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Consent Decrees Without Consent:  
The Rights of  
Nonconsenting Third Parties  

_Douglas Laycock†_

A consent decree is simply a settlement that includes an injunction. Both cash settlements and consent decrees transfer something of value from defendant to plaintiff. Settling by injunction rather than cash does not change the essential nature of settlement, but it does introduce new risks and problems.

One risk peculiar to consent decrees is that the transfer might not be from defendant to plaintiff. Even in trilateral disputes, it is almost impossible for a defendant to pay a cash settlement with someone else’s money.¹ But defendants frequently enter into consent decrees purporting to surrender someone else’s rights. This can happen whenever the dispute involves the rights of some third party; I will refer to such disputes as trilateral. The triangle may consist of minority employees, other employees, and a discriminating employer;² current employees, retired employees, and a bankrupt employer;³ the American Civil Liberties Union (“ACLU”), public school officials, and extracurricular student prayer groups;⁴ or the United States, an oil company, and Indian owners of oil and

† A. Dalton Cross Professor at Law, The University of Texas at Austin. I am grateful to the participants in the University of Chicago Legal Forum symposium on consent decrees, and to Mark Gergen, Julius Getman, Robert Hamilton, Sanford Levinson, William Powers, David Rabban, Cookie Stephan, Teresa Sullivan, Louise Weinberg, Jay Westbrook, and Charles Alan Wright for helpful comments on earlier drafts. Fred Garrett, Russell Miller, and Karra Porter provided research assistance.

¹ Compare note 10.


³ In re Century Brass Products, Inc., 796 F.2d 265 (2d Cir. 1986).

gas interests.  

This article explores a simple thesis: a decree in which A and B agree to transfer the arguable rights of C is not a consent decree unless C also consents. No court should approve such a decree unless C consents, or unless the plaintiff joins C as a defendant and proves all the elements of a claim that a court can lawfully impose on C all the burdens that C bears under the decree. A and B can agree by contract to whatever they want, but the court should not enter their agreement as a consent decree without the participation of C. If a court does enter such a decree without the consent of C, C should be wholly and genuinely unbound by the decree, able to force de novo litigation of his rights by merely filing a complaint or a motion to intervene.

This thesis follows from well-settled principles. The court’s remedial power may be exercised only on the basis of a violation of law, and neither violation nor remedy may be adjudicated without notice and hearing for the parties to be bound. These rights may be waived in a consent decree, but a consent decree may be entered only with the consent of the parties. Whether entered by litigation or consent, decrees do not bind those who were not parties. With respect to C, a decree to which A and B consent is neither a consent decree nor a litigated decree. It is simply beyond the power of the court.

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8 Sanguine Ltd. v. U.S. Dept. of Interior, 798 F.2d 389 (10th Cir. 1986).
10 The nearest parallel in damage litigation is where a settling defendant seeks contribution or indemnity from a non-settling defendant. In jurisdictions that allow such claims, the settling defendant must of course prove that the non-settling defendant is actually liable to plaintiff. “The ultimate problem with any other rule . . . is that potentially it would allow B (the original defendants) to spend C’s (the third-party defendant) money without the final judgment of a court or C’s agreement.” Tankrederiet Gefion A/S v. Hyman-Michaels Company, 406 F.2d 1039, 1043-44 (6th Cir. 1969). “It would . . . offend due process if an indemnitee’s unilateral acts could bind the indemnitor without notice and an opportunity to be heard.” GAB Business Services, Inc. v. Syndicate 627, 809 F.2d 755, 760 (11th Cir. 1987). See also Swartz v. Sunderland, 403 Pa. 222, 169 A.2d 289 (1961); Consolidated Coach Corp. v. Burge, 245 Ky. 631, 54 S.W.2d 16 (1932); Home Ins. Co. v. Advance Machine Co., 443 So.
This summary statement of the thesis does not attempt to specify who counts as a C. It will be necessary to establish some boundaries to the class of Cs who must be joined before the decree is entered. But it is important to examine the core of the problem before examining the cases at the boundary.

I. THE NATURE OF THE PROBLEM

A. Some Illustrative Cases

Sometimes it is obvious that A and B are bargaining over the rights of C. An example is *Harrisburg Chapter of the American Civil Liberties Union v. Scanlon.* The ACLU as plaintiff, and various school districts and education officials as defendants, agreed that extracurricular student groups could not pray on high school campuses. No extracurricular student prayer group was joined as a party; certainly no such group consented to this decree.

The striking thing about this decree is that only the student prayer groups were directly affected. The ACLU did not claim for itself the right to do anything, receive anything, or refrain from doing anything. Rather, it asserted a wholly external preference: the ACLU preferred that the student prayer groups be excluded from campus. The school officials were like the stakeholder in an interpleader, caught between the primary antagonists and probably having no strong preference. But any preference the school officials did have was as external as the ACLU’s. The attempt to litigate this case without joining the student prayer group excluded the party with the greatest stake.

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2d 165 (Fla. App. 1983); Restatement (Second) of Torts, § 886A comment (g) (1981); W. Page Keeton, Dan B. Dobbs, Robert E. Keeton and David G. Owen, Prosser and Keeton on the Law of Torts 339-40 (5th ed. 1984). Some courts have applied a less demanding rule in indemnity cases where the settling defendant invited the non-settling defendant to take over defense of the case. See GAB, 809 P.2d at 760-61.

Once the non-settling defendant’s liability is established, courts give some weight to the amount of the settlement. But again the settlement is not dispositive. See Restatement (Second) of Torts, § 886A comment (d) (1981), and the other authorities cited in this note. Partial deference to the amount of the settlement is less troublesome, because both defendants have the same interest in minimizing plaintiff's damages. The settling defendant will bear a proportionate share of the settlement even if he recovers contribution. He also risks bearing the whole settlement cost himself, because his claim for contribution or indemnity may fail.

11 See text at notes 86-96.
The Commonwealth Court refused to approve the decree, because the student groups had not consented. The parties appealed. The Supreme Court of Pennsylvania affirmed over the vigorous dissent of two justices. The dissenters undertook to resolve the claims of the extracurricular student prayer groups, concluding that they had no right to meet on campus. This conclusion required the dissenters to resolve questions of law and fact that would undoubtedly have been disputed if the student prayer groups had been joined as defendants. The ACLU had a plausible Establishment Clause claim to exclude them; the student prayer groups had plausible claims under the Free Speech, Free Exercise, and Equal Protection Clauses that they were entitled to use spare classrooms on equal terms with other extracurricular groups. These competing claims have been the subject of substantial debate. But the merits are irrelevant to the procedural point: the court could not decide the rights of the student prayer groups before it heard their case.

Wilder v. Bernstein, discussed elsewhere in this volume, provides another example. The City of New York, and plaintiff children represented by the ACLU, consented that Catholic and Jewish social agencies would provide equal access to social services—that they would not prefer Catholic or Jewish clients. The lawyers tell us that both the City and the plaintiffs desired that result; only the religious agencies were opposed. Despite the bitter litigation over other issues, Wilder was a friendly suit with respect to the equal access issue. Indeed, Richard Epstein plausibly argues that by the time of settlement, it had become a friendly suit on other issues as well.

The Wilder plaintiffs were pursuing personal benefits and not merely external preferences. But just as in Harrisburg ACLU, the

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14 Today, the student prayer groups would also have a prima facie claim under the Equal Access Act, 20 U.S.C. §§ 4071-4074 (Supp. 1985).
18 Id. at 206.
The focus of the litigation was on the behavior of the nonconsenting third parties. The plaintiff class sought to change the regulatory behavior of the City, but only as a means to change the primary behavior of the agencies. That the regulatory mechanism was a contract between the City and the agencies may change the law applicable to the merits, but it does not shift the focus away from the agencies. Because the point of the litigation was to regulate the agencies, they should have been joined as defendants. Indeed, the court noted that the agencies would be bound by the decree, because they were in privity with defendant and, alternatively, because they acted in concert with defendant.\(^2\)

The agencies had claims and defenses arising from their contracts with the City and from the Free Exercise Clause. Religious agencies have a substantial claim to autonomy in their operations.\(^2^1\) That claim may be at its weakest in the context of a religious agency that is selling its services to the state; plaintiffs and the City may argue that the agencies surrendered free exercise protection when they accepted state funds and undertook to perform state functions. But that response raises serious issues under the doctrine of unconstitutional conditions.\(^2^2\) Once again there is a conflict between the values of the Establishment, Equal Protection, and Free Exercise Clauses. Perhaps the agencies would not have prevailed on the merits, but there was no way to decide those issues without letting the agencies litigate them.

The legitimacy of the Wilder decree thus depends entirely on the adequacy of the hearing held in response to the religious agencies' objections to the settlement. The decree is in no sense a consent decree, and the consent of the City and the plaintiff adds nothing to the legitimacy of the decree's impact on the agencies. The hearing held on the agencies' objections was more elaborate than most such hearings, but it also gave substantial weight to the consent of the original parties. The court doubted whether plain-

\(^2^0\) Wilder, 645 F. Supp. at 1319.
tifffs were required to make any showing on the merits; it assumed that they were required to show "a serious claim" or "a reasonable basis for the compromise." Inquiry under that standard could not adjudicate the agencies' rights no matter how elaborate the hearing. In any event, the opportunity to object to a done deal will rarely equal the opportunity to litigate a case from the beginning.

Affirmative action cases offer the most common contemporary example of consent decrees that alter the rights of nonconsenting third parties. The procedural issues are the same whether minority employees sue to impose a quota or other employees sue to prevent a quota. Courts have been properly criticized for litigating reverse discrimination suits without the participation of the affected minority groups, and one can easily imagine the reaction if an employer and a union entered into a consent decree forbidding affirmative action. The civil rights bar would not think that minorities were bound by such a decree. But most of the cases involve the opposite situation, in which an employer and minority plaintiffs agree to impose a quota.

The leading case in this area is *Local Number 93 v. City of Cleveland*. Plaintiff was an organization of black and Hispanic firefighters, the Vanguards. The Vanguards sued the City, alleging that its examination and other promotion practices discriminated against minority firefighters. The City and the Vanguards promptly began negotiating with a view to settling the case by imposing a racial quota on promotions. They apparently planned not to involve the firefighter's union in the negotiations, but the district judge insisted that they do so. When the resulting trilateral negotiations failed to reach agreement, the City and the Vanguards submitted a bilateral decree providing for quotas. The trial court entered the decree, and that decision was affirmed by the court of appeals and then by the Supreme Court.

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23 Wilder, 645 F. Supp. at 1321.
24 Id. at 1322.
25 The cases are collected in Comment, 53 U. Chi. L. Rev. 147 (cited in note 2).
27 Compare Note, Participation and Department of Justice School Desegregation Consent Decrees, 95 Yale L.J. 1811 (1986) (criticizing school desegregation decrees entered on consent of school board and Department of Justice without participation of black school children or their representatives).
29 Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985).
30 106 S. Ct. 3063 (1986).
The only source of judicial authority to enter this decree was the consent of two of the three parties. The case had not been tried, discrimination had not been proven, and the court had made no findings. The Supreme Court held that none of that mattered, because the decree was based on consent. The union argued that the quota remedy exceeded what the court could have ordered even if discrimination had been proven. The Supreme Court found it unnecessary to resolve that issue, because the decree was based on consent. The union also argued that the decree violated a statutory restriction on remedies, but the Court held that the restriction did not apply to consent decrees. In short, the consent of the City and the Vanguards made it unnecessary to decide any of the union's arguments on the merits.

Then the Court turned to the critical issue: How does it answer the union's claims of substantive right that someone else consented? The Court's answer was based on two seemingly indisputable principles. First, "it has never been supposed that one party . . . could preclude other parties from settling their own disputes and thereby withdrawing from litigation." Second, the settling parties "may not dispose of the claims of a third party," so the union would not be bound by anything in the settlement.

The problem is not with these principles, but with their application to such an inextricably trilateral dispute. The point of the litigation was to allocate a limited pool of jobs between two groups of employees. The City may have had other interests in the case, but with respect to the quota it was little more than a stakeholder. As in *Harrisburg ACLU* and *Wilder*, the nonconsenting third party had a far more direct stake than the consenting defendant.

The union also had plausible claims that the quota went beyond the limits imposed on such quotas in the litigated cases. Any applicant or employee rejected because of a quota has a prima facie claim under Title VII. There is a judicial exception for quotas designed to remedy past discrimination, but employers are not free to impose any kind of quota that benefits minorities. There are emerging rules and limits: the discrimination must be egregious.
and if a court orders the quota or if a public employer adopts it, the discrimination must be attributable to the employer. The quota must be tailored to the violation; the interests of other employees must not be unduly trammled; the quota must be flexible and temporary; and the beneficiaries must be qualified. These limits protect the interests of other affected workers, and these workers plainly have standing to litigate whether these limits have been exceeded. The court cannot resolve that issue until these workers have been heard.

B. The Central Conundrum

In each of these cases, a defendant (B) is caught between conflicting claims of plaintiffs (A) and one or more third parties (C). In each case there is a serious dispute between A and C: can the student groups pray in classrooms; can religious social agencies with government contracts prefer their coreligionists; how will the limited number of officer positions be allocated? In each case the


Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1847-49 (1986) (plurality opinion); Paradise, 107 S. Ct. at 1065; Local 28, 106 S. Ct at 3036, 3050, 3053; id. at 3054-55 (Powell, J., concurring). This requirement does not apply to private employers governed only by Title VII and not by the Equal Protection Clause. Johnson, 107 S. Ct. at 1449-53; Steelworkers, 443 U.S. at 198.

See Paradise, 107 S. Ct. at 1071-72; Local 28, 106 S. Ct. at 3050, 3053; id. at 3055-56 (Powell, J., concurring); Wygant, 106 S. Ct. at 1846-52; id. at 1853, 1857 (O’Connor, J., concurring).

See Johnson, 107 S. Ct. at 1455-56; Paradise, 107 S. Ct. at 1067, 1073; Local 28, 106 S. Ct. at 3052, 3055; id. at 3055-56 (Powell, J., concurring); Wygant, 106 S. Ct. at 1850-52; id. at 1853-54 (O’Connor, J., concurring); id. at 1857-58 (White, J., concurring); Steelworkers, 443 U.S. at 208-09.

See Johnson, 107 S. Ct. at 1456; Paradise, 107 S. Ct. at 1067, 1070-71; Local 28, 106 S. Ct. at 3051-52; id. at 3055-56 (Powell, J., concurring); Steelworkers, 443 U.S. at 208-09.

See Johnson, 107 S. Ct. at 1454-55; Paradise, 107 S. Ct. at 1073; Local 28, 106 S. Ct. at 3035. “Qualified” apparently means qualified in the sense of meeting some absolute requirement, and not in the sense of being the best person available for the job.

Paradise affirmed an order imposing a promotion quota on the Alabama Department of Public Safety. When the quota was ordered, twelve years after the initial liability determination, the Department had only four black corporals and no blacks with any higher rank. 107 S. Ct. at 1062-63. In Johnson, the beneficiary of affirmative action was promoted into a job category with 238 men and no women. 107 S. Ct. at 1454. The male plaintiff’s claim to be more qualified was based on an insignificant difference (75 versus 73) on a scored interview. Id. at 1448.
consent decree purports to resolve the dispute in a way that rejects some or all of the claims of C.

In each case, either the decree limits the rights of C or it does not. If the decree does not limit the rights of C, it contributes little to resolution of the dispute. Litigation can continue as though the decree had never been entered. If the decree does limit the rights of C, the court has acted without authority. The court cannot deprive C of his claimed rights on the basis of consent, because C has not consented. It cannot deprive C of his claimed rights on the basis of adjudication, because it has not adjudicated anything, and because it cannot adjudicate C's substantive rights without giving C full procedural rights.

The Supreme Court in *Local Number 93* did not come to grips with this conundrum. It said that the decree did not attempt to dispose of the union's rights. But the rest of the opinion plainly took the view that the consent decree accomplished something important. Settlement is an important policy of Title VII, the Court said, and it would not interpret the statute in a way that made settlement "more difficult." Perhaps the Court thought the consent decree would simplify the litigation by neutralizing the City. In other words, the decree bound the City to implement quotas if possible, and perhaps it took away the City's right to oppose quotas in any subsequent litigation between the Vanguards and the union. Under this interpretation, the Vanguards would have gained the right to deal with only one opponent instead of two. That is worth something, but if the union is well-represented and if all issues remain open to litigation, it is not worth much.

The Court might also have thought the consent decree had value as a temporary solution: the quotas could operate until and unless the union or an affected firefighter raised the issue. But the Court seemed to have more in mind. In listing the advantages of consent decrees over ordinary contracts, it said that settlements in public law cases were "designed to be carried out over a period of years."

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44 This statement is tautologically true. For a case applying the stated rule to a named party, see United States v. Ward Baking Co., 376 U.S. 327, 334 (1964).
46 106 S. Ct. at 3080.
47 Id. at 3077 n.13.
48 Id.
The Court cannot have it both ways. The decree must either bind the union and settle the dispute over promotion quotas, fail to bind the union and settle nothing, or partly settle the dispute by severely hampering but not absolutely precluding any further attempt to assert the union's claims. Apart from quite marginal and temporary benefits, any good the decree might do is directly dependent on its power to bind the union. The Court cannot say that the decree is effective but that the union is not bound.

The Court may well have thought that the union would be hampered, even barred, but not bound by res judicata. After saying that the union was not bound, the Court said it might be too late for the union to raise its claims. A bar based on timeliness could bind the union as effectively as res judicata. Such a result has considerable support in the lower court cases. If this is what the Court has in mind, it is disingenuous to say the union is not bound.

The holding in Local Number 93 repeats an earlier error that required amendments to the Federal Rules of Civil Procedure. Rule 24 required a would-be intervenor to show that he "is or may be bound by a judgment in the action," and that he is not adequately represented by an existing party. The Supreme Court held in effect that this standard could never be met, because if the would-be intervenor were inadequately represented, he would not be bound. The Court explicitly refused to consider practical obstacles arising from the decree. The result was an amendment to Rules 19 and 24, requiring joinder or permitting intervention "if as a practical matter" the litigation would impair the interest of a nonparty. It is equally important to examine the practical consequences to C of a consent decree between A and B.

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49 Id. at 3080.
50 See text at notes 155-67.
51 The holding in Local Number 93 may have been colored by the union's litigation strategy. The union intervened as a defendant, and then "despite the efforts of the District Judge to persuade it to do so, the Union failed to raise any substantive claims." 106 S. Ct. at 3080. Perhaps the union was guilty of some genuine procedural default, but it is impossible to tell from the reported opinions. Perhaps the union asserted only substantive defenses, and not "claims." But this would be wholly appropriate; the union was seeking only to prevent a decree from being entered over its objection. In any event, the Court's primary holding—that C cannot prevent a consent decree between A and B—did not depend on its observation about the union's failure to raise substantive claims.
53 Sam Fox, 366 U.S. at 691-92.
54 Fed. Rule Civil Proc. 24(a) and Notes of Advisory Committee to 1966 Amendment.
Some courts have refused to approve bilateral consent decrees in trilateral disputes. But Local Number 93 commits the Supreme Court to approving such decrees, and many other courts have done so, especially in affirmative action cases. Some of these courts have gone further, and insulated such decrees from subsequent attack by C. Local Number 93 says that C is not bound, but it is unclear whether the Court is serious about that promise.

C. The Nature of Bilateral Negotiation in Trilateral Disputes

1. If C Will Be Bound by the Negotiation. The legitimacy of consent decrees depends on the legitimacy of the negotiating process that produces them. Bilateral negotiation in trilateral disputes is wholly unlike ordinary settlement negotiations, and there is no reason to believe that the resulting decrees are either just or efficient. If A and B settle a case by transferring money or some other thing of value from B to A, we can assume that both sides found the settlement more attractive than the risks of litigation. If the value transferred is substantial, it follows that the risk of liability was substantial. But if part of the cost can be shifted to C, the settlement becomes a bargain. If enough of the cost can be shifted to C, the bargain may be irresistible. A settlement in these circumstances shows only that the residual settlement costs borne by B are less than the risks B faces in litigation. A rational B might generously settle even a frivolous claim if C will bear the cost.

In Harrisburg ACLU, the entire cost of the settlement with respect to student prayer groups fell on the unrepresented stu-
dents. The settling school districts gave up nothing on that issue.\textsuperscript{60} In Wilder, substantially all the cost of the equal access settlement appears to have fallen on the religious agencies.\textsuperscript{61} Undoubtedly the City bore some cost; its dealings with the agencies became more difficult. But it was the agencies, not the City, that had to change their behavior and compromise their principles.

Quota settlements in discrimination cases transfer much of the cost to third parties. An employer who litigates to judgment in a Title VII class action may be held liable for substantial amounts of back pay. But if the employer promises a racial preference in future employment decisions, it may settle the case with no back pay or with considerably less than the amount for which it might have been liable. The Supreme Court has mistakenly seen this as a virtue.\textsuperscript{62}

The cost of the racial preference is largely borne by other employees and future applicants, mostly white but also minorities not included in the quota. Employment opportunities for these groups will be reduced. The employer may bear some cost in lowered morale and racial tension,\textsuperscript{63} and if the employer must hire less qualified applicants, productivity will suffer. But compared to the alternative of actually paying the victims of discrimination, a quota remedy is an enormous bargain for the employer. Some courts have held that the employer adequately represents the other employees,\textsuperscript{64} but those holdings wholly ignore the employer's incentives.

Judge Easterbrook considers those incentives but still finds the employer an adequate representative. He suggests that the other employees will somehow put the cost back on the employer.

\textsuperscript{60} The decree also settled other claims on which the schools districts did bear some of the cost of settlement.
\textsuperscript{63} The point is noted in Stotts v. Memphis Fire Dept., 679 F.2d 541, 555 n.12 (6th Cir. 1982).
\textsuperscript{64} Stotts v. Memphis Fire Dept., 679 F.2d 579, 583 n.1 (6th Cir. 1982). The same view is implicit in Corley v. Jackson Police Dept., 755 F.2d 1207, 1210 (5th Cir. 1985). But see United States v. Jefferson County, 720 F.2d 1511, 1516-17 (11th Cir. 1983). In Jefferson County, the union argued that it moved to intervene as soon as it learned the employer would not adequately protect its interests. The court held the motion untimely, noting that the employer and the union had quite different incentives from the beginning; it called the union's decision to rely on the employer "ill-advised." So white employees are excluded because their employer either does or does not adequately represent them. The explanation varies, but not the result.
through higher pay or better conditions. The Supreme Court relied on similar but more restrained reasoning when it held that employers have standing to litigate the imposition of a layoff quota. I have no doubt that the employer is sufficiently affected to have standing, but the notion that the employees can shift all or most of the cost back to the employer is reflexive economic determinism with little basis in experience.

The employer can hide behind the decree, pretending that the law and the court forced him to adopt the quota; the quota is not one of his demands to be put on the bargaining table. Moreover, any form of compensation to the disappointed whites would also have to go to the benefited minorities. A better deal for the whites would violate Title VII; and in the collective bargaining context, it would violate the duty of fair representation and ignore the reality of across-the-board benefits. I would be very surprised if empirical research showed that imposition of a quota in the workplace leads to a more generous total compensation package. The only way to shift the cost back to the employer is through a judgment, award, or settlement that compensates losses caused by the quota. Such a result is possible only if the whites are not fully bound by the consent decree.

A consent decree in which much of the cost is borne by non-consenting third parties is likely to be a settlement that pays more than the case is worth. It is not just that B has little reason to resist on behalf of C. That is important, but the negotiating posture may have changed more fundamentally. In the typical settlement negotiation, some irretrievable loss has occurred, and A and B negotiate over which of them should bear the cost. But in bilateral negotiations over trilateral disputes, the negotiating dynamic may permit A and B to divide a windfall appropriated from C. It is generally easier to divide gains than to divide losses. If sacrificing the job opportunities of white employees can expand job opportunities for minorities and eliminate back pay liability for the employer, the incentives to agree are enormous. That source of incen-

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tive to agree disappears if the whites must agree to bear the cost of the settlement.

This settlement dynamic means that the fact of settlement proves nothing about the rights of A, B, or C. A decree to which C did not consent is no evidence that C's rights may be overridden. But equally important, a decree in which B consents that C pay is no evidence that B has done anything wrong, or that A is entitled to relief. It is essential to keep this point in mind. Courts tend to assume that B is guilty and C is obstructionist. Sometimes that is true, but B's consent that C should lose does not prove the point. In affirmative action cases, there is a tendency to assume that whites are fighting to preserve their unfair share of the jobs. Sometimes they are, but the employer's consent to a quota does not prove that. Sometimes the whites are fighting racial discrimination in the form of a quota that goes far beyond what is necessary to remedy their employer's past offenses. The only way to tell the difference is to try the case or negotiate a settlement with the real parties in interest.

This analysis of B's incentives is fully consistent with more general work on trilateral relationships by sociologists, game theorists, and others. All trilateral relationships tend to produce coalitions of two against the third, and these coalitions are often unstable. With some distributions of relative power, each member of the triad can exercise disproportionate power if he is willing to switch his support between the other two, and he can maximize his power if he observes no principle but self-interest. Thus, it is not necessary to assume that the Pennsylvania school officials in Harrisburg ACLU were hostile to student prayer groups, or that employers are genuinely committed to affirmative action. They can ally themselves with plaintiffs out of sheer self-interest.

In a discrete episode, such as a lawsuit, the parties can ally themselves for that episode only. Thus, it is no surprise that a plaintiff and a defendant may unite against a codefendant or third party; the law is full of examples. Criminal defendants turn state’s evidence; plaintiffs take assignments of defendants’ claims.

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72 Wolff at 157-58.

73 A lawsuit may be either an episodic or terminal situation in Caplow's terms. See Caplow, 64 Am. J. Soc. at 489 (cited in note 71). Either situation produces opportunities for shifting coalitions. Id. at 490, Table I.

74 Consider, for example, the alliance between Ivan Boesky and the Securities and Ex-
against their liability insurers;\(^{75}\) and defendants settle in exchange for a share in plaintiffs' claims against codefendants.\(^{76}\) Except for the peculiar cases discussed in this article, the law does not assume that either party in such negotiations adequately represents the interests of the third party in the triad.

2. *If C Will Not Be Bound by the Negotiation.* If \(A\) and \(B\) knew that the consent decree could not bind \(C\), their negotiations would be very different. If the consent decree would really have no effect on \(C\), \(A\) would surrender rights against \(B\) and get little in return. In *Harrisburg ACLU*, the student prayer groups could gain the use of classrooms by making the same showing that would have been required if the consent decree had never been entered. In *Wilder*, the religious agencies could continue to prefer their coreligionists with the same showing that would have been required if the decree had never been entered. In the affirmative action cases, other employees could prevent or undo quotas with the same showing that would have been required if no consent decree had ever been entered. If a class of minority employees surrendered its back pay claim in exchange for a quota, and then lost the quota because other employees were not bound, it would have surrendered its claim and gained nothing. At most, the consent decree would affect \(B\)'s behavior until the matter was resolved in actual litigation.

If \(C\) successfully insisted that \(B\) disregard the consent decree, \(A\) might recover compensation from \(B\).\(^{77}\) But the availability of damages would be uncertain, the damage remedy would be inadequate,\(^{78}\) and compensation would rarely be what \(A\) really wants. Most plaintiffs would rather avoid harm than suffer harm and receive compensation. Certainly the ACLU would prefer to keep the student prayer groups out of the schools. Nominal damages would

\(^{75}\) See, for example, *Allen v. Allstate Ins. Co.*, 656 F.2d 487 (9th Cir. 1981).

\(^{76}\) See, for example, *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1986). Such agreements are called "Mary Carter agreements;" the name is derived from *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. App. 1967).

\(^{77}\) See *W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983), described in text at notes 103-111.

\(^{78}\) I use "inadequate" in the technical sense, meaning that the injunction would be a better remedy because money could not be used to replace the rights that were lost. See Douglas Laycock, *Modern American Remedies* 339-41, 367-72 (1985). Compensatory contempt would be inadequate in the same way. Id. at 637-38; Doug Rendleman, *Compensatory Contempt: Plaintiff's Remedy When a Defendant Violates an Injunction*, 1980 U. Ill. L.F. 971, 985-86.
be useless, and it would be hard-pressed to prove actual damages.\textsuperscript{79} There is a better prospect of collecting substantial sums in the affirmative action cases. Even so, most minority plaintiffs would rather have permanent jobs than a lawsuit for lost pay. The lawsuit is risky, even though it will be easier to prove violation of the consent decree than to prove past discrimination. And even if plaintiffs win the lawsuit, back pay will not accrue forever.\textsuperscript{80} A would rarely view compensation as an adequate substitute for the consent decree.

\textit{C} would predictably view the risk of inconsistent obligations quite differently. Settling defendants want to know that the case is really over; knowing that \textit{C} could reopen the case at any time would make settlement much less attractive. To be subject to inconsistent injunctions and contempt proceedings would be a nightmare. An unliquidated liability to \textit{A} for obeying a decree in favor of \textit{C} would be only a small improvement. Any steps to make the prospect of such compensation more certain and valuable to \textit{A} would increase the risks to \textit{B}. Most people are risk averse; \textit{B} will predictably fear the risk of liability more than \textit{A} will value the chance of compensation.

To put the point in economic terms, performance of the consent decree may improve the net welfare of \textit{A} and \textit{B}; compensation for breach of the consent decree is unlikely to do so. One reason is that breach and compensation deprives \textit{A} and \textit{B} of the subsidy that the consent decree would extract from \textit{C}. The other reason follows from the assumption that \textit{A} prefers the consent decree to compensation. Where \textit{A} values injunctive relief more than damages, the consent decree may benefit \textit{A} more than it costs \textit{B}. But compensation for violating the decree costs \textit{B} real money without giving \textit{A} what it wanted from the litigation. With such a lopsided balance of costs and benefits, few litigants would agree to be bound to each other by a decree that did not bind \textit{C}.

\textit{A} and \textit{B} may attempt to get some of the advantages with fewer risks by agreeing that if \textit{C} successfully challenges the agreement, \textit{A} and \textit{B} are released from any obligation to each other. Judge Easterbrook describes this as a temporary cessation of hos-


\textsuperscript{80} See, for example, Ford Motor Co. v. EEOC, 458 U.S. 219 (1982); United States v. School Bd. of City of Suffolk, 418 F. Supp. 639, 651 (E.D. Va. 1976).
Such a cease-fire is best embodied in a simple contract, or even an unenforceable political understanding.

When the court enters the cease-fire, it is more like a continuance than a consent decree. Courts purport to be granting more than a continuance when they approve consent decrees. The premise of Local Number 93 is that A and B are bound but C is not. But one court of appeals recently held that A and B should be released from their obligations to each other if a court finds that the decree cannot operate against C. If that becomes the settled rule, A and B will face little risk in a failed attempt to bind C with a bilateral consent decree. A and B may be able to include a clause providing for such an automatic release, but there is at least room to doubt whether they can so control the court's discretion. In any event, my impression is that recent consent decrees have not included such clauses. To do so would seem to invite collateral attack by C, a prospect that A and B have no desire to encourage.

3. Overview: Why A and B Do What They Do. To summarize, a consent decree in which A and B impose the cost of settlement on C is irresistibly attractive if A and B believe that C will be bound, seriously unattractive if they believe that they will be bound and C will not, and akin to a continuance if they believe that they will not be bound unless C is also bound. In most cases it is plain that A and B are attempting to bind C and believe they have a reasonable chance of doing so. If necessary for court approval of the decree, A and B may argue that C will not be bound. But after the decree is entered, A and B regularly argue that C is bound. Often that argument is accepted.

A and B sometimes have legitimate reasons for expecting that C cannot undo the decree. They might be confident that C is too uninterested to raise his potential objections or that his objections will be rejected on the merits. But they need not put these expectations to the test if their bilateral consent is enough to bind C.

A and B may also reasonably expect that the mere existence of the consent decree will prevent or hinder any subsequent assertion of rights by C. The consent decree hinders C because it makes the court a party to the private agreement, makes the agreement en-

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82 Howard v. McLucas, 782 F.2d 956, 961 (11th Cir. 1986).
83 A and B took that position in Local Number 93 v. City of Cleveland, 106 S. Ct. 3063, 3079-80 (1986).
84 See cases cited in notes 155-57. For further discussion of the collateral attack doctrine, see generally Cooper, 1987 U. Chi. Legal F. 155 (cited in note 2).
forceable by contempt, and creates an appearance of judicial resolution of a difficult issue. Consider *Harrisburg ACLU* as an illustration:

1) The ACLU and the school district could point to a judicial decree and claim that the issue was settled. The school district could deny political responsibility for the decree and blame the court.\(^8\) Perhaps the student prayer groups would accept the court order's authority. They would be less likely to accept the authority of a private agreement between the school district and the ACLU.

2) The ACLU could threaten the school district with contempt sanctions if it contemplated any settlement or other accommodation with the student prayer groups. The school district would predictably resist the less immediately threatening claims of the student prayer groups rather than resist the ACLU's contempt citation, just as it had disregarded the possible future claims of the student prayer groups rather than resist the ACLU's existing lawsuit.

3) The judge would initially view the consent decree as permanently removing one controversy from his busy docket. He would not be favorably disposed to plaintiffs who subsequently reopened the matter and sought to litigate it.

4) If the student prayer groups were persistent enough to sue, the ACLU and the school district could argue that their consent decree was binding, or at least entitled to weight. Even if these arguments were rejected, overcoming them would considerably increase the expense and complexity of the litigation, thus reducing the likelihood that the student prayer groups would file suit or persist to judgment on the merits.

5) If the student groups overcame all these obstacles and won their case on the merits, the consent decree would complicate the remedy. A defendant can pay damages for violating inconsistent obligations, but it cannot comply with inconsistent injunctions. Either the consent decree would have to be modified, or the students' remedy would be limited to damages, or further litigation

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would determine which injunction was entitled to obedience.

This array of practical obstacles makes sense of what would otherwise be incomprehensible. A and B hope to gain a great deal by making an unauthorized agreement about the rights of C. They ask the court to enter the decree on the theory that it settles only the dispute between A and B, but as soon as the decree is entered, they act as though C is bound as well.

D. Who Counts as a C?

1. *Before the Consent Decree Is Entered.* The effects of a consent decree may ripple outward, with smaller and smaller effects on more and more people, many of whom cannot feasibly be joined. Injunctive litigation could rarely proceed if it were necessary to join every third party who might be affected. My thesis requires criteria for identifying those third parties whose stake in the litigation is so great that no consent decree should be entered without their consent.

C should be joined if A or B or the court know or should know—in other words, if it is foreseeable—that C will be significantly affected by the proposed decree and that he has an arguable legal claim that he cannot be so affected. This formulation contains several weasel words: "should know," "significantly," and "arguable." Such terms are unavoidable; the question is inherently one of degree. But some cases are clear, and the degree of uncertainty is well within tolerable limits.

The duty to join C necessarily depends on what A or B or the court should know. If C's claim is not foreseeable to either A or B or the court, C cannot be joined. It would be illusory to impose a duty that ignores that reality. If C's claim or defense is unforeseeable to A or B or the court, C must bring it to their attention.

A or B or the court must foresee two things in order to foresee C's claim. The first is factual: they must foresee that C will be significantly affected by the decree. A and B need not search out all the potential Cs who might be affected by some remote or incidental consequence of the consent decree. If millions of people are marginally affected, as in some environmental litigation, the court may reasonably conclude that none are affected so significantly

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86 Compare Fed. Rule Civil Proc. 19(a) (parties should join all who claim an "interest" that may be impaired by the litigation); Fed. Rule Civil Proc. 24(a) (intervenor must claim an "interest" that may be impaired by the litigation).
that they must be joined. That judgment can be informed by the impracticality of either joining millions of Cs or designating involuntary class representatives for them. But where an identifiable group of Cs has a direct and substantial stake in the litigation, these Cs should be joined even if the group is large. Where one or a few Cs will be affected in a way unique to them, the presumption should be that the effect is significant enough to require that they be joined. If C thinks the proposed decree will not significantly affect him, he can consent to it, or even default. It is better to err on the side of giving him notice.

The second thing that must be foreseeable is legal: that there is available to C an arguable legal theory that C cannot be affected in the way the proposed decree will affect him. Many third parties are affected by the economic consequences of consent decrees in ways that the law simply does not address. To take an obvious example, consumers cannot attack a consent decree on the ground that the expense of compliance will force defendant to raise prices. Consumers may be interested in defendant's prices, but they rarely have a legally protected interest. Such an unprotected interest does not give consumers standing to object to consent decrees. An example from a recent case is a neighborhood association objecting to a decree desegregating public housing on the ground that new public housing would reduce property values. Perhaps I am overlooking something, but I cannot think of a legal theory that would protect against that harm. If no legal theory for C is apparent, A and B need not expend great efforts trying to develop one for him.

But if A or B or the court can identify a legal theory that C might reasonably advance, they should not refuse to join him on the ground that his legal theory will not prevail. It is enough that C's legal theory is arguable. If C's interest might be legally protected, the court must hear from C before deciding whether the interest actually is or is not legally protected. When the court omits C from the litigation on the ground that C's arguments cannot ultimately prevail, it is deciding C's case without notice or

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87 See text at notes 184-208. Compare the decision whether to proceed in the absence of a party who cannot be joined. Fed. Rule Civil Proc. 19(b).

88 Gautreaux v. Pierce, 690 F.2d 616, 695 (7th Cir. 1982).

hearing.\footnote{Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479, 484 (6th Cir. 1985), aff'd as Local Number 93 v. City of Cleveland, 106 S. Ct. 3063 (1986).}

No bright line separates Cs who must be joined from those who are too trivially affected or whose claim to legal protection is too tenuous. But these undeniable difficulties at the margins do not affect clear cases like the illustrations in this article. In these illustrations, A and B knew perfectly well that C would be directly and significantly affected. These decrees did not affect C in some incidental way; their very purpose was to regulate C (in \textit{Harrisburg ACLU} and \textit{Wilder}), or to split a limited fund with C (in the affirmative action cases). When the effect on C is this direct, significant, and purposive, C should be joined if there is any possibility whatever that C has a viable legal theory.

C has an arguable legal right in each of these illustrations.\footnote{See text at notes 14-15, 21-22, 36-43.} The student prayer groups' claim to equal access is a straightforward application of the Supreme Court's cases on public fora and content neutrality.\footnote{Widmar v. Vincent, 454 U.S. 263 (1981); Carey v. Brown, 447 U.S. 455 (1980); Madison Sch. Dist. v. Wisconsin Emp. Rel. Comm'n, 429 U.S. 167 (1976); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Healy v. James, 408 U.S. 169 (1972); Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).} Whether that claim is or should be overridden by Establishment Clause concerns requires full litigation. When \textit{Harrisburg ACLU} was decided, the precedents in other jurisdictions were conflicting.\footnote{Compare Widmar v. Vincent, 454 U.S. 263 (1981) (student prayer group has free speech right to meet on college campus), with Lubbock Civ. Lib. Union v. Lubbock Ind. Sch. Dist., 669 F.2d 1038 (5th Cir. 1982) (student prayer group meeting on high school campus violates establishment clause). See generally Laycock, 81 Nw. U.L. Rev. 1 (cited in note 15); Teitel, 12 Hastings Const. L.Q. 529 (cited in note 15).} But even if all cases directly on point in other jurisdictions were consistent and adverse to the student prayer groups, an issue so controversial would remain arguable until unambiguously resolved in a court whose precedents were binding on the court asked to approve the decree.

In \textit{Wilder}, the religious agencies had some claims based on contract. But these were short-term contracts.\footnote{See Epstein, 1987 U. Chi. Legal F. at 211, 222 (cited in note 19).} I would not contend that plaintiffs or the City must anticipate a claim that the course of dealing gave rise to an implied long-term contract, unless they had actual notice that the agencies asserted such a claim. But plaintiffs and the City must surely anticipate a free exercise claim.\footnote{See text at notes 21-22.} The City and the ACLU undoubtedly believe the free ex-
exercise claim should be rejected, but anyone litigating the case should have foreseen the claim. It takes no great imagination to foresee a claim that religious charities have a right to care for their coreligionists first, even if they also agree to help the state care for others.

In the affirmative action cases, the argument over quotas has plagued Title VII from the day it was enacted. The Supreme Court has now rejected the view that all quotas are permitted if they benefit minorities and also the view that all quotas are forbidden. The rules that govern the legality of quotas are unclear and fact-intensive. It is impossible to imagine an affirmative action case in which other employees do not have a strong interest and an arguable legal theory. They should be joined in every case in which plaintiffs seek more than make-whole relief for identifiable victims.

2. After the Consent Decree Is Entered. After a decree has been entered, the problem of identifying C is simpler. Forseeability no longer matters. Nor is there any danger of summoning large numbers of people who are not concerned about their stake in the lawsuit. The issue arises after entry of the decree only if an actual C files a complaint or a motion to intervene. Then the question is not whether A or B or the court should have foreseen him, but whether he has an arguable claim or defense.

II. THE SUPREME COURT AND THE RIGHTS OF THIRD PARTIES

The Supreme Court has considered the rights of C in litigated cases. Courts may issue orders to wrongdoers that substantially affect innocent third parties, but the third parties have some substantive protections against excessively burdensome effects. In many of these cases, the affected third party or a representative was a party to the litigation. In some of these cases, the Court has ordered that exonerated defendants who will be affected by relief against guilty defendants be retained in the case, "so that full relief could be awarded to the victims." The implication is that such relief should not be granted unless the affected third party is a party defendant. Where the Court has proceeded without the af-

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96 See text at notes 36-43.
fected third parties, it has been justifiably criticized.\textsuperscript{100}

The Court has also held that courts can issue "minor and ancillary" injunctions against innocent third parties in order to provide complete relief to plaintiffs.\textsuperscript{101} But more substantial orders against innocent third parties are impermissible even if the third party has been fully heard, because the court's remedial power can be exercised only on the basis of a violation of law.\textsuperscript{102}

These third-party protections in litigated cases would be illusory if they could be bypassed by a consent decree between the other two parties to a trilateral dispute. Yet \textit{Local Number 93} affirmed the entry of just such a bilateral consent decree. Again, what remains to be seen is what the Court meant when it said the nonconsenting third party is not bound.

One earlier case provides a partial answer to that question. In \textit{W.R. Grace & Co. v. Rubber Workers},\textsuperscript{103} the Supreme Court upheld an arbitrator's award of back pay to male workers laid off pursuant to a settlement agreement and in violation of the seniority clause in their collective bargaining agreement. The dispute arose when the employer and the Equal Employment Opportunity Commission ("EEOC") entered into a conciliation agreement without the consent of the union. \textit{W.R. Grace} holds that the conciliation agreement did not eliminate the employer's inconsistent obligations under the seniority clause, and that the arbitrator had power to award back pay under the collective bargaining agreement. At least to that extent, the union was not bound by the conciliation agreement. The opinion says that the employer voluntarily took on inconsistent obligations and has only itself to blame for the resulting expense.\textsuperscript{104}

When the rest of the opinion and the complex procedural history is considered, \textit{W.R. Grace} turns out to be a very narrow holding. The conciliation agreement was not entered as a consent decree; it began as a simple contract. When the union filed its grievances, the employer and the EEOC sued in federal court for a declaratory judgment that the union was bound by the conciliation agreement. They also sought an injunction against arbitration of any claims inconsistent with the conciliation agreement. The dis-

\textsuperscript{102} General Building Contractors, 458 U.S. at 397-402.
\textsuperscript{103} 461 U.S. 757 (1983).
\textsuperscript{104} Id. at 770.
strict court granted summary judgment for the employer, and the union appealed. The Fifth Circuit reversed, because the union had not agreed to the conciliation agreement and the parties who did agree had not shown enough to justify an order overriding the seniority clause. The Fifth Circuit held the seniority provisions of the conciliation agreement invalid and ordered the company to arbitrate the grievances.

Thus, by the time the grievances went to arbitration, the conciliation agreement had been invalidated by a litigated judicial decree, and the male grievants had been reinstated pursuant to the court’s decision. The grievances sought only back pay for the time the more senior males were laid off. Nevertheless, one arbitrator decided that it would be inequitable to require the employer to provide back pay for the time during which it had been subject to the district court’s injunction ordering it to comply with the conciliation agreement. But another arbitrator awarded back pay to other grievants. The employer again sued in federal court, this time to overturn the arbitration awards. The district court held that public policy precluded enforcement of the seniority clause during the time prior to the Fifth Circuit’s decision invalidating the conciliation agreement. The Fifth Circuit reversed and enforced the awards, and the Supreme Court affirmed.

W.R. Grace is an important step in the right direction, but further steps are needed. The most obvious fact about the case is that the conciliation agreement greatly complicated the course of litigation for the union and its members. Their efforts to enforce their rights were seriously hindered by the conciliation agreement, despite the important sense in which the courts ultimately held that they were not bound. These consequences should be foreseeable, and relevant, to a court asked to enter such an agreement as a consent decree.

More important, the Supreme Court’s opinion establishes only a limited sense in which the union and its members were not bound. First, the opinion relies in part on the need for deference to arbitrators. The Court does not say that district courts may, should, or must decide the same way.

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107 Id. at 917.
Second, the Court does not say whether the arbitrators could have awarded back pay for the duration of the collective bargaining agreement if the conciliation agreement had been upheld. The Court reviewed the arbitrator’s award knowing that the conciliation agreement had already been judicially invalidated and that the award covered only the period of uncertainty pending litigation.

Third, the Court relied heavily on the view that the arbitration award neither required the employer to violate the district court’s injunction nor created “intolerable incentives” for it to do so. It emphasized that courts have the contempt power to enforce their injunctions, even those issued erroneously. Here the Court cited Walker v. City of Birmingham, which held that defendants can be punished in criminal contempt for violating an injunction that is flagrantly erroneous and unconstitutional.

This reasoning implies that the Court would not have upheld an award that required or too strongly encouraged the employer to violate the injunction. This implies more generally that a bilateral consent decree binds B until it is modified or vacated, and that no relief to C can require B to violate the decree. This points to a very important way in which a consent decree between A and B binds C: C cannot get equitable relief inconsistent with the consent decree unless he successfully seeks modification of the decree. This may mean that the arbitrators could award back pay but not reinstatement, or that student prayer groups could recover damages but not the right to hold prayer meetings. If the consent decree bars equitable relief to C even when C’s damage remedy is inadequate, C is bound in an important way. To preempt equitable relief for A and limit C to damages, when it might have been the other way around, is an important accomplishment for the bilateral consent decree.

If C cannot get relief inconsistent with the consent decree until the consent decree is modified or vacated, then the most impor-

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109 Id. at 769.
111 See also Local Number 93, where the Court says that one advantage of a consent decree is that it tends to “channel litigation concerning the validity and implications of the consent decree” into the court that entered the decree. 106 S. Ct. at 3076 n.13 (quoting Brief for National League of Cities et al. as amici curiae). The apparent assumption is that third parties harmed by the decree can raise their claims or defenses only in the court that entered the decree, perhaps by intervening and moving to modify.
112 It is no solution to say that B can decide which injunction is more likely correct and obey that one. He is in criminal contempt if he violates either—even if he violates the erroneous one. Walker v. City of Birmingham, 388 U.S. 307 (1967); United States v. Mine Workers, 330 U.S. 258, 289-95 (1947); Howat v. Kansas, 258 U.S. 181, 189-90 (1922).
tant questions are whether C can move to modify or vacate and what he must show to obtain relief. The Supreme Court’s opinion in *W.R. Grace* says nothing about these questions. It was the Fifth Circuit that invalidated the conciliation agreement at the union’s request; the Supreme Court did not review that judgment. But several lower courts have severely limited C’s right to have the decree modified or vacated.\(^{113}\)

III. A Proposed Rule

In this section I propose two solutions to the problem of consent decrees without consent. The preferred solution is that courts should refuse to approve any consent decree that limits the arguable legal rights of some C whose existence is known or foreseeable to the court. The alternative solution is that if such decrees are entered, C should remain genuinely unbound, and courts should do everything possible to eliminate the formal and informal obstacles to full and fair de novo litigation.

Basic principles of due process require at least the alternative solution: courts cannot deprive a person of arguable rights without notice, hearing, and adjudication of the substantive elements of a claim against him. They cannot approve the decree without hearing from C, and then enforce it against C on the ground that it has already been approved. Because I believe that entry of the consent decree commits the court against the rights of C in a way unlikely to be undone in any attempt at de novo litigation, I prefer the more stringent solution of refusing to approve the decree.

A. Before Entry of the Consent Decree

The only way to ensure that C’s rights are not denied or hindered by a consent decree between A and B is not to enter the decree. If a decree purports to limit the arguable legal rights of a nonconsenting party whose interest is known to the court, the court should refuse to approve it.\(^ {114}\) If the court refuses to approve

\(^{113}\) See Cooper, 1987 U. Chi. Legal F. at 157 n.4 (cited in note 2); cases cited in note 57.

\(^{114}\) Some courts have followed this rule, but many have not. Compare Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 695-97 (7th Cir. 1986) (vacating bilateral consent decree on motion of third-party intervenor); Sanguine, Ltd. v. U.S. Dept. of Interior, 798 F.2d 389 (10th Cir. 1986) (vacating bilateral consent decree on motion of third-party intervenor); and Harrisburg Ch. of Am. Civ. Lib. v. Scanlon, 500 Pa. 549, 458 A.2d 1352 (1983) (refusing to enter bilateral decree in trilateral dispute) with Local Number 93 v. City of Cleveland, 106 S. Ct. 3063 (1986) (approving bilateral consent decree over objections of affected third-party intervenor).
the decree, A and B have two principal choices, each with some variations:

1) They can dismiss the lawsuit and embody their agreement in a simple contract. They can act pursuant to the contract until and unless C sues them and wins.

2) They can join C as a defendant under Rule 19.115. They can then negotiate with C and submit a trilateral consent decree, or they can litigate the case. To get a litigated decree, A must prove all the elements of a claim that C has no rights in the matter or that C's rights can be overridden.

The first option makes clear that honoring the rights of C does not give C power to prevent A and B from settling their own differences.116 A and B can always make a contract. With or without a contract, A and B can behave as they wish and force C to sue them. A school district can exclude student prayer groups, with or without the agreement of the ACLU, and force the student prayer groups to sue. An employer can prefer minority applicants, with or without the agreement of any representative of minority groups, and force other applicants to sue. In such a suit, the student prayer groups or the other applicants would be the plaintiffs, and as such they would typically bear the burden of proving that the challenged actions violate their rights.117 But if A and B had clearly violated some well-established right of C, and the real issue were some affirmative defense or justification, substantive law might allocate the burden of persuasion on the critical issue to A and B.116

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116 Rule 19 authorizes joinder of necessary parties (quoted in note 123).
117 See Local Number 93, 106 S. Ct. at 3079 (one party cannot preclude others from settling their own disputes).
119 For example, rejecting a white applicant because the white quota has been filled is a prima facie violation of Title VII. 42 U.S.C. § 2000e-2(a) (1982); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-85 (1976). The employer should bear the burden of proving the affirmative defense that the quota is a protected affirmative action plan. However, the Court has held that affirmative action is not merely a protected form of discrimination. In Title VII terms, it is a "nondiscriminatory" rationale for an employment decision, which the employer must "articulate." Johnson v. Transportation Agency, 107 S. Ct. 1442, 1449 (1987). Under this view, an affirmative action plan negates the charge of discrimination and is not an affirmative defense. The duty to articulate the nondiscriminatory rationale means that defendant bears the burden of producing sufficient evidence of a lawful affirmative action plan to support a judgment for defendant; once that burden has been met, plaintiff bears the ultimate burden of persuasion. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981).
A and B can generally act or contract for whatever reasons they wish. They need not find that B has violated A’s rights before making a deal with each other. It follows that they can defend their bilateral conduct without having to show a past violation, except to the extent that the substantive law sometimes makes a violation or arguable violation of A’s rights an element of C’s rights. For example, a plurality of the Supreme Court appears to limit racial preferences in public employment to cases where there is reason to believe the employer has discriminated in the past.119 If that is the law, white employees challenging such a preference could force the employer to prove that standard is met.

Professor Fiss notes that private behavior by A and B may impose substantial hardship on C,120 and so it may. The question is not whether such behavior is just or desirable, but whether it is permissible. As a practical matter, private parties can act as they will and wait to be sued. It is no different if they embody their plan in a contract.

A court cannot legitimately act as it will and wait to be sued. Judicial power can be exercised only on the basis of a violation,121 or the consent of the affected parties.122 If A and B want to preserve the consent decree or continue the litigation, they must join C as a defendant. Rule 19 provides that parties “shall” be joined if they claim an interest that may, “as a practical matter,” be impaired by the litigation. If the original parties do not join such parties, the court “shall order” that they be joined.123 The rule ap-

With respect to analogous constitutional claims, a plurality of the Court has said that defendants must show evidence of past discrimination, and that such a showing leaves plaintiff with the ultimate burden of persuasion. Wygant, 106 S. Ct. at 1848 (plurality opinion) (employer must show “strong basis in evidence for its conclusion that remedial action was necessary”); id. at 1856 (O’Connor, J., concurring) (employer must offer “evidence of its remedial purpose;” statistical proof is sufficient).


123 Rule 19(a) reads in substantial part:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among
pears to be more ignored than followed, but that is part of the problem. Once a court realizes that a proposed consent decree attempts to limit the arguable rights of third parties, the court should neither approve the decree nor let the litigation continue without first complying with Rule 19.

Once C is joined, he must have all the rights of a defendant. A and B must either secure C's consent or they must prove the pre-requisites to a litigated judicial order against C. If the substantive law makes a violation by B a prerequisite to overriding the rights of C, then C is entitled to defend on the ground that B has not violated the law. We have already seen that B is not an adequate representative of C in a trilateral dispute.

Thus, in a quota remedy case, plaintiffs would have to prove that the employer violated Title VII to justify any remedy at all. But to justify a quota remedy under the Supreme Court's cases, plaintiffs would also have to prove that the discrimination was so egregious that no lesser remedy would suffice, that the quota was not intended merely to achieve racial balance, that it did not "unduly trammel" the rights of other workers, and so on. The burden of proof would be on plaintiffs, because as between plaintiffs and the other employees, nothing would have happened to shift the burden.

The proposed rule sharply distinguishes between private contract and judicial decree. A and B can contract without C's consent, but they cannot get a consent decree without C's consent. C bears the burden of attacking a private contract between A and B, but A bears the burden of securing a litigated order against C. The Supreme Court draws a similar distinction between voluntary and

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no one has done a study, but other scholars have the same impression. Richard D. Freer, Rethinking Compulsory Joinder: Proposal to Restructure Federal Rule 19, 60 N.Y.U. L. Rev. 1061, 1085 n.116 (1985); John C. McCoid, A Single Package for Multiparty Disputes, 28 Stan. L. Rev. 707, 727 (1976).

See text at notes 58-77.

court-ordered affirmative action plans, but it has not seen the implications of that distinction for third-party rights.

The distinction is not merely formal. The consent decree commits the court to the agreement, and therefore commits the court against the rights of C. The decree has consequences that will be difficult to undo, even if the formal rule is that C is unbound and free to litigate the matter de novo. The consent decree allows A and B to avoid responsibility for the harm they inflict on C; it provides the legitimacy of a judicial decision without the reality of a judicial decision. More political or other pressure will be required to get B to violate a consent decree than to breach a contract. Only violation of the consent decree requires B to "defy the court."

The consent decree is immediately enforceable by the court's contempt power. But contempt for violation of a simple contract requires an independent suit for breach, a discretionary judicial decision to order B to specifically perform, and violation of the specific performance decree. Even with a procedural rule that permits collateral attack, an outstanding consent decree may limit C to damages for any violation of his rights. But with a contract, the competing rights of C would provide an arguable reason to limit A to damages instead of granting specific performance. Indeed, a contract requiring C to violate B's rights might be void for illegality.

When C files suit to attack the consent decree, judicial economy will often suggest that the case be assigned to the judge who approved the decree. He may know something about the case as a result of ruling on contested motions before the settlement. But that means C is effectively in the position of arguing that the judge should not have approved the decree in the first place. Even with a procedural rule that permitted collateral attack, C would have to argue that the judge's approval of the decree violated C's rights. C would not be in a promising forum for a fair trial on that claim.

All things considered, A gets substantial advantages from a judicial decree. All the reasons why plaintiffs prefer consent decrees to simple contracts are reasons why consent decrees more effectively limit C's rights. If A wants those advantages, he must either elicit all the relevant consents, or he must bear the burden of proving his case.

Dean Geoffrey Stone has suggested that the consent decree be entered but that it remain vulnerable to a lawsuit like any other act of government. He has further suggested that my error is to

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128 See, for example, Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 77 (1982).
treat C as a defendant who is a target of the decree. In Stone's view, C is a potential plaintiff: if he objects to a government act, he must assert his own claim and file his own lawsuit. This point has force when C is remote from the dispute and neither the court nor the parties have reason to anticipate his objection. I think this approach is unrealistic in the cases I am discussing, where everyone understands that a central purpose of the decree is to limit the rights of C.

Stone's suggestion that the consent decree is like any other act of government is also relevant to our disagreement. As Professor Resnik demonstrates, most consent decrees reflect no judgment of any government official. A and B draft and approve the decree; court approval is a mere rubber stamp. Sometimes the court holds a fairness hearing, and occasionally the court rejects a decree or insists that it be amended. But often, the court signs the decree the day it is filed. This elevation of private agreement to judicial decree—or this delegation of judicial power to private parties—is acceptable as between A and B. It is part of what they consent to. It is not acceptable with respect to C, because C did not consent. If as a practical matter the decree is entered on the say-so of A and B, with no independent judgment by the court, then there is no basis to treat it like an act of government and force C to prove that the government acted illegally.

Even the simple contract between A and B can cause serious problems for C if the courts defer to the contract. W.R. Grace illustrates the point. But much of the difficulty in W.R. Grace resulted from the district court's willingness to specifically enforce the contract without considering C's rights. That approach would be clearly improper under the principles urged here. C may bear the burden of proving that the contract violates his rights, but he is entitled to a full and fair chance to litigate that claim.

B. After Entry of the Consent Decree

If the Supreme Court adheres to its ruling in Local Number

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129 Geoffrey Stone, comments made at the University of Chicago Legal Forum symposium, Nov. 15, 1986.
131 See, for example, Carson v. American Brands, Inc., 450 U.S. 79 (1981); Kasper v. Board of Election Commissioners, 814 F.2d 332 (7th Cir. 1987). Rejection converts a settlement into an immediately appealable order opposed by both sides, so orders rejecting consent decrees are probably disproportionately reported.
93, bilateral consent decrees will continue to be entered in trilateral disputes. Even if the rule proposed here is adopted, courts will sometimes approve consent decrees that override the arguable rights of some nonconsenting C. A and B may not know about C, or they may conceal his existence from the court. The court may not realize that C has an interest in the matter, or the court may conclude that C's interest is not even arguably protected. The court may misunderstand the judicial duty to order that C be joined, or even defy that duty. What is the result if and when C attacks the consent decree?

The only rule consistent with due process is that the consent decree has no effect on C's rights. If the Supreme Court is serious about its assurance that C is not bound by the decree, C may fully litigate all the issues that are logically prerequisite to the claim that his rights may be overridden. If C intervenes in the case, the court should vacate all parts of the decree that affect C and restore the case to the docket. A would be seeking a court order limiting C's rights, and thus A would usually bear the burden of proof. The case would start over, and C would have full rights of trial and appeal. The court vacated a consent decree on precisely these grounds in Sanguine, Ltd. v. U.S. Dept. of Interior. The Fifth Circuit apparently allowed this kind of de novo litigation of the conciliation agreement in W.R. Grace; it is not clear whether the court would have proceeded in the same way if the agreement had been entered as a consent decree.

Full and fair litigation may not require trial. Motions to dismiss and motions for summary judgment would be available, subject to the usual standards. And of course the case might settle again, resulting in a new trilateral consent decree, or in a voluntary dismissal and a contract between A and B.

Full and fair litigation would require diligent judicial efforts to prevent the decree from having informal effects. Judicial reluctance to reopen the case would be recognized as a defect in the system, something to be resisted by both the trial judge and reviewing courts. The consent decree itself could not raise a presumption, shift the burden of proof, or be taken as evidence of any of the relevant facts—not even a violation by B. The decree does not collaterally estop C, because C was not a party. It is not ad-
NONCONSENTING THIRD PARTIES

missible as evidence, because it is not probative of anything. We have already seen that a bilateral consent decree in a trilateral dispute lacks all the usual guarantees of justice or efficiency.\textsuperscript{137}

In some cases, it will be appropriate for the court to vacate the final judgment but reinstate the consent decree as a preliminary injunction, thus preserving the status quo pending litigation or settlement of C's claim or defense.\textsuperscript{138} Unfortunately, this procedure increases the risk that judicial inertia will deprive C of a fair hearing. A court that enters the consent decree as a preliminary injunction should be alert to that risk. Such a preliminary order should not be automatic: A should be required to make at least the usual showing of probable success on the merits and balance of irreparable injury.\textsuperscript{139} Where the balance is close, preliminarily enforcing the decree may be less disruptive and therefore less harmful. But there is also a countervailing factor: where A and B should have foreseen C's claim or defense and failed to join him, there should be a presumption against preliminary relief that affects C.

It is important to conduct this litigation in a way that makes A and B at least somewhat worse off than if they had joined C in the first place. Otherwise, they have little incentive to think about potential Cs and join them as parties. If there is no penalty for ignoring C before the decree, and if there may be judicial inertia in favor of the decree once it is entered, A and B have substantial reason to conceal C's existence from the court, get the decree approved, and take their chances later.

The strongest incentive may be to hold that A and B are bound to each other even though they are not bound to C. A would be bound by his release of claims against B, and B would be liable either to perform the consent decree or pay compensation to A. For reasons already discussed, this result would be quite unattractive to A and B;\textsuperscript{140} they would usually join C rather than risk it. An absolute rule is not required; a substantial risk of this result would be sufficient. I would propose the following rule: where A and B knew of C's existence and failed to join him, and C eventually

\begin{itemize}
  \item \textsuperscript{137} See text at notes 58-77.
  \item \textsuperscript{138} See United States v. City of Miami, Fla., 664 F.2d 435, 452-53 (5th Cir. 1981) (Gee, J., concurring in part).
  \item \textsuperscript{139} See, e.g., American Hosp. Supply v. Hospital Products Ltd., 780 F.2d 589, 593-94 (7th Cir. 1986); Los Angeles Memorial Coliseum Com'n v. Nat. Football, 634 F.2d 1197, 1200-01 (9th Cir. 1980); John Leubsdorf, The Standard for Preliminary Injunctions, 91 Harv. L. Rev. 525 (1978). For a review of the Supreme Court's cases, see Laycock, Modern American Remedies 401-02 (cited in note 78).
  \item \textsuperscript{140} See text at notes 76-81.
\end{itemize}
prevails, $A$ and $B$ should presumptively be held to the consent decree as against each other. They can be released from their mutual obligations where holding them to the decree would harm $C$, or where the hardship to $A$ or $B$ is exceptional.

An alternative is to hold $A$ and $B$ liable for $C$'s attorneys’ fees if $C$ succeeds in having the decree vacated. This would be simpler to administer but perhaps harder to justify: $C$ would have incurred most of the same attorneys’ fees if he had been joined before the decree. Awarding him fees only for the extra step of getting the decree reopened may not give $A$ and $B$ a sufficient incentive join him in the first place. Another weak incentive would be a presumption against preliminary relief after a consent decree is vacated at the request of $C$.

Professor McCoid and others have suggested enforcing Rule 19(c) through Rule 11.141 Rule 19(c) requires plaintiffs to state the names of third parties with interests that might be affected and who have not been joined,142 but the rule appears to be widely ignored. Rule 11 requires pleaders to certify that their pleading is well-grounded in fact and law, and authorizes sanctions for falsely certified pleadings.143 Rule 11 could be amended to require certification that the pleader has complied with Rule 19(c); violation would trigger the existing sanction provisions. This would be a useful incentive to comply.

Providing for appropriate incentives to join $C$ before decree is a detail that could be worked out if the basic proposal were adopted. In the most egregious cases, $C$'s existence will be obvious to the court no matter what $A$ and $B$ do, and $A$ and $B$'s incentives will be less important. If the decree is entered without notice to $C$, a conscientious judicial effort to permit fair litigation, unbiased by the previous entry of the decree, would solve a substantial part of the existing problem.

IV. Rules Proposed By Others

Several courts and commentators have recognized the anomaly of a bilateral consent decree that operates trilaterally. They have proposed solutions less effective than those proposed here. Some of these solutions appear designed to rationalize the result that $C$ is

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141 McCoid, 28 Stan. L. Rev. at 727-28 (cited in note 124). This proposal is endorsed in Freer, 60 N.Y.U. L. Rev. at 1085 n.116 (cited in note 124), and Jones, 14 Harv. C.R.-C.L. L. Rev. at 84-86 (cited in note 26).
143 Fed. Rule Civil Proc. 11.
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generally bound; others appear to genuinely seek a middle ground that gives C some protection but not full litigation rights. None is procedurally fair to C.

A. The Hearing on Fairness or Reasonableness

Courts may give C a right to be heard on the fairness or reasonableness of the decree, but not a right to withhold consent or insist on full litigation. Such a right may be accorded before or after entry of the decree, but it is most commonly accorded before. The obvious model here is that of class members objecting to a class action settlement. C can explain his objections and ask the court to take account of his interests, but the court remains free to approve the decree largely on the authority of the class representative's consent.

This procedure assumes that C's position is like that of objecting class members. But the analogy is false. Objecting class members are represented by the class representative; the court must find as a fact that the representation is adequate; and the adequacy of representation can be independently attacked at the settlement hearing and even collaterally attacked thereafter. If the class representative has a serious conflict of interest with part of the class, that part of the class is not bound. On the other hand, if the representation is adequate, the efficacy of the class action device depends on a rule that absent class members cannot continue to litigate individually. Accordingly, adequate representation in a certified class action, accompanied by individual notice and a chance to be heard on the reasonableness of the settlement, has been held to satisfy due process. I would require both adequate representation and individual notice where feasible, but everyone


145 See Fed. Rule Civil Proc. 23(e).


449 agrees that at least adequate representation is required.

As we have seen, the adequate representation that is essential to class action settlements is wholly absent in the case of C. The fact that we limit absent class members to a hearing on fairness or reasonableness is no precedent whatever for limiting C to the same thing.

The Supreme Court said in Local Number 93 that a reasonableness hearing is all that due process requires before a consent decree is entered. But that holding depends on the Court's holding that the consent decree does not bind the union. The Court explicitly declined to hold that a reasonableness hearing before entry of the consent decree settles the matter forever. Taken at face value, the decision is about timing: full and fair litigation will come after the decree is entered instead of before.

The Court also held that a reasonableness hearing was sufficient in Zipes v. Trans World Airlines. The result in Zipes is defensible, but only on the basis of distinctions that the Court does not yet appear to have made. In Zipes there was a litigated determination that the employer's refusal to employ mothers violated the law. While litigating that issue, the employer faced the risk of full liability for back pay. So long as it faced that risk, and so long as no collateral issue introduced a conflict of interest, the employer's interests were sufficiently aligned with those of its childless employees that it is plausible to say the childless employees were adequately represented. I would let the union or childless employees intervene to defend the unlawful policy if they wished, but I would not let them attack the judgment after it was entered.

After litigation resolved the liability issues, the parties settled the remedies issues. The settlement required reinstatement of identified victims with rightful place seniority and substantial back pay. It did not require a quota. Reinstatement with rightful place seniority may limit rights under the collective bargaining agreement, but it does not discriminate against anyone on the basis of sex. Under the Supreme Court’s cases, reinstatement with rightful place seniority is virtually an entitlement: discretion to deny such relief is very narrow, and protecting the expectancies of incum-


\[150\) 106 S. Ct. at 3079.

\[151\) 455 U.S. 385, 400 (1982). I should disclose that I played a minor role as counsel for the plaintiff class.

\[152\) Id. at 389.
With respect to that issue, there was not much the union could say, and a reasonableness hearing might have been as effective as full litigation rights.

Still, it is plain that the employer did not have the same incentives as the union to litigate whether some exceptional circumstance required that rightful place seniority be denied. And once the settlement fixed the employer’s back pay liability at three million dollars, the employer did not have the same incentives as the union to litigate whether individual plaintiffs were really victims of discrimination. The union should have been entitled to fully litigate these issues, although the relevant substantive law and the litigated finding of discrimination would force the union to bear the burden of proof on each of them.\(^5\)

B. Requiring Timely Intervention by \(C\)

Courts may require \(C\) to intervene in the litigation, and hold that \(C\) is barred if he does not intervene promptly. Several courts have denied motions to intervene on grounds of timeliness.\(^5\) Some of these courts might allow the untimely intervenor to file a separate suit and litigate the issue anew.\(^5\) But there are also decisions

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\(^5\) The Court explicitly allocates the burden of proof to defendants on the issue of identifying individual victims. Teamsters v. United States, 431 U.S. 324, 357-62 (1977); Franks, 424 U.S. at 772-73 (1976). Franks appears to require that those objecting to rightful place seniority bear the burden of persuasion on the issue of exceptional circumstances. Id. at 770-79. See also id. at 777 n. 37 (rightful place seniority is "presumptively necessary").


\(^5\) NAACP v. New York, 413 U.S. at 363, 368; Dunn v. Carey, 808 F.2d 555 (7th Cir. 1986); County of Orange, 799 F.2d at 538-39; National Wildlife Federation, 744 F.2d at 969-71; Jefferson County, 720 F.2d at 1517-19; McAleer v. American Tel. & Tel. Co., 416 F. Supp. 435 (D.D.C. 1976); Ashley v. City of Jackson, 464 U.S. 900, 901-04 (1984) (Rehnquist and Brennan, J.J., dissenting from denial of certiorari). In Dunn, the parties to a federal consent decree asked the federal court to enjoin state court litigation asserting third party rights inconsistent with the consent decree. The federal court of appeals let the state suit
holding that separate suits are barred as collateral attacks on the
consent decree. In circuits with both of these rules, intervention is the exclusive remedy and intervention is often barred as untimely. Although couched in terms of timeliness, these are in effect holdings that C need not be heard, served, or notified: he is bound by a consent decree if he happened to hear about it before it was entered. Some affirmative action cases have gone further. Intervention has been barred as untimely even when the motion to intervene was filed as soon as the original parties proposed a consent decree providing for quotas. These courts reasoned that other employees knew a discrimination suit was pending and should have foreseen that quotas might be requested. In at least one of
these cases, the court ordered that notice of the proposed consent decree be posted at the workplace. But that was apparently for the exclusive benefit of minority employees who might want to object that the settlement achieved too little. White intervenors responding to the notice were told that they were too late. These holdings are in tension with Supreme Court precedent on timeliness of intervention by civil rights plaintiffs.

My favorite timeliness holding is McPherson v. School District No. 186. A consent decree provided for desegregation of a faculty. Seven years later, the court ordered that teachers be laid off on the basis of race rather than seniority. Twelve days after that, the union moved to intervene. Held: untimely. The union should have foreseen seven years before that desegregation might interfere with seniority. In the alternative, the union had no interest. Because the case was about desegregation rather than employment, even the layoff order had little effect on the union’s rights. So an effect too trivial to confer standing should have been foreseen seven years before. Both holdings cannot be right; in fact, both are wrong.

A timeliness standard is defective even if fairly administered. It leads to speculative litigation over how much C knew and when he knew it. By failing to clearly allocate responsibility for bringing C into the litigation, this standard leads to strategic game playing, in which A and B refuse to join C as an additional defendant and C ignores the proceeding and tries to preserve his ignorance.

There is no need to create these unproductive incentives. It is plaintiff’s responsibility to join all parties that he seeks to bind by the litigation. One function of serving a complaint and a summons is to make clear that defendant knew about the litigation and knew he might be affected by it; these issues never need be litigated again. We dispense with the certainty provided by formal service only in the emergency conditions that support temporary restraining orders.

The absurdity of the timeliness cases is revealed by consider-

\[\text{\underline{\text{References}}}\]

161 Stotts, 679 F.2d at 587 (Martin, J. dissenting).
162 Id. at 581 (majority opinion).
163 See United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) (member of plaintiff class can intervene after judgment when class representative accepts favorable individual judgment on merits and fails to appeal denial of class certification).
165 Id. at 978-81.
166 Id. at 981.
ing a similar procedure in bilateral litigation. We would not let \( A \) file a complaint and a proposed decree without serving \( B \), call a press conference and wait for a few newspaper stories, “consent” that the court enter the decree against \( B \), and then say \( B \) is barred because he knew about the case and failed to intervene. That procedure makes no more sense when \( A \) and \( B \) consent for \( C \) than when \( A \) consents for \( B \).

\( A \) best knows what relief he is seeking, and if that relief will directly interfere with \( C \)’s arguable claim of right, \( A \) is seeking relief against \( C \) just as much as he is seeking relief against \( B \). \( A \) will typically know about \( C \) at least as soon as \( C \) knows about \( A \)’s lawsuit and the requested relief—usually long before. It is \( A \)’s responsibility to join \( C \). If \( A \) does not join him, Rule 19 requires the court to order that he be joined.\(^{168}\) \( C \) has no similar duty to intervene.\(^{169}\) Rule 19 imposes a duty; Rule 24 creates only an opportunity. The plaintiff and the court should not be allowed to ignore their responsibilities under Rule 19, and then oppose intervention or subsequent litigation on grounds of timeliness.

It is true that Rule 24 requires that motions to intervene be timely. But Rule 24 does not excuse the duty of the plaintiff and the court under Rule 19. The Advisory Committee Notes to Rule 24 indicate that the primary purpose of nonstatutory intervention as of right is “to entitle an absentee, purportedly represented by a party, to intervene in the action if he could establish with fair probability that the representation was inadequate.”\(^{170}\) This application of Rule 24 fills a gap in Rule 19: if the absentee is represented by a party, and if the parties have no reason to question the adequacy of the representation, there is presumably no obligation to join the absentee under Rule 19. Enforcement of the Rule 24 timeliness requirement in that context does not eviscerate Rule 19.

The drafters of Rule 24 apparently contemplated that plaintiff would join all defendants against whom he sought relief, and that if such a defendant were initially overlooked, he would be joined under Rules 19 or 20.\(^{171}\) Thus, the Advisory Notes do not discuss

\(^{168}\) Rule 19(a) is quoted in note 123.

\(^{169}\) Chase National Bank v. Norwalk, 291 U.S. 431, 441 (1934) (“The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.”). But see Provident Bank v. Patterson, 390 U.S. 102, 114 (1968) (“[I]t might be argued” to the contrary, but the issue was not presented).


the case where an intervenor seeks to oppose a decree that will directly affect him and no party can be expected to represent him. Barring such intervention as untimely eviscerates Rule 19; A has much to gain and little to lose by refusing to join C. The court may succumb to similar incentives: the docket can be cleared, and sympathy-arousing plaintiffs can be helped, if the court takes no initiative under Rule 19 and rejects a subsequent motion to intervene as untimely.\textsuperscript{172}

There is a more fundamental difference between the application of Rule 24 as contemplated by the Advisory Committee and the cases barring intervention by nonconsenting third parties. Inadequate representation can be raised after judgment,\textsuperscript{173} so that denial of an untimely motion to intervene merely postpones the issue. There are practical problems with letting an unrepresented party file a second suit, but at some point these become less significant than the practical problems of letting an intervenor disrupt an earlier lawsuit that is nearing resolution.\textsuperscript{174} Striking a balance between these competing interests is quite different from holding that C is barred forever by his failure to timely intervene in a case where A should have named him as a defendant. But in circuits that bar independent suits by C, that is precisely the effect of denying C's motion to intervene.\textsuperscript{175}

C. Requiring C to Seek Modification of the Decree

Courts may enter the decree and treat any later objection by C as a motion to vacate or modify. Some courts have suggested such an approach without exploring the details.\textsuperscript{176} A mild version of this approach would merely shift to C the burden of persuasion by a preponderance of the evidence, while recognizing that C's rights had not been determined in the original litigation. In a more extreme version, the court could look to the precedents on modification of decrees. Those precedents are inconsistent,\textsuperscript{177} but the most

\textsuperscript{172} An example is Culbreath v. Dukakis, 630 F.2d 15, 25 n.14 (1st Cir. 1980), which held that white employees need not be joined under Rule 19 in suit seeking quota remedy, and that even if they should have been joined, failure to do so does not excuse the timeliness requirement for intervention.

\textsuperscript{173} Hansberry v. Lee, 311 U.S. 32 (1940); Air Line Stew. & S. Ass'n Loc. 550 v. American Airlines, Inc., 430 F.2d 636 (7th Cir. 1970); Gonzalez v. Cassidy, 474 F.2d 67 (5th Cir. 1973).

\textsuperscript{174} An example of such balancing is NAACP v. New York, 413 U.S. 345, 368-69 (1973).

\textsuperscript{175} See cases cited in note 158.

\textsuperscript{176} Culbreath, 630 F.2d at 22; Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982).

\textsuperscript{177} See Laycock, Modern American Remedies at 1019-54 (cited in note 78); Timothy
commonly cited case requires that the party seeking substantial modifications show a significant change of circumstances and substantial hardship.\textsuperscript{178}

Whatever modification precedent the court looks to, it is wholly inappropriate to hold nonconsenting third parties to the same standard as consenting parties. If $C$ is bound by the decree until modified, and if his motion for modification is governed by the same standard governing a similar motion by $A$ or $B$, it is nonsense to say that $C$ is not bound. $C$ would be bound to exactly the same extent as $A$ and $B$.

V. THE COSTS OF INCLUDING $C$

There are costs to insisting on consent from all parties whose rights may be overridden by the settlement. Concern over this cost is most often expressed in the complaint that settlement becomes more difficult.\textsuperscript{179} Some of these difficulties are inherent in trilateral negotiations. Others arise only when $C$ is a large class.

A. The Nature of Trilateral Negotiations

Unanimity is more elusive among three parties than among two. But the cost of procuring $C$'s consent inheres in the situation. It is not a cost created by recognizing $C$'s right to consent. If the agreement cannot be implemented without overriding the arguable rights of $C$, $A$ and $B$'s consent is illusory. We can pretend that it settles something by ignoring $C$'s rights, but we are only pretending. A decree that overrides $C$'s rights without the consent of $C$ is not a consent decree.

Requiring the consent of all three parties makes it impossible for two parties to externalize costs to the third. Professor Rutherglen makes this point—although somewhat in reverse—in discussing affirmative action cases. He says the white employees have no reason to settle, because they have nothing to lose.\textsuperscript{180} That is, they are not accused of wrongdoing and they face no risk of liability for back pay. The only issue for them is the extent to which their job opportunities will be limited to help remedy the employer's dis-


\textsuperscript{179} Local Number 93, 106 S. Ct. at 3077 n.13; Culbreath, 630 F.2d at 22; Schwarzchild, 1984 Duke L.J. at 921-23 (cited in note 132). See also Thaggard, 687 F.2d at 69.

\textsuperscript{180} George Rutherglen, Procedures and Preferences: Remedies for Employment Discrimination, 5 Rev. Lit. 73, 115-16 (1986).
crimination against minorities, and they have no reason to consent to bear the cost of the employer's wrong. That is not quite right, but to the extent it is right, it highlights the way these settlements force the innocent to pay for defendant's wrongdoing.

If it were true that a litigated decree could not limit white job opportunities, then it would be true that white workers face no litigation risks and would never agree to anything. But the premise is not true. The Supreme Court has held that quotas may be imposed in some litigated cases, and it has begun to formulate rules governing their imposition.\textsuperscript{181} Thus, as Rutherglen also notes, white employees do face litigation risks, and they may agree to some quota to avoid the risk of a more severe one.\textsuperscript{182}

The parties can assess the chances of a litigated quota remedy, and the likely severity of the quota if ordered, just as they assess the chances of a damage judgment and the likely amount of damages. White employees who faced a substantial risk of a 30 percent minority quota at trial might settle the case for 20 percent quota. Or they might agree to a 30 percent quota in exchange for a cash payment from the employer. Thus, Rutherglen's objection reduces to the obvious point that few defendants will consent to the maximum liability that might be imposed if they go to trial. There is nothing illegitimate, racist, or selfish about white employees negotiating the same way. If plaintiffs want the full 30 percent, they should prove their case and bear the risks of trial like any other litigant.

The Supreme Court held in \textit{Local Number 93} that plaintiffs and the employer may agree to more relief than the court could order.\textsuperscript{183} Even with all parties participating, they may agree on a creative form of relief that the court could not have ordered. But the affected parties will not agree on a 40 percent quota in case where the most a court could order is a 30 percent quota. Settlement relief that exceeds what a court could order is one more product of letting A and B negotiate the rights of C.

B. Multiple Third Parties and the Problem of Representation

Another source of difficulty in trilateral negotiations is that they may involve more than three parties. C may be a group of 1,000 unorganized individuals with no obvious representative.

\textsuperscript{181} See text at notes 36-43.
\textsuperscript{182} Rutherglen, 5 Rev. Lit. at 116-17.
\textsuperscript{183} 106 S. Ct. at 3077-79.
They cannot all participate in the litigation, and if each of them must consent individually, there may be insuperable holdout problems.

Sometimes these problems are an avoidable consequence of defining the original litigation too broadly. In *Harrisburg ACLU*, the ACLU sued state education officers as well as some school districts, hoping to resolve the matter for every school in the state in a single decree. If we take seriously the procedural rights of the student prayer groups, we must join every student prayer group in the state, or at least an adequate representative. But the ACLU could also sue one school district and the local student prayer group, and rely on stare decisis rather than res judicata to influence resolution of the same issue elsewhere.

In affirmative action litigation, the problem of multiple parties is unavoidable. If the court is to consider a quota remedy in a factory with 100 minority employees and 900 other employees, there are at least 1,001 parties. Even this figure omits future applicants, but only a guardian ad litem can adequately represent them. With incumbents, it may be possible to find some more appropriate representative.

1. **Who Should Be Notified?**
   
a. **Incumbent Workers.** Assuming that plaintiffs must sue the other employees or a representative, the initial question is who must be served with a summons. The answer is all employees who might be affected by a quota remedy. To see why, we must first consider the alternatives of suing the union or designated representatives of a class of white employees.

   If there is a collective bargaining agreement, the union is an adequate representative for employees claiming rights under the agreement. The most common example is seniority rights. But employees opposing a quota remedy also have rights under Title VII,184 and if the employer is a governmental unit, the Equal Protection Clause.185 The union's authority as exclusive bargaining representative under the National Labor Relations Act does not give it power to surrender individual rights under the civil rights laws.186 To the contrary, the union is regulated by those very

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laws.\textsuperscript{187} One tempting solution in the unionized sector is to certify a defendant class and appoint the union as class representative.\textsuperscript{188} But that solution assumes that the union can legitimately represent only the white workers, which is not true. The class representative under Rule 23 assumes a fiduciary duty to the class members that would conflict with the union’s statutory duty of fair representation to all its members.\textsuperscript{189} Sometimes the union is fully committed to the anti-quota position and would adequately represent workers opposed to a quota. \textit{Local Number 93} is an example of this scenario. But certifying the union as a class representative would legally obligate it to disregard the interests of its minority constituents. That is at least an undesirable result, and probably an illegal result. White and minority union members in quota disputes are like the opponents and supporters of the racially restrictive covenant in \textit{Hansberry v. Lee}:\textsuperscript{190} no class representative can represent both sides. The Second Circuit recently recognized a similar problem: a union could not adequately represent both its retired members and its active members in litigation with a bankrupt employer seeking to reject the collective bargaining agreement.\textsuperscript{191}

Even so, the union may sometimes be the key to a solution. The union may be able to mediate or negotiate a compromise acceptable to all its members, or to so many of them that any dissenters can represent themselves without making the litigation unmanageable. Such solutions can emerge informally and by acquiescence. But they should not be legally imposed, either by certifying the union as a class representative or by treating the union’s consent as binding all the conflicting interests among the membership.

With respect to incumbent employees whose names and addresses are known, the only solution is to notify them all individually and give them an opportunity to defend the action. That is the apparent holding of \textit{Mullane v. Central Hanover Trust Co.}\textsuperscript{192} Even

\textsuperscript{188} Fed. Rule Civil Proc. 23(a) authorizes suits against a representative on behalf of a class.
\textsuperscript{189} See Vaca v. Sipes, 386 U.S. 171 (1967); Steele v. L. & N.R. Co., 323 U.S. 192 (1944); compare Hansberry v. Lee, 311 U.S. 32 (1940) (class representative cannot represent those who support, and also those who oppose, enforcement of racial covenant in deed).
\textsuperscript{190} 311 U.S. 32 (1940).
\textsuperscript{191} In re Century Brass Products, Inc., 795 F.2d 265 (2d Cir. 1986).
when the number of defendants is very large, due process is not satisfied by appointing a representative who proceeds without the knowledge of identifiable individuals among the represented.

The court might seek to avoid this step by certifying a defendant class and appointing individual members of the class to represent it. A number of lower court cases hold that Mullane is inapplicable to class actions for injunctive relief.\textsuperscript{193} I find these opinions unpersuasive,\textsuperscript{194} but I assume they will be followed.

Even if plaintiff class actions without notice are constitutional, it is a far more difficult step to apply this principle to a defendant class of blue collar workers.\textsuperscript{195} Plaintiff class representatives are self-appointed, which is not ideal, but at least they have expressed interest in the case and they have hired a lawyer. Defendant class representatives appointed by the plaintiffs or the court may not be willing to serve, may not know how to find a lawyer, and probably cannot pay the lawyer. Successfully resisting a quota remedy will not create an immediate pool of money out of which to pay a contingent fee. Notifying five randomly selected workers that they are the class representatives is unworkable and constitutionally insufficient to bind the class. It may be necessary to eventually certify a class for settlement purposes, but the case must begin with individual notice to every incumbent employee who might be disadvantaged by the quota.

b. \textit{Applicants}. Representation problems are much more severe in the case of hiring quotas. It may sometimes make sense to notify persons with pending job applications, and to certify representatives of the class of all present and future job applicants who might be affected by the quota. But status as an applicant for work with a particular employer is often short-lived, and an applicant's stake with any particular employer is often small. The court can

\begin{footnotes}
\item[193] The best of these opinions is Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 254-57 (3d Cir. 1975). Other examples include Alexander v. Aero Lodge No. 735, Intern. Ass'n, etc., 565 F.2d 1364, 1373-74 (6th Cir. 1977); Larionoff v. United States, 533 F.2d 1167, 1184-87 (D.C. Cir. 1976); Frost v. Weinberger, 515 F.2d 57, 65 (2d Cir. 1975).
\item[194] Wetzel holds that due process is satisfied if the named plaintiff is an adequate representative. 508 F.2d at 256-57. The opinion cites dictum in Hansberry v. Lee, 311 U.S. 32, 40-42 (1940). But Hansberry held only that adequate representation is necessary. It had no occasion to consider whether adequate representation is sufficient where individual notice is possible or feasible. The facts involved egregious conflict of interest; the decision predates Mullane; and notice was not at issue. The Court offered some rationales for class actions, such as binding parties who could not be found and avoiding delay caused by the old rule that actions abate if any party dies. None of these reasons suggest a need to dispense with notice to class members who can be located.
\item[195] See the discussion of the problems with defendant class actions in Hensoin v. East Lincoln Township, 814 F.2d 410, 414-17 (7th Cir. 1987).
\end{footnotes}
notify current applicants, but it certainly cannot rely on them to represent a class. Current applicants arguably, and future applicants certainly, are like the remaindermen in *Mullane.* They do not have to be notified individually, but if they are to be bound, the court must appoint a guardian ad litem to represent their interests.

In *Mullane,* the guardian could be paid out of trust funds in which the remaindermen had an interest. There is no comparable source of funding for a guardian for future applicants. But the employer may be willing to pay a guardian for future applicants, to ensure that the decree is really final. Such an arrangement would require careful judicial supervision to ensure the independence of the guardian and his counsel; the court should focus on this risk in assessing the adequacy of representation under Rule 23. It would probably help insulate the guardian and his lawyer if the employer paid a fund into court and did not receive bills directly. But the arrangement has potential benefits for all sides, and the ethical rules do not preclude it.

It may be that no one is willing to pay a guardian ad litem for future applicants. In that case, the solution is simple. They do not have to be notified, and they are not bound. The legality of the hiring quota will be litigated if and when some future applicant cares enough to file a lawsuit. If and when that time comes, he may be certified as a representative of all future applicants so that others will be bound. Alternatively, if he sues only on his own behalf, the stare decisis effect of a decision upholding the quota will likely chill repeated litigation by other applicants. The risk of repeated litigation is very slight.

2. *Representation at the Answer and Beyond.*

   a. *Where Someone Answers on Behalf of the Class.* Nine hundred employees receiving a summons are not going to hire 900

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197 Other examples include *In re Century Brass Products, Inc.,* 796 F.2d 265, 275 (2d Cir. 1986) (court appointed representative of retired employees of bankrupt employer); *In re Amatex Corp.,* 755 F.2d 1034, 1043 (3d Cir. 1985) (guardian ad litem for unknown future asbestos victims).


199 Compare Geoffrey C. Hazard, Jr., A General Theory of State-Court Jurisdiction, 1965 Sup. Ct. Rev. 241, 287-88. Professor Hazard suggests that unidentifiable claimants are properly barred not by ineffectual publication notice, but by statutes of limitations. With respect to future applicants, the statute of limitations does not begin to run until their application is rejected.
separate lawyers and file 900 separate answers.\textsuperscript{200} Left to their own
devices, some may answer and many may default. If all goes well,
they may pool their resources, hire one lawyer, and organize them-
selves into one or more natural classes with emergent leaders as
class representatives. A court interested in manageable litigation
and a just resolution on the merits would encourage and facilitate
that process.

Events will often not proceed so well. But groups of employees
have organized themselves in just this way in some of the reported
cases.\textsuperscript{201} Creditors' committees organize themselves in this way in
bankruptcy cases. Creditors' committees may find it easier to or-
organize, because the court can authorize payment of attorneys' fees
from the bankrupt estate,\textsuperscript{202} and the average creditor is probably
more legally sophisticated than the average blue collar worker. But
workers have a different advantage; they are a social group in daily
contact. A union that is unable to represent both sides in such a
dispute may well be able to help both sides find representation.

In the likely event that some bewildered workers show up on
answer day without counsel or any notion of how to proceed, the
court can help them get their day in court without abandoning its
neutral role. The court can explain the need for a lawyer and the
advantages of having a single lawyer represent all similarly situ-
ated workers. It can explain that they are more likely to get ade-
quate and affordable representation if they answer as class repre-
sentatives and share the cost, and that a lawyer may be able to
help organize the class.

When a client asks a lawyer to represent him, and when the

\textsuperscript{200} See Charles Dickens, Bleak House 22 (Signet ed. 1964) ("Eighteen of Mr. Tangle's
learned friends, each armed with a little summary of eighteen hundred sheets, bob up like
eighteen hammers in a pianoforte, make eighteen bows, and drop into their eighteen places
of obscurity.").

\textsuperscript{201} See Corley v. Jackson Police Dept., 755 F.2d 1207, 1208-09 (5th Cir. 1985) (describ-
ing collateral suits and motions to intervene by white police officers); Williams v. City of
New Orleans, 729 F.2d 1554, 1556 (5th Cir. 1984) (intervention by classes of Anglo, His-
panic, and female police officers); Stotts v. Memphis Fire Dept., 679 F.2d 579 (6th Cir. 1982)
(motion to intervene by eleven white firefighters on behalf of all others); Culbreath v.
Dukakis, 630 F.2d 15, 19 (1st Cir. 1980) (motion to intervene by professional organization
formed during pendency of case); Alaniz v. California Processors, Inc., 73 F.R.D. 289, 294
(N.D. Cal. 1976) (intervention by eighteen cannery workers on behalf of class); Deveraux v.
Geary, 765 F.2d 265, 270 (1st Cir. 1985) (independent law suit by five white police officers,
not on behalf of class).

\textsuperscript{202} See 11 U.S.C. § 1102 (1982). The court takes the initiative in appointing the first
creditors' committee, id. at § 1102(a)(1), but the parties take the initiative in creating addi-
tional committees for separate classes of creditors and equity holders, id at § 1102(a)(2).

client cannot be adequately represented unless the cost can be shared with others similarly situated, organizing the class is part of the representation of the original client. In such situations, restrictions on solicitation by lawyers should not preclude the lawyer from recruiting additional class members to share the cost, or from speaking at meetings of potential class members.\textsuperscript{204}

Defendants who initially default can be included in a subsequent class certification. The reasons are similar to the reasons a Title VII plaintiff can represent class members who have not satisfied the procedural prerequisites to being a plaintiff.\textsuperscript{205} If some C files a timely answer, A and B know that there is opposition to overriding C's rights, and that C's answer may be amended to allege that C represents a class. That gives A and B adequate notice and serves the purposes of the rule requiring an answer within twenty days.\textsuperscript{206} Requiring all members of the class to answer within twenty days, or requiring those who do answer to initially and explicitly answer on behalf of all, would convert the twenty-day limit for answer into an engine of destruction for the rights of a large class of unsophisticated defendants. Indeed, if no C answers within twenty days, but someone answers soon thereafter, and before A and B have been prejudiced by the delay, there is power to accept the answer and vacate any default judgment previously entered.\textsuperscript{207} Courts should exercise that power for unsophisticated defendants; a whole class should not be barred because a pro se answer was filed on the twenty-third day.

Stringent enforcement of default rules could make the C class worse off than if it had not been served. If these employees were not served, a representative seeking to intervene on behalf of the class should have far more than twenty days to do so. The purpose of notice is to provide more adequate procedural protection; it

\textsuperscript{204} See A.B.A. Code of Professional Responsibility D.R. 2-104(A)(5) ("If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder."). See also In re Primus, 436 U.S. 412 (1978) (solicitation even of the first claimant is constitutionally protected where motivated by desire of non-profit organization to advocate political beliefs through litigation on behalf of appropriate clients).\textsuperscript{205} Franks v. Bowman Transportation Co., 424 U.S. 747, 771 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975).\textsuperscript{206} Fed. Rule Civil Proc. 12(a).\textsuperscript{207} Fed. Rule Civil Proc. 55(c) ("For good cause shown the court may set aside an entry of default. . . ."); Traguth v. Zuck, 710 F.2d 90, 94-95 (2d Cir. 1983); Farnese v. Bagnasco, 687 F.2d 761 (3d Cir. 1982); Meehan v. Snow, 652 F.2d 274 (2d Cir. 1981); Kegel v. Key West & Caribbean Trading Co., Inc., 627 P.2d 372 (D.C. Cir. 1980); Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice & Procedure § 2693 (1983).
should not take away the second-best protection provided by the possibility that a self-appointed leader will act to protect the class.

Certifying class representatives from among those who have answered and taken an active role in the litigation is a much less hazardous enterprise than certifying class representatives before the initial notice. Courts have some experience with comparable choices in litigation involving multiple potential representatives on the plaintiffs' side. The process is often unprincipled, but it is better than the alternative of wholly unmanageable litigation.

Once a defendant class is certified, the litigation can proceed under Rule 23. The employer and the representatives of the two classes (minority employees and other employees) may negotiate a trilateral consent decree, or they may litigate the case. The consent decree would be subject to a reasonableness hearing under Rule 23, but absent class members adequately represented by the class representative could not veto the settlement or insist on full litigation.

b. Where No One Answers for the Class. It may be that all those who answer do so individually and have no interest in representing the class. If only a small number of affected employees answer, and if the others are barred by their default, those who answer may acquire power to extract excessive compensation or protections for themselves. If 850 white employees are bound by their default, it is easy to envision a settlement in which the fifty who answered are exempted from operation of a quota, or in which the fifty receive a cash payment to consent to the quota. It is one thing to have the interests of all the white employees represented in a dispute that directly affects them; it is less attractive to have a few white employees extracting private benefits at the expense of both the minority employees and the bulk of the white employees.

That result may be unattractive, but it follows from our general practice with respect to default judgments. The court has only limited powers to prevent it. Where there is a natural class and where those who answer are natural candidates for the position of class representative, the court can encourage them to act as class representative, but it cannot force them to do so. The court can point out that it may be in their interest to act as class representative: they greatly increase their chances of paying a lawyer to re-

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present them adequately. But if all those who answer do so individually and refuse to represent the class, the absent class members are barred by their own default. If no C answers, the entire class is barred by default, and A and B can file their consent decree.

These results are not attractive, but they are not peculiar to trilateral litigation. Courts regularly enter default judgments against unsophisticated litigants. We can probably do more than we do to protect such defendants from their lack of sophistication, but that is not the subject of this paper. Whatever protections our system provides unsophisticated litigants generally should be available to an unsophisticated C. That he is C rather than B does not entitle him to more.

CONCLUSION

For a party in our legal system to be bound by a judicial decree without ever having a chance to be heard is obviously an anomaly. Yet that will be the result as long as Local Number 93’s rule that C cannot prevent entry of a consent decree between A and B coexists with the lower courts’ rule that C cannot thereafter attack the consent decree either in separate litigation or by intervening in the original case.

The courts have stumbled into this anomaly because their attention was focused elsewhere. Many factors have contributed to this development: the policy that favors settlement; the sense that A and B are entitled to make their own deal; the fear that C would unduly complicate the negotiations; the desire to clear the docket; and perhaps most of all, our commitment to economic justice for the victims of racial discrimination. The combination of these factors has led to a series of decisions that make C go away. C is always raising his claims in the wrong place or at the wrong time or in the wrong way. Collectively, these decisions have effectively barred C altogether in the quota cases. In other kinds of trilateral disputes, the record is mixed; courts have been more sensitive to C’s procedural rights when their judgment is not clouded by race.\(^2\)

\(^2\) See Dunn v. Carey, 808 F.2d 555 (7th Cir. 1986) (permitting independent suit challenging consent decree); Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 695-97 (7th Cir. 1986) (vacating consent decree on motion of intervenor); Sanguine, Ltd. v. United States Dept. of Interior, 736 F.2d 1416 (10th Cir. 1984) (vacating consent decree on motion of intervenor); Harrisburg Ch. of Am. Civ. Lib. v. Scanlon, 500 Pa. 549, 458 A.2d 1352 (1983) (refusing to enter consent decree without participation of affected third party); County of
The only reliable solution is that provided by the Pennsylvania Supreme Court in *Harrisburg ACLU*: courts should not enter consent decrees without the consent of all the foreseeable parties whose arguable legal rights are directly affected. The second-best solution is to vigorously and effectively abolish the rule prohibiting independent litigation by C. If a nonconsenting C objects to a consent decree, the parts of the decree that affect C should be vacated and the case restored to the docket.

Orange v. Air California, 799 F.2d 535 (9th Cir. 1986) (denying intervention but dictum that third party was not bound by consent decree); National Wildlife Federation v. Gorsuch, 744 F.2d 963 (3d Cir. 1984) (nonparty bound on peculiar facts, but dictum that nonparties should usually not be bound). See also United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) (member of plaintiff class can intervene after judgment when class representative fails to appeal denial of class certification); Zenith Corp. v. Hazeltine, 395 U.S. 100, 108-12 (1969) (nonparty not bound by litigated decree, even though affiliated with party); Hansberry v. Lee, 311 U.S. 32, 40-41 (1940) (class member not bound by decree entered in litigation by class representative with conflicting interest); Chase National Bank v. Norwalk, 291 U.S. 431, 441 (1933) (non party not bound by litigated decree, even if he could have intervened); In re Century Brass Products, Inc., 795 F.2d 265 (2d Cir. 1986) (refusing to treat union as representative of both active and retired employees). But see Wilder v. Bernstein, 645 F. Supp. 1292, 1321-22 (S.D.N.Y. 1986) (nonparty objecting to consent decree limited to fairness hearing).