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Floor Remarks of U.S. Senator Lamar Alexander
Introduction of the Federal Consent Decree Fairness Act
March 4, 2005

Mr. ALEXANDER. Mr. President, today I want to talk about a piece of legislation I introduced earlier this week. It is called the Federal Consent Decree Fairness Act. It has to do with federalism, with democracy, with responsibilities of State and local government. It has to do with our effort to try to restrain the growth of the cost of Medicaid so that we can properly fund other programs such as higher education, elementary and secondary education, and research. I introduced that legislation, along with Senator Pryor of Arkansas, who is the lead Democratic sponsor. Senator Cornyn and Senator Kyl joined us at that time.

Since that time, 12 other Senators have asked to join us. I ask unanimous consent that the following Senators be added as cosponsors to S. 489, the Federal Consent Decree Fairness Act: Senators McConnell, Bennett, Cochran, Craig, Domenici, Hutchison, Inhofe, Lott, Roberts, Santorum, Smith, and Warner.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ALEXANDER. I failed to mention an early sponsor and a principal sponsor, Senator Ben Nelson of Nebraska.

Senator Nelson of Nebraska is a former Governor. Senator Pryor is a former attorney general. Senator Cornyn is a former attorney general. I am a former Governor. That explains part of our interest in this. Congressman Jim Cooper, by the way, a Democrat from Nashville, will be the principal Democratic sponsor of this legislation in the House. It has strong bipartisan support.

As I will show in a few minutes, it strongly supports the idea of limiting what we call democracy by court decree. Limiting the idea of Federal courts running the Government has strong bipartisan appeal. It has strong support from the left and the right, because democracy by court decree interferes with democracy. It interferes with the ability of voters to elect officials who are accountable, and then throw them out if they don't like what they are doing.

Consent decrees, which are judicial orders based on the consent of the parties engaged in civil court action, can be an effective judicial tool when drawn narrowly, and with respect to State and local policy choices. Congress passes legislation and sets conditions on grants that must be followed by State and local governments. When they are not followed, it is important for citizens to be able to turn to the court to see that their rights and the rule of law are upheld. That is the heart of the idea of federalism.

Unfortunately, in many cases, rather than preserving the separation of powers between the Federal Government and the State government, consent decrees have the opposite effect. What we are seeing in State after State is government policy controlled by courts and judges instead of by Governors, mayors, and legislators.

For example, in Maine in 2003, the Governor had to propose deep cuts to mental health services for children because consent decrees made it almost impossible to restrain other parts of the budget.

In New York City, Latino parents are upset because schools are forcing their children into bilingual education programs when they want them in a different kind of program to learn English. And why is that happening? Because for the last 30 years, bilingual education in New York has been mandated by a consent decree that the schools have no choice but to obey.

In Los Angeles, a consent decree has forced the Metropolitan Transit Authority to spend $110 million per year on improving city buses. That sounds like a good idea. But that is 47 percent of the Metropolitan Transit Authority's budget spent on just buses, leaving the remaining 53 percent to pay for street and freeway improvements, rail systems, transportation planning programs, and the reduction of debt. Meanwhile, ridership on MTA buses increased only marginally in the first 6 years of judicial management, and residents of Los Angeles complain that other MTA services are suffering, and their elected officials are not able to do anything about it because the courts are running the transit authority.

The State of Tennessee has also become a victim of democracy by court decree. Tennessee, like every State, has to balance its budget. I can speak from experience. I did it for 8 years. I know it involves some difficult choices. Our Democratic Governor Bredesen of Tennessee is making some of those choices. But he can't do it because the Federal Government has refused to let him to do what he feels he needs to do to balance the budget.

Late last year, it became apparent that the costs of the Medicaid program in Tennessee are rising at an unsustainable rate. The Medicaid caseload has gone up 40 percent across this country in the last 5 years. When you combine that with sharp increase in the rate of inflation for health care costs over the regular inflation rate, we get a staggering impact, not only on the Federal Government but especially on State Governors who are balancing their budgets. The inevitable result of that is the Governors reach to find somewhere else to get the money to balance their budget. Where does it come from? It comes from education. It comes from especially higher education. In the last 4 years, Federal spending for K-12 education has gone up about 40 percent. In Tennessee, spending for K-12 education over those same 4 years has gone up about 11 percent.

In other words, Federal spending is going up three times the rate of State spending. The reason is Medicaid is eating up the money, and the Governor is unable to control the growth of Medicaid because the Federal court says it can decide better than the Governor can where those dollars ought to be spent. For example, pre-K education is something on which Governor Bredesen wants to spend the money. He can't charter a preschool program, an important program such as I suppose the distinguished Senator from Connecticut is advocating nationally. His hands are tied. Governor Bredesen has tackled TennCare. He ran for office and said, ``I wanted to be elected to fix the TennCare Program." He has come up with a plan that would result in Medicaid spending in Tennessee rising only $75 million this year instead of the $650 million it will rise without those changes. But he is constrained by a series of four Federal court consent decrees entered into by his predecessors going back 25 years.

These consent decrees dictate policies on medical screening for children, requiring the States to provide patients with high-cost, brand name prescription drugs, and affecting the

ability of States to verify the eligibility of the patients they serve. But most importantly, they deny the voters the opportunity to have a new Governor and a new legislature look at all of their programs and make choices about how and where to spend the money.

In the face of enormous pressures, the Federal courts are going to force Tennessee to maintain programs that the Governor says he would rather not maintain because he would rather spend the money for education.

Governor Bredesen is making painful, difficult decisions. He has proposed cutting 323,000 adults from TennCare and limiting the benefits for the remaining 396,000 adults because he wants to strengthen Tennessee's pre-K and K-12 programs, and have a first-rate system for colleges and universities.

I might emphasize that the services the Governor hopes to limit are not required by the Federal Government. They are optional services that States may or may not offer, according to the Federal law, except they are not as optional as we might think. On January 29, Judge William Haynes, U.S. District Judge, declared he must approve any of those changes. So we have a Federal court judge, not the Governor and legislature, making those decisions.

The Federal Consent Decree Fairness Act contains three main provisions that address many of these concerns. First, it lays out a series of guidelines that will guide Federal courts in approving future consent decrees. Basically, these guidelines follow suggestions which the U.S. Supreme Court made in the year 2004 in a decision in which it expressed concern about the fact that old consent decrees were limiting the actions of newly elected officials and interfering with democracy.

The bottom line of these guidelines is to narrow the consent decrees and encourage the courts to get the decision-making back in the hands of the elected officials as soon as possible.

Second, our legislation creates term limits for consent decrees. Fundamentally, it says any new Governor may go into the court and ask the judge to vacate or modify that consent decree; or a Governor or mayor may do that 4 years after the original date of the consent decree.

Seventy-five of the 100 Senators in this body have served in State or local government before. I am sure they can understand the frustration of being elected to fix the schools, or improve the roads, or repair the prisons, or restrain growth of Medicaid, or improve colleges, and discover they don't have the authority to do it because the Governor or mayor 15 years ago entered into a consent decree and the court approved it, and the newly elected official can't change it.

Finally, the bill shifts the burden of proof from the State and local governments to the plaintiffs in the case.

Under current law, State and local governments must prove that a decree is no longer necessary to protect the plaintiffs' rights. In other words, they must prove a negative. Now the plaintiff will have to prove that the court interference with the decisions of elected officials is still needed.

The court still retains full control of the case. The court still retains the ability to protect the rights of Americans. But the court would have instructions to say that if the parties come to you and say, ``Mr. Court, Ms. Court, we can't solve this problem, will you approve this consent decree?" The court will say, ``I will temporarily get involved in what is

your responsibility, but I will do it under a narrowly defined set of terms and very shortly I will make sure that it gets back in the hands of elected officials."

I have in my remarks, which I will submit in complete form for the RECORD, some of the comments of the Supreme Court in *Frew v. Hawkins* in 2004. The Court took an extraordinary step in inviting the Congress to pass legislation such as this and in suggesting to the Federal courts that they might narrow their consent decrees and as soon as possible get these decisions back in the hands of elected officials.

In other words, the principle here is democracy and whether unelected people or elected people will make the decisions.

This is an especially important piece of legislation at a time when we are considering Medicaid. We are asking States to restrain the growth of Medicaid. We are still spending a lot of money. Over the next 10 years, we propose to spend $1.2 trillion--new dollars. We are not restraining spending much. But if the caseload is growing by 40 percent, and if the cost of health care is rising faster than the normal cost of living, and if we still require Georgia, or Connecticut, or Alabama, or Tennessee, to pay for 43 percent of Medicaid, and we haven't changed the eligibility requirements, and we don't give the States much flexibility, and the Federal court tells the Governors they can't do it, we are giving the States an impossible assignment. The only result will be the gradual destruction of our system of higher education, which is principally funded by State governments.

I strongly urge my colleagues to seriously consider this legislation. I am glad to see 17 Senators of both parties have already signed on. I am glad a leading Democrat in the House, Congressman Jim Cooper, will be sponsoring a version of this bill as well.

I will have printed in the RECORD a series of comments about a book, *Democracy By Decree*, which is the scholarship on which this legislation is based. This book is by Ross Sandler and David Schoenbrod, professors at the New York Law School. The book is published by Yale University Press. It has been widely praised by columnists as evenhanded. Among those who praise the scholarship are former Senator Bill Bradley, Ed Koch, Diane Ravitch, John Sexton, president of the New York University and Dean of the NYU Law School, and Chris DeMuth, president of the American Enterprise Policy Institute for Public Policy Research. Not many pieces of scholarship have support from such a broad spectrum.

I ask unanimous consent to have printed after my remarks the complete comments of those individuals I just mentioned, as well as a column by George F. Will in Newsweek on November 28th, saying that *Democracy By Decree* is one of the most important books on governing in the last 10 years. I ask unanimous consent also to have printed an article from the Wall Street Journal on December 31, 2002, by Thomas J. Main, assistant professor at the School of Public Affairs of Baruch College. I ask unanimous consent that a review of the book by Ross Weiner in the Legal Times also be printed.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SESSIONS. Will the Senator yield for a question?

Mr. ALEXANDER. Of course.

Mr. SESSIONS. Senator Alexander, I appreciate your remarks, having been a U.S. attorney involved in urging certain consent decrees and having been an attorney general and seeing it from the side of the State.

My question is this: What your legislation would do is provide a mechanism to guarantee a periodic review of a consent decree so it would not continue indefinitely.

There are many in this country that are well over 20 years in which judges are intimately involved in details of governing and the local people have to seek approval for any of the most minute changes.

This would not eliminate consent decrees. It would not eliminate their enforcement, but it creates a mechanism by which they are periodically reviewed so as to determine whether they should be extended.

Mr. ALEXANDER. The Senator is absolutely right. Perhaps Congressman Cooper had the best phrase. He said the purpose of this legislation is to keep democracy fresh.

The people are entitled to two things. One is to have their constitutional and Federal rights enforced in the Federal courts. This will continue under this legislation. But they are also entitled to have democratically elected leaders that can make the policy decisions and do the governing, which is what we say to the rest of the world.

We are fighting in Iraq and Afghanistan, sacrificing lives and hundreds of billions of dollars to promote the idea that people have a right to elect their own officials, yet we have drifted into the situation somewhere, as in the Tennessee case, where we have four prior consent decrees that will leave in the Federal courts these decisions and the Governor cannot change them. Even though a previous Governor entered into them, the standards are such he cannot change them.

He has a right to go in there and say, Judge, I hope you will review it. The plaintiff, not the Governor, has to persuade the judge that it needs to be continued. And if it does, the court may continue the consent decree if he considers it to be useful.

Mr. SESSIONS. I say to the Senator, I think that is a very thoughtful and important change he is proposing. We need to give it the most serious consideration. It would strike me that it does go to the heart of what democracy is. We created a legislative and executive branch elected by the people and empowered to deal with certain of these issues. It should be only for extraordinary things that a court would maintain extended jurisdiction over the elected representatives.

Mr. ALEXANDER. I thank the Senator from Alabama.

When the word ``judges'' is mentioned in this Chamber, we automatically divide, especially during this season. That is why I am so glad Senator Pryor of Arkansas, Senator Nelson of Nebraska, and Congressman Cooper have joined in this. Former Senator Bill Bradley has praised the ideas found in *Democracy by Decree.*

This is not a Democratic or Republican idea. Democracy is everyone's idea in this country. One reason it has such broad support is that it is not just the court's fault that this is happening; sometimes Governors and mayors do not want to deal with the prison problem. They do not want to deal with the Medicaid problem, so they unload it on the courts. That hurts the people who should be helped. It deprives the voters of their right to choose elected officials.

The bill has broad bipartisan support. I hope it continues to have.

Praise for Democracy by Decree

(By Ross Sandler and David Schoenbrod)

``The first book that shows how courts can do their proper job of protecting rights without allowing elected officials off the hook for their proper job of making policy."-Former Senator Bill Bradley

``A fascinating book for someone like me who regretted agreeing to a court-approved consent decree limiting the city's authority in programs involving prisons, welfare, education, homeless shelters, etc."--Ed Koch, former mayor, New York City

``A brilliant, well-written, and brave account of how federal courts have distorted our political system by taking control of complex institutions like schools and prisons--sometimes for decades--instead of enforcing rights, which is their proper domain."--Diane Ravitch, New York University

``With fascinating blow-by-blow accounts, Sandler and Schoenbrod expose how advocates for one interest group inevitably undermine the interests of others and thwart the ability of those in responsibility to balance interests for the common good."--Philip K. Howard, author of The Death of Common Sense

``Democracy by Decree is an impressive and thoughtful analysis of the current court-centered rights culture in which it is too easy for elected officials to `pass the buck' to courts while taking actions that are blatantly unconstitutional."--Nadine Strossen, president, American Civil Liberties Union, and professor, New York Law School

``Democracy by Decree shows how courts can protect rights and still let mayors and governors do their job."--John Sexton, president of New York University and dean of New York University School of Law

``Sandler and Schoenbrod's account--really a discovery--of the existence of a second government in our midst is meticulous, nuanced, and alarming. By showing how unilateral judicial government undermines both democracy and individual rights, they have done a significant service to both." Christopher DeMuth, president, American Enterprise Institute for Public Policy Research

[From Newsweek, Feb. 28, 2005]

Judges and ``Soft Rights''

(By George F. Will)

On Feb. 15 the New York Times carried this headline: Judge Orders Billions in Aid to City Schools. The derangement of American government, and the decay of democratic sensibilities under rule by the judiciary, are apparent in the fact that such headlines do not enrage, or even startle.

In a case that began 12 years ago, and will surely run at least 12 more, Leland DeGrasse of the New York Supreme Court has decreed that an extra $5.6 billion, a 43 percent increase in the school budget, must be spent on the schools every year--presumably until he decides that the schools are delivering a ``sound basic'' education. And over the next five years another $9.2 billion must be spent to improve class sizes and facilities.

Why? Because the state constitution says, ``The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of the state maybe educated'' and this has been interpreted to guarantee a ``sound basic'' education. Those two adjectives are the slender reeds supporting this latest excess by the imperial judiciary.

In 1993 the Campaign for Fiscal Equity, a self-generated group, unelected and accountable to nobody, sued, charging that the constitution's adjectives were not being fulfilled. Between 1997 and 2003 spending on the city's schools rose $4.8 billion--54.5 percent. But DeGrasse, who apparently thinks he learned in law school how to fix urban education, believes the canard that in primary and secondary education there is a clear causal connection between financial inputs and cognitive outputs--that the best schools are the ones on which the most money is spent. Actually, New York ranks third among the states in per-pupil spending ($11,218; the national average is $7,734). The highest per-pupil spending is in Washington, D.C., which probably has the nation's worst schools.

DeGrasse's ruling is just the latest of thousands of such instances of judicial overreaching involving schools, prisons, hospitals, transportation, environmental policies and other matters. Constitutional or, more often, statutory language stipulates praiseworthy but vague goals to be enforced by courts. Then ``public interest'' groups, eager to wield the power of elected officials without the tiresome matter of running for office, go to courts.

The courts, with an arrogance often tacitly encouraged by elected officials eager to avoid difficult choices, wander beyond their competence. They do not merely enforce compliance with the law, they dictate in minute detail what shall constitute compliance--e.g., the water temperature in prison showers, the soap used to wash prison floors, the frequency with which prison windows are washed. Really.

In 2003 two professors at the New York Law School, Ross Sandler and David Soenbrod, published ``Democracy by Decree: What Happens When Courts Run Government'' (Yale), perhaps one of this decade's most important books on governance. They explain how federal standards are attached to federal money by Congress's heroically transmuting aspirations into rights-enforceable claims. Congress has become a bestower of mass-produced rights--to ``healthy'' air, to ``appropriate'' education for the handicapped, etc.

These are what Sandler and Schoenbrad call ``soft rights": ``Traditional common law rights, such as the right against trespass, are typically negative. They tell government what it cannot do. Soft rights, such as the right to healthy air, are typically positive. They tell government what it must do." In practice, judges--unelected, unaccountable and inexpert--often dictate what it must do.

Some political activists have decided that, the dismantling of segregation proved that the primary means of social improvement should be through judicially enforceable rights. And many liberals, frustrated by the public's increasing conservatism, are unwilling to have the patience required by democracy--the politics of persuasion. They know that rights claims can truncate debate and trump policy considerations about the community's conflicting imperatives and priorities. And ``public interest" groups have become skilled at getting themselves entitled to control a sphere of public policy. They negotiate consent decrees, many of which have empowered courts-as-legislatures to formulate public policies for 20 or 30 years. All of which confirms Sandler and Schoenbrod's central point: Not all that lawyers do in their various venues amounts to the rule of law, as a democracy ought to understand that.

In responding to DeGrasse's hubris, New York might consider Andrew Jackson's strategy. In 1832 the Supreme Court rendered a decision favoring two imprisoned missionaries in Georgia, a decision Jackson disagreed with, vehemently. He reportedly said: ``[Chief Justice] John Marshall has made his decision, now let him enforce it." Marshall could not; the missionaries remained in prison.

New York's Supreme Court can neither tax nor spend. The state legislature is not a party to the suit, so it cannot be held in contempt. Perhaps it should just ignore the court's ruling as noise not relevant to the rule of law. Which happens to be the case.

[From the Wall Street Journal, Dec. 31, 2002]

Closed Doors, Open Season

(By Thomas J. Main)

Ten prisoners in a Philadelphia prison sued Mayor Wilson Goode in the early 1980s claiming that conditions there violated their rights. The result was a consent decree, in 1986, that limited the number of prisoners who could be held in the city's jails.

And the result of the decree itself? ``A blood-chilling crime wave," write Ross Sandler and David Schoenbrod. In 18 months, ``police rearrested 9,732 defendants released because of the consent decree." They were charged with ``79 murders, 959 robberies, 2,215 drug dealing crimes, 701 burglaries, 2,748 thefts, 90 rapes 14 kidnappings, 1,113 assaults, 264 gun-law violations and 127 drunk-driving incidents." This is only one of the hair-raising stories in ``Democracy by Decree," (Yale, 280 pages, $30) a critique of astonishing efforts to govern society through the miracle of what the authors call ``institutional reform litigation."

The tactic is simple: A crusading lawyer notices that some public entity--a prison, a hospital, an environmental or child-welfare agency--is performing below expectations, as the lawyer sees it. He then finds ``parties" willing to say they have been injured and searches for a legal hook--a statute, regulation or right whose violation offers the basis for a lawsuit.

And legal hooks abound. Congress regularly passes laws with sweeping guarantees vaguely phrased. Did the Americans with Disabilities Act (1990) really require curb ramps at every intersection within just five years? Did the Clean Air Act of 1970 really promise that the air will be entirely clean by the end of the decade? (And when, precisely, is air ``clean"?) Can schools immediately offer a free and appropriate education to all children with learning disabilities, as the Education for All Handicapped Children Act (1975) seemed to require?

These may be worthy goals, if they are indeed required by statute. But they are not easily achieved. Indeed, state and local governments are likely to act on them as they act on everything else: incrementally, tentatively and piecemeal. Thus it is often possible for public-interest lawyers to make a prima facie case for one violation or another. Not that they need do much more than that. Many public officials--rather than submit to trial and the risk, however slim, of draconian punishment--settle such cases by entering into consent decrees with plaintiffs.

Consent of the sued? Public officials would rather settle than fight.

From this point on, as Messrs. Sandler and Schoenbrod show, the powers of elected officials ``are eroded in favor of a negotiating process between plaintiffs' attorneys, various court-appointed functionaries, and lower echelon officials." This controlling group, as the authors call it, ``works behind closed doors" to draft complicated decrees. Its members bargain, log-roll and cut deals, and the judges before whom the original suit was brought rarely intervene.

Under such circumstanes, the concerns of ordinary public managers get short shrift. In Jose P. v. Ambach, for instance, a consent decree dictated the terms of ``every aspect of [New York's] special education; from staffing to teaching and collecting data." With appendices, it filled 515 pages.

And once a consent decree is agreed on, it is very difficult to change, even in the face of dramatic developments. In 1971, for instance, the New York City Housing Authority was accused of failing to give rent-delinquent tenants due process. The city signed a consent decree that imposed elaborate, court-supervised procedures for eviction. Twenty years later, the crack-cocaine epidemic hit public housing, and everyone--city officials and law-abiding tenants alike--wanted to speed along the eviction of drug-dealers.

The decree's controlling group, however, objected to quicker procedures. Its members even disputed ``whether living next door to a drug dealer actually increased the risk of criminal violence." It took two years of legal wrangling before the Housing Authority could make its changes, and by then the tenants had hired new lawyers to fight ``against the lawyers who theoretically were representing them."

It should be said that Messrs. Sandler and Schoenbrod do not oppose all public-interest litigation. They note that lawsuits have helped put an end to racial segregation and to the abominable conditions in various prisons and mental institutions. They accept court intervention in even less dramatic cases, as long as some common-sensical reforms are put in place, like opening controlling-group meetings to the public and making it easier to change outdated provisions. They note as well that the rights asserted by Congress are too often ``aspirations rather than practical possibilities." In any case, making minute policy adjustments is best left to the political branches of government, not the courts.

One of the book's most striking anecdotes illustrates this. In the early 1990s, New York tried to install sidewalk toilets, only to run into the problem of making them large enough for wheelchairs--as required by regulators interpreting federal law--without making them inadvertent criminal dens. At a public meeting, the spokesmen for the toilets' maker, whose designs were apparently not generous enough, found themselves confronted by angry citizens in wheelchairs. Then in walked another advocate, whose disability, the authors write, ``was that he grew to be only about three feet high."

``I don't care about wheelchair accessibility," this man declared belligerently. `` can't reach the higher toilet seat in the wheelchair-accessible toilets. What about that?"

To this question, the law has no good answer.

[From the Legal Times, May 5, 2003]

THE CORROSIVE CONSENT DECREES

(By Ross Weiner)

Democracy by Decree: What Happens When Courts Run Government is a thought-provoking book about the fundamental issues of democracy, federalism, and separation of powers. Authors Ross Sandler and David Schoenbrod put forward a forceful critique of the consent decrees that often result from institutional reform litigation and have, over time, reduced the power of democratically elected state and local institutions to make public policy choices.

Yet Democracy by Decree is not a wholesale attack on class actions or the consent decrees that often settle these cases. The authors, who both teach at New York Law School, are content to offer reform proposals, but do not advocate removing the judiciary from its important place in protecting the rights of aggrieved plaintiffs. But they do forcefully attack the habit of using courts, and class actions in particular, to make public policy decisions that are better left to the democratically elected.

The authors argue that the courts are the proper forum for remedial action or for limited prospective action to ensure that constitutional rights are not violated, but that institutional reform litigation creates many negative unforeseen consequences when it encroaches upon the elected branches of government by instituting widespread oversight of public institutions.

Sandler and Schoenbrod trace the historical development of institutional reform litigation to the civil rights movement. They argue that the heroic achievements of civil rights era attorneys in dismantling segregation inspired a generation of attorneys to become ``public interest" lawyers to fight for social change. Many elected Southern officeholders at the time actively worked to subvert the constitutional rights of their African-American constituents, and this massive resistance forced the judiciary to take over the management of several public institutions to ensure that African-Americans could freely exercise their constitutional rights. They note that the difference between the attitudes of local and state officeholders during the civil rights era and the attitudes of later elected officials is often lost on these public interest attorneys.

The authors argue that, in much of the recent institutional reform litigation, the rights at issue and the behavior of elected officials is less stark than that during the civil rights era. While their policies may in fact violate statutory rights, their intentions are far less nefarious. Rather, this litigation often concerns statutory rights or federal aspirations, while local elected officials attempt to balance public policy choices with their constituencies' own limited financial wherewithal. These officeholders often support the underlying rights being enforced, but are simply unable to muster the public resources to attain those unfunded federal mandates. Such new rights often call for government to provide something to its citizens, unlike a more traditional right, which called for government to refrain from taking something away from the citizenry.

The authors postulate that most of these officeholders are a far cry from the Southern segregationists, but that the public interest lawyers and the judiciary have devised standard remedial actions that do not differentiate between the attitudes of officeholders and the rights being enforced.

Democracy by Decree provides many examples of cases that illustrate the perils and unforeseen consequences of institutional reform litigation. Jose P. v. Ambach, which began in 1979, shows how the judicial process usurped special education policy in New York City.

This case has its roots in the congressional passage of the Education for All Handicapped Children Act. The legislation contained vague goals, but with no clear mechanism outlining for states and localities the means to achieve the nebulous ends outlined in the statute. The federal right to special education created by this statute begat class action litigation to enforce such a right when New York City could not comply with all the goals outlined in the statute.

The litigation ultimately resulted in a court finding New York City in violation of the statute, and affirming a very broad consent decree among plaintiffs and city officials, which mandated many changes to special education policy in New York City. Over the decades in which this decree has been in place, the court and the plaintiffs' attorneys have had the authority to reject or approve all changes to the city's special education program. This has shifted policy-making power from open forums among the elected City Council and city agencies to closed-door negotiations between attorneys.

The authors show how this has led to many unintended consequences, including the locking into place of special education policy designed more than two decades ago, which now may be outdated; the reduction of money available for students in nonspecial education classes; and the awarding to plaintiffs' attorneys of a significant degree of control over a large portion of the city's budget.

An intended consequence of these types of consent decrees is to limit the variety of policy choices available to elected officials. The authors contend that when public interest attorneys were confronting massive resistance, this was the correct choice for the judiciary. But when confronting public officials who attempt to deal with such issues by balancing the proper amount of funding for special and nonspecial education programs, more flexibility is required.

The authors argue that it is sometimes appropriate to restrain the future actions of private citizens indefinitely in private litigation, but in institutional reform litigation--in the absence of an intent to impede the constitutional rights of individuals--present day officeholders should not be allowed to sign away the rights of the people and their future representatives to make public policy choices.

Sandler and Schoenbrod emphasize sympathetically that they, too, were once public interest attorneys. And they avow their admiration for the efforts of civil-rights lawyers to fight segregation. Thus, the tone of the book feels similar to that of a journalist paying homage to Bob Woodward and Carl Bernstein, while attacking the type of journalism that may have developed in the wake of Watergate. Such rhetorical shields appear to be attempts to protect their work from political criticism by public interest attorneys and the lobbying groups they populate. Their homage to the roots of public interest litigation does bolster the credibility of Democracy by Decree, and it is to their merit that they do not resort to the tired clichs often heard in the political arena about judicial activism.

At its heart, Democracy by Decree is an ode to representative government. The authors demonstrate that the judiciary has an important role in protecting the rights of citizens, but argue convincingly that when it comes to making basic public policy choices, representative democracy may not be perfect, but it is often better than any viable alternative.