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Points of View  
Commentary and Analysis

## BREAKING THE DEAL

### PROPOSED LIMITS ON FEDERAL CONSENT DECREES WOULD LET STATES ABANDON COMMITMENTS.

Timothy Stoltzfus Jost

Bashing judges as petty anti-democratic tyrants is a hardy perennial of American politics. It bloomed once again this spring in the political and media brouhaha surrounding the Terry Schiavo litigation.

But it paints a false picture of America's courtrooms. The truth is that our judges are thoughtful, honorable, and prudent men and women who do their best to interpret laws adopted by our democratically elected Congress and state legislatures and apply them to messy factual situations. So it is unfortunate to see Sen. Lamar Alexander (R-Tenn.) joining the chorus of those unfairly attacking these public servants.

Alexander's April 4 commentary urged passage of his proposed Federal Consent Decree Fairness Act ('Free the People's Choice,' Page 58). The senator's immediate concern is several consent decrees that are undemocratically (he contends) binding the Tennessee Medicaid program. Let's get the facts straight.

## PLAYING BY THE LAW

Medicaid is our nation's largest health insurance program. In fiscal 2006, the federal government will spend almost \$200 billion on the program. The federal government pays 64 cents of every dollar spent in Tennessee on Medicaid. Since Tennessee does not have to take this money, it is not unreasonable to expect the state to comply with federal law when it does. The consent decrees that Sen. Alexander's proposed legislation would help abrogate require nothing more than that.

In each of the three consent decrees described by Alexander, Tennessee was sued for not complying with federal Medicaid law. The Supreme Court has long recognized that federal law gives Medicaid recipients enforceable rights. Some of these -- such as the right of poor children to early and periodic screening, diagnosis, and treatment of illness - - are quite sweeping.

In each of the three cases, Tennessee's democratically elected governor agreed to take specific steps to comply with a law adopted by Congress. In each case, the plaintiffs agreed to give up substantial rights to achieve a more rapid settlement of the dispute. In each case, the plaintiffs and the state came to an agreement that they presumably felt they could live with and committed themselves to it. In not one of these cases did a judge tell

the parties what to put in their agreement.

Tennessee may now believe that it is in compliance with Medicaid law. If this is true, it simply needs to move to modify or terminate the decrees that bind it.

It may also believe that particular judicial orders enforcing these consent decrees are incorrect. If it believes that, it can appeal. Indeed, on April 12 the U.S. Court of Appeals for the 6th Circuit reversed one of the court orders mentioned by Sen. Alexander that had blocked certain changes in the state's program, concluding that the order exceeded the terms of the consent decree.

But as the Supreme Court held unanimously last year in *Frew v. Hawkins*, another case involving a Medicaid consent decree, a state that has entered into a consent decree cannot simply walk away from the order because it no longer feels like complying.

The proposed Federal Consent Decree Fairness Act would allow a state to do just that, and not only in Medicaid disputes. This legislation applies to virtually all cases brought against state and local governments to enforce federal law. The legislation would apply not just to litigation brought by individuals seeking the protection of federal law, but also to most litigation brought by the Justice Department against state and local governments. Although Sen. Alexander's bill would exempt school desegregation cases, it would cover cases involving race discrimination in employment; housing; and hospitals or other institutions receiving federal funding. It would also undermine consent decrees entered to enforce the Voting Rights Act. It would weaken consent decrees in cases under the Americans With Disabilities Act, cases enforcing federal environmental statutes, and cases brought to defend property and economic rights, religious liberty, or access to guns under the Second Amendment.

It is no wonder that a broad coalition of 86 national, state, and local groups -- including the AARP, the National Urban League, and the Southern Poverty Law Center -- submitted a letter to Congress on April 12 opposing this legislation.

### DISCOURAGING ACT

The Federal Consent Decree Fairness Act would dramatically change the terms of consent decrees both existing and future. It would limit the certain duration of such decrees to four years or until the end of the term of the governor or highest-ranking official who agreed to the decree. At that time, the state or local government could move to modify or terminate the decree without offering any reason whatsoever.

The burden would shift to the plaintiff to prove that continuation of the consent decree was necessary 'to uphold a Federal right,' a technical phrase that could leave out many claims under federal laws. The plaintiff, in other words, would have to litigate the case all over again. If the court failed to act on the state's motion to overturn within 90 days (and the federal courts are fairly busy places), the consent decree would be terminated until the court decided the motion.

As a practical matter, the Federal Consent Decree Fairness Act would mean that no consent decree against a state government could be expected to last longer than four years. The vast majority would be even shorter in duration, as most would be entered at some point after the beginning of the term of office of the relevant official. States would be allowed to walk away from their commitments simply by electing a new governor, cities by electing a new mayor.

Because the legislation limits the effectiveness of only consent decrees, not litigated

decisions, the immediate effect would be to discourage future consent decrees. If future plaintiffs wanted to make sure that a final decree remained enforceable, most cases now settled through consent decrees would have to be litigated to judgment. Yet the Supreme Court has long articulated a policy encouraging settlement of cases, as has Congress.

### WHY WE CONSENT

Settlement of cases is vital for conserving the limited resources of the federal courts and for preventing intolerable judicial backlogs. It allows parties to avoid the prolonged uncertainty of complex litigation. It also saves them tens of thousands of dollars in attorney and expert witness fees, discovery costs, and other expenses. Those saddled with more litigation costs would include the Justice Department and other federal agencies, the federal courts, the intended beneficiaries of federal rights, and even state and local governments (the intended beneficiaries of Sen. Alexander's legislation).

Though a consent decree is enforceable as a judgment of the court, it is also a contract between the parties -- and comes with many of the benefits of private agreements.

Consent decrees allow the parties to determine the scope and terms of a judgment through the give-and-take of negotiation rather than to have terms judicially imposed that neither side may favor.

The kinds of cases addressed by the Alexander legislation commonly involve federal rights in complex federal programs and legislative schemes. Plaintiffs and defendants both accept certain losses in settling these cases in reliance on the decree's promise of corresponding gains. Plaintiffs settle for less-expansive interpretations of their rights than they may be entitled to; defendants agree to more specific obligations than they might have otherwise assumed.

Like other contracts, consent decrees are efficient -- they represent terms that both sides believe they can work with. Courts ought to be particularly hesitant to modify these terms as any modification is likely to alter the balance struck by the parties -- to restore to one party advantages earlier forgone and deprive the other of benefits it may have sacrificed much to gain.

### FAIR AND FLEXIBLE

Litigants often use consent decrees to address problems that cannot be fixed overnight. For example, the city of New Orleans settled a Clean Water Act lawsuit with the Justice Department in 1998 by agreeing to modernize an antiquated sewage collection system. Many consent decrees, therefore, last for considerable periods of time. The time limits that would, for all practical purposes, be imposed by Alexander's legislation would be impractical and even unworkable in many cases.

Time limits are also unnecessary. Consent decrees in class actions currently cannot be entered until a judge holds a 'fairness hearing' to ensure that the agreement is consistent with the public interest. Under [Federal Rule of Civil Procedure 60\(b\)\(5\)](#), any consent decree can be modified or terminated whenever either party shows that 'it is no longer equitable' that the decree be enforced as agreed. And, indeed, consent decrees are often modified or terminated as conditions change.

But as the Supreme Court declared unanimously last year in *Frew* : '[D]istrict courts should apply a 'flexible standard' to the modification of consent decrees when a

significant change in facts or law warrants their amendment. . . . If the State establishes reason to modify the decree, the court should make the necessary changes; where it has not done so, however, the decree should be enforced according to its terms.'

By tying the life of consent decrees to the election process, the Federal Consent Decree Fairness Act would also inject the disruption of state politics into the federal judicial process. 'Elect me,' politicians might promise, 'and I'll end that consent decree.' Outgoing governors could enter into consent decrees to politically embarrass their successors by forcing them to move for modification of decrees in popular programs. The bill would thus drag the federal judiciary into state and local political bickering, threatening the very respect for judicial impartiality upon which the rule of law depends.

The Federal Consent Decree Fairness Act poses a serious threat to the authority of the courts, to the power of Congress, and to our federal democracy. It would undermine the key role that federal courts play in protecting the public's rights under the Constitution and under federal law. It is simply bad public policy and should be rejected.

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