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DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT. By Ross Sandler[1] and David Schoenbrod.[2] Yale University Press. 2003. Pp. 288. $30.00

Mark Tushnet[3]

This is a deeply confused book. Not that the authors' stance is unclear: They have seen federal courts in action, and they don't like what they see. Their subject is federal judicial supervision of state and local governments through injunctive decrees. The authors' position wouldn't be confused—or at least would be confused in a different way—if they dealt with injunctive decrees aimed at enforcing what the judges took to be constitutional requirements. In such cases there's at least something coherent that can be said about judges displacing democratic decision-making.

Sandler and Schoenbrod, though, don't deal with constitutional cases. Their concern is judicial enforcement of federal statutes, such as the Clean Air Act and the Education for All Handicapped Children Act. As they say in their preface, "In most cases, Congress had enacted a law that told federal judges to enter decrees against state and local governments, or the state and local officials had consented to the entry of the decree against themselves, or both" (p. vi). But, the authors assert that these decrees "are nonetheless antidemocratic" (p. vi).[4]

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4. Despite their focus on judicial enforcement of federal statutes, Sandler and Schoenbrod occasionally refer to litigation based on the Constitution, which adds confusion to the argument. They have a chapter on the Prison Litigation Reform Act of 1995, which was directed primarily at litigation aimed at enforcing the Eighth Amendment's ban on cruel and unusual punishment. (Curiously, the chapter frames the story of the PLRA around a truly minor provision requiring federal courts to allow state officials to

Sandler and Schoenbrod claim to speak on behalf of democracy in criticizing judges in these cases, and that's where the confusion enters. You can get into complicated discussions of the democratic origins of constitutional mandates when dealing with decrees purporting to enforce such mandates. But there's nothing complicated about the democratic pedigree of federal statutes. Assume for the moment that judges have faithfully interpreted the statutes (Sandler and Schoenbrod seem to think they have). Then, the judicial decrees do no more than pit the expression of one democratically responsible body—Congress (and the President)—against some others—governors and state legislatures, mayors and city councils. You can't get any purchase from democratic theory on how that sort of conflict should be resolved. According to Sandler and Schoenbrod, "With the supreme legislature in the land positively commanding courts to lead the way, many judges marched forward" (p. 30).[5] The question is irresistible: Would the pro-democratic thing be for judges to refuse to comply with Congress's commands?[6]

What's even more confusing is that Sandler and Schoenbrod, apparently striving for a larger audience than most academic books reach, sprinkle their argument with examples that quite frequently don't make the point they say they're making.[7]

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intervene in prison litigation. I suspect that Sandler and Schoenbrod framed the story this way because someone told them that a book aimed at a non-specialist audience has to have good anecdotes, and the actors in the story they tell are a moderately interesting cast.)

5. The confusion pervades the book. So, for example, Sandler and Schoenbrod write, "When judges impose such decrees, it is the voters who lose. They lose the ability to hold elected officials accountable for the performance of governmental institutions" (p. 9). But, voters still have the power to hold members of Congress accountable for the statutes on which the judges relied, and to hold mayors and members of city councils accountable for accepting consent decrees. *See also* p. 154 ("The problem begins with Congress.").

6. The most promising theoretical perspective available here is one drawn from federalism and an account of constitutional limits on national power. But, again putting aside the problem that judicial enforcement of *such* limits raises the protean issues of democratic legitimacy that Sandler and Schoenbrod try to avoid by focusing on statutes, the fact of the matter is that there's no serious constitutional challenge (yet) available against the statutes Sandler and Schoenbrod discuss: They are all pretty straight-forward uses of Congress's power to regulate commerce among the several states or to condition the appropriation of federal funds on compliance with congressional requirements.

7. For example, Sandler and Schoenbrod head one section, "Plaintiff's attorneys have the de facto power to veto modifications in the long-term plan" (p. 127). The anecdote in this section involves a consent decree stipulating procedures to be used to evict tenants from public housing. The housing authority sought to modify the decree so that it could evict crack cocaine dealers. Did the plaintiffs' lawyers have a veto over the modification? "After three days of testimony, Judge Loretta A. Preska issued a fifty-five page opinion deciding that on balance it was permissible for the New York City Housing Authority to use the lawful, speedy procedures" (p. 129). Legislatures would like governors

Early in the book they describe their involvement in litigation to enforce the Clean Air Act. The story starts with an agreement between New York's Governor Nelson Rockefeller and New York City's Mayor John Lindsay to raise bridge tolls to finance improvements in mass transit. Note, right away, that here we have two elected politicians coming to an agreement, without any judicial involvement. But, Rockefeller's and Lindsay's successors responded to the plan's unpopularity with drivers, and stalled in implementing the agreement. At that point, Sandler and Schoenbrod say, "Relying on Congress's declaration that citizens had a right to clean air, we decided that we would be the ones who would enforce that right in the New York courts" (p. 29). They filed an action under the Clean Air Act, but the federal district judge refused to enter the injunction they sought. The court of appeals reversed. So, did the courts end up setting the fees charged on the bridges into New York? Not exactly. "Led by Daniel Patrick Moynihan in the Senate and Elizabeth Holtzman in the House, Congress outlawed both our lawsuit and Governor Rockefeller's decision favoring tolls" (p. 30). How this is supposed to demonstrate the evils of "democracy by decree" escapes me.[8] As far as I can tell from Sandler and Schoenbrod's account, there never was even a decree entered, much less any enforcement action taken.[9]

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and presidents to have veto powers that effective. (Perhaps the problem is that the Housing Authority couldn't impose the new rules directly, but had to go through a court hearing, as Sandler and Schoenbrod suggest in writing, "While this litigation continued, the tenants . . . lived with the danger and intimidation of drug dealers next door" (p. 129). To evaluate the cogency of this concern, we would have to know something about the administrative processes in New York, and about the politics of administrative rule-change. My guess is that the Housing Authority probably would have been able to impose the new rules somewhat more rapidly than actually occurred, but not instantaneously.)

8. Sandler and Schoenbrod earlier outline the structures of politics that, they believe, lead state and local officials to fail when they oppose federal mandates:

> Advocates for the new initiative emphasize benefits and hide costs. State and local officials cannot easily oppose new federal programs aimed at helping constituents, and may even be co-opted into supporting a mandate in order to get a larger share of federal funds. Even when some oppose mandates, they have little success because the price of mandates is paid by everyone and therefore is the particular concern of no one (p. 24).

The stories Sandler and Schoenbrod recount systematically undercut the theory on which they rely, leading me to wonder whether the theory is right.

9. I should note the following argument, made, as far as I can tell, nowhere in Sandler and Schoenbrod's book: The New York Clean Air Act story does demonstrate the evils of democracy by decree, because the mere possibility that a decree would be entered forced New York's delegation in Congress to use some of their political chits to secure legislation, thereby depriving them of the chance to use those chits on some other issue of interest to their constituents. That argument is better than any Sandler and Schoenbrod offer, but, because it deals with changes on the margin of the politically possible, the argument could not support the level of vitriol Sandler and Schoenbrod direct

Sandler and Schoenbrod do sketch—or perhaps better, hint at—two more substantial arguments about judicial enforcement of congressional statutes, but they develop neither in sufficient detail. First, they sometimes direct their ire at Congress for enacting the statutes they describe.[10] Fair enough, but hardly compatible with their simple-minded criticisms of judges for displacing democracy. Second, and more important, Sandler and Schoenbrod periodically acknowledge that the processes bound up with judicial enforcement of statutory requirements are, at bottom, political processes. As they put it, "Consent decrees transfer power not from politicians to a judge but from one political process to another" (p. 7). I would think, then, that the interesting question is how one political process compares to the other, in terms of democratic accountability and policy effectiveness. Sandler and Schoenbrod sketch the political process involving courts, but say almost nothing, at least directly, about the alternative[11]—and, again, their stories about litigation suggest pretty strongly that the two political processes are not as different as Sandler and Schoenbrod appear to believe.[12]

Judges enforcing statutory requirements are, as Sandler and Schoenbrod say, marching to Congress's command. We can't fairly fault them for acting against democratic norms when they do so—unless, somehow, Congress's actions are inconsistent with democratic norms. The obvious thing to say here is that the problem is one of excessive delegation of authority, the topic of Schoenbrod's prior book.[13] Sandler and Schoenbrod sketch some standard, public-choicy arguments explaining why Congress might want to delegate authority. They point out that the stat-

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(unjustifiably) against courts. (Note that the villain in *this* story is Congress, which creates the possibility of litigation, not the courts, who never have to do anything for the adverse political consequences to flow.)

10. For example, Sandler and Schoenbrod write, "The perversion of court enforcement from rights enforcement to policy imposition is the fault . . . of Congress" (pp. 139-40).

11. Perhaps Sandler and Schoenbrod believe that merely labeling a process associated with the courts as political is sufficient to discredit it, no matter what the alternative political process is. This may do in the popular press, and perhaps has some analytic bite in connection with judicial enforcement of constitutional rights, but it is inadequate in a serious academic analysis.

12. I use this qualified formulation because Sandler and Schoenbrod do not provide anything approaching a full account of their understanding of the alternative political process.

13. DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993). Sandler and Schoenbrod are concerned with delegation to courts rather than to administrative agencies, but the associated problem of democratic responsibility for actual policymaking is the same whether the assignee of policymaking authority is an administrative agency or a court.

utes they discuss involve what they call "soft rights," which they define as imposing "aspirational" obligations (p. 103). Why does Congress enact soft rights? Most of the time, Sandler and Schoenbrod say that Congress does so because such rights are popular. So, for example, they write:

> In enacting a statutory right for children with disabilities to receive an appropriate education, Congress emphasized the image of deaf, blind, and wheelchair-bound children kept out of the school building or, even more pathetically, simply denied an education. We can all agree that such neglect is morally wrong (pp. 103-04).

But, of course, you can't get any mileage out of a democracy-based criticism of legislation on the ground that such legislation is popular. Sandler and Schoenbrod continue by noting, "The right that Congress wrote into the fine print of the act . . . went far beyond the image that lent poignancy to the campaign to create the right" (p. 104). The real question, then, is why Congress did so.

Part of the answer, surely, is ease of drafting: Congress enacts a broadly worded statute to ensure that the people it really wants to benefit from the aspirational right will actually receive it. Another part of the answer is interest-group pressure: Once an issue is ripe for legislative treatment, interest groups with related issues try to get a sympathetic legislator to attach a provision addressing their issues. Sandler and Schoenbrod provide a third component of the answer: "Politicians are regularly tempted to sacrifice the long-term public interest for their own short-run private political gain" (p. 171).

The interest-group and short-term perspective answers identify problems now commonly described as agency problems. That is, the politicians the people elect are not faithful representatives of their constituents' interests. I'm not entirely persuaded, though, that Congress enacts soft rights because of agency problems. The reason is that voters no less than politicians overlook long-term costs in pursuit of apparent short-run benefits—which raises some conceptual questions about *defining* the public interest with reference to the long-term. I have in mind here recent referenda in Florida and California. The people of Florida approved a referendum dictating that class sizes in public schools be reduced, without adopting any provision dealing with financing the new policy. The people of California approved a referendum requiring the establishment of a system of

after-school programs, again without providing funds for the new programs.[14] It seems that the people themselves have a short-run perspective. This suggests that politicians who pursue short-run goals while disregarding long-run costs may well be faithful servants of a shortsighted public. Whatever problems this causes, it isn't that the politicians are acting in a manner incompatible with democracy, as the term is usually understood.

There's an additional problem in criticizing legislation creating soft rights as antidemocratic. What can we do about it? The obvious remedies are technocratic governance and judicial enforcement of a nondelegation doctrine, but these themselves raise questions of democratic accountability.

As to technocracy: Sandler and Schoenbrod sometimes hint that one problem with judicial enforcement of statutory requirements is that such decrees displace the budget decisions made by elected officials, thereby interfering with the elected officials' ability to develop programs advancing the public interest within limited budgets. For example, they summarize one criticism of one of the cases they study in this way: "The court set about to reform a single program in a vast educational structure—a fool's errand because special education could not be reformed without reforming the entire system" (p. 92). This sounds like Sandler and Schoenbrod seek what might be called comprehensive rationality in public policy. That certainly would address some of the problems Sandler and Schoenbrod identify, and technocrats usually favor comprehensive rationality. But, Sandler and Schoenbrod sometimes don't like technocrats either: "democracy by decree shifts attention from the concerns of local voters to the preoccupations of technocrats. The technocrats engage in a prolonged process to specify comprehensive, universally applicable solutions to policy problems" (pp. 158-59). And their dislike is appropriate, at least from the perspective of the kind of democratic theory to which Sandler and Schoenbrod say they are committed: The technocratic quest for comprehensive policy rationality is in serious tension with the populist democratic concerns on which Sandler and Schoenbrod seem to focus (referenda *are* democratic politics in action directly, after all).

As to judicial enforcement of a nondelegation doctrine: Well, that, obviously, replaces one problem (which is not really a

14. Political observers generally saw the referendum as a trial run for Arnold Schwarzenegger's gubernatorial candidacy.

problem of lack of democratic accountability) with another (which is). Maybe the best one could do is work within a framework of statutory interpretation: Judges should be careful about construing statutes to create soft rights.[15] But, perhaps because they agree that the federal judges they criticize are doing what Congress really wanted, Sandler and Schoenbrod offer a weaker set of prescriptions, amounting to a catalogue of rules courts should apply in the course of enforcing soft rights (pp. 193-221).

The more important, but underdeveloped, argument is that judicial enforcement of statutory requirements is a political process that displaces an alternative political process. As is too frequent in the book, the authors use a phrase they think is pejorative—here, "the controlling group"—to label the process. We can begin to understand what's at stake by picking apart what they have to say about the controlling group, and then by comparing the political process they describe to the alternative.

For Sandler and Schoenbrod, the controlling group is "a bureaucracy consisting of attorneys for the parties, the functionaries and experts they bring into the negotiating room, and various court-appointed officials such as special masters" (p. 118). The authors' most interesting comments deal with the actions of *defendants* in the litigation they describe. I enumerate some of their comments, coupling them with some critical observations.

(1) Sandler and Schoenbrod criticize defendants for agreeing to settle cases, arguing that "[o]fficials can protect and expand budgets and programs . . . [and] gain protection against even more stringent laws and rules" (p. 122). A signal of the authors' analytic confusion is their description of this behavior as "trump[ing] political bodies" (p. 122), when, of course, the defendants are themselves political.[16]

15. So, for example, they might construe aspirational statutes not to create enforceable rights. *See, e.g.*, Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981) (holding that the federal Developmentally Disabled Assistance and Bill of Rights Act did not create enforceable rights); Blessing v. Freestone, 520 U.S. 329 (1997) (holding that Title IV-D of the Social Security Act does not create a private right to enforce substantial state compliance with its provisions). Sandler and Schoenbrod acknowledge that stated Supreme Court doctrine is far less supportive of the processes they criticize than one might think, but point to a "split between Supreme Court principles and lower court practice" (p. 162) to explain why the processes persist. I think they are right in identifying such a split, but they don't offer much in the way of an explanation of its origins. They say that the Court "has yet to put in place an effective mechanism for enforcing its own rules" (p. 165), and suggest that appellate review is inadequate because too few cases are appealed (p. 167).

16. Sometimes Sandler and Schoenbrod describe defendants as civil servants and bureaucrats, but equally often they assert, correctly, that the defendants are mayors and

(2) According to Sandler and Schoenbrod, "Mayors and governors are afraid to direct their attorneys to move for termination for fear of stimulating plaintiffs to launch a critique of their administration—one that could be highly publicized . . ." (p. 131). But, as Sandler and Schoenbrod also point out, plaintiffs are part of a network of interest groups, and policy changes unconnected to litigation can lead to highly publicized critiques as well. Consider, for example, the widely publicized stories about the ineptitude of Florida's department of children's welfare, which lost track of a number of children under the department's nominal supervision. So, again, Sandler and Schoenbrod haven't identified something that distinguishes the political process of judicial enforcement from the alternative political process.

(3) Sandler and Schoenbrod write, "Lower-level officials from the agency being sued who chafe at ordinary bureaucratic restrictions gain valuable purchase on policy and budgets" (p. 131).[17] This seems to me accurate. Still, a fair comparison of alternative policy processes would note the way in which lower-level officials use leaks, contacts with the press, and contacts with interest groups to achieve *some* purchase on policy and budgets.

(4) The authors describe the fact that "legislative policy judgments [must] be made in the open" as one "constitutional safeguard" of democratic governance, and say that "[t]he controlling group prefers to make public policy behind closed doors" (p. 156). But, backroom deals are commonplace in the ordinary legislative process too. Deals are hammered out behind closed doors and ratified in public—just as occurs in the judicial proceedings Sandler and Schoenbrod discuss.

(5) Sandler and Schoenbrod say that "voters lose the ability to communicate with government" in the political process of judicial enforcement (p. 157). They say that this sort of litigation "shifts power from the village council, city hall, and statehouse to bureaucracies in Washington and the courtroom" (p. 158).

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members of city councils. I understand how one might think that civil servants might "trump" political bodies, although one would want a much better developed account of the indirect responsibility civil servants have to political bodies before one could really accept this criticism. I simply don't understand, though, how decisions by mayors and city councils "trump" political bodies, that is, themselves.

17. *See also* p. 156 ("Plaintiffs' and defendants' representatives . . . have a mutual interest in building up the budget and power of the government agency that is the target of the lawsuit.").

Washington bureaucracies are hard to approach without a "lobbying/litigating operation in Washington," and "[i]nfluencing judges requires intervening in a lawsuit" (p. 158). The claim about Washington bureaucracies is particularly puzzling, because the authors' focus is *not* on regulatory requirements adopted by federal agencies and enforced by the courts, but on the statutes underlying those regulatory requirements. Washington bureaucrats have nothing to do with enacting those statutes.[18] Maybe ordinary voters can't influence their elected representatives without some interest group support, but that claim opens up a much larger critique of representative democracy than Sandler and Schoenbrod develop. And, regarding judges, I don't understand why the only way ordinary voters can influence judges is through intervention. The more obvious method, I would have thought, is to contact their elected representatives—mayors, members of city councils, state legislators and governors—to affect the positions taken in litigation.

Sandler and Schoenbrod feature several case studies in their account. Examining two indicates the problems that arise when critics look at one political process without considering the alternative.[19] Sandler and Schoenbrod invite us to "[c]onsider government by decree from the perspective of Commissioner Nicholas Scoppetta" (p. 144), the administrator of New York's child welfare agency from 1996 to 2001, responsible for the city's foster care and protective services programs. After a public scandal—not associated, as Sandler and Schoenbrod tell the tale,[20] with any judicial enforcement proceedings—Mayor Rudolph Giuliani appointed Scoppetta to head a new agency reporting directly to the mayor. Scoppetta developed a plan to reduce individual caseworkers' caseloads, improve training and supervision, and the like. Shortly before Scoppetta took his new job, though, a lawsuit had been filed seeking close judicial supervision of New York's child welfare system, invoking constitutional and statutory rights. Sandler and Schoenbrod's general story about judicial enforcement leads them to assert, "Defendants in such a case would normally consent to a decree that imposed a detailed, long-term plan on the disputed governmental program," but

18. Again, one could develop a fancy theory about how bureaucrats generate statutes, but there's nothing approaching such a theory in this book.

19. For strenuous and astute criticism of one-institution analyses and advocacy of full institutional comparisons, see NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

20. Here I rely entirely on the authors' account of the events.

Scoppetta "adamantly refused to cede control" (p. 146). After noting this, Sandler and Schoenbrod go into the hypothetical universe in which a settlement was reached, making the plaintiffs' lawyers "co-commissioners in fact," leading to "clashes of ego and . . . friction and conflict," and more (p. 147).

But, astonishingly to anyone who thought that Sandler and Schoenbrod were providing a case study of the problems of judicial enforcement of statutory requirements, nothing of the sort happened. Scoppetta was indeed under an earlier decree requiring that evaluations of foster care placements be completed within thirty days. He believed that an adequate evaluation could be done in three days. "It took Scoppetta ten months of painful and sometimes bitter negotiations to persuade plaintiffs' attorneys to approve the change" (p. 147). Sandler and Schoenbrod observe that the earlier decree gave Scoppetta cover, and that "[i]t took personal leadership to seek change in an institution where blame avoidance is too often job number one" (p. 148). I interrupt the narrative here to make three points. First, this particular requirement has nothing to do with the broader lawsuit brought just before Scoppetta took office, so there's a narrative lurch in Sandler and Schoenbrod's presentation. Second, I wonder how long it would have taken Scoppetta to impose the new rule even without the overhanging decree. Bureaucracies move slowly,[21] and ten months doesn't seem like that long a time to me for an important policy change to be put in place even without any lawsuit hanging over your head. Interest groups would pay attention to new programs, and Scoppetta might well have had to justify his new plans in public hearings before some city council committee, and in the press. Again, Sandler and Schoenbrod's inattention to the alternative political processes makes it impossible to determine whether their criticism of the judicial enforcement process has any cogency. And, third, and perhaps most obvious, the story they tell *contradicts* their account of judicial enforcement generally. Instead of a spineless bureaucrat or one who welcomes litigation as a way of increasing his clout within the government, we have a leader. And, once more, any sensible evaluation of alternative processes

21. To quote Harry Truman on what Truman believed to be Dwight Eisenhower's mistaken inferences from Eisenhower's military experience, "He'll sit here . . . and he'll say, 'Do this! Do that!' And nothing will happen. Poor Ike—it won't be a bit like the Army. He'll find it very frustrating." RICHARD E. NEUSTADT, PRESIDENTIAL POWER 9 (1960).

would have to tell us how often bureaucracies have leaders, and how often they don't.

After several more paragraphs fulminating about democracy by decree, entirely disconnected from the narrative that seems to be presented as a way of supporting the criticisms, Sandler and Schoenbrod return to Commissioner Scoppetta, who, it turns out, "successfully negotiated a consent order that left full control of the remedy in his and the agency's hands as long as the agency in good faith advanced its own remedial plan" (p. 149). The judge supervising the case noted that it was unlikely that any court order could improve on the plan Scoppetta developed, and the decree provided for its own termination in two years if the agency "continued to demonstrate good faith" (p. 149), which it did.

The sentence that immediately follows this narrative is: "That court decrees interfere with the operation of government is, of course, not the whole story" (p. 149). Indeed, according to this case study, the proposition that court decrees interfere with the operation of government isn't even *part* of the story. What Sandler and Schoenbrod think they have established with this case study remains a mystery.

About one-fourth of the book deals with a single case study, involving special education programs in New York City. Here I direct attention to only some parts of the story Sandler and Schoenbrod relate. The story begins with Congress's enactment of the Education for All Handicapped Children Act in 1975. By 1978 the city was in "blatant violation" (p. 53) of the federal statute, and faced enforcement litigation. After Mayor Edward Koch appointed Frank Macchiarola chancellor of the city's schools in that year, Macchiarola searched for a permanent director of special education. In 1979 Macchiarola hired one of the nation's leading experts on special education, Jerry Gross. Within two months, Gross proposed "a radical new approach" (p. 59) to special education, allowing placement decisions to be made in local schools rather than by a central staff. According to Sandler and Schoenbrod, the plaintiffs in the pending litigation "embraced" the plan (p. 60)—which, note, had been developed by a professional on the chancellor's staff, hardly an outsider or someone unaccountable to the political process. The school board adopted Gross's plan, but refrained from agreeing to write it into a consent decree. The federal judge supervising the lawsuit adopted Gross's plan as well, ordering the school board to

come up with concrete plans "that would breath life into the Gross Program" (p. 62).

To this point, it's hard to see anything special about the court's intervention. Macchiarola, a mayoral appointee, hired a subordinate to develop a plan, which the court accepted. Sandler and Schoenbrod don't like what the court did, though, because it "shifted power dramatically" (p. 61) by giving power to the controlling group, who benefited "because of their command of the arcane terms of the decree and their ability to haul the board of education before the special master and the judge" (p. 62). Pause for a moment here and reflect on the empowerment occasioned by mastery of "arcane terms." The politically accountable officials who developed and approved the plan surely had the same, or even more, mastery of those terms than the plaintiffs' lawyers.

Not much changed as the controlling group developed the detailed plans. The plans by their terms had short deadlines, which no one ever thought realistic and which were never met. According to Sandler and Schoenbrod, "A major dispute erupted over 'preventive services' . . . to prevent children from needing special education" (p. 64). Although at first city officials agreed to include such services, they reconsidered as the cost implications became clear. The special master recommended that preventive services be provided. The judge, in Sandler and Schoenbrod's terms, "split the difference," asserting that the consent decree might indeed require the board to provide preventive services, but held "that the board should not be compelled to provide preventive services until its other major obligations were carried out" (p. 66). This outcome seems to me an essentially complete victory for the school board and its fiscal concerns, coupled with a meaningless sop to plaintiffs that, if the world ever changes dramatically, they might actually get some preventive services. Yet, Sandler and Schoenbrod seem to think that this outcome somehow demonstrates that judicial enforcement proceedings displace political responsibility.

Sandler and Schoenbrod go through much more detail on the special education litigation. They conclude that "no governmental official or institution has taken responsibility for what happened" (p. 94). That seems untrue, at least in connection with the initial Gross Plan. There Chancellor Macchiarola pretty clearly did take responsibility. And, Sandler and Schoenbrod add, school "[b]oard officials alternately used and attacked [the litigation] process, but overall stayed with it" (p. 95). The authors think that there's something wrong with going along to

keep "the court off its back" (p. 95), and maybe there is. But, there's no problem of democratic responsibility here. If New York's people, or its mayor, didn't like it when the board of education "stayed with" the decree instead of resisting it at every point, the people and the mayor had the tools to rein the board of education in.

Perhaps Sandler and Schoenbrod mean that no one took responsibility for the overall outcome at the end of the day. Here a point that Sandler and Schoenbrod mention takes on greater significance: New York City had *nine* school chancellors over the course of the litigation. The chancellors didn't leave because they couldn't handle the special education litigation; they resigned, or were fired, because they couldn't manage New York's schools. The turmoil in the city's special education programs, that is, seems more a characteristic of the city's schools than something fairly attributable to judicial enforcement of the federal statute. Put another way, chances are pretty good that the city's special education programs would be in no better shape had special education been addressed by the board of education or the school chancellor entirely free from judicial supervision.

The difficulty with Sandler and Schoenbrod's argument can be summarized by quoting and then rewriting their own summary of the problems they find in judicial enforcement of statutory requirements. Here is their summary:

> Democracy by decree, in the end, privileges those groups and interests that have the tight organizations and sophistication needed to get Congress to pass a federal statute that creates rights, and then to follow up with litigation leading to a decree enforcing that right. The great mass of less organized and sophisticated interests and the public at large get no seats at this judicial managed, invitation-only table of government. Democracy by decree, which is justified by opening up government to those who have been disenfranchised, ends up disenfranchising others—the very sorts of people that the public interest bar claims to represent (p. 158).

Here's the rewrite:

> Legislation and administrative rule-making, in the end, privilege those groups and interests that have the tight organizations and sophistication needed to get Congress to pass a federal statute that creates rights, and then to follow up with pressure on administrators to create rules enforcing those rights. The great mass of less organized and sophisticated interests and the public at large get no seats at this invitation-

> only table of government. Legislation and administrative rulemaking, which is justified as government by the people, ends up disenfranchising some of the people.

The rewrite seems to me about as accurate as the original. If it is, what Sandler and Schoenbrod are concerned with is not really "democracy by decree," but with modern government. But, it would take a very different book than the one they have written to develop a critique of modern government.

Early in the book Sandler and Schoenbrod comment that proponents of judicial enforcement "conclude that they cannot show that decrees actually do more good than harm because the criteria by which such a determination could be made have not been established" (p. 6).[22] But, a decent study of *two* political processes would have to compare the results achieved under one with those achieved under the other. If you can't tell when a judicial decree has accomplished anything, maybe you can't tell when legislation or administrative action has either. I am reminded here of Mark Graber's astute comment on the subtitle of Gerald Rosenberg's highly regarded study *The Hollow Hope: Can Courts Bring About Social Change?*[23] Graber has suggested that someone ought to write a book called *The Hollow Hope: Can Legislatures Bring About Social Change?* His point is that in both cases the answer is probably, "Sometimes yes, sometimes no." The same might be said about judicial and administrative enforcement of aspirational legislation. Unfortunately, we can't begin to answer the right question after reading Sandler and Schoenbrod because they don't ask it.[24]

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22. They cite here MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY-MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998), which deals mostly with *constitutional* litigation. *See* note 2 *supra* (discussing the authors' failure to keep the argument focused on judicial enforcement of statutory requirements).

23. Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991).

24. Sandler and Schoenbrod's general failure to compare the political process associated with judicial enforcement of statutory requirements with the political process associated with legislative and administrative enforcement of those requirements—or of the more general aspirational policies those requirements embody—produces some more discrete failures. For example, Sandler and Schoenbrod observe that judicial enforcement proceedings "inevitably lead[ ] to an emphasis on the quantifiable dimensions of the defendant's mission and deemphasize[ ] the rest" (p. 148). So, for example, enforcement proceedings in the disability-education case they study focused on "deadlines hit, psychologists hired, evaluations performed, placements made", because these "surrogates" for educational quality "were all that the courts could measure" (p. 159). A study that really compared political processes might ask whether the legislative and administrative processes use *non*-quantitative measures of educational quality, or better surrogates.

None of this is to say that there are no problems with any judicial decrees in cases involving aspirational statutes. Of course there are—sometimes. The problems go to policy rationality and to Congress's democratic legitimacy. There are problems of policy rationality and democratic legitimacy as well in the formulation and implementation of government procurement policy, in Medicare, in ordinary education programs not under judicial decree, and in just about every other area of policy. Once we abandon the delusion that problems of policy rationality and democratic legitimacy are distinctive to judicial enforcement of statutory requirements, we're going to need careful assessments of the legitimacy and capacity of different institutions of governance—of different political processes—to address a range of policy issues. Focusing solely on the problems associated with some judicial enforcement proceedings does not advance the real inquiry.

I'm pretty sure that there's an interesting and well-reasoned book to be written about the judicial role in enforcing statutory requirements. This isn't it.

The use of school-wide test scores in the recently enacted federal education legislation suggests that the differences between the judicial and the legislative processes may be small.