BOOK REVIEWS

Democracy by Decree: What Happens When Courts Run Government
Ross Sandler and David Schoenbrod
New Haven and London: Yale University Press, 2003, 280 pp.

Professors Sandler and Schoenbrod collect a compelling set of vignettes that show how the courts, over the last few years and at an exponential rate, are replacing state and local officials in running many important state and local services, such as welfare, jails, prisons, noise pollution, and foster care. The judges typically issue details decrees, totaling hundreds of pages, instructing mayors, governors, prison wardens and others how to run government. Instead of government by the people, there is government by judicial decree, or—more precisely—government by plaintiffs' lawyers, for they are the ones that draft the decrees.

The authors should know their subject. During the 1970s, both of them worked as public interest lawyers for the National Resources Defense Council, and their list of acknowledgments includes people such as the long-time executive director of the NRDC, the former chief of Vice President Hubert H. Humphrey's office of liaison with state and local governments, and Edward I. Koch, former mayor of New York City.

Now, after decades of experience, the authors have a different view. "Believers in democracy by [judicial] decree," they note, "argue that the political process is not fast enough or cannot be trusted. We thought the same when we were public interest lawyers but we were wrong. Looking back, we see that our own accomplishments came chiefly from politics as usual, not democracy by decree" (p. 31).

The authors explain that when they first started bringing suits in 1973 they lost, but by "the end of the 1970s we were winning these cases and negotiating lengthy consent decrees that bind such governments this day" (p. 28).

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Some of the authors' friends also no longer share the same enthusiasm for the judicial revolution that they helped create. When Edward I. Koch was a congressman, he had no trouble voting for federal laws that mandate vague restrictions on local government. "I voted for that [a federal law that created a right to public transportation for the disabled]. You'd be crazy to be against that. When you are a member of Congress and you are voting a mandate and not providing funds for it, the sky's the limit" (p. 20). As New York City mayor, he often found himself hamstrung by these judicial decrees.

The judicial revolution had a very quiet beginning. When Congress considered the Clean Air Act of 1970, it created federal standards and proposed that federal officials and only federal officials would be responsible for enforcing the law. The environmentalists argued that citizens should be able to bring suits and their lawyers should be able to collect attorneys' fees paid by the loser. "This citizen suit provision was inserted into the pending bill and passed Congress without attracting much attention" (p. 27).

That provision for attorneys' fees is no small matter, for it allows the lawyers to do good, in their view, and also to do well. There seems to be little judicial scrutiny of these fees. It is, after all, other people's money. In one case, the plaintiffs' lawyers received more than $2.1 million in fees for work performed during June 1989, and January 1999, even though the case settled in 1986 (p. 131).

Other things conspire to make these suits happen. Judges often like being reformers deciding important policy issues (how to make the welfare system better) instead of deciding humdrum matters (did the defendant violate a trademark). The judges tend to defer to the plaintiffs' lawyers in approving the decrees, and those lawyers like sitting at the table as equal participants with the lawyers for the city or state.

The defendants are also part of the problem, for they often prefer to settle and accept detailed consent decrees that go beyond what any statute might require because a settlement benefits their corner of the bureaucracy. For example, the decree will ensure that the judge will keep money coming their way, so that they do not have to fight with other parties who have claims on the city or state budget. Thus, the San Francisco School Board insisted that it was still in violation of the law, so that the money to "cure" the violation will keep flowing. The defendants use the lawsuit to "force" them do what they would like to do but do not have the political backing to accomplish (p. 131).

One part of the equation that is missing are the plaintiffs—not the plaintiffs' lawyers but the actual plaintiffs. Too often, no one pays attention to them. For example, in one prison reform suit, the plaintiffs' lawyers wanted the city to close the old jail and build a new one next to LaGuardia Airport, but many of the prisoners opposed the relocation because it would be a lot harder for their families to visit them. The

"clients" fought with *their* lawyers and the lawyers won. The lawyers seemed to regard their "clients" like a fifth wheel (pp. 124–25).

The growth of federal judicial involvement in the nuances of municipal government is exponential. From 1789 to 1939 there were no federal statutes regulating state and local governments. In the decades of the 1930s Congress enacted one such statute, the Davis Bacon Act (1931), requiring that the local prevailing wage be paid to construction workers employed under federal contracts and financial assistance programs. In the 1940s Congress enacted another such law, the Hatch Act (1940), prohibiting various public employees (including state employees) from engaging in certain political activities. In the 1950s Congress enacted no new legislation. By 1996 a federal commission found more than 200 separate mandates involving 170 laws that reach into every little interstice of state and local government. In just one year, 1994, there were more than 3,500 judicial opinions arising under more than 100 separate federal laws involving state and local governments. Judicial decrees rule prisons in 41 states and local jails in all 50 states. There are similar figures for schools, mental hospitals, environmental matters, and so forth (pp. 4, 21–23, 228–37).

Are the judicial decrees good policy? Consider one example the authors offer dealing with prison reform. In 1982 some prisoners sued Philadelphia Mayor Wilson Goode and others over allegedly unconstitutional prison conditions. Mayor Goode proposed to agree to a decree that would limit the number of prisoners kept in the city's jails. The District Attorney, who was not part of the suit, heard about the negotiations and protested on the grounds that this reduction in the prison population would lead to bail jumping of those most likely to be guilty.

The mayor's interests were different than the D.A.'s interests. By agreeing to release prisoners, the mayor would not have to spend money to fix the prisons. Instead, the mayor agreed to changes in criminal procedures that the D.A. would have to enforce. If the prisoners sued in the future, the damages would come from the D.A.'s budget, not the mayor's. The D.A. tried to intervene in the suit but the federal judge did not allow him to do so. The decree went into effect and what resulted was "a blood-chilling crime wave." In an 18-month period, the Philadelphia police rearrested nearly 10,000 of the defendants that the mayor's consent decree had freed. Those defendants were charged with 79 murders, 90 rapes, 14 kidnappings, more than 700 burglaries, and nearly 1,000 robberies. One criminal (not knowing that he was dealing with an undercover policeman) asked for the illegal transaction to be moved across the street to the Philadelphia side, so that they could take advantage of the consent decree if they were arrested (pp. 185–86).

While attacking such consent decrees, the authors make clear that they do not oppose all judicial oversight. For example, they fully support the desegregation decisions. In those cases, the Constitution does grant a right to "equal protection," and those suffering discrimination were often

denied the vote because of discriminatory voting laws. They could not use the political process to seek redress.

The authors conclude that courts should continue to enforce rights, because government must not be above the law. But they should leave to elected officials the right to make policy and manage operations, or we will have a government of lawyers instead of a government of law. The authors suggest reform based on the model of the Prison Litigation Reform Act of 1995. For example, the consent decrees should have finite limits. If the plaintiffs want the decree to continue, they should have the burden to show that it is still needed to prevent concrete abuses.

The authors persuasively argue that future politicians should not be bound by the consent decrees of their predecessors (p. 227–28). For example, when New York City Mayor Abraham Beame objected to a federal court order requiring him to ban parking in the Manhattan business districts (because of general federal clean air requirements), he learned that the time to appeal the judge's order was not in 1977 (when the judge issued it) but four years earlier, in 1973, when John V. Lindsay was mayor (p. 168).

The Prison Litigation Reform Act also prevents federal judges from issuing orders that are not needed to stop violations of federal law, "even if a defendant consents to the entry of the decree" (p. 189). That provision may also be a useful tool to reform this area of the law.

The authors try to explain why we have moved to government by decree, but some of their explanations do not ring true. They blame, among other things, the enactment of the 17th Amendment, establishing the direct election of the Senators, so that the states lost "their" representatives. Yet the people ratified that amendment in 1913, and the revolution did not begin until the middle 1970s.

The authors also refer to the New Deal and the Court's abdication of commerce clause matters to Congress. While the Court allowed a much broader federal power after 1937, it is interesting that Congress did not use that power *against the states* until much later. When Congress adopted the Fair Labor Standards Act in 1936 (during the New Deal), the act admittedly applied in a far-reaching manner. It set the minimum wage to be paid by businesses engaged in interstate commerce (enterprises competing in national and foreign commerce), and also by more local (intrastate) commercial enterprises as well. Even so, Congress did not impose such demands on ordinary state and local government units as such. Congress did not brush away this distinction until 1974. Then, Congress exercised a scope of congressional power over the states that even the New Deal Congress had not attempted.

While I do not agree with the authors' list of root causes for the present situation, that does not detract from this useful volume that is, frankly, a fun read.

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