southern "plantation model" prisons. See, e.g., FEELEY & RUBIN, *supra* note 7, at 51-55 (describing Cummins Farm in Arkansas).

13. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994). Also, for those who acknowledge the necessity of an administrative state but not an unbounded administrative state, Feeley and Rubin's unqualified embrace of big government is problematic.

14. Public choice theorists contend that elected officials "represent nothing but their own desire to get reelected"; postmodernists claim that political representation is a distortion "spawned by the unfounded assertion that one person represents the views of others . . ." FEELEY & RUBIN, *supra* note 7, at 331.

15. Correspondingly, in answering charges that judicial policy making is problematic because judges—unlike agencies—are not subject to direct elected government supervision, Feeley and Rubin's response is relativistic. They claim that, in fact, popularly elected officials rarely check agency heads.



that judicial policy making is legitimate because the modern state embraces governmental problem solving.<sup>16</sup>

Perhaps my argument is unfair. Perhaps Feeley and Rubin's ultimate point is that judicial policy making is as legitimate as other types of policy making in the modern state. For example, it may be that courts and agencies approach policy making in quite similar ways. This observation, of course, constitutes one of the central claims of *Judicial Policy Making*. In particular, building upon their study of prison reform litigation, Feeley and Rubin point to ways in which judicial and agency policy making are indistinguishable from each other. "A good policy-making judge," according to this account, "should follow the same widely recognized principles" that guide administrators (p. 322). Like administrators, judges should obtain "information from as many groups as possible," should "regularly [turn] to experts in the fields who [have] developed solutions through hands-on experience," and should deal with problems of uncertainty "by proceeding incrementally" (p. 320). Correspondingly, a policy-making judge—through the appointment of special masters and the utilization of injunctions to maintain control over a lawsuit—can avoid the pitfalls of deciding a case at a moment in time where a changed understanding of the underlying facts can only be corrected through a reversal. A policy-making judge, moreover, need not allow the parties before her to frame the issues that she will consider. Likewise, a policy-making judge is not bound by precedent-based legal arguments.

In the prison reform cases they study, Feeley and Rubin contend that judges, either directly or through special masters, did follow this model.<sup>17</sup> In this way, they argue that traditionalist norms no longer apply to modern day adjudication. Feeley and Rubin thus consider outdated traditionalist arguments that the "distinctiveness of the judicial process—its expenditure of social resources on individual complaints, one at a time—is what unfits

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See *id.* at 333. But this answer is insufficient. First, if true, it may be that two wrongs do not make a right. Second, Feeley and Rubin never really prove this assertion. The question of how democratic government oversees agency decision making (and why that oversight is analogous to democratic government oversight of the judiciary) is never considered in a meaningful way.

16. When all is said and done, Feeley and Rubin never advance an affirmative argument as to why judicial policy making is legitimate. Their argument, instead, is a refutation of traditionalist claims that judicial policy making violates either the structure of the Constitution or rule-of-law constraints.

17. Feeley and Rubin's treatment of policy making by special masters as no different than policy making by judges is problematic. While special masters serve at the pleasure of the judge who appoints them, "[a]n independent monitor himself becomes a new actor in the political equation, whose position the judge must reckon in the political calculus." Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 97 (1979). See, e.g., Resnick, *supra* note 5, at 437-38. For this reason, special masters present risks of their own, especially the risk that policy-making judges may well lose control of institutional reform litigation. Furthermore, the adversary process itself may limit the master's ability to serve a constructive policy-making role. See Note, "Mastering" Intervention in Prisons, 88 YALE L.J. 1062, 1080-81 (1979).

the courts for much of the important work of government."<sup>18</sup> In their view, joy, not horror, is the feeling that the following depiction of a hearing on a Los Angeles school busing case ought to evoke: "Once one comprehends that the court is displacing the [school] board, . . . the occasionally circus-like quality of the hearing becomes more explicable, if not more orderly. It doesn't, as the judge has remarked upon occasion, look much like a court, and for good reason: it really isn't one."<sup>19</sup> To put it another way, when critics of judicial policy making talk of the "danger" that courts, in "developing a capacity to improve on the work of other institutions, may become altogether too much like them,"<sup>20</sup> Feeley and Rubin argue that such a transformation is both appropriate and, in critical respects, already has occurred.

But Feeley and Rubin's example—prison reform litigation—is not fully generalizable, and as a result, their proof is incomplete. To begin with, prison cases allow judges to be pro-active in ways that school desegregation and other institutional reform litigation does not. Rather than managing a case filed by, for example, the NAACP Legal Defense Fund (an interest group with a well-defined sense of the remedial relief it seeks),<sup>21</sup> strong-willed plaintiffs do not figure into Feeley and Rubin's prison cases. Rather, judges often handpicked these cases from the hundreds, if not thousands, of prisoner-filed pro se petitions (pp. 81, 100).<sup>22</sup> Judges, moreover, handpicked the counsel to represent prisoners in these lawsuits (pp. 61, 81, 100, 114). Witness, for example, the extraordinary role Judge William Jayne Justice played in launching prison reform litigation in Texas. After hearing William Turner, a Legal Defense Fund lawyer, deliver a speech on prisoners' rights, Judge Justice "resolved to develop a prisoners' rights case of his own and to contact Turner to see if he would represent the complainants. . . . To develop the issues in the case, Judge Justice asked his clerks to locate 'typical' [inmate] petitions" (p. 81).

Prison cases are different from school and other institutional reform litigation for additional reasons. With so many inmates filing so many different types of petitions, a judge, rather than relying on counsel to filter

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18. HOROWITZ, *supra* note 5, at 298.

19. Fletcher, *supra* note 5, at 694 (quoting Stephen C. Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 UCLA L. REV. 244, 259 (1977)).

20. HOROWITZ, *supra* note 5, at 298; see also David L. Kirp & Gary Babcock, *Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALA. L. REV. 313 (1981) (arguing that courts attempting to shape efficacious remedies in institutional reform cases must deviate from traditional adjudicative modes to do so, and that such deviation jeopardizes the institutional legitimacy of the courts).

21. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

22. Prisoners typically have ample time to file such petitions and have little to lose by doing so. See Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 682-83 (1993).

information for her, is extremely well positioned to play a hands-on role. Moreover, in most of the cases Feeley and Rubin consider, prison officials worked in tandem with federal judges in an effort to squeeze money from state law makers.<sup>23</sup> Furthermore, state governors did not challenge judicial intervention and state law makers "were as often supportive as condemnatory" (p. 168).

The willingness of prison officials, state law makers, and governors to play ball with federal judges is a critical and distinctive feature of the prison reform saga.<sup>24</sup> Courts could behave like agencies, in part, because their decision making was accorded the same respect as an agency's cease and desist order. Absent a generally supportive implementing community, however, there is reason to doubt that prison reform litigation would have followed the agency model. Without the powers of purse or sword, federal judges, unlike agencies, must overcome inherent limits to their authority. Specifically, to force compliance by recalcitrant state officials, federal judges must appeal to other parts of the government.<sup>25</sup> Of course, policy-making judges can improve the likelihood of the implementing community's signing off on their orders by, for example, inducing state officials "to participate in a deliberative process to formulate and implement an effective remedy."<sup>26</sup> But policy-making judges are far more dependent on the implementing community than are their agency counterparts.<sup>27</sup>

Feeley and Rubin acknowledge the critical role that the implementing community plays in actualizing judicial policy making. Their depiction of prison reform litigation, despite its trumpeting of the court's power to set policy, is replete with examples of how judges took state and federal

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23. While Feeley and Rubin claim that the majority of prison officials opposed these lawsuits, *see* FEELEY & RUBIN, *supra* note 7, at 168, three of their four state case studies suggest otherwise, *see id.* at 61 (Arkansas), 101-02 (Colorado), 116 (Santa Clara, California). In Arkansas, for example, prison commissioner Robert Sarver was "quite willing to aid the court, and it was his witnesses, more than those of the complainants, who provided Judge [J. Smith] Henley with the most trenchant criticisms and effective diagnoses of problems in the prison system." *Id.* at 308.

24. Court appointed special masters too were accorded great respect. In Santa Clara, for example, prison officials "were clearly willing to be ordered around by a judicially appointed officer, and perhaps even pleased by the prospect of submitting to the authority of an expert." *Id.* at 122.

25. A dramatic example of this phenomenon is the Little Rock desegregation case, where President Eisenhower sent Army troops into Little Rock to force compliance with a court order. *See* Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641 (1997).

26. Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 856 (1990).

27. Agencies too are dependent on the implementing community. Powerful interests, for example, can navigate around agency demands by lobbying both the White House and Congress (or the governor's office and state law makers). More strikingly, through the formation of so-called "iron triangles," agency heads sometimes work in a partnership with the regulated community and their legislative overseers. Nevertheless, whereas a court must go through an agency to secure implementation of institutional reform litigation, agency enforcement efforts are not similarly encumbered.

interests into account in fashioning their institutional remedies. First, judicial participation in prison reform litigation was an outgrowth of efforts during the 1960s to nationalize civil rights and liberties protections. Through Great Society legislation, Congress facilitated stepped-up agency and judicial enforcement of constitutional rights, especially in the South. School desegregation is an obvious example. With lower court judges refusing to pressure Southern school systems to desegregate, Congress, through the 1964 Civil Rights Act,<sup>28</sup> authorized Department of Justice school desegregation litigation and prohibited the dissemination of federal funds to school systems (or anyone else) that discriminated on the basis of race. Moreover, through the 1965 Elementary and Secondary Education Act,<sup>29</sup> Congress sought to nationalize state educational systems through cash awards to systems to promote federal objectives, including desegregation.<sup>30</sup> With Congress and the White House backing school desegregation, the federal courts too reentered the school desegregation fray by, among other things, managing school systems through structural injunctions.

Prison reform litigation is part and parcel of this campaign to expand constitutional protections by nationalizing state institutions. For example, through *Miranda v. Arizona*,<sup>31</sup> *Mapp v. Ohio*,<sup>32</sup> and other landmark decisions, the Supreme Court already had signaled its willingness to intercede on behalf of criminal suspects (pp. 159-60). Against this backdrop, lower court judges launched their prison reform movement. In other words, as Feeley and Rubin put it, "the basic relationship between the civil rights movement and prison reform is causal, not adventitious" (p. 159).

Second, judicial participation in prison reform litigation did not contradict the preferences of elected government officials. As discussed above,<sup>33</sup> state officials did not resist court ordered prison reform. The federal government also supported these initiatives, at least during the heyday of prison reform litigation. Justice Department filings backed prison reform initiatives as well (pp. 82, 168). Through its Bureau of Prisons, moreover, the Justice Department played a leadership role in advancing "progressive prison practice[s]," including the provision of pro-plaintiff expert testimony in prison cases (p. 164). For its part, Congress, in 1965, established the Law Enforcement Assistance Administration which "invested heavily in developing and promoting uniform standards . . . derived from the federal Bureau of Prisons" (pp. 167-68). In 1980, Congress enacted the Civil

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28. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

29. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

30. See Neal Devins & James B. Stedman, *New Federalism in Education: The Meaning of the Chicago School Desegregation Cases*, 59 NOTRE DAME L. REV. 1243, 1245-51 (1984).

31. 384 U.S. 436 (1966).

32. 367 U.S. 643 (1961).

33. See *supra* notes 23-24 and accompanying text.



Rights of Institutionalized Persons Act,<sup>34</sup> "an explicit effort to impose national standards on state prisons" (p. 168).

Third, federal judges paid close attention to these signals. They regularly referred to Bureau of Prison practices in their decisions and accorded "enormous credence" to the testimony of Bureau officials (p. 164). Law Enforcement Assistance Administration efforts to establish national standards likewise played a prominent role in court decision making (pp. 370-71). In addition to these efforts to nationalize prisons, the American Correctional Association, the Department of Justice, and the American Bar Association also embraced national standard setting and, in so doing, helped shape prison reform litigation (pp. 164-65, 370-72). Indeed, as Feeley and Rubin acknowledge, the existence of such standards "is often a major incentive for decision makers to define and address a particular problem" (p. 165). For this very reason, Feeley and Rubin's broader claims about judicial policy making seem overstated. No doubt, they may well be correct in arguing both that federal judges were at the fore of the prison reform movement, and that federal judges viewed the Eighth Amendment ban against cruel and unusual punishment as an open-ended grant of jurisdiction to set national prison standards. Yet rather than establishing norms and standards themselves, federal judges appeared to be implementing nationalist norms set by politically accountable institutions.<sup>35</sup> As such, the preferences of elected government officials, not court-created coordinating ideas, may well have set the parameters of prison reform decision making.<sup>36</sup>

In light of recent events, this conclusion seems inescapable. Specifically, when Congress and the White House began to signal their disapproval of prison reform litigation in the late 1980s, federal courts relented. For example, Justice Department lawyers, over the objections of plaintiffs' attorneys, successfully convinced federal judges to relinquish jurisdiction in some long-standing cases (p. 50). By 1992, the U.S. Supreme Court joined forces with the Bush Justice Department and engineered its own "retrenchment" of judicial policy making in this area (p. 3). By 1994, the "retrenchment" was complete. "With the advent of a Republican-controlled Congress in 1994 and a Democratic president who was intent on

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34. Civil Rights of Institutionalized Persons Act of 1980, Pub. L. No. 96-247, 94 Stat. 349.

35. Along these lines, it is also significant that federal judges did not seek to take over the federal prison system. Rather, showing great deference to Bureau of Prison arguments, district judges steered clear of federal prison litigation. See FEELEY & RUBIN, *supra* note 7, at 129-43. In other words, rather than making policy, district judges opted for a system that put into place standards set forth by a federal agency.

36. Of course, it may be that elected officials and federal judges shared a vision of prison reform. But to argue that coordinating ideas served as an effective rule-of-law constraint requires some evidence that judges did not simply operate within the parameters set by Congress and the Justice Department. On this point, the judiciary's recent retreat in this area—when Congress and the White House no longer supported prison reform—speaks volumes. See *infra* note 37 and accompanying text.



preempting the tough-on-crime issue, restriction of prisoners' rights became a matter of national consensus" (p. 382). In 1994 and again in 1996, Congress enacted legislation limiting court-ordered remedies in prison reform litigation (p. 382).<sup>37</sup>

The lesson here is obvious: Namely, federal court judges do not make policy in a vacuum. Instead, courts pay attention to the social and political forces that surround them. As such, the story of prison reform is not simply one of judicial policy making, but of how courts make policy in conjunction with other parts of the government, and the people as well.<sup>38</sup> To their credit, Feeley and Rubin call attention to the myriad ways in which federal judges took into account the desires of state and federal officials. But they do not consider what this means. In particular, how should courts interact with other parts of the government in sorting out highly contentious social issues? Do inherent limits on judicial authority constrain judicial policy making? More specifically, can courts make policy (and have that policy stick) if the implementing community disapproves of the courts' initiatives? If not, is policy making truly a standard method of judicial action?

In asking these questions, I do not mean to suggest that courts do not make policy. But judicial policy making is not truly analogous to agency policy making. Sometimes courts appear to behave an awful lot like agencies, and prison reform litigation may fit this mold.<sup>39</sup> Yet even here the courts' sensitivity to the preferences of elected officials suggests otherwise; that is, courts almost always take into account that they have "neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of [their] judgments."<sup>40</sup>

### III

#### CONCLUSION: THE LEAST DANGEROUS BRANCH?

To say that inherent limits on judicial authority compel successful policy-making judges to play ball with other parts of the government begs

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37. In 1994, Congress enacted the Violent Crime Control and Law Enforcement Act, legislation requiring an individual prisoner to demonstrate that alleged overcrowding violates her Eighth Amendment rights. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. In 1996, Congress enacted the Prison Litigation Reform Act, legislation that limits the court's power to, among other things, appoint special masters, approve consent decrees, and maintain jurisdiction over prison reform litigation. *See* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66.

38. This also means that the courts' power to make policy will be constrained—if not eliminated altogether—when the people and their representatives reject such judicial initiatives. In the case of prison reform litigation, populist resistance ultimately overtook judicial policy making. *See supra* notes 36-37 and accompanying text.

39. With that said, courts need not follow the Administrative Procedure Act or other law maker specified procedures.

40. THE FEDERALIST No. 78, at 490 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

the more fundamental question of whether courts ought to shape public discourse by managing schools, prisons, and the like in the first place. The answer to this question, for reasons detailed above, cannot be that courts and agencies make policy in fundamentally similar ways. Moreover, without an affirmative justification for the administrative state, the argument that the modern state in and of itself legitimates judicial policy making seems ill-founded. Weaknesses in Feeley and Rubin's proof, however, do not mean that traditionalists are correct in arguing that courts ought not to shape public discourse through value-laden policy judgments.

Traditionalists miss the mark when arguing that "[t]he judiciary's frequent intervention in ordinary political affairs works against both the preservation and the healthy growth of our constitutional traditions."<sup>41</sup> Instead, the Constitution is made more vibrant and more stable by constitutional dialogues among the people, judges, and elected officials.<sup>42</sup> In particular, as Alexander Bickel put it, complex social policy issues, especially those that implicate constitutional values, are best resolved through "the sweaty intimacy of creatures locked in combat."<sup>43</sup> Of particular significance, judges and politicians sometimes react differently to social and political forces. Congress, for example, focuses its "energy mostly on the claims of large populous interests, or on the claims of the wealthy and powerful, since that tends to be the best route to re-election."<sup>44</sup> Courts, in contrast, are less affected by these pressures, for federal judges possess life tenure. Accordingly, because special interest group pressures affect courts and elected officials in different ways, a full-ranging consideration of the costs and benefits of different policy outcomes is best accomplished by a government-wide decision-making process. For this reason, courts and elected officials should both be activists in shaping constitutional values.

Courts should be activist for other reasons as well. Sometimes courts are willing to take a stand on issues that the elected government either is uninterested in or considers too hot to handle. School desegregation, abortion, and reapportionment are examples of courts playing such a leadership role. Elected officials too may need the judiciary to play a leadership role. Late 1960s voting rights decisions (upholding congressional reforms) gave cover to Southern officials willing to comply with the new policy but *unwilling* to take responsibility for it.<sup>45</sup> Another example of this phenomenon

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41. ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* 3 (1989). My point here concerns the soundness, not the legitimacy, of the judiciary's participation in policy making.

42. This point is further developed in Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998).

43. BICKEL, *supra* note 3, at 261.

44. Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269, 273 (1993).

45. See Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 NW. U. L. REV. 985, 1017 (1990).

is prison reform litigation, where prison officials sometimes formed partnerships with federal court judges in an effort to secure funding from state law makers.<sup>46</sup>

Judicial activism, of course, is a far cry from judicial supremacy. Rather, emotionally charged and highly divisive issues are best resolved through political compromises that yield middle ground solutions. In participating in these compromises, courts ought to be activist, not absolutist. Witness, for example, the disastrous backlash that occurred in the wake of *Roe v. Wade*.<sup>47</sup> By seeking to settle the abortion controversy in a single ruling,<sup>48</sup> the Court brought much woe down upon itself and the nation. Had the Court moved more cautiously, allowing the elected government and the people an opportunity to shape abortion rights, there is reason to think that the abortion controversy would have been less intense.<sup>49</sup>

In the case of prisons, judges were able to play a leadership role because the implementing community supported much of their work. But judges who sought to be dictatorial, ignoring the signals elected officials sent them, were far less successful than judges who sought to mediate compromise solutions among the affected interests.<sup>50</sup> Feeley and Rubin certainly understand the critical role that the implementing community played in the prison dispute, calling attention to the ways in which judges worked with state and federal officials. Likewise, they understand that incrementalism and compromise are critical tools for a policy-making judge. For these and many other reasons, *Judicial Policy Making and the Modern State* is an important and valuable book.

With that said, Feeley and Rubin undersell the nexus between judicial policy making and the preferences of elected government officials. Judicial policy making is extraordinarily contextual and, as such, is constrained as much by political realities as it is by the rule of law. More significantly, federal courts are not agencies and, consequently, must operate in accordance with their strengths and limits. One of these limits is the necessity of eliciting elected government support, and with it, the need to pay close attention to the signals sent by elected officials. To put it another way, judicial policy making in the modern state operates in the shadow of the desires of elected government officials.

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46. See *supra* notes 23-24 and accompanying text.

47. 410 U.S. 113 (1973).

48. See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE*, 585-87 (1994); Bob Woodward, *The Abortion Papers*, WASH. POST, Jan. 22, 1989, at D-1.

49. See SUNSTEIN, *supra* note 1, at 114; Neal Devins, *The Democracy-Forcing Constitution*, MICH. L. REV. (forthcoming 1999). In contrast, *Brown v. Board of Education* is a model in judicial statesmanship. See *id.*

50. See Sturm, *supra* note 26, at 871-75, 878-80.