

# Consent Decrees in Institutional Reform Cases Against State and Local Government

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**Panel: What's Happening With Injunctions?  
Workshop on Remedies: Justice and the Bottom Line  
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1. Introduction
  - a. These comments are based upon work co-authored with Ross Sandler, chiefly Democracy by Decree: What Happens When Courts Run Government (Yale University Press, 2003).
  - b. Our theses
    - i. Courts should always be available to enforce rights, including in institutional reform cases against state and local government.
    - ii. In these cases, courts should leave policy making to elected officials except when needed to enforce rights.
    - iii. Consent decrees in such cases tend to be broader than needed to enforce rights.
  
2. Why these consent decrees are broader than needed to enforce rights.
  - a. Those who negotiate the decree have objectives that differ from simply enforcing rights.
    - i. Plaintiffs' attorney seeking to reform a government program want improvement that is comprehensive.
    - ii. Government officials in charge of the program want to implement their own favorite ideas and to use the litigation to free themselves from constraints imposed by elected officials.
  - b. These negotiators (we call them "the controlling group" ) are to a considerable degree free from constraint by
    - i. The plaintiff class
    - ii. Governors and mayors

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- (1) Most cases today are brought under federal statutes.
  - (2) The statutes let Congress claim credit for popular goals, but put the burden of delivery on governors and mayors.
  - (3) The consent decree lets the governors and mayors avoid a trial on their violation of a statute with popular goals and instead present themselves as problem-solvers. The heaviest obligations are often postponed until after the next election.
- iii. The state legislature and municipal council
  - iv. Members of the public who may be harmed by the decree
  - v. The federal agency charged with enforcing the statute
  - vi. The trial court
  - vii. The appellate courts
  - viii. Public scrutiny.
- c. The controlling group produces a detailed, long-term plan for the government program.
    - i. The plan bears no necessary relationship to the rights whose violation justify the lawsuit.
    - ii. By signature of the trial judge, the plan becomes a consent decree binding the defendants and their successors in office.
  - d. Once entered, the decree grows over time.
    - i. Some aspects of the original decree prove unworkable.
    - ii. To avoid the obligation to carry out these unworkable requirements, defendants ask plaintiffs' attorneys to consent to modifications
    - iii. The price of consent is adding requirements to the decree.
    - iv. As the decree grows into a file folder, or even a file drawer, full of amendments and side-deals, the public has no ready way of knowing what the decree requires.
  - e. The result is government according to the controlling group's closet contract rather than government by elected officials or government by rights.
- 3. To limit consent decrees to enforcing rights, we need to change court practices that privilege the controlling group.
    - a. Framing the decree
      - i. Problem: Current court practices allow the entry of consent decrees broader than needed to protect rights.

- (1) In private litigation, defendants strenuously resist decrees broader than needed to remedy the violation, but in institutional cases against state and local government, elected officials go along with decrees that are broader than needed to remedy the violation.
  - (2) The burden of complying with the consent decree falls not only upon these incumbent officials, but also their successors in office and the public.
  - (3) Incumbents should not be able to use a consent decree to contract away the power of government to make policy. “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 [our] 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 simply by locking them into binding contracts.” *United States Trust Co. v. State of New Jersey*, 431 U.S. 1, \_\_\_ (1977) (Brennan, J., in dissent).
- ii. Our recommendations: Trial judges should limit the decree to requirements needed to enforce rights.
- (1) Judges should begin the remedies phase with findings of fact on the wrong done to plaintiffs.
  - (2) This “bill of wrongs” would provide the judge with a check on ambitions of the controlling group.
  - (3) Nothing in this formulation prevents the decree from including any appropriate prophylactic requirements.
- b. Managing the Decree.
- i. Problem: Current court practices make it difficult for defendants to get the decree modified, even when they have better ways of running government consistent with vindicating plaintiffs rights.
    - (1) Some of the bright ideas embedded in consent decrees never work or founder on changed circumstances.

- (2) Yet, court rules make it difficult and burdensome for officials to change the consent decree. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992)
    - (3) The resulting rigidity in government policy is bad for the public at large, including sometimes groups as weak as the plaintiff class or the plaintiff class itself.
  - ii. Recommendations:
    - (1) Lower courts should consistently follow the dicta in the Supreme Court's unanimous opinion in *Frew v. Hawkins*, 540 U.S. 431, 442, (2004) that implicitly loosened *Rufo*'s requirements for modification. Ross Sandler & David Schoenbrod, "The Supreme Court, Democracy and Institutional Reform Litigation," 49 *New York Law School Law Review* 915 (2005).
    - (2) Controlling groups should also be required to
      - (a) open the doors of their meetings to the public.
      - (b) provide the public with an up-to-date decree.
- c. Ending the Decree.
  - i. The Problem: Current court practices require decrees to remain in force longer than needed to enforce plaintiffs rights.
    - (1) Termination requires compliance with not only the law, but also all the contract that the controlling group has written into the consent decree.
    - (2) Yet, government's performance in social programs is almost never good enough to vindicate the high principles written into the decree.
  - ii. Our recommendation
    - (1) Decrees should end at a fixed time unless plaintiffs can show that the decree is still needed to enforce rights.
    - (2) The burden should be on plaintiff to prove that the decree is still needed, rather than on the defendants to prove that it is not needed.