Testimony of

Dr. Michael S. Greve

John G. Searle Resident Scholar
Director of the AEI Federalism Project; Co-Director of the AEI Liability Project at
American Enterprise Institute
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TESTIMONY
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OVERSIGHT AND THE COURTS

FEDERAL CONSENT DECREE FAIRNESS ACT (S. 489)

Michael S. Greve
John G. Searle Scholar
American Enterprise Institute

Mr. Chairman, Members of the Committee:
I respectfully submit this testimony as an independent but not an indifferent expert. My first law review publication two-plus decades ago argued for the congressional termination of certain consent decrees. I have since followed the scholarly literature, and I have written extensively for both academic and general audiences on the federalism questions that in my estimation lie at the core of the proposed Federal Consent Decree Fairness Act ("FCDFA"). In my former professional capacity as the director of a public interest law firm, I have enjoyed (in a manner of speaking) a close-up, practical view of the inordinate difficulties that attend the modification of consent decrees. I strongly support the proposed legislation.

Introduction

The purpose of the FCDFA is to facilitate the modification and termination of consent decrees by (1) permitting state or local defendants to apply for modification or vacation of a consent decree four years after its entry or upon a change in the elected government; (2) imposing on the plaintiffs the burden of proof to demonstrate that the decree is still necessary to uphold a Federal right, rather than requiring the defendants to demonstrate the necessity for modification; and (3) providing for automatic termination if the court fails to rule on the motion to modify or vacate within ninety days. These provisions would effect a well-targeted reform at the intersection of two pervasive and profoundly problematic institutional practices: "institutional reform litigation," and the private enforcement of federal programs against state and local governments.

Institutional reform litigation--that is, lawsuits on behalf of broad constituencies to bring about lasting change in the programs and operation of public agencies--may take the form of judicially imposed injunctions as well as consent decrees, and it often proceeds under the Constitution rather than federal statutes. The FCDFA is limited to statutory rather than constitutional cases, and it applies only to consent decrees, not to judicially imposed, post-liability injunctions. In addition, S. 489 exempts school desegregation decrees. By all accounts, however, the FCDFA would affect a very wide range of federal statutes and reach a significant segment of the institutional reform litigation "market."

Many thoughtful scholars have ably described the many problems of institutional reform litigation, and some of them have testified on the proposed legislation. For that reason, my remarks principally address the private enforcement of federal statutes (typically "conditional spending" statutes) against state and local governments.

The problems in this area fall under the general heading of "federalism." As discussed below, the private enforcement of conditional spending statutes erodes the states' and local governments' position in the federal architecture, erodes political responsibility and accountability at all levels, and expands federal programs beyond the envisioned and authorized levels. While these problems arise even where private enforcement does not take the form of structural, long-lasting consent decrees, such decrees are particularly troublesome. Moreover, the United States Supreme Court has recognized the problematic nature of private enforcement and, over the past two decades, has developed limiting doctrines. The FCDFA effectively complements that jurisprudence.

1. Private Enforcement of Conditional Funding Statutes Is Inherently Problematic.

The contention that the private enforcement of federal conditional funding or "entitlement" programs is problematic (at least where Congress has not unmistakably authorized that mechanism) may sound heretical. But while the practice seems well-entrenched in American government, it is in fact quite exceptional--and ill-advised. It is not the practice of other federal countries, and it was not the practice of the New Deal. The U.S. Supreme Court's federalism decisions of the past two decades reflect grave doubts about the legitimacy and utility of private enforcement.

Virtually all federal systems, from Germany to India, feature intergovernmental, federal-to-state payments to implement welfare, health, environmental, and education policies. Almost always, however, the negotiation of funding levels and the enforcement of funding conditions are left to intergovernmental processes. The United States is virtually alone in entrusting the enforcement of intergovernmental bargains largely to third-party private litigants and to courts.

Even in the United States, broad-based private enforcement is of relatively recent vintage. The New Deal, which first implemented intergovernmental transfer payments on a large scale, thought of "entitlement programs" as entitlements for the states, not private beneficiaries. That understanding prevailed for the following three decades. In 1964, when Congress enacted Title VI of the Civil Rights Act, is was very careful to specify

that the enforcement of the statute against recalcitrant state and local officials should be the province of the federal government, rather than private litigants and courts. The Medicaid statute, enacted in 1965, likewise lacks a private enforcement mechanism.

The creation of private entitlements and enforcement rights--sometimes under so-called "implied" private rights of action, more often under 42 U.S.C. §1983--was principally the work of the United States Supreme Court in the 1960s and 1970s. Its essential modus operandi is the transformation of funding conditions into private "rights" or entitlements that are judicially enforceable against state and local governments.

That activist jurisprudence reached its zenith in 1980, only to be decisively rejected soon thereafter. Beginning in the mid-1980s, the Supreme Court changed course and cut back on the recently created "rights." Those curbs have taken several forms, including constitutional limitations on private parties' ability to enforce statutory entitlements by means of damages judgments against state and local governments; more restrictive canons of statutory interpretation with respect to "implying" private rights of action; a sharper distinction between private entitlements and programmatic funding conditions; the rule that a "detailed remedial scheme" created by statute forecloses private remedies under §1983; and, foremost, the so-called "clear statement" rule, which holds that courts may entertain private suits to enforce federal programs against state and local governments only when Congress has made that intention unmistakably clear in the language of the statute.

All these doctrines are firmly rooted in the Court's concern for federalism. The clear statement rule in particular reflects the presumption that Congress should not lightly be presumed to have altered the federal balance to the states' disadvantage --a presumption that in turn presupposes that private enforcement statutes do alter that balance. That premise is buttressed by substantial evidence. The private enforcement of federal conditional funding statutes compromises federalism in several ways.

(a) Private Enforcement Erodes the Recipient-Governments' Autonomy. As the Supreme Court has put it, conditional spending statutes are "in the nature of a contract." State and local governments receive federal funds in exchange for performing certain functions, subject to certain conditions. To entrust the monitoring and enforcement of that bargain to third-party beneficiaries is to bias the system against the recipients.

A bargain "in the nature of a contract" presupposes that the parties have fair notice of the scope and content of the agreement. State or local governments that accept federal funds must of course abide by the funding conditions and, in the event of noncompliance, countenance the prospect of unilateral federal enforcement action, either by legal or fiscal means. (The quid pro quo is that the recipients can terminate the bargain at any time.) Third-party enforcement, however, places the bargain--more often than not, a highly complex regulatory regime--at the discretion of private litigants and federal courts. Given the vagaries of that process, no state or local government can fairly be said to have been on notice as to what its acceptance of the funds might entail. Statutes that fail to state the

recipients' exposure to suit with clarity and specificity expose the states to unforeseeable liabilities.

That risk, moreover, is entirely one-sided. Private enforcement that transforms grant conditions into irreducible entitlements changes the "mix" of funds and obligations to the recipient-governments' disadvantage. But there is (generally speaking) no recognizable legal claim to make the federal government adjust its end of the bargain correspondingly--e.g., to pony up more money. For these reasons, third-party enforcement systematically erodes the position of state and local governments in the federal scheme.

(b) Private Enforcement Erodes Political Responsibility. Private enforcement greatly exacerbates the most troublesome feature of intergovernmental programs--the erosion of political responsibility and accountability at all levels.

A cottage industry of lawsuits under the Individuals With Disabilities and Education Act, for example, has created severe fiscal and disciplinary problems for local school districts. No one, however, appears responsible. School administrators complain about rigid federal mandates and inadequate funding. Legal advocacy groups protest that they won their clients' entitlements fair and square in Congress, and that the enforcement of those entitlements is a matter of simple justice. Judges assert that they are only enforcing the will of the Congress. Congress, in turn, blames "activist judges" for the untoward consequences of its legislation. In short, political actors up and down the chain get to shift blame--and parents have no way of assigning responsibility.

While accountability problems can arise under any intergovernmental program, third-party enforcement greatly increases the risk by conferring substantial power and authority upon two sets of actors--advocacy groups and federal judges--that are beyond any political control. Careful studies have shown that litigation is often the linchpin of an unaccountable political process.

(c) Private Enforcement Generates Program Expansions on Autopilot. Federal conditional funding statutes embody rough compromises between the statutory beneficiaries' claims, the taxpayers' concerns, and rival constituencies' claims on the same limited funds. Private enforcement systematically tilts the balance in the implementation phase toward the beneficiaries. In the legislative process, taxpayers and rival interests have a voice. In a litigation-driven process, they are sidelined. There are no plaintiffs for fiscal responsibility or a more flexible administration of grant conditions; due to plaintiff self-selection and to limitations on legally recognizable claims, the enforcement process cuts in only one direction. The plaintiffs' claims, moreover, are brought against government bureaucracies that have an interest in expanding their constituencies' entitlements and in shielding their programs from budgetary and political control. Those agencies often lack adequate incentives to defend against private claims. Sometimes, their conduct borders on outright collusion, a problem that is particularly pronounced in the context of consent decree litigation (see 2.(a) below).

(d) A Note on Beneficiaries. It is widely assumed that the private enforcement of grant conditions is ipso facto a boon to the intended statutory beneficiaries--and any restriction on that enforcement mechanism, ipso facto an assault on their interests. That is not so. Private enforcement undoubtedly augments the power and influence of legal advocacy groups, but it does not necessarily benefit their purported clients' interests.

Statutes of the type here at issue attempt to distribute scarce public resources to large numbers of potential beneficiaries. In that context, "rights" amount to an assertion that some claimants shall prevail over other potential beneficiaries, whose claims may be equally pressing. The distributional conflict is palpable in the protracted litigation over the consent decrees that govern Tennessee's Medicaid programs ("TennCare"). Each month of TennCare administration under the decree rules cost the State an extra $43 million--funds that would otherwise have been available for school improvements or other public purposes. The longer the decrees run, the harsher future cuts will have to be, thus prompting the loss of Medicaid benefits for individuals who might otherwise have continued to receive them.

Congress has intermittently recognized the potentially destructive impact of private enforcement provisions. The one unambiguous domestic policy success of the past decade, the 1996 welfare reform, explicitly repealed any and all statutory entitlements. That provision diminished the role of poverty rights groups--and benefited the poor (in the aggregate): post-enactment, welfare rolls have been cut in half. While many factors have contributed to that success, the statutory design has played a crucial role. But for the repeal of private enforcement provisions, poverty rights lawyers would have litigated welfare reform into the ground.

2. Consent Decrees Pose Special Problems.

The termination and modification provisions of the FCDFA are carefully calibrated to redress private enforcement problems in the context of consent decrees, where those problems are particularly acute. Moreover, they dovetail perfectly with the U.S. Supreme Court's federalism jurisprudence by fashioning an institutional remedy that the Court itself cannot provide.

(a) Consent Decrees Increase Federalism Risks. Opponents of the FCDFA have argued that consent decrees preserve (1) the parties' ability to "move on" without having to resolve time-consuming and needlessly divisive questions of past liability and (2) their ability to tailor flexible remedies. These perceived advantages, however, correspond directly to the most serious deficiencies of consent decrees.

Without a determination of liability, far-reaching consent decrees may be entered without any finding of a legal violation, let alone a violation of the plaintiffs' rights. Consequently, consent decrees often afford "relief" that no plaintiff could rightfully

demand, that no judge could order, and that no bureaucracy could administer without the artifice of a consent decree. This feature of consent decree litigation enormously exacerbates the dangers of eroding political accountability and of unauthorized program expansions.

State and local bureaucracies have powerful incentives to put themselves under a consent decree that will immunize their decisions and averred budgetary "needs" against legislative control and budgetary claims by rival agencies and their constituencies. Politicians have equally powerful incentives to shirk political responsibility for the administration of public programs, and "Sorry, we are under a court order" is a ready means to that end. Thus, the institutional "defense" in institutional reform litigation may range from diffidence to naked collusion with the plaintiffs. Federal courts have noted this danger with striking frequency. Consent decrees, Judge Easterbrook of the U.S. Court of Appeals for the Seventh Circuit has noted, should not become "a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them."

Once a consent decree has been entered and administered for some time, its administration becomes increasingly self-referential. The question of whether there ever was a legal basis for the decree falls by the wayside, and the remedy itself takes center stage. Paradoxically, this gives the parties an incentive to negotiate consent agreements that are "written to be violated." A clearly written consent agreement imposing manageable obligations might terminate--precisely the opposite of the result intended by the parties. In short, consent decrees in excess of the statutory scheme have a tendency toward self-perpetuation.

(b) The FCDFA Effectively Remedies the Inadequacy of Appellate Judicial Oversight. Consistent with its over-all federal jurisprudence, the Supreme Court has articulated a growing concern with the detrimental effects of consent decrees on democratic governance at the state and local level. In Rufo v. Inmates of Suffolk County Jail, the Court relied on those considerations in formulating a more flexible standard for the modification of governmental consent decrees than the stringent, quasi-contractual standard that applies to consent decrees that obligate only private parties (for example, in antitrust law). In Frew v. Hawkins, the Court reiterated those concerns (albeit in dicta) and again exhorted lower courts to pay heed to the legitimate concerns of state and local governments.

It has long been recognized, however, that Supreme Court standards and appellate judicial oversight provide no adequate means of policing consent decrees. In the most extensively studied context, school desegregation, the Supreme Court has repeatedly admonished lower courts to terminate decrees once a school district has achieved unitary status, and it has supplied lower courts with guidance on the legal standards that should delimit the scope and duration of desegregation decrees. These directions are far more stringent and detailed than the generalized exhortations of Rufo and Frew. Even so, the Court's interventions have had essentially no effect on school desegregation decrees.

The futility of the Court's exhortations is readily explained. While the term "consent decree" suggests a discrete, easily reviewable order, the reality is a process of interest group haggling and bureaucratic management over which even the nominally presiding district judge, let alone a reviewing appellate court, typically has very little effective on-going oversight and control. Appellate courts are placed in a position of absentee landlord, and even that is an excessively charitable description: whereas an absentee landlord can conduct sua sponte inspections, appellate review requires a motion by one of the parties. The review, moreover, will typically turn on the district court's factual findings with respect to a remedial record spanning many years--in other words, on matters where the appellate courts' competence and standard of review are at their nadir.

To state the point directly: The Supreme Court has fully recognized the inherent problems of the private enforcement of federal statutes, and it has consistently worked to minimize them. Those problems are most acute in the context of consent decrees. Precisely here, however, the Court has found no way to apply the logic of its federalism decisions in an effective manner. The FCDFA would provide a targeted, salutary remedy for that defect, fully consistent with the consistent jurisprudence of the past two decades.

(c) The "Federal Right" Standard of the FCDFA is Crucial to its Effectiveness. Defendant-governments' inclination to request a modification or termination of a consent decree is a matter of incentives. The FCDFA cannot overcome all the hurdles, from bureaucratic inertia to political unpopularity, that often prevent government officials from requesting the termination of consent decrees. But the proposed reversal of the burden of proof is an important step in the right direction.

Of greater importance is the requirement that plaintiffs opposing the modification or termination of a consent decree must show that the decree is still necessary to uphold a Federal right. As mentioned, Supreme Court precedents distinguish between violations of federal law and of federal rights. The FCDFA standard goes to rights. It would lead to the virtually automatic dismissal of consent decrees that were never predicated on violations of rights to begin with. Put differently, the "Federal right" standard focuses the modification or termination proceeding precisely on the point that should have been, but often was not, at the center of the entry of the consent decree. We do not know what percentage of extant consent decrees would flunk the FCDFA standard, but my guess it that the number is substantial. Opponents of the FCDFA appear to agree with that assessment.

The "Federal right" standard has further salutary implications. Opponents have charged that the ninety-day period provided for in the bill in insufficient to conduct a full trial on what is bound to be a convoluted factual record. That might be so if the defendants' compliance record over many years were the focus of the proceeding. The question of a Federal right and its violation, however, is much more focused. It is typically a legal rather than a factual inquiry, and it can usually be resolved by means of pre-trial summary judgment. That judgment, in turn, is readily reviewable by appellate courts.

(d) The FCDFA Embodies a Sensible Balance Between Democracy and Judicial Protection of Rights. The FCDFA would provide state and local governments with a means of moving for the modification or termination of consent decrees that, regardless of their original merits, appear ill-advised for one reason or another. Those reasons may include overtly political considerations. By predicating the ability to move for modification or termination on a change in administration, the FCDFA explicitly recognizes the legitimacy of "politics" in this context.

The charge that the FCDFA unjustifiable "injects" politics into the legal process is, respectfully, hard to take seriously. First, it ignores the obvious fact that government officials may decide to enter consent decrees for political reasons, prominently including a flight from responsibility. It is unclear why politics should be legitimate at the front but not the tail end. Second, the administration of public programs and the allocation of scarce resources--the subjects of the consent decrees here at issue--are inherently political questions. That is why we have elections.

Politics, all agree, must stop at the water's edge of individuals' rights, and that is what the FCDFA provides. If a consent decree remedy is still required to uphold a Federal right, it will continue in operation. If the remedy has redressed an original rights violation, it will terminate upon the government's motion, as it should. If a consent decree never rested on a rights violation to begin with, the plaintiffs obtained several years' worth of relief to which they were not entitled. In that case, it is hard to see how a successful termination motion leaves them worse off.

Summary and Concluding Remarks

The FCDFA's sponsors have stated its purpose with admirable clarity: it is not a "court-stripping" law but rather an effort to restore political responsibility and accountability to a bureaucratic process that currently operates without effective political or, for that matter, effective judicial control. Interminable consent decrees inflict grave costs on the public fisc, on democratic government, and on the political autonomy of state and local governments--and, more than occasionally, on the intended beneficiaries of the federal statutes under which judicial consent decrees are entered.

The probable effects of the FCDFA are difficult to predict. For reasons mentioned, motions for termination are likely to be granted in a large proportion of cases, but it is an open question to what extent state and local governments would utilize the options provided under the enactment. The most closely analogous existing statute, the Prison Litigation Reform Act, appears to have had a measurable effect on the number and scope of judicial decrees. However, the PLRA governs judicial injunctions as well as consent decrees, and state and local officials may be more likely to apply for the termination of orders than for the termination of decrees to which their predecessors agreed. For that and other reasons, the consent decree "drop rate" pursuant to the FCDFA should be expected to be more modest.

The FCDFA may well have a greater effect on the number and scope of future consent decrees. That is because the opportunities for termination reduce the expected value of an agreement to the litigants. Some have suggested that the reduced value of consent decrees might have the perverse effect of increasing the volume and scope of judicial injunctions, as litigants will now feel compelled to take cases that might well settle all the way to a judicial determination of legal liability. Due to the restrictiveness of well-established legal standards to prove up a violation of privately enforceable statutory rights, however, this substitution effect is likely to be very limited and, moreover, amply compensated by the corollary disincentives to bringing suit in the absence of a violation of rights.

The sensible course of action in the face of uncertainty is to enact the FCDFA and to monitor its outcomes. I confidently predict that the evidence will show it to have been an important step in the right direction.