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HEADLINE: Government by Decree-The High Cost of Letting Judges Make Policy

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BODY:

When judges intervene in New York City policy, their decisions can take on a life of their own.

For example, in 1980, the city and state agreed to a 47-page federal court order in Jose P. v. Ambach, a case brought under a 1975 federal law guaranteeing educational equality for the handicapped. Most observers agree that the special education system that grew out of this case is deeply flawed: it mislabels thousands of children, segregates many in dead-end classes, and uses legions of psychologists and social workers to administer repetitive evaluations that accomplish little but cost a great deal. Teachers refer students for special education in order to get discipline problems out of their classrooms, while principals refer poorly performing students to special ed to eliminate their test scores from the school's average. Special ed is a very large, gold-plated cog in a rusty educational machine, with an annual price tag of $1.67 billion, or three times more per pupil than ordinary education. And the city and the Board of Education can do little to change things, because they are bound by the terms of the decree.

Another example: in 1981, New York City settled a lawsuit brought by the Coalition for the Homeless, agreeing to a court decree that requires the city to provide free shelter for all homeless men. Result: since the late 1970s, when Callahan v. Carey was filed, the number of homeless single adults seeking shelter from the city has grown from about two thousand to seven thousand; the city spends between $18,000 and $20,000 per year sheltering each of them. Despite these expenditures, most observers agree that conditions in the shelters are terrible. But New York's ability to make changes is constrained by the demands the decree places on the city's limited resources.

Every recent New York mayor has discovered that his ability to change city policy is sharply curtailed by such judicial decrees. Every mayor has damned decrees for restricting choice, distorting priorities, and frustrating reform. But every mayor, including Rudolph Giuliani. has authorized the city to consent to more of them.

Courts must sometimes intervene in policymaking to protect citizens' legal rights. But the city, state, and federal governments and the courts should reform the process to achieve a balance between the rights of plaintiffs and the need for a flexible, politically accountable city government.

The process by which these decrees are created is simple enough: a lawyer or advocacy group brings a suit on behalf of an aggrieved individual or class of people, claiming that the c1ty has violated their rights, usually under

federal or state statutes or regulations. If the plaintiffs prove the violation, the court can impose a remedy of its own design. More typically, the plaintiffs and the governmental defendants negotiate a settlement and consent to the court entering a decree requiring the government to take specific actions. Since these actions take time to complete, the orders typically set out milestones against which the court can measure the city's progress in complying. Judges, who have many other duties, usually leave management of the decree to the parties or to court-appointed special masters or advisors.

The final product of such a process is a binding blueprint enforced by judicial power--a unique, custom-designed management protocol that channels a local government's budget and resources, overriding the political process by which decisions about public policy are normally made. In principle, decrees are supposed to be lifted when the city complies. In practice, they can be interminable. In the most difficult areas of public policy, local governments rarely achieve sustained compliance sufficient to wipe the slate clean.

Since the ink dried on the consent order in Callahan, for example, then- Mayor Edward I. Koch has been reelected twice and defeated, Mayor David Dinkins has come and gone, and Rudolph Giuliani has moved into Gracie Mansion. Former Governor Hugh Carey has moved to Florida, and homeless plaintiff Robert Callahan has died. Callahan's attorney, Robert Hayes, now lives in Maine. There have been six commissioners of the Human Resources Administration and two commissioners of the new Department of Homeless Services. Countless studies and reports on homelessness have reflected an evolving public understanding of the issue. But city officials remain locked in Callahan's legal embrace, apparently unable either to meet its terms or to retire from the field. The court continues to manage the city's shelter system in exquisite detail, right down to the number of toilets and showers each shelter is required to have.

If city officials achieved full compliance with court decrees like the one in Callahan, the orders would be lifted. Why is full compliance such an elusive goal? City officials almost never intentionally defy a court order, because they would have much to lose by making an enemy of the court. If the city can convince the court that compliance is impossible, it will win a modification.

The failure to comply generally results from a combination of two factors. First, courts often underestimate the sheer magnitude of the tasks demanded. The courts that approved Callahan and Jose P. could not have anticipated the enormous growth in the number of homeless men and students deemed handicapped- -growth due in part to the benefits conferred by the decrees. Second, political support may not be sufficient to ensure that the decree is followed; citizens' priorities may differ from those of the court. Courts view these reasons, however, as akin to a lack of will power.

The court, by its order and the enforcement muscle behind it, theoretically supplies the necessary will power. But even judicially supplied will power is often not enough officials cannot unilaterally impose the court's will on the many components of the city, state, and federal governments that usually must work together to take any significant action. Indeed, the attempt to do so raises serious questions about whether the process, as it currently exists, is compatible with democracy.

An Undemocratic Process

Consent orders do have their roots in the democratic process: they are usually based on an underlying statute, duly passed by Congress or the State Legislature, mandating that the city accomplish certain goals. Often, however, the statute does not specify precisely how the city is to do so. The Federal Government, for example, directs the city to cease dumping sludge from its sewage treatment plant into the Atlantic Ocean; the city has to plan, site, build, and operate an alternative disposal system. The state tells the city that homeless families must be placed in appropriate housing immediately on application; the city has to allocate funds, hire personnel, and secure housing for homeless people.

To ensure that their goals are met, the federal and state governments often write their statutory mandates to make

them enforceable in court Plaintiffs-- environmental groups or homeless people--sue. The city often fights for years. Plaintiffs, however, frequently prevail, especially under statutory or regulatory mandates designed to make liability open-and-shut. Once it has been established that the city is liable for a violation--or sometimes before- - officials often choose to bargain for a consent order specifying a remedy that incorporates the best deal it can negotiate with the plaintiffs.

This way of making and enforcing laws under-mines democratic accountability in several ways:

Shifting of costs. By requiring local governments to pay for the benefits it mandates, Congress or the State Legislature frees itself from the need to take account of the costs of its policies. Legislators in Washington or Albany can take credit for bestowing boons on voters but let the blame for the costs fall upon city officials. Congress bans asbestos in the schools not because its members care more about children's health than parents or local school officials do, but because members of Congress can enjoy the political benefits of promising to pay for them. Mayor Koch has admitted that as congressman he always voted to impose requirements on cities because when someone else must foot the bill, "the sky is the limit."

The same posturing takes place at the state level. Acting under the direction of the legislature and governor, the commissioner of the New York State Department of Social Services, Cesar Perales, issued a regulation requiring that cities house homeless families immediately upon demand. He rebuffed New York City's complaint that it was not possible to comply. Later, as a deputy mayor in the Dinkins administration, Perales found he could not comply with a decree enforcing his own regulation. Though he complained that his regulation had been misinterpreted, the irony did not motivate either the legislature or the Department of Social Services to amend it or to start paying the full cost of compliance. Meanwhile, a state Supreme Court justice has relentlessly enforced the regulation, holding city officials, including Perales, in contempt of court.

Shifting of responsibility. Since enforcement of policies is left to the courts, Congress and the legislature have little reason to reconsider their handiwork in light of changing conditions. Legislators effectively leave the field, delegating management of government programs to judges, who constitutionally lack the capacity to choose between various policy options.

Artificially setting priorities. A court order elevates a particular policy above what might otherwise be an equally or more urgent priority. The City Council, for instance, might debate whether the City of New York should use its limited capital funds to build schools or a sewage sludge treatment plant. A court cannot engage in such a debate. Its order transforms the sludge plant from an option into a priority, placing it at the top of the budgetary list. Because courts must take the cases that come their way, no one has the power to review whether the resulting allocation of the city's resources makes sense.

Going beyond the law. Once a City consents to particular terms, court rules make it extremely difficult to change the order--even if those terms were not actually required by the law. Judges treat consent decrees (in contrast to those imposed without consent) as contracts to end litiga- tion, akin to a settlement in a private dispute. In this view, it would be unfair to alter the contract except under strictly controlled circumstances.

The principle that consent decrees are binding regardless of the underlying law prevails in the federal courts under a 1992 U.S. Supreme Court decision. In 1979, Suffolk County, Massachusetts (which includes Boston), agreed to replace an old, inadequate jail with a new one in which every prisoner would have his own cell. Thirteen years later, the county asked that the court modify its decree to allow two prisoners in a cell, since the U.S. Supreme Court had subsequently made it clear that double-bunking was not unconstitutional and Boston's prison population had greatly exceeded expectations. The Supreme Court ruled that the modification could not be made unless the changed circumstances were unforeseen. The Court believed that any less rigid rule would dissuade plaintiffs from negotiating settlements.

Depriving voters of their voice. These decrees bind future administrations, so voters cannot change policy through

the normal means of voting out the incumbent. In some cases, administrations deliberately use decrees to impose their preferred policies on their successors.

As a mayoral candidate in 1989, David Dinkins had promised to provide domestic partners of city employees the same health benefits that spouses of employees receive. He was unable to make good on his promise, because the City Council refused to authorize costly benefits for the large number of (primarily heterosexual) domestic partners. The Lesbian and Gay Teachers Association filed a lawsuit claiming the city was required to provide such benefits under various human rights laws and constitutional provisions. The city vigorously disputed the claim, but before the courts decided who was right--and just a few days before the 1993 mayoral election--Dinkins consented to a state court order binding the city in perpetuity to provide benefits to domestic partners and their children.

Why the City Consents

If consent decrees are so problematic, why does the city agree to them? Consider the incentives for the various parties to the decrees. City officials, as defendants in lawsuits, face an intertwined political and legal problem. They may well agree with the plaintiff's objectives hut are branded in court as violators. A consent order allows officials not only to gain time for compliance, but also to transform themselves from lawbreakers into law implementers. That a decree will bind their successors hardly matters to them. Individuals named as plaintiffs (homeless people, prisoners, or handicapped children, for example) usually lack the capacity to manage the litigation. Their attorneys have the real power and also the real stake--perhaps in court- awarded fees, but certainly in reputation and power, which they hope to wield for ends they believe good. An attorney who establishes a violation earns a favored place at the table of government. A deputy mayor or commissioner must sit down and negotiate an order, which becomes not only policy but law that the plaintiff's attorney can enforce by invoking the court's power to cite officials for contempt.

The judges themselves are parties to the decree in the sense that it becomes a prominent work product. Judges sometimes get so wrapped up in their own decrees that appellate courts have to remove them on the ground that they have lost the requisite judicial detachment. The loss of detachment is usually less overt, so it goes uncorrected. In the litigation enforcing the Perales regulation on homeless families, the Dinkins administration demonstrated dedication, good faith, and hard work as well as misjudgments, failures, and reversals of policy. But the trial judge, in imposing contempt fines on four administration officials, emphasized the primacy of her order. She wrote that she could not countenance noncompliance to allow the city time to redesign its emergency placement systems or because the City Council opposed one remedy, housing families in commercial hotels.

With plaintiffs suffering intolerable conditions, attorneys seeking a place at the table of government, city officials stung by being branded lawbreakers, and judges armed with the contempt power, negotiating a consent order can seem like the safest response. Each side can give the other what it wants. The defendants get a schedule of compliance they can live with; they may also get relief from particularly onerous legal requirements that the plaintiffs see as less important. The plaintiffs' attorneys get an ongoing say about city policy; they become sidesaddle commissioners. The judge gains prominence by harnessing the court's power to solve a public controversy.

But a deal that is good for these players may in time harm the city. Even when a decree has unanticipated harmful consequences, it is very difficult for future administrations to undo the deal. Unless all of these players agree or the city complies completely-- neither of which is likely--the decree can be terminated entirely only by amending the underlying statute or constitutional provision. So, as Richard Briffault of Columbia Law School has pointed out, consent decrees are the functional equivalent of constitutional amendments or statutes, though they have never been approved by a legislature. Such inflexibility is not automatically justified on the basis that the decree protects rights. Consent decrees also frequently decide matters of policy, setting out in intricate detail how rights are to be implemented. And they regularly deviate from the rights that gave rise to liability because the plaintiff's attorney and defendants think, for their own reasons, that the change makes sense.

Despite all these problems, judges sometimes have legitimate reasons to intervene in city policymaking. The most

compelling is the need to uphold constitutional rights, whose fundamental purpose is to protect individuals from the excesses of democratic decision-making. Most injunctions against the city, however, do not deal with constitutional rights. Rather, they enforce rights created by Congress, the State Legislature, and federal and state administrative agencies.

The federal and state governments also have legitimate reasons to regulate cities--for example, to prevent them from discriminating against nonresidents who cannot vote in city elections, and to ensure that certain laws and policies are uniform throughout the nation or the state.

Given these considerations, how can judges and mayors ensure that those with legitimate complaints against the city can have their day in court, while at the same time safeguarding democratic accountability and good government? We propose six actions the courts, the legislatures, and the city should take: limit the duration of decrees, involve Congress and the State Legislature in the decrees arising from laws they have passed, prohibit unfunded mandates on localities, be cautious in consenting, open the enforcement of decrees to public scrutiny, and reconsider existing decrees.

Impose Term Limits

Every law student knows of the "rule against perpetuities," which invalidates trusts that let the deceased rule forever from the grave. Yet judicial decrees continue to bind the city even after the original plaintiffs are dead or disinterested and defendants are no longer in office. Since the mid-1980s, the city has sought, and usually received a clause in each decree terminating it if compliance is achieved. But full compliance is rare.

All decrees against cities, whether consented to or not, should have a definite ending date, measured by the political calendar rather than the calendar of compliance. Whether or not the city ever quite makes it to the ultimate goal, the order should end at some point, and the issue should return to the political and electoral marketplace. Once the term limit is reached, the decree would end. The prior judgment of liability, if any, would endure, but the question of how to remedy the wrong would be reopened for further negotiation or litigation.

How long a decree should last depends on the circumstances. But one accepted measure of government time is the four years allocated to an elected administration. If a decree ended with the term (or terms) of the administration that consented to it, the policy choices it reflects would be subject to electoral validation. Courts should shift the burden to the plaintiffs to demonstrate that any additional time beyond the electoral cycle is necessary because of the peculiar characteristics of a case.

Under a legal doctrine known as equitable discretion, judges have the power to include term limits in decrees. They should use that power, because they have a duty to consider the impact of the decree on the public. Endless decrees undermine the public's basic right to hold their officials accountable and frustrate the need for a flexible government. The court should insist upon a firm ending date, even if the city is willing to do without one.

Bring in the Legislature

Even if the city has unquestionably violated the law, deciding how to remedy the wrong often involves politically charged questions of policy. Courts generally let local governmental defendants take the lead in proposing the terms of a decree. But that involves only the executive branch, even though the legislative branch has the last word on policy and budget. Under traditional legal doctrine, courts have the authority to solicit legislative assistance in designing remedies. They should use this authority more often, especially since they are usually enforcing rights created by the legislature.

Courts have followed this course in some cases. After finding local governments throughout New York State in violation of a statute mandating that all real property be assessed at full value for tax purposes, the New York Court of Appeals (the state's highest court) authorized local governments to remain in violation for 18 months while state and local legislators considered remedies. Complying with the mandate raised a host of policy concerns, not the least of

which was disrupting the expectations of taxpayers. In the end, the legislature eliminated the mandate.

Giving the State Legislature time to legislate the remedy might produce three results. First, if convinced that the right is worth its cost, the legislature might actually fund a remedy. Second, it might clarify, rescind, or reduce the right, as in the real property tax assessment case. Third, it might enact nothing.

The first two possibilities are the happiest because they leave policy choices to elected officials who are accountable for them. The third possibility leaves those choices to the judge. While a judge cannot interpret the current legislature's inaction as diminishing rights conferred by a past legislature, he might conclude that the legislature's unwillingness to help reduces the city's likelihood of successfully complying with an ambitious injunction. The judge could take that factor into account in defining remedies and establishing; milestones.

End Unfunded Mandates

One way to make the federal and state governments more accountable would be to bar them from imposing mandates for which local governments must pay with their funds. In 1993, the U.S. Conference of Mayors once again called on Congress to stop enacting unfunded mandates. In response, the Senate Governmental Affairs Committee is marking up a bill to relieve cities and states from complying with the nearly two hundred unfunded federal mandates. But Congress has little incentive to pass this legislation.

New York City, however, has a real chance to protect itself from unfunded state mandates. The state constitution requires that on Election Day in November 1997, voters will decide whether to call a state constitutional convention. New York City should join with municipalities throughout the state to urge an affirmative vote, then use the convention to enact a prohibition on unfunded mandates. Such an amendment is long in coming: a staff study for the 1938 New York State constitutional convention highlighted the need for protection from unfunded mandates.

In 1993, Governor Mario Cuomo appointed a Temporary State Commission on Constitutional Revision, which again identified unfunded mandates as a potential issue. Professor Briffault, in his briefing paper for the commission, notes that 14 state constitutions have such prohibitions. California's constitution, for example, requires the legislature or any state agency "that mandates a new program or higher level of service on any local government" to provide "a subvention of funds to reimburse such local government," unless the local government itself requests the mandate.

New York State's constitution, by contrast, allows the legislature to make laws dealing with any topic for which it can articulate a state concern. A constitutional amendment would add a second, more practical requirement: if the state is to dictate policy to local governments, it must pay for the privilege. The amendment should be drafted to require he legislature to take fiscal responsibility for existing as well as new mandates.

Be Cautious in Consenting

Whether to consent to a decree is always a judgment call. It is not possible to lay down a rigid rule on strategy, especially one involving the ultimate bargain to end litigation. Nonetheless, it is worth restating the obvious reasons why the city should be cautious in consenting.

Mayors should not ordinarily consent to the entry of a decree if there is any real issue about whether the city is in violation of the law. The city should go to trial, and if it loses, it should appeal. It may win at either level. Moreover, if the city loses on appeal, the rule that binds it will bind other cities, giving New York allies in trying to persuade the legislature to reconsider.

If the city loses on the issue of liability and the plaintiffs offer a decree that the city finds acceptable, the city should tell the court that it does not object to its entry, rather than affirmatively giving its consent. The difference is important: by not consenting, the city can more easily, under court rules, obtain a later modification to accommodate changing circumstances

Open the Process

Once a judge signs a decree, enforcement becomes in effect, the property of the plaintiffs' attorneys. Under the Jose P. decree, for instance, attorneys for the Board of Education report to the plaintiffs' attorneys at closed meetings scheduled every two weeks.

Such enforcement regimes hide the results from the public and turn public programs into private fiefdoms. They avoid sunshine laws requiring open meetings and public notice. If an industry had such special access to the government officials that regulate it, there would be loud complaints, and rightly so. Private attorneys and advocacy organizations, whatever their good intentions, should not have the power to control public policy in secret.

The formulation and enforcement of decrees should be open for public participation. Courts should require public notice and open meetings. Reports should be widely distributed and written in plain English. Formal participation by nonlitigants should be made easy. Interested groups not represented at the liability stage of the litigation should be able to participate formally during the remedy stage.

Reopen Existing Decrees

In dealing with the existing judicial orders under which the city now labors, officials should go on the offensive, seeking to modify the decrees rather than just defending their failure to comply. The case enforcing the Perales regulation shows why. In 1992, the city and four high Dinkins administration officials were brought up on contempt charges for failing to house homeless families immediately. While acknowledging violations, the city argued that it should not be held in contempt because it had tried in good faith to comply. In particular, it noted that between 1984 and 1992, it built more housing for homeless families than the Federal Government built throughout the entire United States and that it put homeless families at the front of the queue for placement in public housing. But the city's efforts had perverse results. Families that were living with relatives while waiting for housing took to the streets to jump the queue. The city ended up with more homeless families than it expect ed. Nonetheless, the trial court held the city and the officials in contempt. In May 1994, the Court of Appeals affirmed the decision, stating that the "feasibility of compliance is not before us at this time, nor are intractable or Herculean municipal efforts of a financial or political variety."

The city should force the courts to deal with such realities by moving to modify the decrees instead of waiting to be cited for contempt. The city will have to show that unforeseen circumstances justify the requested modifications. In the homeless family case, the perverse effects of the city's efforts to comply and the upsurge in the number of homeless families seeking shelter should meet that test.

The plaintiffs will undoubtedly respond that the changes do not warrant revision. They may argue that the city can simply put more resources into providing housing or other benefits. To answer this argument, the city should ask judges to broaden their focus from the decree in the case before them to the cumulative burden of all the decrees against the city. When a judge considers one decree at a time, the orders almost always look feasible. The expense is invariably small relative to the city's overall revenues. Plaintiffs in any one case can argue that the city could satisfy all its requirements if it cut "frills" or raised taxes.

The picture changes when each decree is placed in the broader context of all decrees and mandates imposed upon New York City. A preliminary Giuliani administration study shows that complying with the ten largest decrees and mandates uses fully 26 percent of the city's tax revenues. And the city has many other demands upon its revenues: police, fire protection, sanitation, drinking water, debt service, education, roads, and so forth.

To accompany its motions to modify the many consent decrees against it, the city should prepare a Consent Decree Cumulative Data Book detailing the number of decrees and mandates, their age and total cost, the other fiscal burdens that the city cannot avoid, and the administrative bur- dens and inflexibility imposed by the decrees. The book would demonstrate circumstances unforeseen when all the older consent decrees were entered: the city's fiscal crisis is no

longer viewed as temporary, the decrees have lasted far longer than anticipated, and their cumulative effect undercuts the city's ability to meet future obligations. The Data Book would also be useful in winning more realistic terms in new decrees.

Plaintiffs would still get a remedy. But instead of being locked into detailed protocols designed many years ago, the city could propose new ways to protect plaintiffs' rights. Under established legal doctrines, the new remedy could allow violations of plaintiffs' rights to continue only when they are minor relative to the hardship to the city and public.

Individual motions to modify particular decrees would ultimately be decided in the appellate courts. The courts could not responsibly say that the city must give first priority to each and every one of its obligations; they would have to allow the city some flexibility.

In December 1981, then-Mayor Koch delivered an address at the annual conference of the National League of Cities in which he called for lifting the "mandate millstone" from the cities. Since then, mandates and the resulting court orders have become more numerous and burdensome, and government at all levels has become less accountable. The reforms we have suggested would make government more responsive and responsible, while ensuring that

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