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From Status to Contract and Back again: Consent Decrees in Institutional Reform Litigation Injunction

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From Status to Contract and Back Again: Consent Decrees in Institutional Reform Litigation

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I. INTRODUCTION

In issuing remedial decrees in institutional reform cases against state and local governments, courts should, as we argued in our book *Democracy by Decree*, enforce rights and otherwise leave policy making to elected officials.[1] We have also argued that decrees in such cases tend to control policy more than is needed to enforce rights, even when the need for prophylaxis is taken into full account.[2]

The point we emphasize in this essay is that overly broad consent decrees work an inappropriate shift from judicial protection of the plaintiffs—in their status as right-holders—to judicial protection of plaintiffs in a new status—as beneficiaries of a contract. What starts out as a flexible remedy morphs into a rigid contract.[3] Holders of rights to social programs are entitled to have

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1. ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003).

2. On the need for prophylaxis, see Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief*, 27 REV. LITIG. 99 (2007).

3. *See* Hecht Co. v. Bowles, 321 U.S. 321, 329–30 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.").

their rights enforced, but not to achieve hegemony over the policy choices entrusted to public officials.

Our concern is the current court practice that encourages judges to view consent decrees against governmental officials as contracts rather than equitable remedies. This not-so-subtle shift in theory collides with fundamental democratic principles. As Justice William Brennan wrote in dissent:

> 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.[4]

Part II of this essay explains why decrees against state and local government in institutional reform cases tend to be broader than needed to enforce rights and thus work a shift from status to contract. Part III suggests ways to reverse the shift from status to contract so that consent decrees are confined to their proper business of protecting rights. Part IV explains why reform is urgent.

The dichotomy between status and contract is, of course, not new. *See, e.g.*, HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 165 (10th ed. Beacon Press 1963) (1861) ("[T]he movement of the progressive societies has hitherto been a movement from Status to Contract.").

4. U.S. Trust Co. v. New Jersey, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting).

II. WHY DECREES AGAINST STATE AND LOCAL GOVERNMENTS TEND TO BE BROADER THAN NEEDED TO ENFORCE RIGHTS

The bulk of decrees against state and local governments are negotiated and entered by consent.[5] Those who negotiate the decree have objectives that differ from simply enforcing rights.[6] In targeting a government agency, the plaintiffs' attorneys generally seek improvement that is as comprehensive as possible.[7] As plaintiffs' attorneys, we did the same ourselves. The agency officials whom mayors, governors, and their commissioners task to negotiate with the plaintiffs' attorneys often seek to use the lawsuit as a way to implement their own favorite ideas and to free themselves from policy constraints and budget restrictions imposed by other officials.[8]

The negotiators, whom we call "the controlling group," write a detailed, long-term plan for the government program.[9] In the horse trading that produces the plan, some rights are let slide and commitments unessential to vindicating any right are included in the plan because they seem like good ideas to the controlling group.[10] By signature of the trial judge, the plan becomes a consent decree binding the defendants and their successors in office.[11]

Once the decree is entered, the controlling group usually continues to meet, often in regularly scheduled sessions closed to the public.[12] Its job now is to administer the decree, and that typically results in the decree broadening.[13] One reason for this broadening is that some of the hopeful ideas in the original decree prove unworkable, so defendants must ask plaintiffs' attorneys to consent to modifications.[14] As the price of consent, plaintiffs usually demand adding new requirements to the decree.[15] As the new requirements compound, the decree grows from a document into a

5. SANDLER & SCHOENBROD, *supra* note 1, at 118–19.
6. *Id.* at 139.
7. *Id.* at 142–43.
8. *Id.* at 123–25.
9. *Id.* at 118.
10. *Id.* at 123–24.
11. *Id.* at 127.
12. *Id.* at 125.
13. *Id.* at 126–28.
14. *Id.* at 127–28.
15. *Id.*

file folder and, in some cases, into a file drawer or even a file cabinet.

III. WAYS TO LIMIT DECREES TO ENFORCING RIGHTS

We suggest changing court practices in three areas: (1) framing the decree, (2) managing the decree, and (3) ending the decree.

A. Framing the Decree

Persons negotiating a consent decree aimed at reforming a governmental social program know that changes in agency culture and performance will likely take years. They anticipate that elected and appointed officials come and go, that unexpected events and failures of performance will compel changes of plans and modifications, that future economic cycles could dramatically affect resources, and that even the most popular social programs must still compete annually for funds and leadership with other equally compelling programs. This reality leads parties to opt for a decree template designed to defeat the uncertainties of time. The result is often a complex and rigid decree loaded with specific interim milestones, cascading obligations that may only marginally relate to the rights at issue, and outright substitutions warranted only by the parties' agreement and self-interest.[16]

This negotiation process, with its generous and unbounded template, permits the parties to draft new and expanded duties far beyond the legal requirements actually written into the governing statute.[17] It is by the creation of new and expanded duties that today's office holders are able to burden or restrict the options available to future office holders.

Under the leading Supreme Court case, the trial judge is free to sign off on such a broad decree if the incumbent defendants consent and the terms of the decree are related in some loose sense to the aims of the lawsuit.[18] So long as the defendants consent, judges

16. *Id.* at 123–24, 126–29.

17. *Id.* at 123–25.

18. Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986).

may approve decrees without considering whether they are broader than needed to protect rights.[19] This latitude makes sense in litigation against private defendants because private litigants can generally be counted upon to strenuously resist overly broad decrees. Also, if private defendants over-promise or overly restrict their successors, it is their private loss, not the public's loss.

This judicial latitude makes little sense, however, in the context of institutional reform litigation because the burden of the overbreadth falls upon others—future mayors or governors, the state or local legislatures, and the public that ultimately foots the bill. These real parties in interest are usually not parties in the suit. They often do not know the terms of the proposed decree until it begins to impact them.

All public officials are temporary holders of governmental authority. While they and their successors must obey the law, it is equally true that each of them is forbidden from contracting away the public's rights to self-government.[20] Consent decrees that progressively shrink the authority exercised by elected officials are operating like contracts rather than equitable remedies.

In our book, *Democracy by Decree*, we argued that, to prevent overly broad consent decrees, trial judges should limit the decree to requirements needed to enforce rights.[21] In dicta in a subsequent opinion, *Frew ex rel. Frew v. Hawkins*, a unanimous Supreme Court made the same point: "If not limited to reasonable and necessary implementations of federal law, remedies outlined in consent decrees involving state officeholders may improperly deprive future officials of their designated legislative and executive powers."[22]

For the Supreme Court's admonition to change the practices of trial courts, new procedures must be accepted. Judges should begin the remedy phase with findings of fact on the wrong done to plaintiffs. This "bill of wrongs" would provide the trial judge with a check on ambitions of the controlling group. For example, where plaintiffs allege that a public school system is taking too long to place students in appropriate special education classes and this condition is illegal and in fact exists, the parties should not be

19. SANDLER & SCHOENBROD, *supra* note 1, at 167–74.

20. 2A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 10.39 (3d ed. 1996).

21. SANDLER & SCHOENBROD, *supra* note 1, at 45–46.

22. 540 U.S. 431, 441 (2004).

permitted to enlarge the consent decree to cover other aspects of special education that are not similarly alleged, illegal, and known to in fact exist.

A clear, initial statement of the violation establishes boundaries for the consent decree. The parties could agree to the bill of wrongs without the defendants exposing themselves to liability in other cases. This is because § 36 of the Federal Rules of Civil Procedure allows for admissions that are binding only in that case and in no other.[23]

There is a risk of course that the controlling group gins up whatever findings seem necessary to support the decree it wishes to enter. Yet, to the extent that the bill of wrongs is fictional, it will help to alert elected officials, the judge, and the public of excesses in the decree. In any event, the bill of wrongs will be helpful in cabining modifications of the decree.

B. Managing the Decree

Running complex governmental social programs calls for management skills of a very high order. Signing a consent decree does not repeal this reality. Over time, the controlling group is sure to experience less than perfect outcomes and outright failures, as well as evolving and unexpected ideas, policies, and events. Yet current court practices, following a contract analogy, view motions to modify consent decrees as attempts to get out of binding contracts.[24] This might make sense in cases against private defendants who generally should be held responsible for dealing away their own prerogatives. But, in litigation against state and local governments, mayors and governors are dealing away the prerogatives of their successors in office and the public generally.[25]

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23. FED. R. CIV. P. 36(b) ("Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding."); *See* 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2264, at 531 (2d ed. 1994) ("Any admission obtained under Rule 36, whether an express admission or an admission by failure to respond, is for the purpose of the pending action only. It is not an admission for any other purpose nor may it be used against the party who made it in any other proceeding.").

24. United States v. ITT Cont'l Baking Co., 420 U.S. 223, 235–37 (1975).

25. SANDLER & SCHOENBROD, *supra* note 1, at 167–74.

The Supreme Court made some allowance for this concern in *Rufo v. Inmates of Suffolk County Jail.*[26] What it did there, however, was not enough. *Rufo*'s criteria for modification are framed in contract terms.[27] One instance where *Rufo* allows modification is where an unforeseen change makes performance more difficult.[28] This is a cousin of the contract doctrine of supervening impracticality.[29] *Rufo* also requires that the modification be tailored to the change.[30] This, too, is a cousin of contract doctrine, which in instances of supervening impracticality enforces the contract to the extent practicable.[31]

Another aspect of *Rufo* is that the trial judge grant no deference to defendant officials on the issue of whether the criteria for modifying the decree have been met.[32] This lack of deference may be appropriate in enforcing contracts of a proprietary nature, like a purchase contract or bond debt, but not in cases where the subject of the contract is governmental in nature, as is almost invariably the case in institutional reform cases.

In our book, we argued that trial judges should permit governmental officials to modify the terms of a consent decree whenever they present a reasonable justification for the modification.[33] A unanimous Supreme Court seemed to agree when it put a helpful gloss on *Rufo* in *Frew v. Hawkins*: "A State, in the ordinary course, depends upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenues and resources. The basic obligations of federal law may remain the same, but the precise manner of their discharge may not."[34]

Frew's entire discussion of modification avoids any hint of contract thinking.[35] Although the Supreme Court has spoken, there

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26. 502 U.S. 367 (1992).

27. *Id.* at 378–83.

28. *Id.*

29. RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

30. *Rufo*, 502 U.S. at 391.

31. RESTATEMENT (SECOND) OF CONTRACTS §§ 270, 358 (1981).

32. *Rufo*, 502 U.S. at 393 n.14 ("[T]he moving party bears the burden of establishing that a significant change in circumstances warrants modification of a consent decree. No deference is involved in this threshold inquiry.").

33. SANDLER & SCHOENBROD, *supra* note 1, at 213–14.

34. Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431, 442 (2004).

35. *See* Ross Sandler & David Schoenbrod, *The Supreme Court, Democracy and Institutional Reform Litigation*, 49 N.Y.L. SCH. L. REV. 915–23 (2005)

is reason to suppose that lower courts have, for the most part, failed to pay attention. In the *Frew* case itself, on remand, the appellate court refused to grant deference to state officials, discounted the state's claims that it was in compliance with the federal law, and refused to terminate the decree.[36]

C. *Ending the Decree*

The problem here is that current court practices require decrees to remain in force longer than needed to enforce plaintiffs' rights. Termination requires compliance with not only the law, but also with all the contractual obligations that the controlling group has written into the consent decree.[37] For example, a federal statute may require a state to establish a system to notify children of available health services, while a consent decree based on that statute may have enlarged that right to include multiple costly and repetitive attempts to locate children eligible for the program. In our view, a successor official should be able to get the court to terminate a multiple notification obligation written into a consent decree so long as that official has come into compliance with federal law. Obligations agreed to by the prior official, however worthy, should not, without statutory support, limit the successor's choices. Overly broad consent decrees may, as the Supreme Court succinctly observed in *Frew*, "lead to federal-court oversight of state programs for long periods of time even absent an ongoing violation of federal law."[38]

In our book, we recommended that decrees should end at a fixed time unless plaintiffs can show that the decree is still needed to enforce rights. A bill that got substantial and bipartisan support, the Federal Consent Decree Fairness Act,[39] would have produced this

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(observing that the court in *Frew* encourages a new level of deference to local officials when modifying existing consent decrees, in contrast to the rigid *Rufo* standard).

36. Frazar v. Ladd, 457 F.3d 432 (5th Cir. 2006). The court applied the *Rufo* standard, stating that it rejected the argument that *Frew* "ushers in a new standard for consent decree modification." *Id.* at 438.

37. Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 249–50 (1991).

38. *Frew*, 540 U.S. at 441.

39. Federal Consent Decree Fairness Act, S. 489, 109th Cong. (2005) (introduced March 1, 2005 by Senator Lamar Alexander (R-TN)); Federal Consent

result as well as implementing our recommendation on modifying consent decrees. The chief argument of the opponents of the bill was that plaintiffs would litigate rather than settle, thus making work for the courts and the parties.[40] This argument is, however, not credible. Plaintiffs have many reasons to settle. If the decree is litigated, it is subject to appeal, and the Supreme Court has imposed stiff limits on the scope of court-imposed decrees where the parties have not consented.[41] Consent decrees provide faster relief for clients, faster payment of attorney fees for the plaintiffs' lawyer, and eliminate the risk of losing the case. Besides, the plaintiffs can keep the decree in force if it is still necessary to protect rights.

The Federal Consent Decree Fairness Act is not a one-off copy of the Prison Litigation Reform Act (PLRA) and lacks some of its most controversial features.[42] Professor Margo Schlanger's study of the impact of the Prison Litigation Reform Act on decrees shows that it did not do away with existing decrees or prevent the entry of

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Decree Fairness Act, H.R. 1229, 109th Cong. (2005) (introduced March 1, 2005 by Representative Roy Blunt (R-MO)).

40. *E.g.*, HumanRigtsWatch.org, Letter Opposing Consent Decree Fairness Act, http://hrw.org/english/docs/2005/04/13/usdom10482.htm (last visited Dec. 3, 2007) (signed by multiple advocacy groups) ("Th[e] burden of proof provision—which reverses decades of existing law that places the burden on the defendants—creates an additional disincentive for plaintiffs to settle . . . ."); *Federal Consent Decree Fairness Act: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 13 (statement of Rep. Berman, Member, House Comm. on the Judiciary) ("I can't think of why any plaintiff, whether it's the Federal Government or a private party, will ever settle a case. Why won't they want to litigate everything to a final judgment, which isn't, obviously, subject to that kind of automatic review and requirement that you reprove your case. So I think it eliminates settlements.").

41. *E.g.*, Lewis v. Casey, 518 U.S. 343, 357 (1996) ("The actual-injury requirement would hardly serve the purpose ... of preventing courts from undertaking tasks assigned to the political branches ... if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration.").

42. For example, The Federal Consent Decree Fairness Act, unlike the PLRA, had no bearing on damages claims and did not require exhaustion of administrative remedies. *Compare* S. 489, 109th Cong. (2005), *with* 42 U.S.C. § 1997e (2000). The version of the Federal Consent Decree Fairness Act that we supported in the end lacked the PLRA's limit on fees for masters and attorneys, and contained no automatic stay if the trial court failed to rule on a motion to modify or terminate by a set time limit.

new ones. Indeed, she had to work hard to show that it had any substantial impact.[43]

IV. CONCLUSION: THE URGENCY OF REFORM

Adoption of these suggestions would have two impacts. First, it would require more, rather than less, involvement by the trial judge. The trial judge would be compelled to scrutinize the draft consent decree to ensure that the decree does not go beyond the rights violated. This is an appropriate role for the trial judge, who, for both practical and legal reasons, provides the main restraint on the parties. Second, adoption of these suggestions would provide a sound basis for consideration of motions to modify and terminate consent decrees, and appellate review of the disposition of those motions.

The controlling group of lawyers and officials who manage a consent decree is free from constraint to a considerable degree. The plaintiff class is often too large and uninformed to provide much of a check on its attorneys. The governors and mayors have personal, political, and practical reasons for going along with the controlling group. The state legislatures and municipal councils are usually not parties to the case and often do not know much about the decree until after it is entered. The same is true of members of the public who may be affected or harmed by the decree. The federal agency charged with enforcing the statute usually plays little or no part in the process. There is no appeal from the entry of a consent decree, so the appellate courts provide no check. Once the decree is entered, current court practices on modification and termination restrict the ability of appellate courts to limit the decree to its proper scope.[44]

Our suggestions would shift the evaluation of decrees from contract principles to traditional equity principles. The difference is substantial: *Contract doctrine allows great latitude to the parties as they negotiate the agreement, and then tends to narrow the relevant factors on judicial review to the four corners of the contract.*[45]

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43. Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 583–84 (2006).

44. SANDLER & SCHOENBROD, *supra* note 1, ch. 5.

45. *See* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 574 (1984) ("It is to be recalled that the 'scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of

Equity doctrine, on the other hand, limits the scope of the initial decree to only what is needed, and then on judicial review broadens the relevant factors by looking beyond the agreement to additional factors such as the impact of the contract on the democratic values of state and local governments.

Doctrines based upon contract, when applied to institutional reform litigation, render governments less able to resolve social disputes through democratic processes. As Justice Jackson argued in an earlier era when judges sought to limit governmental authority, "The vice of judicial supremacy, as exerted for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts."[46] This statement was written in 1941, and the judicial interventions Jackson opposed prevented government from addressing the social issues of the 1930s. Today, judicial management of consent decrees as contracts has had a similar effect of closing the avenues to peaceful and democratic conciliation of our contemporary social and economic conflicts.

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one of the parties to it' or by what 'might have been written had the plaintiff established his factual claims and legal theories in litigation.'" (quoting U.S. v. Armour & Co., 402 U.S. 673, 682 (1971))).

46. ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 321 (Octagon Books 1979) (1941).