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FROM THE MAGAZINE

Hope on Consent Decrees

The Supremes make it easier to escape rule by judicial decree.

David Schoenbrod, Ross Sandler

For decades now, state and local officials nationwide have struggled to make policy while bound within the constraints of old court orders, agreed to by their predecessors. These "consent decrees"—covering everything from bilingual and special education to prison conditions, public housing, and welfare—undermine representative government by turning judges into lawgivers, and they have often had ruinous consequences.

The decrees typically result from the federal lawsuits that have proliferated since the 1960s, in the wake of legislation in ever more areas of social policy. Congress will enact a law, usually under its spending power, in pursuit of a worthy social objective, such as making all curbs wheelchair-friendly or requiring foster-care programs to have children adopted within 15 months, leaving it up to the states and localities to figure out how to make that happen. Plaintiffs—who tend to be professional advocates—then launch a federal lawsuit, charging that a state or city has failed to achieve Congress's goal. Rather than endure costly litigation, many state and local officials settle such suits by agreeing to plans, timetables, milestones, and other provisions, folded into a court order and signed by the judge on the consent of the parties. Plaintiffs' lawyers then oversee the consent decree's implementation.

Not surprisingly, many of these court-ordered nostrums (some of which have governed city or state programs for 20 years or longer) don't work as hoped. Officials trying to comply with them regularly face unintended side effects, new circumstances, competing budgetary demands, budgetary restraints, the unavailability of specialized personnel, and other contingencies. Under normal democratic conditions, policymakers could just change their approach. But locked rigidly into the decree, they can do nothing without the permission of the plaintiffs' attorneys, whose interests often do not match the public's. Failed policies thus continue indefinitely, as in the notorious *Jose P.* case, a Dickensian 1979 consent order that most observers agree has led to disastrous mismanagement of special education in New York City's schools but that still remains stubbornly in force. (See "New York's Fiscal Equity Follies," page 88.)

State and local officials seek to modify the terms of decrees, of course. But courts—all the way up to the Supreme Court—have in the past given them very little wiggle room. Supreme Court case law has held that modifications are acceptable only if officials can prove an "unforeseen" change of circumstances—and it has set the bar high for determining whether something is unforeseen.

Thankfully, help may be on the way, thanks to the highest court's January ruling in *Frew* v. *Hawkins*, a case concerning Texas's effort to escape a Medicaid-related consent decree. On the face of it, the decision seems to reinforce the power of consent decrees over government officials, and that is exactly how some press reports described it: the court rejected Texas's constitutional claim that state sovereignty shielded it from sanctions for failing to complete measures included in the Medicaid consent decree and ruled that the state remained obligated to the original agreement. End of story, right?

Not by a long shot. If you read it carefully, *Frew* v. *Hawkins* provides a road map that shows state and local officials caught in unbending consent decrees how to regain some flexibility. In a remarkable coda to the decision, Justice Anthony Kennedy, writing for the other justices, agreed with the amicus briefs filed by 20 state attorneys general: "enforcement of consent decrees," he observed, "can undermine the sovereign interests and accountability of state governments" and "improperly deprive future officials of their designated legislative and executive powers." Moreover, Kennedy continued, "a state . . . depends upon successor officials, both elected and appointed, to bring new insights and solutions to problems of allocating revenues and resources. The basic obligations of federal law remain the same, but the precise manner of their discharge may not." The upshot, according to Kennedy: federal courts should give officials administering consent decrees substantial discretion to adapt to changing conditions.

Frew v. *Hawkins* may signal the beginning of the end of the worst problems with consent decrees, Jose P. included.

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