Testimony of

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"Federal Consent Decree Fairness Act"
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My name is Ross Sandler. I am a professor of law at New York Law School. Joining me in this written testimony is, David Schoenbrod, also a professor of law at New York Law School.

Professor Schoenbrod teaches the law of remedies and is a co-author of a casebook that deals extensively with decrees against state and local government: Schoenbrod, Macbeth, Levine & Jung, Remedies: Public and Private (West Publishing, 3d ed. 2002). Earlier in his career, Professor Schoenbrod worked for Senator and Vice President Hubert Humphrey, clerked for Judge Spottswood W. Robinson III of the Court of Appeals for the District of Columbia Circuit, and assisted John Doar and Franklin Thomas at the Bedford-Stuyvesant community development organization.

I teach state and local government law and direct the Center for New York City Law. In that capacity I edit three newsletters on New York City issues: CityLaw, CityLand, and CityRegs. The Center also maintains a Web site providing the public with free access to 25,000 New York City administrative decisions: www.citylaw.org. From 1986 to 1990, I served as Commissioner of Transportation of the City of New York under Mayor Edward I. Koch.

The sponsors of the Federal Consent Decree Fairness Act have stated that they based their bill on a proposal made in a book written by Professor Schoenbrod and myself, Democracy by Decree: What Happens When Courts Run Government (Yale University Press, 2003). The book grew out of our experience at the Natural Resources Defense Council where, from 1975 through 1980, we were a litigation team. Among the cases we litigated was a Clean Air Act case against state and local officials in which we sought to enforce New York City's transportation control plan and reduce air pollution in New York City. Friends of the Earth v. Carey, 535 F.2d 165, (2d Cir. 1976) and 552 F.2d 25 (2d Cir. 1977), stay denied, 434 U.S. 1310 (1977) (Mr. Justice Marshall), cert. denied,

434 U.S. 902 (1977). Our courtroom victories resulted in the judge asking the parties to negotiate a consent decree. The decree ultimately controlled important aspects of how New York City operated its roads, ran the transit system, deployed police and traffic agents, regulated pollution, and much more. In time, we came to be surprised by the scope and duration of the power that we had over city officials who, unlike us, were politically accountable. When I later became Commissioner of Transportation, I became a defendant in our own case and, as such, was subjected to the decree we had negotiated.

Professor Schoenbrod and I have not lost our firm conviction that the doors of federal court houses should be open to those whose rights are violated. But, we have gained the understanding that, as federal judges now operate, consent decrees during the remedy phase of institutional reform litigation are often more intrusive and last longer than needed to vindicate federal law.

Our analysis does not support the usual complaint about judicial activism: that judges are too active in finding rights in the constitution or statutes. Rather our analysis found that after liability has been established and rights acknowledged, judges, during the remedy stage, allow the parties to negotiate decrees that go beyond correcting the violation that was the plaintiffs' actionable claim. These broad consent decrees last longer than necessary to remedy violations of federal law, and they hobble the capacity of elected officials to manage complex and costly social programs. Subsequently elected officials find their authority restricted when they seek to modify previously adopted long term plans, adjust policies and balance budgets.
The obvious question is why are the decrees broader than necessary to protect the rights?

Institutional reform cases begin with plaintiffs' attorneys seeking to change how a government program operates - be it foster care, special education, mental health services, accessibility, or any of the dozens of types of state and local programs subject to institutional reform litigation. Plaintiffs' attorneys easily find a legal hook that they can use to draft a complaint because Congress and federal agencies have created so many standards applicable to state and local programs that most programs are in violation.

With the plaintiffs' attorneys having an open and shut case, the judge tells the parties to negotiate a decree. Those sitting around the negotiating table include the plaintiffs' attorneys, defendant officials, and government attorneys. We call these negotiators the controlling group. All of the members of the controlling group have ideas about how to improve the program. Through a process of horse trading, they construct a plan to change it. The plans are usually quite detailed. Many go on for dozens of pages. The obligations written into the plans are not tethered to the violations that gave rise to the suit, but rather reflect the controlling group's collective ideas about how to make the program run better. For example, a federal statutory requirement that state health officials provide health care assistance to children eligible for federal assistance, might be expanded in a consent decree to also require repeated and costly additional efforts to locate potentially eligible children by telephone, direct mail, visits and other methods.

The signature of a judge turns this plan into a federal court order that must be obeyed by the defendants and their successors in office. Many decrees last for decades.

Governors and mayors have their own reasons to go along with a consent decree. Contested litigation makes them a target of criticism, while the consent decree lets them take credit for a solution. The consent decree might be constructed so that the more onerous requirements fall due after the next election. For the appointed officials who run the programs under reform, the decree gives them a way to broaden their power and grow their budgets by court order rather than through the usual processes for securing the approval of governors, mayors, or legislatures. This latter point was noted by Justice Sandra Day O'Connor in Blessing v. Freestone, 520 U.S. 329 (1997), a case where private plaintiffs faulted Arizona state officials over the way the officials had managed the child support services program required under the Social Security Act. Justice O'Connor, in describing the questionable tactics of the state officials, wrote that "attributing the deficiencies in the State's program primarily to staff shortages and other structural defects, [the state officials] essentially invited the District Court to oversee every aspect of Arizona's Title IV-D program." Id. at 1360.

Plaintiffs prefer to negotiate the decree for the obvious reason that they get to determine its terms and avoid a trial, but there are other powerful reasons why plaintiffs seek to negotiate a decree. A decree entered over the defendants' objection can be appealed, which delays implementation, often for years. Even more importantly, while the law is very forgiving about what the parties may agree to in a negotiated decree, the law is very unforgiving about what a judge may order over the objection of the defendant. Lewis v. Casey, 518 U.S. 343 (1996). When a judge drafts a decree he or she is strictly limited to a remedy measured by the violations proved, but when the parties draft their own decree the strict limitation goes out the window.

Judges sign overly broad negotiated decrees because no one objects and otherwise they will have to write the decree themselves, which would mean conducting a hearing, mastering the management of the governmental agency, and taking responsibility for the policy choices.

Once the decree is signed, it must be obeyed unless and until the decree is modified or vacated. Obeying a consent decree that is five, ten or fifteen years old often makes no sense. Initiatives don't work as hoped. Budget priorities or circumstances change. Experts advocate new solutions. In our book, Democracy by Decree at pp. 128-29, we described how it took eighteen months of litigation before the New York City Housing Authority could gain approval to modify a twenty-two-year-old decree in order to evict promptly criminal tenants who used their apartments as drug emporiums. Escalera v. New York City Housing Authority, 924 F.Supp. 1323 (S.D.N.Y. 1996). In the litigation over the proposed modification, the parties battled over whether the advent of crack cocaine was sufficiently new and unexpected to warrant revising the old decree, whether living next door to a drug dealer actually increased risk of criminal violence, and whether hiring more housing police might be a better solution, i.e., "more suitable" than evicting drug dealers. After three days of testimony Judge Loretta A. Preska issued a fifty-five-page

opinion deciding that on balance it was permissible for the Housing Authority to use the lawful, speedy eviction procedures more speedy than the consent decree. While this litigation continued, the tenants, the purported beneficiaries of the old decree, lived with the danger and intimidation of drug dealers next door. The snarl of litigation so incensed the tenant organization that it hired other lawyers to fight on the side of the Housing Authority and against its old lawyers.

Under the Supreme Court case of Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992), it is difficult for states and localities to get out from under decretal requirements that make no sense and are unnecessary to protect rights. The Rufo test is demanding and time consuming. And, to have any chance at success, the leaders of the defendant agency must divert their attention from other managerial problems to litigation. So, the leaders typically decide not to litigate and instead beseech plaintiffs' attorneys to consent to a modification. The plaintiffs may give the state or city some leeway, but in return demand that new obligations be added to the decree. In this way, the decree grows from dozens of pages to hundreds or even thousands of pages. With all the modifications on consent, side deals, and letters of understanding, it is often only members of the controlling group who understand what the consent decree requires.

The Supreme Court, in its unanimous opinion in Frew v. Hawkins, 124 S.Ct. 899 (2004), forcefully recognized the problem presented by consent decrees that unnecessarily constrain the policy making discretion of state and local officials. The Court made clear that the proper measure of injunctive relief should be plaintiffs' rights rather than a bargain struck in a consent decree. For our analysis of Frew, see Sandler & Schoenbrod, "The Supreme Court, Democracy and Institutional Reform Litigation,"49 New York Law School Law Review 915 (2005).

While the Supreme Court has recognized the problem, it has not fully fixed it. In institutional reform litigation, there has been a persistent gap between the Supreme Court's calls for lower courts to respect the policy making prerogatives of state and local officials and actual practice in the lower courts, as we have shown. See Democracy by Decree at ch. 6. One reason is that it is difficult for successor officials to complain effectively about overly broad decrees entered into by their predecessors. Frew itself does not fix the problem because the Supreme Court is, after all, a court rather than a legislature and so typically works incrementally rather than by comprehensively reversing and revising previously announced litigation ground rules. But, the Court has in a similar context recognized that Congress can change these ground rules and make new ground rules applicable to old as well as new decrees. French v. Miller, 530 U.S. 327 (2000). In French, none of the Justices expressed a contrary view on this point.

The Federal Consent Decree Fairness Act articulates ground rules for modifying and vacating consent decrees entered against states and localities. These ground rules are in accord with the view expressed by the Supreme Court's opinion in Frew that the proper measure of injunctive relief should be plaintiffs' rights rather than a bargain struck in a consent decree. Section 2 of the Act articulates principles that the Supreme Court recognizes, but that controlling groups often get away with ignoring. Section 3 begins by

defining the consent decrees to which this section applies. It then goes on to allow state and local officials to move to modify or vacate the decree, but instructs the court to deny the motion if plaintiffs show the decree is needed to protect their rights.

The Act allows courts to protect rights, but otherwise lets state and local officials run state and local government. The Federal Consent Decree Fairness Act strikes this balance by making clear that the bargains written into consent decrees are not contracts, but are judicial remedies ultimately to be measured against federal law, not the preferences written into consent decrees in prior times or by prior officials. This is precisely the kind of balance suggested by Justice Brennan in a case where a prior agreement in the form of a past bond covenant prevented subsequently elected officials from acting to confront new air pollution challenges. Justice Brennan wrote:

One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent. Crucial to this end is the assurance that new legislators will not automatically be bound by the policies and undertakings of earlier days. . . . [N]othing would so jeopardize the legitimacy of a system of government that relies upon the ebbs and flows of politics to "clean out the rascals" than the possibility that those same rascals might perpetuate their policies by locking them into binding contracts. United States Trust Co. v. State of New Jersey, 431 U.S. 1, 45 (1977) (Brennan, J., in dissent)