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Consent Decrees in Institutional Reform Litigation: Strategies for State Legislatures

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Foreword by Senator Jeff Sessions, Alabama

One of the most dangerous, and rarely discussed, exercises of raw power is the issuance of expansive court decrees. Consent decrees have a profound effect on our legal system as they constitute an end run around the democratic process. Such decrees are particularly offensive when certain governmental agencies secretly delight in being sued because they hope a settlement will be reached resulting in the agency receiving more money than what the legislative branch or other funding source would otherwise have deemed justified. Thus, the taxpayers ultimately fund the settlement enacted through this undemocratic process.

A consent decree is the equivalent of a legislative enactment created at the hands of the courts, and often less subject to modification. By entering into these decrees, current state executives, such as Governors or Attorneys General, can bind the hands of future state executives and legislatures. A predecessor's consent decree is difficult to alter or end; in practice, a decree can last for many years – longer than the remedy that was needed. I have witnessed, first hand, the use of these decrees and the constitutional questions that can arise. Thus, I applaud the effort of the authors of this paper to draw renewed focus to the issue.

When I served as Alabama's Attorney General, I immediately had to deal with a consent decree, which my predecessor had entered into, concerning the composition of the state supreme court. I thought the consent decree was completely unconstitutional; unfortunately, a U.S. District Judge ultimately approved it.

The Alabama Attorney General acquiesced to a court decree that increased the number of justices on the state supreme court by two seats. Of course, it is the attorney general's responsibility to represent the state's interest. The attorney general has no higher duty than to defend the state constitution. By entering into this consent decree he essentially amended the state constitution that directs the selection of new justices on the state supreme court and even the size of the court. When I became attorney general I objected to this decree and was successful on appeal in having the Eleventh Circuit Court of Appeals reject it.

Consent decrees are, and will remain, an important part of the settlement of litigation in America; however, there are important improvements that can be made to the process. I applaud the work of Professor Michael DeBow, Jack Park, and Gary Palmer and appreciate the suggestions for reform they make to this area of the law. I have known each of these men for some time; Professor DeBow, of the Cumberland School of Law at Samford University, and Mr. Park, currently serving in the Inspector General's office at the Corporation for National and Community Service, both spent time with the Alabama Attorney General's office in their respective careers. Mr. Palmer, President of the Alabama Policy Institute, has worked tirelessly and very effectively in Alabama public policy for many years. The suggestions they make in the following paper should be given careful consideration as they propose valuable, reasoned solutions to a problem that must be addressed.

Finally, I thank the Alabama Policy Institute (API) in sponsoring the production of this paper. The API serves the people of Alabama in promoting policies that will save taxpayers money; provide greater choice and responsible spending in education, and among other issues, promoting legislation highlighting the fact that taxation and regulation through litigation is not the proper role of the judiciary.

An Introduction to Consent Decrees in Institutional Reform Litigation

A consent decree is a judge's order based on a voluntary agreement between parties in a lawsuit, which is enforceable by contempt and can be modified only by court order. Consent decrees entered into by private parties provide a reasonable and effective tool for settling lawsuits. But with lawsuits involving state and local governments, consent decrees have become a weapon in the arsenal of activist plaintiffs and activist judges that they are more than willing to use.

Activist plaintiffs pursue what is known as "institutional reform litigation" in an effort to impose broad and long-term reform of government programs and laws against state and local governments. The best hope for achieving their objective is to convince state and local governments to settle the case through a consent decree.¹ Often the plaintiffs seek a consent decree settlement because they want to avoid long and expensive trials that could last for years and which they could possibly lose.² In addition, if the lawsuit goes to trial and the judge rules in favor of the plaintiff, the judge would be limited to ordering a remedy based on the facts of the case. But a consent decree can go well beyond what could legally be ordered after a trial.³ This creates a powerful incentive for plaintiffs because it creates an opportunity to enact reforms well beyond what the law would require.⁴

Finally, activists have a strong incentive for getting state and local governments to enter into a consent decree because they are much easier to enforce than other judgments and very difficult to terminate and because, in effect, whatever the law actually requires is no longer in dispute or even applied. By expanding beyond the scope of the requirements of the law, a consent decree can enact a public policy agenda that otherwise would have little or no public support.

Ross Sandler and David Schoenbrod point out in their book, *Democracy by Decree*, that consent decrees cover a broad range of government programs from special education to mental hospitals to prisons and many other programs as well. As a result, state and local governments have been deluged with institutional reform lawsuits. Sandler

¹ Gerald N. Rosenberg, *The Politics of Consent: Party Incentives in Institutional Reform Consent Decrees in Consent and Its Discontents: Policy Issues in Consent Decrees*, Andrew Rachin, editor, Princeton University, 16 (2006)

² *Id.* at 16-17

³ *Id.* at 17-18

⁴ Dr. Michael S. Greve, *A Review of Federal Consent Decrees*, testimony before the United States Senate Committee on the Judiciary, July 19, 2005

and Schoenbrod state that “Decrees have ruled prisons in forty-one states and local jails in fifty states.”⁵ They add that a 2000 study found that there have been more than six hundred school districts operating under a consent decree and that there was no hint of impending termination for the vast majority.⁶

It is little wonder then that there is a whole industry of institutional reform activists engaged in filing hundreds of lawsuits against state and local government.

As Sandler and Schoenbrod point out, the advocacy groups that press institutional reform litigation against state and local governments often “identify a program that needs change, construct a legal theory that some constitutional or statutory requirement has been violated, and file a lawsuit.”⁷ When a “legal claim is accepted as appropriate for the court to entertain, lawyers for the plaintiffs and defendants are encouraged to negotiate a detailed plan to fix the entire system.”⁸ The plan is then issued as a court order or consent decree.

Mayors, governors, or commissioners who agree to such decrees and their successors, must then obey the orders by implementing all of their provisions. Defiance would be contempt of court, a crime potentially punishable by imprisonment or other severe sanctions.⁹

The plaintiffs know that many times when an institutional reform lawsuit is filed against a city, county, or state agency, government officials will agree to settle because it is in their best interest to work out a solution instead of having to present a defense in court. In far too many cases, elected officials will pursue a settlement rather than going to trial on the merits because they want to avoid a potentially politically embarrassing trial. And in many cases, they may seek a consent decree because they may view a court order as a way to enact a reform agenda that they support but that is politically too risky to push legislatively.

The result is institutional reform which takes the place of formal legislation by binding elected officials or those in charge of state or local agencies to a “remedy” that may or may not be the best way to rectify a grievance or problem. The use of court orders or consent decrees circumvents the will of the people by usurping the powers of

⁵ Ross Sandler & David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government*, Yale University Press 4 (2003)

⁶ *Id.* at 4

⁷ *Id.* at 3

⁸ *Id.* at 4

⁹ *Id.*

the legislature and binds future legislatures and governors to the terms of the decree. In that respect, consent decrees are anti-democratic because they obstruct accountability between people and their government.

Taxpayers are doubly hurt by paying higher taxes to support these questionable judicial remedies, as well as by having their right to representation denied. Judges and advocates of consent decrees argue that society and our nation's legal institutions would be much worse off without such decrees. This view unfairly assumes that the public and its elected representatives cannot be trusted and therefore must be compelled by court order. In addition, as Sandler and Schoenbrod point out, there is nothing to show that consent decrees have not done more harm than good and even enthusiasts for them have grown to doubt their efficacy.¹⁰

Consent decrees often impose enormous burdens on state and local governments without positive results. An evaluation of the degrees of success indicates that

...court decrees regularly fail to achieve all of their promise and many do not come close. Advocates for consent decrees cannot ignore the fact that many decrees have yet to achieve their objectives despite having reached their twentieth or thirtieth year. Nor can they ignore the multitude of contempt proceedings plaintiffs repeatedly bring, nor the bulging files of modifications and amendments attached to decrees issued long ago.¹¹

Through federal consent decrees there has been a progressive denial of representative government. Expanding on a point by Sandler and Schoenbrod in regard to judges,¹² in the past there was a greater respect for the separation of powers and a willingness by governing officials to act within their constitutionally defined roles. Unfortunately, too many of today's governing officials from each branch of government come from a different mindset altogether. The example that we highlight in this paper is the problem of federal consent decrees which have empowered federal judges to circumvent legislative bodies and set policies that have the power of law and appropriate revenues thus taking to themselves powers not delegated to them by the United States Constitution. And Congress has willingly delegated its lawmaking power to federal agencies and to federal judges by passing laws that are aspirations rather than clearly

¹⁰ *Id.* at 6, 151

¹¹ *Id.* at 6, 150

¹² *Id.* at 9

defined statutes and thus leaving it to others to decide what the law should be.¹³ This has been done at the costs of untold billions of dollars to taxpayers nationwide and at the greater cost of substantially undermining the people's right to representative government.

For years, the usurpation of the authority of duly elected governing officials through the use of consent decrees has gone unchallenged by governors and state legislatures. That needs to change. It is with that in mind that the Alabama Policy Institute commissioned this paper to educate state lawmakers and the public about the problem of federal consent decrees and to present policy recommendations that will help restore the ability of state governments to manage their own affairs unencumbered by expansive and expensive federal decrees.

A Brief Overview of Judicial and Congressional Abuse of State and Local Governments' Authority

Without delving into a long civics lesson, to fully appreciate the scope and seriousness of the problem of federal consent decrees it is helpful to be reminded that our nation is a constitutional republic. That is, our government is under the authority of the United States Constitution which defines the structure and the responsibilities of the various branches of government.

Most people know that our Constitution calls for a separation of powers which means our government is divided into three branches: the executive, which is the president and his cabinet; the judicial, which consists of the United States Supreme Court and the lower federal courts; and the legislative, which is made up of the Senate and the House of Representatives. The founding fathers based our government on the idea that there would be a clear separation of powers with certain powers exclusively vested in each branch and with checks and balances to ensure that these powers are not usurped and that government remains answerable to the people.

At the state level, the governments of all 50 states are modeled after the federal government, and all 50 states are governed by their respective constitutions which also have a clear separation of powers. Moreover, according to Article IV, Section 4 of the Constitution of the United States, every state is guaranteed "...a republican form of

¹³ For a more detailed presentation on the problem of delegation see David Schoenbrod, *Politics and the Principles That Elected Legislators Should Make the Laws*, Harvard Journal of Law and Public Policy, May, 2003

government.” That is, we are entitled to government by elected representatives, not by a judicial oligarchy or their appointed overseers.

One of the central features of the division of powers in our federal government and of every state government is the legislative power—the power to make law—is reserved to the legislative branch. According to the United States Constitution and the constitutions of the states, the executive branch does not have the power to make law. The president and the governors can suggest legislation for making law and they each have some discretion in regard to issuing executive orders, but they cannot dictate new laws. Similarly, federal and state courts are empowered to say what the law is, not what it ought to be.

There is a fundamental reason why, under our federal and state constitutions, allowing judges, or anyone other than Congress or state legislatures, to make law is undesirable. Judges are typically not accountable to the people. Even in states where state judges are elected, the constitutional rights of citizens can be undermined by judges who legislate from the bench. In those cases, the people have a remedy through the election process in which they can rid themselves of activist judges.

In regard to federal judges, the people have no recourse because federal judges are appointed for life. Congress does have the power to remove judges for bad behavior, but it appears that Congress does not consider unconstitutional judicial usurpation of the legislative power to be bad behavior.

Judicial activism strikes at the very heart of representative government. The right of the people to govern themselves through elected officials that they can hold accountable is foundational to the American republic.

Indeed, the U. S. Supreme Court has recently taken steps to reign in the lower courts on the abuse of consent decrees. In *Frew v. Hawkins*, which is discussed in more detail later in this paper, the Supreme Court laid down two principles to guide the lower courts in terms of the objectives of consent decrees.

First, the courts should limit their decrees to their one and only legitimate purpose – a demonstrated necessity to protect plaintiffs from illegal injury. And second, even when a decree is necessary, courts must strike a balance between protecting plaintiffs and allowing governments to function. At least that is how the U.S. Supreme Courts thinks the lower courts should construct consent decree court orders. But, as many state and

local governments have found, the practice of the lower courts is often well outside the guidelines of the Supreme Court, as the following indicates:

- The Supreme Court holds that decrees are solely for remedying violations of rights. Yet lower courts have regularly entered decrees that advance policy agendas extraneous to, and impose requirements far beyond, the rights that plaintiffs claimed were violated.
- The Supreme Court holds that decrees are solely for protecting plaintiffs. Yet lower courts have regularly entered decrees that protect an entire class.
- The Supreme Court has long held that decrees are for protecting only those plaintiffs faced with imminent injury. Yet lower courts have frequently issued decrees to protect all potential plaintiffs without regard to whether or not they are even threatened.¹⁴
- The Supreme Court has repeatedly held that lower courts should give priority to letting state and local governments function. In *Milliken v. Bradley*, the Supreme Court stated that the lower courts “must take into account the interests of state and local authorities in managing their own affairs” Yet, lower courts have brushed this aside.
- The Supreme Court has maintained that, in framing relief from a consent decree, the lower courts should give due deference to the policy judgments of state and local officials on how they should obey the law. As stated in *Frew*, “... it is not the role of the Courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.” Yet, lower courts have continued to take matters out of the hands of elected officials and put them into the hands of an unelected and secretive controlling group that is accountable to no one but the judge.
- The Supreme Court has said that lower courts should avoid imposing decrees that require technically complex and evolving policy choices, especially in the absence of judicially discoverable and manageable standards. Yet, lower

¹⁴ For example, *R.C. v. Hornsby*, 475 F.Supp.2d 1118 (M.D. Ala. 2007), aff’d, 2008 WL 816679 (11th Cir. 2008) (unpublished opinion). The courts would not vacate or trim back the decree even though (1) there was no private right of action to support the claims in the suit, and (2) the plaintiff class included individual members who lacked standing in that they were not exposed to an actual and imminent injury.

courts have regularly entered decrees that require ongoing surveillance of matters that are highly subjective or technical.

States should take note of the principles outlined in *Frew* by the U.S. Supreme Court and use these guidelines as part of their arguments in support of maintaining state and local control over the powers that properly belong to them in developing and implementing remedies involving violations of federal law.¹⁵

Citizens of the 21st Century, who have become well accustomed to judicial activism, may be unaware that the practice of judges, particularly federal judges, of usurping powers not assigned to them under the Constitution has a long history. But what may be even more interesting is that the blame for these violations of the constitutional authority cannot be laid entirely at the feet of activist judges. Sadly, since the early 20th Century, not only has that right has been eroded by activist judges and activist bureaucrats, but also by a complicit Congress that has been all too willing to delegate their lawmaking powers to judges and bureaucrats and allow them to define and implement laws that are politically unpopular.

For many years Congress has set the table for litigation against state and local government by passing laws so vaguely written that they opened the door for activists to file suit in order to use the vaguely written statutes for imposing their own agendas. In passing such vague laws, Congress has intentionally delegated lawmaking power to government agency bureaucrats and invited state and federal judges to make laws through consent decrees that otherwise would have been politically impossible to pass.

Congress has compounded the problem by imposing national standards on state programs which have played a substantial role in the usurpation of state legislative and executive functions by the federal courts. Sandler and Schoenbrod state that "...from the mid-1960s to the end of the 1970s, Congress went from regulating state and local governments hardly at all to regulating them in detail."¹⁶ They report that

In statutes enacted between 1970 and 1991, Congress preempted more states' laws than it had from 1789 to 1969. A federal commission concluded in 1996 that more than 200 separate federal mandates involving 170 federal laws reached "into every nook and cranny of state and local activities." A study of reported federal court decisions for the year 1994 found that more than 3,500 judicial opinions

¹⁵ Sandler & Schoenbrod, *supra* note 5, at 162-164

¹⁶ Sandler & Schoenbrod, *supra* note 5, at 21

arose under more than 100 separate federal laws involving state and local governments.¹⁷

In addition, Congress has passed laws that included federal funding to state and local governments with all the entanglements that are commonly associated with mandates and money. Activists have used state and local governments' addiction to federal funding to great effect, by using the threat of the loss of federal funding to obtain settlements via consent decrees.¹⁸ As a result, instead of 50 laboratories of democracy as the founders intended, the states have become 50 service delivery agencies of the federal government that are funded at least in part with federal money. Unfortunately, many governors and other state government officials like the arrangement because, whether or not they value or approve of the programs, they definitely value and approve of the federal money behind them.

But Congress has not always included money with the federal mandates it has passed. Until 1995, Congress had been in the habit of passing laws that the states were required to implement but without providing any funding or prescribing the means to raise the funding to pay for the mandates. The states rebelled and demanded that Congress cease imposing unfunded mandates on the states. The result was the passage of the Unfunded Mandates Reform Act of 1995. However, passage of the Unfunded Mandates Reform Act did not totally solve the problem because Congress continues to pass nebulously crafted legislation that institutional reform litigation practitioners can exploit in the federal courts.

Much like they did in the early 1990s, state governments should confront their Congressional delegations and demand that every federal statute include precise definitions of what the law requires in order to clearly establish the intent and scope of the law. If a state government is then sued for failure to implement such a law, the court will have less latitude to impose wide ranging remedies. In addition, clearly defined statutes will give states more incentive to demand a trial on the merits.

While governors and state legislatures have shown a willingness to confront Congress, they have been much less willing to take on federal judges in regard to federal consent decrees, perhaps because it may seem to them that the power of federal judges is absolute and insurmountable. But there are some actions that governors and state

¹⁷ *Id.*

¹⁸ *Id.* at 17-18

legislators can take to restore their authority over state policy making and the appropriation of state revenues. The most important contribution that this paper can make to the resolution of the problem of federal consent decrees is to present recommendations that governors, attorneys general, and state legislators can implement. In that regard, this paper presents some suggestions that can help state governments significantly regain their constitutional authority to make laws and appropriate revenues.

Consent Decree Reform: The Way Forward

The United States legal system underwent dramatic changes during the 1960s and 1970s. One of the most drastic was the use of litigation by liberal activists to seek results they could not achieve through electoral politics and legislative action. Activists filed dozens of lawsuits nationwide, seeking change in the operation of state or local government institutions such as prisons, schools, mental hospitals, and other welfare agencies. The legal theory of such lawsuits – dubbed “institutional reform litigation”¹⁹ – was that then-current operations of a state or local government unit violated the rights of a group of individuals (prisoners, students, patients, welfare recipients) under either the U.S. Constitution, a federal statute, or both.

Often, the defendant state or local government unit agreed to settle the lawsuit against it. This involved the parties presenting their proposed settlement to the judge assigned to their case, who then approved it and entered a “consent decree” into the court’s records that embodied the terms of the agreement between the government and the plaintiffs’ attorneys.

Of course, consent decrees are a long-standing feature of civil litigation in U.S. courts. In fact, the vast majority of lawsuits end with a settlement rather than a decision by the trial court “on the merits.” If plaintiff and defendant can agree on terms for a settlement, they commit these terms in a written document and submit it to the court, which then enters a “judgment by consent” – known more familiarly as a consent decree. This type of legal agreement happens many times a day, in every jurisdiction in the nation.

¹⁹ The term was coined by Harvard law professor Abram Chayes in his seminal article *The Role of the Judge in Public Law Litigation*, Harvard Law Review, vol. 89, pp. 1281-1316 (1976).

This paper is not concerned with consent decrees entered in run-of-the-mill lawsuits. Rather, our focus is on consent decrees entered in institutional reform litigation. This is an extremely important subject. Two of the most trenchant critics of these decrees, Professors Ross Sandler and David Schoenbrod, have noted their near ubiquity:

This template for reform has been applied to the full range of governmental programs, including, to name just a few examples, special education, mental hospitals, environmental protection, and prisons. The decrees cover not only an enormous range of programs but also an enormous range of states and cities. Decrees have ruled prisons in forty-one states and local jails in fifty states. A recent study counted more than six hundred school districts subject to desegregation decrees and found that the “vast majority” continue “with no hint of impending termination.”²⁰

Sandler and Schoenbrod note that the earliest institutional reform lawsuits were grounded in Constitutional law, while later waves of litigation tended to be grounded in dozens of federal statutes passed by Congress from the 1960s through the 1990s. This litigation conferred vaguely-worded new rights on the public and empowered citizens to sue to enforce the statutes – including the federal civil rights and environmental laws, the OSHA statute, and the Americans with Disabilities Act. Many recent cases have involved federal statutes which call on states to provide medical care or educational services to certain classes of citizens, such as children with disabilities. A good deal of litigation has involved portions of the Medicaid law and the Social Security Act.²¹

As this form of consent decree was subjected to critical scrutiny over the past 30 years or so, various problems became apparent. In short, like other ideas born of the ‘60s and ‘70s, consent decrees resulting from institutional reform litigation had a significant, but initially unseen or unanticipated, downside.

For example, analysis and criticism of the consent decree practice surrounding prison reform litigation eventually led to Congress’ passage of the Prison Litigation Reform Act of 1995. Discussion of the shortcomings of consent decrees in the institutional reform context continued, culminating in the introduction of the Federal Consent Decree Fairness Act (FCDFFA) in the 109th Congress. The Senate bill, S. 489, was co-sponsored by Senators Lamar Alexander (R.-Tenn.) and Mark Pryor (D.-Ark.). The House bill, H.R. 1229, was sponsored by Representative Roy Blunt (R.-Mo.).

²⁰ Sandler & Schoenbrod, *supra* note 5, at 4

²¹ See *id.* at 229-237 (collecting 76 federal statutes).

Hearings were held on the FCDDFA in both the Senate and House judiciary committees in 2005, but the bill was not brought to a vote in either house.

The remainder of this paper highlights the downside of institutional reform litigation and, most importantly, provides viable solutions for reform. This paper will make the case for consent decree reform – at both the federal and the state level. The most significant contribution that this paper makes to the debate is to suggest ways that state legislatures and state officials can make a significant contribution to consent decree reform.

Consent Decrees in Institutional Reform Litigation: An Illustrative Case

Although each lawsuit aimed at the reform of a state or local government, and the consent decree that settles it, has unique features, they generally share several salient characteristics. These common features are well-illustrated in the 2004 decision of the U.S. Supreme Court in *Frew v. Hawkins*²² which involved such a consent decree. That case, an example of the problems that are created when Congress passes vaguely written laws, began 11 years earlier, in 1993. Plaintiffs sued the state of Texas, alleging that it had failed to satisfy the requirements of the federal Medicaid statute because it

did not ensure eligible children would receive health, dental, vision, and hearing screens; failed to meet annual participation goals; and gave eligible recipients inadequate notice of available services. Petitioners also claimed the [Texas Medicaid] program lacked proper care management and corrective procedures and did not provide uniform services throughout Texas.²³

The text of the relevant sections of the federal Medicaid statute speaks in mostly general terms about the obligations of the state governments under it. Section 1396a of Title 42 of the U.S. Code says that “A State plan for medical assistance must” – among other things – “provide for” the types of screening which the plaintiffs sought.²⁴ Section 1396d(r) of Title 42 goes into more detail, stating that the state-provided screening services must include “a comprehensive health and development history,” “a

²² 540 U.S. 431 (2004).

²³ *Id.* at 434

²⁴ 42 U.S.C. § 1396a(a)(43).

comprehensive unclothed physical exam,” “appropriate immunizations . . . according to age and health history,” “laboratory tests,” and “health education.”²⁵

It is easy to imagine reasonable people differing over whether a given level of state-provided screening services met this rather vague federal mandate. How much of a physical exam is necessary before we all agree it is comprehensive, or how much health education is necessary? (Other statutes used in institutional reform litigation speak of reasonable efforts and sufficient staffing, without bothering to define what constitutes “reasonable” or “sufficient.”) This brings us to the first general truth about institutional reform litigation: *The burden placed on the state or local government defendant by the federal Constitution or federal statute at issue tends to be difficult to quantify, making it difficult to determine whether the state or local government has met its legal obligation or not.*

After some initial skirmishing between the state and the plaintiffs’ lawyers, the federal district judge in this case “certified” a “class” of plaintiffs totaling more than one million children entitled to the screening services at issue. After this development, settlement negotiations quickened. The Texas state government agreed to settle the lawsuit and entered into a consent decree. “The District Court conducted a fairness hearing, approved the consent decree, and entered it in 1996.”²⁶

Here is how the U.S. Supreme Court described the consent decree that “settled” the *Frew* litigation:

The decree is a detailed document about 80 pages long that orders a comprehensive plan for implementing the federal statute. In contrast with the brief and general mandate in the statute itself, the consent decree requires the state officials to implement many specific procedures. An example illustrates the nature of the difference. The . . . statute requires states to “provid[e]” or “arrang[e] for the provision of . . . screening services in all cases where they are requested,” and also to arrange for “corrective treatment” in such cases. [Citation omitted.] The consent decree implements the provision in part by directing the Texas Department of Health to staff and maintain toll-free telephone numbers for eligible recipients who seek assistance in scheduling and arranging appointments. [Citations omitted.] According to the decree, the advisors at the toll-free numbers must furnish the name, address, and telephone numbers of one or more health care providers in the appropriate specialty in a convenient location, and they must also assist with transportation arrangements to and from appointments. [Citations omitted.] The advisors must inform recipients

²⁵ 42 U.S.C. § 1396d(r).

²⁶ 540 U.S. at 434-35.

enrolled in managed care health plans that they are free to choose a primary care physician upon enrollment. [Citations omitted.]²⁷

Thus, our second general truth: *Consent decrees in institutional reform cases have the same effect as a clarifying statutory amendment from Congress – without any input from Congress! The parties are, in effect, writing new federal law that will apply to them and to the individuals affected by the institution being “reformed.”*

The Supreme Court opinion continues the procedural history of the case: “Two years after the consent decree was entered, [the plaintiff class] filed a motion to enforce it in the District Court. The state officials, it was alleged, had not complied with the decree in various respects After an evidentiary hearing, the District Court issued a detailed opinion concluding that certain provisions of the consent decree had been violated.”²⁸

General truth number three: *A federal district judge typically retains jurisdiction over a complex case “settled” by consent decree, and thus continues to decide disputes between the plaintiff group and the government over the implementation of the decree.*

It is important to note that this phase of judicial administration of the decree can continue for many years – even decades -- after a judge’s initial approval of the decree. Year in, year out – through one state legislative session after another and one gubernatorial administration after another – the parties to the original litigation appear before the judge arguing over the best way to implement vague federal statutory (or Constitutional) requirements. In the process, the federal judge retains jurisdiction, but the locus of power in the case actually lies elsewhere.

Sandler and Schoenbrod explain that this continuing oversight is negotiated between the judge and the “plaintiffs’ attorneys, various court-appointed functionaries [court monitors and the like], and lower-echelon [state or local] officials.”²⁹ Sandler and Schoenbrod label this group the “controlling group.” We will follow their usage.

In effect, the settlement opens the door for a federal district judge to empower a controlling group with the authority to both make policy (law) and appropriate revenue.

²⁷ *Id.* at 435

²⁸ *Id.* at 435-36 (citing *Frew v. Gilbert*, 109 F.Supp.2d 579 (E.D. Tex. 2000)). On remand after the Supreme Court’s decision, the district court denied the state’s motion to dissolve the decree. 401 F.Supp.2d 619 (E.D. Tex. 2005). The Supreme Court recently refused to review the district court’s ruling. 127 S. Ct. 1039 (2007). For more on *Frew*, see Ross Sandler & David Schoenbrod, *The Supreme Court, Democracy and Institutional Reform Litigation*, New York Law School Law Review, vol. 49, pp. 915-942 (2004-05).

²⁹ Sandler & Schoenbrod, *supra* note 5, at 7

Being so empowered and without the restraints of having to apply specific laws, these groups often impose remedies that go well beyond what is required or that could be reasonably justified. They also move the goalposts that would otherwise end their and the court's power. And because they are not subject to state open meetings laws, controlling groups can meet in secret with no public notice and no public scrutiny.³⁰

As the decree's life continues, state representation is subject to change, but the lawyers for the plaintiffs and the court monitor remain the same. Gradually, because of their experience with the case, they assume the power to control what happens. When they are unhappy, they invite the judge's attention by filing motions asking that the court tell the state to do more. When the state seeks the court's approval for modification or termination of the decree, it encounters stout resistance from the controlling group which sees the state's move as a threat to their power. General truth number four: *Members of the controlling group who stay at the table gain a large measure of control that the state officials who are responsible for the program cannot regain without great difficulty.*

Federal law allows the plaintiffs who obtain a consent decree that favors them to recover their attorney fees. In addition, if the court appoints a monitor to help with continuing oversight or the state hires private sector lawyers to help its own lawyers, the state will have to pay for those services. These costs will continue until the decree comes to an end, and the money spent on lawyers and court monitors goes on top of the money spent for compliance with the terms of the decree. General truth number five: *The decree will cost the state more than originally anticipated.*³¹

Is there any time limit on this process? It is black-letter law that “[i]f a consent judgment does not have an expiration date written into its terms, it generally remains in effect until it is dissolved; court jurisdiction over consent judgments is usually retained for an indefinite period.”³² Rule 60 is the mechanism for a state or local government defendant to seek dissolution of a consent decree through the Federal Rules of Civil

³⁰ *Id.* at 125

³¹ A recent vivid example of excessive expenses associated with a long-running case can be found in *Reynolds v. McInnes*, 338 F.3d 1201 (11th Cir. 2006). After dealing with only one of the appeals in the case, the court observed that the costs incurred by the state for attorneys on all sides, consultants, and in fines were “staggering,” *Id.* at 1220, and that, under the consent decree, the lawyers for the plaintiff class were paid without regard to whether they prevailed. The court stated, “The promise of fees for time spent without regard to the outcome of a motion or appeal in a case that apparently has endless potential for dispute may be the kerosene for the litigation fires which have raged out of control in this case.” *Id.* at 1221. It observed that the district court “may wish to consider” trying to control the fire by “cutting down that fuel.” *Id.*

³² Am. Jur. 2d Judgments § 200; see also 49 C.J.S. Judgments § 187.

Procedure. This rule authorizes the district judge to do so on the grounds that “the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, *or it is no longer equitable that the judgment should have prospective application.*”³³ The burden of proof on this issue rests with the party seeking removal of the decree. A state or local government must try to convince the judge that the decree is no longer necessary. Thus the status quo is preferred. Furthermore, the district judge’s decision on a motion to dissolve a consent decree is not likely to be overturned by an appellate court. Unless the parties agree otherwise, the consent decree will continue as long as the administering judge feels it necessary. General truth number six: *Consent decrees are “like a maze: easy to enter, but hard to exit.”*³⁴

What Is Wrong With This Picture?

Why are these lawsuits and the consent decrees that settle them controversial? After all, Congress – our duly elected representatives – passed the statutes involved. The state or local government represented by appropriate, popularly-elected officials did agree to the settlement. The consent decree process is explicitly provided for in the Federal Rules of Civil Procedure. So what is the problem?

There are numerous problems with this kind of consent decree. Our focus will be the six problems most relevant to this area of legislative reform.³⁵

First, consent decrees in institutional reform litigation raise both separation of powers and federalism concerns. The federal judge and state executive officers involved in the administration of such a decree act as if they are members of Congress, amending an earlier, vague Congressional enactment in order to give it form and substance. This amounts to virtual legislation. The federal and state officers involved have no

³³ FRCP 60(b)(5) (emphasis added).

³⁴ Sandler & Schoenbrod, *supra* note 5, at 174.

³⁵ A significant criticism that we will not delve into is the fact that consent decrees usually affect persons who were not represented in the lawsuit or in the negotiation of the decree. For more on this topic, see Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, University of Chicago Legal Forum 103-154 (1987).

Constitutional warrant through which to exercise the legislative power. *This is the Constitutional problem.*³⁶

Second, these consent decrees ask a great deal of the judges who administer them. Depending on the scope of the decree, a federal judge's competence as a manager may be overwhelmed. Corporation law rules that decisions of boards of directors are normally beyond legal challenge – the so-called “business judgment rule” – in part because judges recognized that they were poorly equipped to second-guess the decisions of business people.³⁷ Judges are not business experts nor are they experts in the design, staffing, and operation of complex governmental entities. Further, judges lack the time, freedom of mobility, and resources to provide continuous overseeing of the operations of a state agency. *This is the judicial competence problem.* The courts often attempt to ameliorate this problem by appointing a monitor, often from the ranks of academia or the legal profession. This does not make the problem go away.

Third, these consent decrees lift the issue of public administration from the public arena of politics and place it in the much less public arena of the judicial process. The result is that the public, often unable to follow what is going on with the administration of their state or local government's affairs, is now unable to participate directly in the decision-making processes. In most instances, court secrecy rules make it virtually impossible for mere citizens to know what is happening. To quote Sandler and Schoenbrod again:

Meeting without observers and outside the reach of sunshine laws and administrative procedures, the controlling group prefers privacy and meetings that are not publicly scheduled. The parties claim a privilege of confidentiality like that which keeps confidential private parties' negotiations over private lawsuits. But confidentiality in public law cases keeps negotiations over public policy private and thereby preserves the controlling group's proprietary control.³⁸

This secrecy contributes to public confusion about the nature of the decree. For example, some people may believe that the judge imposed the terms of the decree on the government. Secrecy also makes it impossible for the public to hold anyone accountable for decisions made under the continuing supervision of the decree. Since no one can tell

³⁶ Of course, Congress itself could spare us the Constitutional problem by writing clearer legislation and by refusing to delegate the legislative power to others. Unfortunately, Congress is highly unlikely to take its Constitutional duties in this connection seriously any time in the near future.

³⁷ See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“The judges are not business experts.”)

³⁸ Sandler & Schoenbrod, *supra* note 5, at 125.

who is responsible for what, the assignment of blame (or praise) for the administration of the decree is impossible. Avoiding responsibility and passing the buck are made much easier by a process so lacking in transparency. *This is the political accountability problem.*

Fourth, the attenuation of political accountability enables the judge and the members of the controlling group to focus exclusively on the subject of the consent decree. The subject of the consent – building sidewalk ramps for wheelchair access, for example – becomes the only subject worth discussing. No tradeoffs need be made. Other public priorities – highway construction or teachers’ salaries or disaster preparedness – don’t enter into the equation. *This is the tunnel vision problem.*

Fifth, both the political accountability and tunnel vision problems increase the temptation facing the government officials in the controlling group to use the consent decree process to benefit their government institution. Consider the *Frew* litigation once again. The plaintiffs’ demands would require a larger budget for the Texas Medicaid agency. What bureaucrat worth his salt would fail to use the consent decree as a vehicle for seeking larger budget outlays for his agency? Viewed this way, government officials and plaintiffs share some significant common interests in the expansion of the government agency in question.

This makes the states’ ability to defend against an institutional reform lawsuit more difficult because some government officials actually welcome the opportunity to expand their programs and budgets through a court order. With a consent decree, they can pursue an agenda that they cannot get approved by either of the political branches, the governor and legislature, and they can force the taxpayers to pay the bill. Consequently, many state bureaucrats become willing accomplices with the plaintiffs, the judge and the judicially appointed controlling group in limiting or removing the legitimate powers of the governor and/or state legislature. *This is the opportunistic bureaucrat problem.*³⁹

Sixth, and finally, the problems associated with such consent decrees are aggravated by the fact that the government officials who decide to settle an institutional reform lawsuit can, under the rules currently followed, effectively bind their successors to the settlement they negotiate. Future governors, mayors, or other state or local office-holders or officials, inherit the consent decrees negotiated by their predecessors, and will

³⁹ For more on this, see *id.* at 156-157, 171.

be required by the federal court to live up to the terms unless the later-serving officials move for dismissal of the decree and the judge so rules. As the rules currently read, the deck is stacked against this happening. Because the burden of proof is on the moving party, state (or local) officeholders are, in effect, bound to a bargain they did not negotiate. *This is the inheritance problem.*

Political accountability, tunnel vision, opportunistic bureaucrat, and inheritance problems all aggravate the Constitutional problem. Moreover, it is unrealistic to expect the judge to ameliorate any of these problems to any significant extent. The judicial competence problem reminds us that a judge is not Solomon. He is not likely to be able to produce good public administration and public policy through his own efforts, in the face of the other problems named here.

Given these interlocking problems, how might the practice of consent decree in institutional reform litigation be reformed?

Reform at the Federal Level

Congress rewrote the rules for consent decree practice in federal litigation over prison conditions in 1995. The Prison Litigation Reform Act (PLR Act) requires the judge to draw narrow decrees, using “the least intrusive means necessary to correct the **federal** violation, and give substantial weight to any adverse effect on public safety or the operation of the state’s criminal justice system” (emphasis added.) Further, the PLR Act includes a sort of “sunset” provision for prison decrees.

The act . . . calls for a prompt termination of a decree unless it is still needed to prevent violations of federal law. Once a decree has been operating for two years, the defendants may move for its termination and the judge must grant the motion unless the judge makes written findings, based on a record, that the decree is still needed to prevent future violations of law. Those who seek to keep old prison decrees alive must now prove that the decree is still needed.⁴⁰

Constitutional challenges were repeatedly denied, culminating in the U.S. Supreme Court’s 2000 decision in *Miller v. French*,⁴¹ upholding the Prison Litigation Reform Act against such a challenge.

⁴⁰ *Id.* at 189

⁴¹ 530 U.S. 327 (2000).

The 1995 Prison Litigation Reform Act has been a success, as the controlling groups in many long-settled prison cases found themselves unable to justify the continuation of their old consent decrees. “They simply could not show significant current, ongoing violations of federal law, and so the old decrees were terminated.”⁴² The act’s sunset provision, including its change in the burden of proof, seemed a promising way to move forward with reform at the Federal level, striking as it does directly at the dead wood problem.

In 2005 Sen. Lamar Alexander (R-Tenn.) and Sen. Mark Pryor (D-Ark.) cosponsored the Federal Consent Decree Fairness Act (FCDFFA) in the United States Senate that would limit the abuses of federal consent decrees and Rep. Roy Blunt (R-Mo.) introduced similar legislation in the United States House of Representatives. It is important to note that the proposed legislation would not eliminate any existing federal consent decrees. The purpose of the proposed law is to change the procedures for modifying or vacating a consent decree and to allow newly elected officials to execute their legislative duties in matters that otherwise were removed from his or her oversight by a federal consent decree. The objective of the FCDFFA is to remove consent decrees as an impediment to state and local government and to offer state officials the opportunity to change or end consent decrees more easily. This would be accomplished by (1) placing term limits on consent decrees, (2) placing the burden of proof on the plaintiff in order to keep the decree in place, and (3) return responsibility to state and local governments.⁴³

In addition, the proposed FDCFA of 2005 contains a sunset-type provision. Section 3 of the act will allow state or local officials affected by a pre-existing consent decree to move that the decree be modified or vacated “upon the earlier of” 4 years after it is entered, or in a civil case, “the expiration of the term of office of the highest elected State [or local] government official who authorizes the consent of the State [or locality] in the consent decree.” Section 3, like the 1995 PLR Act, shifts the burden of proof from the moving party to “the party who originally filed the civil action to demonstrate that the continued enforcement of a consent decree is necessary to uphold a federal right.” Thus the FCDFFA is aimed directly at the inheritance problem and, given the success of the 1995 Prison Litigation Reform Act in clearing away deadwood consent decrees in prison

⁴² Sandler & Schoenbrod, *supra* note 5, at 190-191.

⁴³ The Federal Consent Decree Fairness Act (S. 2289 and H.R. 4041) was reintroduced in the 110th Congress.

litigation, the FCDDFA sunset terms will likely have a positive effect on the other problems associated with consent decrees. Consequently, Congress should return to the issue and pass the Federal Consent Decree Fairness Act.⁴⁴

Reform at the State Level

State legislatures and state officials should also take up the task of reforming consent decree practice. It is the right thing to do as a matter of state and federal constitutional law and it will properly augment the Legislatures' power in the administration of state and local government programs.

Federal reform efforts have addressed the role of federal judges and the Federal Rules of Civil Procedure. Obviously, this route to reform is not available to state legislatures. State legislators have to approach consent decree reform by asking how they can affect the actions of state and local officials in the negotiation and enforcement of these decrees. State legislatures cannot directly address Constitutional or Federal judicial competence problems. However, state legislatures can act in a way that ameliorates political accountability, tunnel vision, and opportunistic bureaucrat problems, and enhances the governor's and the state legislature's oversight of the operation of state and local government agencies.

The Consent Decree Fairness Act for State Courts

State legislatures should adopt measures based on the proposed federal CDFA, making its terms applicable to institutional reform lawsuits brought in state courts. While the vast majority of the institutional reform lawsuits discussed in this paper were filed in federal court, such litigation is also brought in state courts. Numerous lawsuits challenging state funding of K-12 education are a good example of this.⁴⁵ In the event that Congress passes the CDFA, there may be a shift of future institutional reform litigation to the state courts. The state legislatures need to act in anticipation of such a move. Because we support the CDFA at the federal level, it is an easy step to endorse its provisions for adoption at the state level as well.

⁴⁴ We note that the FCDDFA was sternly opposed by 85 liberal advocacy groups. The letter and a list of opponents to the FCDDFA can be found at <http://hrw.org/english/docs/2005/04/13/usdom10482.htm> .

⁴⁵ For a recent survey of the results achieved by school funding lawsuits, see Eric A. Hanushek, ed., *Courting Failure: How School Finance Lawsuits Exploit Judges' Good Intentions and Harm Our Children* (2006), <http://www.hooverpress.org/productdetails.cfm?PC=1238> .

Hold State Attorneys General Accountable

The state attorney general is usually the person with ultimate responsibility for approving consent decrees that bind state and local government entities.⁴⁶ We pause to note that the state attorney general should be prepared to “just say no” to proposed consent decrees in institutional reform litigation. By interposing legal and factual defenses, the state attorney general can defeat attempts to put federal courts in charge of state agencies. Even if the defense proves unsuccessful, the state attorney general may limit the degree of judicial oversight. In addition, the state attorney general who fights and loses has appeal options that the state attorney general who signs onto a consent decree does not.

When confronted with an institutional reform litigation suit, the state attorney general should investigate the charges against the state to determine the merits of the case. If it is determined that there is merit to the charges in that the state is in violation of federal law, the state should initiate its own reform efforts directed toward complying with the federal laws and regulations in question. Once a reform plan is complete it should be implemented as soon as practicable. The state should submit the plan to the judge and ask for a stay to give the state a reasonable opportunity to implement the plan in a good-faith effort to bring the state into compliance. If the judge rejects the plan, the state should demand a trial.⁴⁷

If the state attorney general’s investigation into the merits of an institutional reform litigation suit determines that the state is not in violation of federal laws and regulations, the attorney general should inform the state legislature and the legislature should invite the plaintiffs to appear at a hearing to present their complaint directly to the state legislature. If it is determined that the plaintiffs case is without merit, the state should demand a trial on the merits of the case.

The state’s primary objective involving any institutional reform litigation suit should be to determine whether or not the state is in violation of federal law and if so,

⁴⁶ To the extent that this is not true in a given state, adjustments would obviously need to be made to our recommendations.

⁴⁷ *Marisol v. Giuliani* is an important example for state and local governments in that when confronted with an institutional reform lawsuit, Mayor Rudolph Giuliani refused to settle and demanded a trial. New York City recognized that there was a problem and was proactive in developing a remedy that the court recognized as a good faith effort. The plaintiffs settled with New York on the city’s terms, leaving the city in charge of its own program without any judicially imposed mandates. The plaintiffs accepted these terms because the city refused to accept a consent decree and demanded a trial on the merits of the case. See Sandler & Schoenbrod, *supra* note 5, at 193-194.

implement a good-faith remedy to resolve the problem while preserving the right and ability of the state legislature, governor or other elected or appointed official, to perform the duties they are constitutionally entitled to perform.

The objective in going to trial is either to win the case or confine any judicial remedy to what federal law requires rather than meekly submit to a consent agreement that can easily be expanded well beyond what the law would require. It is important that states pursue this course as a means of ensuring that the state's elected representatives and executive office holders maintain control of the policy making and appropriation process instead of giving up that control to an unelected control group that operates in secret.

In framing a defense, states should suggest by motion that judges adopt findings of fact on the alleged violation of federal law. The plaintiffs should be required to present their list of specific violations and injuries that is the basis of their action against the state. States should refuse to settle any litigation in which the violations and injuries are nebulous and subjective or the plaintiff refuses to provide such a list.⁴⁸ If the state investigates and determines that a violation has occurred, the state should immediately begin developing a good-faith remedy. By insisting on findings of fact, the state can argue that any judgment must be limited to a remedy of the specific violations or injuries. By establishing the merits of the case, states establish a basis for appealing the judge's decision. Moreover, by establishing findings of fact of violations and injuries before the court, if the state later moves to modify or terminate the decree, the findings would limit the plaintiff's efforts to argue for continuance to whether or not the violations and injuries have or have not been remedied.

As outlined above, if the suit goes to trial, the state should be proactive in offering a plan to remedy violations as a basis for settlement contingent on the judge leaving all control to the state. The state can then ask for declaratory judgment that defines the state's legal obligation without defining the policy and procedures required to meet them.

The states should cite precedent involving federal agencies found to be in violation of federal law. When a federal agency is found to be in violation of a federal law, the courts nullify the illegal action but then let the agency determine how to

⁴⁸ *Id.* at 200-203

comply.⁴⁹ Federal judges should be willing to accord to the states the same opportunities to comply with the law as they often do federal agencies if for no other reason than respect for the right of the people to have their elected representatives developing policy and appropriating revenue. By doing so, judges would uphold the tradition of judicial restraint that seeks to avoid usurping the authority of the legislative and executive branches of state government.

States should view vaguely written federal laws the same as they did unfunded federal mandates. They should consider such statutes as an encroachment on state sovereignty and as an attempt to use the courts to force state and local governments to implement politically unattainable policy objectives while also passing on all the costs to the states' citizens.

Recommendations for State Legislative Action

Because consent decrees often wind up causing harm or imposing a burden on other citizens not involved in the litigation, the state legislature has an obligation to act to protect themselves and the rest of their state's citizens by imposing restrictions on state officials' ability to enter into a consent agreement. Accordingly, and in addition to the state CDFA mentioned just above, we recommend the passage of a strong state consent decree reform bill that would –

- 1) Direct the state attorney general⁵⁰ to negotiate a time limit, keyed to the expiration of the attorney general's (or governor's) term of office, in every consent decree entered into by the state government or any local governments.
- 2) Direct the attorney general not to enter into any settlement that does not include clearly defined and objective metrics as a basis for compliance and termination. This allows the people to hold their representatives accountable for the development of public policy and the appropriating of state revenues, it allows the state to develop a good faith remedy for the violations that are the basis of litigation, and it retains the rights of the plaintiffs through the courts if state government does not act in good faith. By and large, the public desires that all

⁴⁹ *Id.* at 208

⁵⁰ And any other relevant state or local officers.

citizens' rights be respected and protected. If the actions of state or local governments result in a violation of real rights, public sentiment is fairly consistent in favor of providing a remedy. It is when plaintiffs or activist judges attempt to impose social or cultural change or attempt to impose an agenda on state and local government that the public will object. It is against such litigation that the legislature must act.

- 3) Direct the attorney general to refuse to enter into any settlement that does not require that all parties be subject to the state's open meetings law. Control groups should be required to post public notice of any and all meetings and give adequate notice of proposed actions that allows adequate and reasonable time for public comment.
- 4) Require the state attorney general to obtain legislative and executive branch approval of any settlement of an institutional reform litigation prior to his agreeing to it. This should take the form of a resolution, passed by a majority of both houses of the state legislature and signed by the governor. Prior to legislative approval, the state attorney general should be required to explain the policy and budgetary implications of the proposed consent decree to the legislature and to the governor.
- 5) Require the state attorney general to report to the governor and the state legislature on an annual basis on all the consent decrees currently in force against the state government and all local governments in the state. Budgetary and policy implications should be clearly addressed, with the help of the legislature's budget office and other relevant agencies. The state attorney general should notify the governor and the legislature, with respect to each such consent decree, if he will seek to have it dismissed in the coming year, and the reasons for his decision.
- 6) Require the state attorney general's office to maintain a complete and up-to-date list of consent decrees in force against the state government and local governments, to post such a list on the office's website, and to provide links on the website to publicly available documents describing the decrees and their administration.

In addition to the statutory recommendations above, state legislatures should consider establishing their own Joint Permanent Committee on Consent Decrees. There are a number of permanent committees established by acts of the Legislature which are composed of members of both houses that operate as advisory bodies to advise the Legislature on courses of action in specialized issues such as consent decrees. A Joint Permanent Committee on Consent Decrees would ensure that members of the State Legislature are well-informed as to the status and costs of current consent decrees, the opportunities for modification or termination of existing decrees, and ensure that the members are fully informed about any future institutional reform litigation brought against the state.

While state legislative actions along these lines will not solve all the problems associated with consent decrees in the institutional reform context, it goes a long way toward remedying the political accountability problem. By opening up the process by which the decrees are negotiated and enforced, the public will have a better idea of what is happening and who in state and/or local government is responsible for what is happening. Forcing legislators and governors to take a public stand when entering into such a decree will improve the decision-making process; requiring an annual review of all relevant consent decrees will, with any luck at all, improve administration. Putting the state attorney general in charge of making information available to the governor, the state legislature, and the public should facilitate public debate over the public's business – something that is squelched by current consent decree practice.⁵¹

Conclusion

The use of consent decrees to settle institutional reform litigation raises serious problems that deny the public knowledge of and opportunity to participate in significant matters of public policy – for years or even decades. Congress should adopt the Consent Decree Fairness Act, and state legislatures should adopt legislation solutions suggested in

⁵¹ Our own search for all federal consent decrees that currently apply to the state of Alabama, its cities, counties, and municipalities proved a frustrating ordeal. To obtain such a list, API requested the assistance of the Alabama Attorney General's Office. Almost two months later, we received a partial list. Neither the Attorney General's Office nor the Alabama League of Municipalities maintains a complete list. When we contacted the federal courts, we were told only that cases were filed by case name and/or number and, accordingly, it would be difficult if not impossible to retrieve only those cases settled by consent decree. The U.S. Department of Justice was unable to provide a list for the same reason.

this paper. In this way, the entire process becomes transparent and all the participants in institutional reform litigation will, in turn, become accountable to the taxpaying public.

In addition to the actions recommended for Congress and the states, a widespread effort should be undertaken to educate law students to restore the respect for the separation of powers doctrine and the limits that it properly imposes on the judiciary. There should also be an effort to educate governors, attorneys general, legislators, state agency directors, and local government officials on the necessity of avoiding consent decree agreements to protect their authority from judicial intrusion and to protect the right of citizens to representative government.⁵² The governors and attorneys general need to take responsibility for protecting their state's citizens from costly consent decree agreements as part of their responsibility for protecting the constitutional powers of their offices. No governor, attorney general, or other state official should willingly surrender the legitimate powers of their office or the legitimate powers of their successors.

While they cannot prevent an activist plaintiff from filing an institutional reform lawsuit, too often governors and other executive branch members are unaware that they can mount a formidable defense against such lawsuits. If state and local governments were committed to forcing plaintiffs to prove their case in a trial, there is a substantial probability that there would be fewer cases filed against them. If nothing else, it is almost certain that going to trial would result in far fewer expansive and expensive court orders that compromise legislative and executive powers and undermine the people's right to representative government.

Implementing the policies and strategies recommended in this paper would be a good start toward restoring a proper balance between the executive, legislative, and judicial branches of government. As a result, citizens will once again enjoy the "republican form of government" guaranteed by Article IV of the U.S. Constitution.

⁵² *Democracy by Decree: What Happens When Courts Run Government* should be required reading for all candidates for state attorney general.

