1987

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Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change

Michael W. McConnell†

Lawmakers always have dreamed of making their decisions irrevocable. Ancient lawgivers pronounced a curse on future generations who might presume to alter their enactments. Modern politicians hope to set in train such powerful political forces that successors will not be able to change direction. Here in Chicago, a faction of the City Council recently attempted to guarantee against prospective electoral defeat by voting (by simple majority) to require a two-thirds vote in the future to dislodge themselves from Council leadership posts or to change key provisions in the Council rules.¹

But statutes, however wise, can be repealed by later legislatures,² executive orders can be modified by successor Presidents,³ and council rules adopted by a majority can be repealed by future

† Assistant Professor of Law, University of Chicago Law School. The author participated as counsel in several of the cases discussed herein: Roti v. Washington, United States v. Board of Education of the City of Chicago, Citizens for a Better Environment v. Gorsuch, and Mabry v. Johnson. Many thanks are due to Paul Bator, Frank Easterbrook, Richard Epstein, Larry Kramer, Douglas Laycock, Geoffrey Miller, Richard Stewart, and David Strauss for helpful comments on an earlier draft.


² For a self-conscious example, see Jefferson's Bill for Establishing Religious Freedom in Virginia:

And though we well know that this Assembly . . . have no power to restrain the acts of succeeding Assemblies, constituted with powers equal to our own, and that therefore to declare this act irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right.


³ Consider, for example, the controversy over suggestions that the President amend or revoke Executive Order 11246 (Sept. 24, 1965), which establishes affirmative action requirements for contractors doing business with the federal government. Cong. Q. Weekly Rep. 2106-07 (Oct. 19, 1985). No one, to my knowledge, has suggested that the President lacks this power.
majors.\textsuperscript{4} Even the Constitution can be amended by vote of the same percentage of states originally required to ratify it.\textsuperscript{5} Future lawmakers have just as much power to depart from the decisions of their forebears as their forebears had to make the decisions in the first place.

Unless, we are now told, the decisions have been embodied in consent decrees.

Consent decrees are a form of settlement in which the parties agree to end the litigation in return for a promise that one (or both) of them will change their conduct for a specified period of time, sometimes indefinitely. They are entered as a judgment of the court and are enforceable in the same way as court injunctions; yet they contain no determination by the court either that the party thus bound had violated the law or that the relief thus granted was legally warranted. Of concern here are consent decrees between government lawyers and a private party, in which the private party agrees to cease litigation (as either plaintiff or defendant) on agreed terms, in exchange for a commitment by the government that executive discretion will in the future be exercised in a particular way.

Consent decrees have not traditionally been considered a tool of governmental policy making. Statutes, executive orders, regulations, adjudications, and policy statements have heretofore been the means by which governmental policy is given the force and effect of law.\textsuperscript{6} Recent federal court decisions—especially United States v. Board of Education of City of Chicago\textsuperscript{7} and Citizens for

\textsuperscript{4} Roti v. Washington, 148 Ill. App. 3d at 1012, 500 N.E.2d at 467, quoting State ex rel. Kiel v. Riechmann, 239 Mo. 81, 97-98, 142 S.W. 304, 309 (Mo. 1911) ("The same power which can make rules in the first instance can directly attack and unmake or repeal such rules.").

\textsuperscript{5} U.S. Const. art. V; compare id. art. VII. One provision of the Constitution purportedly cannot be repealed: the "equal Suffrage" of each State in the Senate. U.S. Const. art. V. This is a deeply paradoxical limitation; nothing in the text indicates that this limitation cannot itself be amended by ordinary action.

\textsuperscript{6} In perusing the leading casebooks on administrative and legislative process, I have found none in which consent decrees were mentioned either in an index or a table of contents.

\textsuperscript{7} 554 F. Supp. 912 (N.D. Ill. 1983) (approving consent decree); 567 F. Supp. 272 (N.D. Ill. 1983), aff'd in part, vacated in part, 717 F.2d 378 (7th Cir. 1983) (holding United States in violation of decree); 567 F. Supp. 290 (N.D. Ill. 1983) (upholding constitutionality of the desegregation plan); 588 F. Supp. 132 (N.D. Ill. 1984) (on remand, holding United States in violation of decree, requiring Administration to lobby for additional funds, and quantifying the United States' obligation at $103.9 million); vacated and remanded, 744 F.2d 1300 (7th Cir. 1984).
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a Better Environment v. Gorsuch—have, however, created a new species of lawmaking. The courts in these cases held, in effect, that executive officials in one Administration can set policy today and bind their successors to comply with it tomorrow, by settling a lawsuit on those terms. This development forces us to look at consent decrees in a new light.

Professor Peter Shane has made a major contribution by offering the first comprehensive analysis of "discretion-limiting" consent decrees in the context of the Constitution's allocation of lawmaking authority. While recognizing that consent decrees can go beyond constitutional bounds by interfering with constitutionally-vested executive discretion, Professor Shane's central message is that there is no cause for alarm: consent decrees, even in cases like Chicago Board of Education and Citizens for a Better Environment, fall within the flexible tradition of American administrative and constitutional law. The anxiety over consent decrees, he suggests, reflects little more than a general anxiety over increasing judicial oversight of executive functions.

I disagree. Whatever may be the state of executive-judicial relations generally, consent decrees like those emerging from these cases are a unique and unacceptable development. To the extent that consent decrees insulate today's policy decisions from review and modification by tomorrow's political processes, they violate the democratic structure of government. They should be repudiated before they become a common part of the legal landscape.

I. LEGAL AND CONSTITUTIONAL LIMITS ON CONSENT DECREES

A. The Distinctive Character of Consent Decrees

Why do consent decrees against the government pose a special problem for constitutional and administrative law? Most consent decrees are ordinary compromises of litigation, controversial only insofar as the legal claims underlying them may be controversial. As a means for resolving legal disputes without wasteful litigation, consent decrees are unexceptional, indeed indispensable tools, for the intelligent conduct of government litigation. To be sure, consent decrees frequently require the executive to surrender a portion of its authority to the courts; this raises the usual set of problems of reconciling aggressive judicial supervision of executive

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* 718 F.2d 1117 (D.C. Cir. 1983).
performance with the structural principles set out in the Constitution. But consent decrees are not unique in this regard. Injunctions, declaratory judgments, and legislative schemes inviting an active judicial role all raise the same set of problems. Is there any sense in which government consent decrees should excite more than the usual anxiety over the transfer of policy-making discretion from Presidents to judges?

I contend that a narrow but important class of consent decrees, if judicially enforced, would violate the structural provisions of the Constitution by denying future executive officials the policy-making authority vested in them by the Constitution and laws. These consent decrees circumvent democratic change by precluding subsequent Presidents from changing policies set, through consent decree, by a previous Administration (or, for that matter, by preventing a single President from changing his mind). Furthermore, especially at the state and local level, consent decrees can enable officials to transgress limits on their authority or sidestep political checks and balances.

For example, an opponent of affirmative action might sue the Secretary of Labor, contending that Executive Order 11246, which establishes goals and timetables for the hiring of black construction workers in federally-funded construction projects, is unconstitutional. (I presume, for purposes of this hypothetical, that there is no legal obstacle that would prevent the President from revoking the Executive Order, but also that there is no judicially-accepted principle of constitutional law that would persuade a court to strike down the Order.) Could executive branch lawyers settle the lawsuit by entering a consent decree rescinding the Executive Order and promising that it would never be reinstated? In the face of such a decree, could a future President who supports affirmative racial preferences reissue the Executive Order?

Under current law, a proposed consent decree may be entered as a judgment of the court without any independent determination by the court that it is warranted under the facts or law pertinent to the case. Moreover, the current rules regarding enforcement

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10 See U.S. Const. art. II, § 3 (assigning to the President the responsibility to “take Care that the laws be faithfully executed”); Robert F. Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661 (1978). Defenders of the new model of public law do not deny that it has been a major departure from the traditional understanding of judicial and executive roles. See Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669, 1669-70 (1975); Shane, 1987 U. Chi. Legal F. at 284-86 (cited in note 9).

11 Local Number 93 v. City of Cleveland, 106 S. Ct. 3063, 3077-78 (1986). See also note
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and modification of consent decrees bind future government officials, unless the private party to the decree agrees to a modification or the officials are able to persuade the court that enforcement of the decree would result in a "grievous wrong." That voters may have elected government officials with different views about appropriate public policy does not, presumably, constitute a wrong sufficiently "grievous" to meet this test.

Surely there is something troubling about such a decree. I do not doubt that the President has the authority to revoke an executive order in response to a lawsuit. It is much harder to accept his authority to bargain away the right of his successors to adopt a different policy. Consent decrees of this sort differ fundamentally from other forms of governmental policy making: they expressly limit future political discretion.

To be sure, today's policy inevitably has repercussions for tomorrow. It is harder for future policymakers to reverse course than it is to chart a policy in new areas. But the general rule for democratic bodies is that the same authority that has power to adopt a legal rule has authority to change it. By contrast, if government policy is set by consent decree, then future executive officials cannot abrogate the decree on their own authority. They would have to obtain the consent of an outside party (the other party to the decree or a judge). Unlike other forms of government policy making, consent decrees, in Professor Shane's apt words, make ordina-


15 This problem may be compared to that discussed by Professor Douglas Laycock in Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 U. Chi. Legal F. 103. In his article, Professor Laycock discusses the effect of consent decrees on third parties unrepresented in the litigation. Here, the unrepresented "third parties" are future executive officials, and ultimately the people who elect them.

16 Unless, of course, they follow Professor Shane's wise counsel and incorporate in every "discretion-limiting" consent decree language permitting future modification. See Shane, 1987 U. Chi. Legal F. at 261, 265 (cited in note 9). I agree that his suggested "guidelines" would be more effectual than current Justice Department guidelines. See id. at 265, 279-84.
rily "revisable" discretion "nonrevisable." That is, they insulate the policies embodied in the decree from future political change, and thus from the democratic process.

B. The Standards for Judging the Constitutionality of Consent Decrees

Article II of the Constitution vests significant discretionary authority in the President, and through him in subordinate executive officers. By "the President" the Constitution of course means the incumbent; the powers of the office cannot be exercised by former holders of the office. The Constitution explicitly provides that Presidents shall serve four-year terms of office, for a maximum of two terms. At the end of his term, the authority of a President and his Administration comes to an end. Any attempt by a President to exert legal control over the powers of his successors, unless specifically authorized, is a violation of these constitutional provisions.

The textual allocation of powers to a President of limited term is fundamental to democratic accountability. When voters elect a new President, they expect that he will have authority to change those policies that, under the Constitution and laws, are left to the discretion of the executive. The conduct of the executive branch, no less than the legislative, is intended to be politically accountable. That is why we hold elections for President. If changes in policy have already been ruled out by binding and irrevocable agreements with private parties, then there is no point in holding them.

The question is not solely whether Congress has passed legislation—such as the act authorizing the Attorney General to settle

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16 Id. at 244.
17 I reject Professor Shane's suggestion, id. at 264, that discretion-limiting consent decrees are analogous to agency regulations binding the agency to rule-making procedures that go beyond statutory minima. See also Percival, 1987 U. Chi. Legal F. at 344-46 (cited in note 13). Future agency heads are free to revoke those regulations. By contrast, if the same procedures were embodied in a consent decree, future agency heads would be unable to change them without permission from private parties or the court.
18 U.S. Const. art. II, § 1; id. amend. XXII, § 1.
19 Thus, the crux of my disagreement with Professor Shane is his conception that the electoral accountability of the presidency is not an important feature of our constitutional system. See Shane, 1987 U. Chi. Legal F. at 291 (cited in note 9) ("The reason we can plausibly claim to have a politically accountable government with respect to domestic regulatory policy is not, for the most part, because we may vote for the President, but rather because we vote for Congress.").
litigation — that could be construed to provide authority to enter discretion-limiting consent decrees of the sort described here. Even if Congress were to pass a statute in so many words ("the Attorney General is hereby authorized to enter into consent agreements with private parties that limit the constitutional discretion of future Presidents, and the courts shall enforce such decrees"), it would be unconstitutional in many of its applications. Not even Congress has the power to diminish the constitutional authority of future Presidents.

Nor is the question solely one of "good faith" or proper use of discretion. To be sure, one of the evils to be guarded against is the collusive settlement — government lawyers settling a suit on favorable terms to the opposing party precisely because they expect that successive administrations may be less sympathetic to its cause. But even in the absence of collusion, current officeholders might well view the present concessions of the opponent as more important than the future policy-making discretion of unknown successors. The constitutional issue is not whether those who bargained away executive authority decided wisely, but whether they had the authority to bargain with that currency at all.

The enforceability of a consent decree follows logically from its nature as a hybrid between a litigated judgment and a contract. A consent decree cannot have any greater weight than the combined authority of the parties who consent and the court that enters the judgment. There are, therefore, two alternative bases for upholding and requiring specific performance of a discretion-limiting consent decree.

1. The Relief Contained in the Consent Decree Could Have Been Ordered by the Court if the Case Had Proceeded to Judg-

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22 One of the cases discussed by Professor Shane, id. at 251-53, involved an agreement signed in 1979 that purported to freeze the rules governing mortgage foreclosure relief for five years. Ferrell v. Pierce, 743 F.2d 454 (7th Cir. 1984). It may not have been a coincidence that Carter Administration appointees toward the end of that administration chose a period of time lasting roughly to the end of the succeeding administration. Compare Dunn v. Carey, 808 F.2d 555, 560 (7th Cir. 1986) ("A court must be alert to the possibility that the consent decree is a ploy in some other struggle. . . . The federal litigation may have offered an opportunity to achieve other goals, and the 'consent' . . . may have been what defendants received in exchange for giving plaintiffs what they wanted.").
23 Local Number 93, 106 S. Ct. at 3074; United States v. ITT Continental Baking Co., 420 U.S. 223, 236 n.10 (1975); Kasper v. Board of Election Commissioners, Nos. 87-1125 and 87-1126, slip op. at 10 (7th Cir. 1987). See also Note, The Consent Judgment as an Instrument of Compromise and Settlement, 72 Harv. L. Rev. 1314, 1316-17 (1959).
If a lawsuit goes to judgment, the court may have authority to issue an order requiring the executive to comply with legal requirements, and defining the nature of the executive’s legal obligations. If government lawyers, in an exercise of professional discretion, decide to compromise on similar terms, this poses no more constitutional problem than would a similar litigated decree. On the other hand, to the extent that a consent decree contains elements that differ from or go beyond what a court could order in a litigated judgment, it has no more force than any other agreement between a government official and a private party. It gains no authority by virtue of being filed with the court. Judicially-imposed limitations on executive authority derive from law—that is, from the Constitution, statute, or unrevoked regulation or executive order. The troublesome character of consent decrees is that they purport to make legally enforceable against future officeholders a requirement or limitation that has not been imposed by law.

Of course, it is not always possible to determine, without the benefit of trial, what relief a court would be authorized to enter against the government. In some cases, it is far from a perfunctory task for a subsequent court, asked to order specific performance of a consent decree, to determine whether it is enforceable on this basis. In other cases—important cases—the conclusion is painfully obvious. I will discuss the practical problems of making this determination below. Suffice it to say that if no judicial authority for the terms of a consent decree can reasonably be inferred, it cannot

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16 This is not to say that such decrees, like litigated judgments, may not raise constitutional problems of other sorts. The law underlying the decrees may be unconstitutional—indeed, it may be unconstitutional precisely because it delegates excessive lawmaking or executive supervisory authority to the courts. See, for example, Maryland v. United States, 460 U.S. 1001, 1004-06 (1983) (Rehnquist, J., dissenting from summary affirmance) (questioning the constitutionality of statute allowing courts to override executive decisions on the basis of their own “public interest” determination). But these problems are the problems of modern public law generally, not peculiar to consent decrees. See generally Shane, 1987 U. Chi. Legal F. at 255-61 (cited in note 9).

17 See System Federation v. Wright, 364 U.S. 642, 651 (1961) (“the District Court’s authority to adopt a consent decree comes only from the statute which the decree is intended to enforce”). This presumes an understanding of the judicial role under which remedies are deducible from violations, a proposition which is now controversial. See generally Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Owen M. Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 47 (1979). If the judicial role is seen, instead, as the development and articulation of public values (Chayes, 89 Harv. L. Rev. at 1295-96; Fiss, 93 Harv. L. Rev. at 18) the consent decree becomes problematical on a different ground: that it subjects a public function to private agreement. See Owen M. Fiss, Justice Chicago Style, 1987 U. Chi. Legal F. 1, 12-17.

17 See text at notes 37-40.
serve as a basis for limiting the legally-vested discretion of future executive officials.

2. The Commitment Must be Within the Authority of the Government Signatory, Unaided by the Power of the Court. If a given provision of a consent decree is beyond the court's remedial authority, it must be based on consent. Thus, the decree can be enforceable only if the government signatory has authority to give his consent—that is, authority from some source, other than the litigation, to bind the discretion of present and future officeholders.28

There are specific contexts in which government officials can take actions that restrict the legal discretion of their successors. Some of these, like the President's pardon power29 or the Congress's power to borrow money on the credit of the United States30 are expressly authorized by the Constitution. A President can pardon a person of a suspected crime, and no future President can prosecute him for it. One Congress can borrow money on the credit of the United States, and a later Congress is obligated to pay it back. Other putative powers of government officials to bind their successors are more problematic.31 This is not the occasion for cataloging or justifying circumstances when the Constitution permits executive decisions that bind future legal discretion. Such instances are rare. But if an executive official can bind the discretion of his successors by unilateral action, there is no reason why he cannot do the same by way of settling a lawsuit.32 Conversely, if the official lacks the authority to bind the discretion of his succes-
sors, it is a pure bootstrap argument to say that he can do so by forging an agreement with a private party and submitting it to a court.

Although my principal focus in this article is on federal separation of powers, these principles have wider applications. At the state and local level, consent decrees are sometimes used to evade the political power of other branches and levels of government. For example, a city council may be precluded, under state law, from making certain decisions without a popular referendum. It follows that the city council may not evade the referendum requirement by entering a consent decree promising to make those decisions. 33

The constitutional standard thus applies beyond the context of an executive official and his successors: a consent decree gains no legal force by the “consent” of officials who lack the power to make the relevant substantive decision in the absence of the decree.

C. Legal Consequences of Finding That a Decree Violates Constitutional Principles

That a consent decree may unconstitutionally interfere with policy-making discretion vested in a government official does not, in and of itself, render the decree void. Among the class of consent decrees that theoretically intrude into the constitutional discretion of the incumbent President, many will accord with current policy and thus not raise actual problems. It is only when officials later wish to exercise their constitutionally-vested discretion contrary to the terms of a decree that an actual, ripe constitutional controversy arises. The issue, therefore, is not so much the legality of a given consent decree as the availability of specific performance if the incumbent no longer deems compliance to be in the public interest. 34

The court asked to enforce the decree must determine whether it comports with these constitutional principles. If it does not, this does not mean that the decree was “unlawful” in any sense. No criticism is implied of the signatories or of the court that entered the decree. Rather, this simply means that the officials whose discretion is limited are entitled to modification or rescission to the extent that the decree goes beyond constitutionally enforceable limits. Other portions of the decree, if severable, should still be

33 See text at notes 81-86 for examples.
34 Where the decree limits the discretion of other branches or levels of government rather than that of future officeholders, the legal consequence of a finding that the decree violates the Constitution is that the decree is void and of no legal effect.
enforced. In other words, to the extent that the decree is constitutionally unenforceable, a change in government policy, without more, must be considered a legitimate basis for modification of the decree.\textsuperscript{35}

This does not mean that government officials are free to violate outstanding consent decrees that they may believe to be unconstitutional. Until the court has reached the conclusion that the decree is unenforceable, the consent decree stands as a binding court judgment. Nor does it mean that the private party to the decree is left without a remedy. On the contrary, that party is entitled to some other form of relief that will restore the status quo ante. In the typical public law case, nothing more is required than to permit the private party to reopen the litigation, because the party has given up nothing other than the lawsuit. If the private party assumed obligations under the decree, however, it must be freed of those obligations, just as the government is freed of its obligations. Moreover, if the private party has suffered any concrete loss, the government is required to make it whole.\textsuperscript{36}

Rescissions of consent decrees under this standard may in practice be quite rare. Powerful, if informal, pressures disincline government officials to breach prior commitments made by their agencies, even if there is no legal compulsion. The prospect of reinstatement of the lawsuit is one such pressure. But when the official determines that the public interest in changing policy outweighs the considerations against, these principles offer a standard for modifying or vacating consent decrees that better accords with the Constitution’s allocation of decision-making discretion.

D. Practical Problems of Applying These Legal Standards

Balanced against these considerations of democratic accountability is the practical usefulness of the consent decree, in appropriate cases, for the expeditious resolution of legal controversies. Protections against improper or abusive decrees should not be made so sweeping that they eliminate the incentives for voluntary settlement where it would be in the public interest. Two specific practical objections may be made to a strict enforcement of legal limits.

\textsuperscript{35} Several distinguished lower court judges have proposed substantial loosening of the standards for modification of public law consent decrees. See note 12.

\textsuperscript{36} The right to compensation for property loss has its source in the Just Compensation Clause of the Fifth Amendment, and the right to reinstate the lawsuit has its source in the substantive law that was the basis for the original lawsuit. The private party is relieved of its obligations under the decree under ordinary principles of contract law.
on consent decrees. First, it may sometimes be difficult, without trial, to determine the extent of relief a district court could order and, hence, the lawful scope of a consent decree. Second, the adoption of these principles will make settlement of lawsuits against government officials more difficult. I will provide reasons why these objections should be given little weight, and show that in other contexts (procurement and plea bargaining) similar limits on specific performance of government commitments have not seriously inhibited contracting with the government.

1. The Difficulty of Determining Lawful Scope of Relief Without Trial. The first practical difficulty is how to apply the first criterion for a lawful consent decree—whether the court would have authority to order the relief if the case proceeded to judgment—without a trial. How is it possible to tell whether the consent decree goes beyond what the court could have ordered if there has been no determination on the facts or the law of the case?

For a large number of cases—including all but one of the examples discussed in the next section—this poses no problem, because the consent decree unmistakably goes beyond any conceivable court order. In Chicago Board of Education, for example, the United States was the plaintiff and the Board of Education was the wrongdoer; there was no basis whatsoever for any relief against the United States on behalf of the Board. The imposition of multi-million dollar liability was obviously beyond the court's power.

In other cases, determining whether the decree was within the range of permissible judicial remedies had the case gone to trial will not be difficult, because the scope of the relief is a pure question of law. The court asked to enforce, vacate, or modify the decree can as easily assess the merits of the case as the court that entered the decree. This is likely to be the situation in the large majority of consent decrees against the government in regulatory programs, since the issue is rarely the factual question of what the government has done, but virtually always the legal question of what the government's responsibilities are. In the large majority of cases involving consent decrees that impinge on executive discretion, the underlying issue is one of continuing government policy or conduct. While there may be issues of fact, they are unlikely to grow stale. Hindsight and additional experience may even make it

37 Overton v. City of Austin, 748 F.2d 941 (5th Cir. 1984), is the exception. See text at notes 85-86. There, the district court declined to enter the decree without proof that it was warranted by law.

38 See text at notes 60-61.
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Resolving Disputes Through Compromise and Settlement

In the small number of cases in which the scope of relief depends upon factual showings that have become difficult to make when the government officials decide to challenge the decree, it may be appropriate for the subsequent court to defer more readily to the plaintiffs' initial allegations. It may also be prudent, where such problems are anticipated, for the parties to the consent decree to lay a factual predicate for the decree at the time it is made.

2. Effect on Settlements. Some have warned that adherence to the principles limiting consent decrees could make it harder to resolve disputes through compromise and settlement. I am skeptical. Defenders of discretion-limiting consent decrees assure us that this form of settlement is rare. Their claim is plausible, since good faith efforts to settle litigation will ordinarily reflect compromise; it is an unusual "compromise" that goes beyond the relief the court might grant if the case were litigated to judgment. Good faith compromise of legal disputes should not be seriously inhibited by these principles.

Moreover, private parties will seldom stand to lose from entering a consent decree with the government—even if they know that a future officeholder can withdraw when he concludes that the consent decree is contrary to the public interest. The private party will obtain the relief it seeks for some period of time, perhaps forever, without the expense of trial. Future officials may not object to the substantive terms of the decree; and even if they do, they may be restrained from seeking to rescind it because of regulatory

40 Compare Fed. Rule Crim. Proc. 11(f) (court may not approve plea bargain unless there is a factual basis for the guilty plea).
41 See, for example, Percival, 1987 U. Chi. Legal F. at 341, 343-44 (cited in note 13).
inertia, political pressure, or the desire to maintain good will with parties that have frequent contacts with the agency. The worst scenario for the private party is that, at some point in the future, it will have to litigate the issues. This is not likely to be perceived as a bad deal.

The only settlements likely to be seriously inhibited are those in which present officials choose to bargain away their successors' constitutional authority rather than face the present consequences of litigation, including the possibility of losing. If these settlements are inhibited, it is all to the good.

Even if this constitutional rule did discourage some settlement agreements that are in the public interest, this would not be dispositive. In many contexts, agreements (some of which may be beneficial) are made void or voidable because of a potential for abuse. Plea bargains, for example, are a useful means of settling criminal litigation; but it does not follow that plea bargains should be enforced even if they have the potential for violating constitutional rights. Similarly, I do not think that the potential encouragement of settlements in cases against the government could possibly justify actual infringement of the executive's constitutional discretion.

3. Experience in Other Contexts. Concerns that an inability to bind future executive discretion will inhibit the settlement process ring hollow when we examine two closely related areas: procurement contracts and plea bargains.

a. Procurement Contracts. Every procurement contract entered by the federal government contains a "termination for convenience" clause. This permits the contracting officer to terminate the contract at any time prior to completion, in whole or in part, if in his judgment the public convenience so demands. The decision to terminate is within the executive's discretion; the government need not even supply a reason. In the event of a termination, the contractor is entitled only to performance costs incurred prior to
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receipt of the termination notice (and to profits on those costs, if any) and to the costs of termination. The contractor is not entitled to the usual compensation for anticipated profits, nor to consequential damages. As one commentator has noted, under these clauses “[t]he government’s right to terminate a contract for its convenience exceeds the usual rights of a party to a private contract.”

Although termination clauses are now required by federal regulation, the government’s power to rescind procurement contracts was first recognized by the Supreme Court in a case in which there was neither an express clause in the contract nor a statute or regulation authorizing it. The Court reasoned that “it would be of serious detriment to the public service if the power of the [contracting department] did not extend to providing for all such possible contingencies by modification or suspension of the contracts. . . .” The decision might well have been bottomed, instead, on constitutional principles. By recognizing the executive’s right to modify or terminate a contract, the Court ensured that the power of future Congresses to determine appropriations and of future executives to determine military and domestic needs would not be diminished by the prior contracts of predecessor executive officials. Protecting future discretion, in this context, has evidently not seriously inhibited private contractors from doing business with the federal government.

b. Plea Bargains and Nonprosecution Agreements. When a prosecutor strikes a plea bargain with a criminal defendant, future prosecutorial discretion is necessarily limited. In Santobello v. New York, the Supreme Court held that when a guilty plea entered by a criminal defendant “rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” The reason for this is that a guilty plea constitutes the waiver of important constitutional rights. Such a waiver must be “voluntary and knowing;” if it was based on a false premise—such as a prosecutorial promise that is not executed—then the guilty plea itself is voidable.

47 Federal Acquisition Regulations, 48 C.F.R. § 49.202 (cited in note 45). See also Riley, 2 Federal Contracts, Grants & Assistance at 328, 341-43, 345-46 (cited in note 45). The only exceptions are for instances of government misconduct. Id. at 346.
48 Id. at 325.
51 Id. at 262.
While future prosecutorial discretion is limited by the plea bargain, it does not follow that a criminal defendant can obtain specific performance of the bargain over the objections of the government. Both the logic of the due process claim and the precedents of the Supreme Court make clear that the remedy for a prosecutor’s breach is to permit the defendant to withdraw his plea. While due process demands that the defendant be made no worse off because of the abortive bargain, he need not be given the benefit of his bargain.

The nonprosecution agreement is more complicated, and the law regarding enforcement of such agreements is unsettled. By statute, the prosecutor is authorized to promise only use and derivative use immunity for testimony, not full transactional immunity, and then only with court approval. Informally, however, prosecutors sometimes promise full indemnity from prosecution if a potential defendant cooperates with an investigation. If these promises were specifically enforceable, they would be executive decisions that bind future executive discretion. In fact, the lower courts were split on the enforceability of these agreements in much the same way they are split on consent decrees. Some courts would enforce the agreements. Others held that due process demands no more than that accused’s testimony not be held against him. The analysis here supports the latter decisions. The argument is now academic, since the Supreme Court has held that statutory immunity

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82 In many instances, the government will prefer specific performance as the remedy for an inadvertent breach, because conducting a trial is no longer possible. See Santobello, 404 U.S. at 263 (question is “whether the circumstances of this case require only that there be specific performance of the agreement”); United States v. Brown, 500 F.2d 375, 378 (4th Cir. 1974) (describing specific performance as “the lesser relief” when compared with withdrawal of the plea); United States v. Garcia, 698 F.2d 31, 37 (1st Cir. 1983) (defendant requested withdrawal of plea as remedy for government’s breach of plea bargain; government requested equivalent of specific performance).

67 See Wayne R. LaFave and Jerold H. Israel, 1 Criminal Procedure § 8.11(d), at 691-92 (1984). It is difficult to see, after Santobello and Mabry, why nonprosecution agreements should be more susceptible to specific performance than plea bargains.
is the exclusive means by which prosecutors can promise immunity.\(^5\)

Thus, in other significant contexts, private parties find it in their interest to strike bargains with the government, even though they are not assured of specific performance if successor officials later determine that the bargain is not in the public interest. As long as they receive compensation for their actual (and not anticipatory) property losses and are restored to their pre-bargain legal rights, their position is enhanced by agreements with the government on these terms. If procurement contracts can be entered and plea bargains made without sacrificing future executive discretion, there is no reason consent decrees cannot meet the same standard.

II. Examples of Unlawful Decrees

Since these constitutional principles follow from the very logic of consent decrees, one might wonder whether any actual consent decrees could have violated them. Informed observers state that consent decrees of this sort have been rare.\(^6\) But two recent decrees, both upheld by federal courts and defended by Professor Shane, plainly fall into the unconstitutional category, as do a surprising number of other decrees entered by state officials. Other federal consent decrees would apparently present the same problems were they enforced by their terms in the courts. And if the device is legitimated, they may cease to be so rare. Consent decrees could become the philosopher's stone of administrative law, transmuting ephemeral power into irrevocable policy. The following examples are presented to indicate the breadth and seriousness of the problem.

A. United States v. Chicago Board of Education

In United States v. Chicago Board of Education,\(^6\) the Carter Justice Department sued the Board of Education for unlawful segregation of the public schools. The parties ended the litigation by consent decree. The Board agreed to desegregate; the federal government agreed to use its "best efforts" to find "available" funds to facilitate the desegregation plan. This latter provision was interpreted by the district court as committing future Presidents to support legislative measures to provide significant amounts of fed-


\(^{59}\) See sources cited in note 42.

\(^{60}\) See note 7 for citations of complete case history.
eral financial aid to the Chicago school system. Thus, when President Reagan proposed nationwide changes in federal education policy, including a reduction in federal aid, an increase in local flexibility in using aid, and the elimination of the federal Department of Education, the district court held that the United States had violated the consent decree, in bad faith.61

Under the standards set out above, this decree, as interpreted, should have been held unlawful and unenforceable. First, it contained relief that no court would have had authority to order in the underlying lawsuit. Since the entire basis of the lawsuit was that the Chicago Board of Education had segregated its schools in violation of the Civil Rights Act and the Equal Protection Clause—which the United States was suing to enforce—the court had no authority to order any relief whatsoever against the United States. The United States had no legal obligation to the Board. Second, outside the context of the consent decree, officials of the Carter Administration had no authority to limit future Presidents’ recommendations to Congress concerning levels of spending for education. The voters have the right, as a matter of fundamental democratic principle, to elect Presidents who might wish to change the level of spending for education. It is illegitimate for one Administration to sign an agreement with an outside party that attempts to prevent the voters’ decision from having practical effect.

B. Citizens for a Better Environment

In Citizens for a Better Environment v. Gorsuch,62 the Ford Justice Department entered a consent decree promising that future Administrators of the Environmental Protection Agency would target twenty-one named industries for investigation. This consent decree, like that in Chicago Board of Education, violated the principles set forth above. First, although the Administrator was the defendant in the underlying lawsuit, the parties conceded that the court would have had no authority, absent agreement by the government lawyers, to impose this form of relief. The statute vested discretion to choose the targets for investigation in the Administrator,63 and there was not the slightest suggestion in the legislation that these twenty-one industries had to be among them.64

61 567 F. Supp. 272 (N.D. Ill. 1983), aff’d in part, vacated in part, 717 F.2d 378 (7th Cir. 1983); 588 F. Supp. 132, vacated and remanded, 744 F.2d 1300 (7th Cir. 1984).
62 718 F.2d 1117 (D.C. Cir. 1983).
64 Robert Percival defends the decree on the ground that the Environmental Protection
Second, outside the context of a consent decree, one Administrator would have no authority to limit his successors' investigatory discretion. Presumably, an Administrator could promulgate a regulation targeting the twenty-one industries for investigation; but future Administrators would have just as much authority to revoke regulations as past Administrators had to impose them. Since the court had no power to order it, and the Administrator had no power to agree to it, this consent decree should not have been given binding legal effect.

C. Other Possible Violations

While Chicago Board of Education and Citizens for a Better Environment are the clearest cases, other consent decrees or settlements entered by the federal government have potentially violated the principles set forth above. In National Audobon Society, Inc. v. Watt, for example, the Carter Justice Department entered into a stipulation and agreement that the executive branch would not move ahead with a public dam project authorized by Congress, and that it would submit legislative proposals to Congress modifying the project's scope. Five years later, under a new Administration, the executive wished to proceed with the project. The settlement seemed to violate constitutional principles, since both the promise to submit legislation and the promise to postpone construction.

Agency ("EPA") had been in violation of time limits for the promulgation of standards. Percival, 1987 U. Chi. Legal F. at 338-40 (cited in note 13). While this statutory violation presumably could be the basis for a remedy, however, it could provide no justification for this sort of remedy. In effect, Mr. Percival's group, the Environmental Defense Fund ("EDF"), bargained with EPA to allow the agency to violate the unrealistic time limits set by Congress, in exchange for giving the EDF a degree of control over the agency's substantive policy. This sort of bargain bears no resemblance to the statutory scheme, and has the alarming feature of effectively delegating governmental authority to a private interest group. Compare Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).


68 The decree in Ferrell v. Pierce, 743 F.2d 454 (7th Cir. 1984), is sometimes cited as going beyond constitutional limits. See Shane, 1987 U. Chi. Legal F. at 251-53 (cited in note 9). In Ferrell, Department of Housing and Urban Development ("HUD") officials signed a decree agreeing to certain procedures for implementation of a mortgage relief program, and limiting the discretion of their successors to modify the procedures for five years. Whether this decree was lawful depends on whether any alternative procedures HUD might have wished to adopt would satisfy the strict statutory requirements. This issue was not resolved in Ferrell because soon after the decree was entered Congress amended the underlying statute. The dispositive issue in Ferrell was Congress's intent in passing the subsequent amendments. See Ferrell, 749 F.2d at 467-71 (Coffey, J., dissenting).

67 678 F.2d 299 (D.C. Cir. 1982).
went beyond what a court could have ordered, and purported to limit the constitutionally-vested discretion of future executives. The court of appeals avoided these "extremely interesting, . . . novel, and far-reaching" constitutional issues by construing the decree as containing an implied time limit, which had already passed.

Similarly, in *Alliance to End Repression v. City of Chicago*, the FBI settled a lawsuit charging First Amendment violations by a consent decree which, according to one reasonable interpretation, went "further than the First Amendment" in restricting the FBI's investigatory powers. Eighteen months later, the Attorney General issued new guidelines for FBI investigations, and the private parties to the decree sought to enjoin those guidelines. Observing that "naturally a court will hesitate to assume that by signing a consent decree the government knowingly bartered away important public interests merely to avoid the expense of a trial," and that the broader interpretation of the decree "maybe even violat[ed] the President's constitutional obligation to 'take Care that the Laws be faithfully executed,'" the court of appeals construed the decree narrowly to preserve the FBI's investigatory discretion within only the substantive limits imposed by the Constitution.

In *Women's Equity Action League v. Bell*, federal officials charged with the responsibility of enforcing various civil rights laws challenged the constitutionality of an earlier consent decree which, they contended, "violate[d] fundamental principles of separation of powers" by "usurp[ing]" the discretion of the executive branch in a number of ways. The decree, among other things, committed the government to a particular strategy for civil rights enforcement, which was not specified by statute, and subjected budget decisions to supervision by plaintiffs' lawyers and the court. While expressing no opinion on "the legality of the consent

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68 In the meantime, the executive branch had completed all necessary environmental analyses, and no further legal obstacles to construction (other than the stipulation) existed. Id. at 303.
69 Id. at 305 n.12, 310-11.
70 742 F.2d 1007 (7th Cir. 1984) (en banc).
71 The court of appeals expressly noted that the words of the decree "will bear" this interpretation. Id. at 1011.
72 Id. at 1016.
73 Id. at 1013.
74 Id. at 1014.
75 743 F.2d 42, 43 (D.C. Cir. 1984) (per curiam).
76 An account of the separation of powers issues in the case is found in Jeremy Rabkin, *Captive of the Court: A Federal Agency in Receivership, Regulation 16* (May/June 1984).
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decree,” the court of appeals remanded the case to the district court to determine whether there existed a justiciable case or controversy.77

In an interesting case at the local level, White v. Roughton,78 township officials settled a constitutional challenge to the procedures used in administering a local welfare program by entering a decree that promised, on its face, that the township would maintain its substantive welfare standards “from this day forward.”79 Four years later, the township board of trustees repealed the welfare program. The plaintiffs sought to hold the township and its officials in contempt of the decree. Under the principles outlined above, this aspect of the decree was unenforceable, since the court would have had no authority in a procedural due process case to order indefinite continuance of a substantive program, and because government officials apparently have no authority under state law to make such a promise. Without reaching the constitutional issue, the court dismissed the action. Stating that “we doubt the township was so inept a bargainer that it gave the plaintiffs not only all the procedures they wanted but also substantive entitlements to which they had no possible claim,” the court construed the decree as governing only procedures.80

In each of these cases, officials had entered consent decrees that appear to be unconstitutional under the analysis presented here. In each, the court of appeals avoided the constitutional question, either by construing the decree narrowly or by resorting to justiciability doctrines. While this approach may well be the most prudent for the courts, the cases do not inspire confidence that government officials—unassisted by later reviewing courts—will refrain from bargaining away the constitutional discretion of their successors when short-term considerations seem to demand it.

D. A Variation on the Theme: Consent Decrees that Sidestep Political Constraints

Consent decrees do not only purport to bind the future; sometimes they unbind the present from political restraints from coordinate branches of government or the people. In Dunn v. Carey,81

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77 Women’s Equity, 743 F.2d at 44.
78 689 F.2d 118 (7th Cir. 1982).
79 Id. at 119. The court of appeals conceded that the language of the decree was “unambiguous.” Id. at 120.
80 Id. at 121.
81 808 F.2d 555 (7th Cir. 1986).
for example, state law limited the power of local officials to construct new public buildings. A group of plaintiffs—detainees at a county jail—sued county officials for providing allegedly inadequate jail facilities. The officials signed a consent decree, by which they agreed to construct a new jail, police and city hall complex, to be financed through new taxes. While not "imply[ing] that this particular decree was a conscious evasion or that the litigation became collusive," the court of appeals speculated that the county officials had been "frustrated by their inability to win political approval for the construction of a new city hall." Since the district court obviously did not have authority to order construction of a new city hall or police headquarters and since the county officials lacked authority to authorize these buildings, the consent decree was unconstitutional and unenforceable under the standards presented here.

Another troublesome example is compromise by the executive of constitutional challenges to legislative enactments. This can have the effect of thwarting legislative will, usurping judicial responsibility, and binding future executive discretion, all in one consent decree. As one court has noted, for a government lawyer to agree to a consent judgment holding a state law unconstitutional confuses "the three branches of government." "An attorney general," the court stated, "can have no authority to be the binding determiner that legislation is unconstitutional." While an attorney for the government may be able to exercise prosecutorial discretion and not enforce a statute he believes to be unconstitutional, he cannot impose this judgment on his successors. And while an attorney for the government may express his view to the court that a statute is unconstitutional and decline to defend it, the court remains responsible for reaching its own judgment on the legal issue.

The consent decree device has even been used to alter the form of government without popular consent. In Overton v. City of Austin, a Voting Rights Act suit, the city council signed a decree agreeing to change from an at-large to a single-member district election system. Under state law, however, such changes in the city

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82 Id. at 560.
83 National Revenue Corp. v. Violet, 807 F.2d 285, 288 (1st Cir. 1986).
84 Id. See also INS v. Chadha, 462 U.S. 919, 939-40 (1983); Strauss v. United States, 516 F.2d 980, 982 (7th Cir. 1975); United States v. State of Texas, 680 F.2d 356, 370 (5th Cir. 1982).
85 748 F.2d 941 (5th Cir. 1984).
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charter required a vote of the people. The district court accord-
ingly refused to enter the decree as a judgment of the court in the
absence of proof that the prior at-large system was in violation of
the Act. The court of appeals affirmed, stating,

The court here is not being asked merely to put its sanc-
tions behind a substantive result that the parties would
be empowered to achieve themselves, as in the case of the
usual consent decree; rather, it is being asked to effectu-
ate a substantive result which the parties wholly lack the
jurisdictional power to bring about by themselves. . . .
Absent a properly grounded judicial determination that
the present charter provisions are illegal, the consent of
the parties provides an insufficient basis on which to ju-
dicially ordain a different system of council election and
composition.86

These examples demonstrate that the enforcement of consent
decrees must be subjected to constitutional discipline. Consent de-
crees that block ordinary avenues of political change or that side-
step political constraints are neither so few nor so trivial as to jus-
tify reliance on the good judgment and self-restraint of
government lawyers. Real issues of democratic accountability are
at stake.

III. DEFENSES OFFERED FOR DISCRETION-LIMITING CONSENT
DECREES

Even defenders of discretion-limiting consent decrees are
forced to concede that some executive powers are so central to the
constitutional scheme that they must not be bargained away in the
settlement of a lawsuit. It would be absurd, for example, to think
that one President could make a legally binding promise that sub-
sequent Presidents would veto particular legislation. Thus, Profes-
sor Shane acknowledges that "any purported promise, say, not to
veto any environmental protection bill voted by Congress during
the next five years could not have legal force."87 He reaches the
same conclusion with regard to the President's power to grant par-
dons.88 Consent decrees making promises concerning the future ex-
ercise of the veto or pardon powers, he states, would be unenforce-
able because they would amount to a “disruption” of a “critical . . .

86 Id. at 956-57 (footnote omitted).
88 Id. at 236.
aspect of the framers' design."  

Applying this logic to all the powers of the executive would, however, lead to the conclusion I have urged here—and to invalidation of the very consent decrees Professor Shane has set out to defend. Defenders of these decrees find it necessary, therefore, to establish a hierarchy of executive powers, with some of them "critical to the framers' design" and others less so. Non-"critical" executive powers could be circumscribed by consent decree even though "critical" executive powers, like the veto and pardon powers, could not.

Professor Shane thus distinguishes between two categories of discretion-limiting consent decrees: those that limit future "constitutionally-vested" presidential discretion and those that limit merely "statutorily-vested" discretion. The former category is generally unenforceable in the absence of an "overriding public interest," at least if it has the potential to disrupt the executive branch's performance of its assigned constitutional duties. The latter category is generally enforceable, unless it is in "contravention of statute" or it cannot "reasonably be regarded as within Congress's authorization" (apparently generously understood).

It is easy to understand the reluctance to make a stark choice: discretion-limiting consent decrees, as defined above, are enforceable, or they are not. But the precarious middle ground position nevertheless undermines a central tenet of democracy: the people, and their elected officials, must be allowed to change their minds. Even in the more-protected area of "constitutional" discretion, the application of the standard is weak; in the area of "statutory" discretion there is no real protection at all.

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89 Id. at 258.
90 Id. at 265.
91 Professor Shane's position on consent decrees is of a piece with his overall preference for ad hoc "balancing" over rule-governed adjudication in separation of powers cases. See id. at 256-59, 268-70, 278 n.136, 286-87. He ascribes this jurisprudential approach to recent Supreme Court decisions, which take a functional, rather than a categorical view of the separation of powers. Id. at 278. This does not, however, paint an accurate picture of modern Supreme Court separation of powers cases. Except where Richard Nixon was a party (and of course such cases are subject to a different constitutional standard altogether), separation of powers cases have taken a decided turn toward what its critics decry as "formalism" and I prefer to view as a natural reading of the text and structure of the Constitution. See Bowsher v. Synar, 106 S. Ct. 3181 (1986); INS v. Chadha, 462 U.S. 919 (1983); Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Buckley v. Valeo, 424 U.S. 1 (1976).
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A. "Constitutionally Vested" Discretion

Not all consent decrees that invade “constitutionally vested” executive discretion are unlawful, according to Professor Shane’s schema. His example of constitutionally-vested discretion that can be bargained away is the President’s power to recommend legislation to Congress—the power implicated in Chicago Board of Education. He finds “persuasive” the argument that President Carter’s lawyers could make a judicially enforceable promise that President Reagan would not recommend cuts in future budgets for elementary and secondary education. “[T]he interference with executive responsibilities is limited,” Professor Shane says, and, after all, the consent decree avoided “the extraordinary effort and expense of a trial.”

The problem with this approach is that it provides no coherent basis for determining which presidential powers may be bargained away and which cannot. Under what theory could the President’s power to veto be inviolable, while his power to recommend legislation is not? The Constitution expressly vests the power to recommend legislation to Congress in the President, as a matter of his personal discretion: the President “shall from time to time... recommend to [Congress’s] Consideration such Measures as he shall judge necessary and expedient.” It cannot be denied that the Chicago consent decree, as interpreted, interfered with this constitutional responsibility. President Reagan considered his education “Measures” “necessary and expedient”; yet the consent decree forbade him to recommend them to Congress.

The President’s power to promote a legislative program is not an insignificant power. It lies at the heart of the President’s function as chief executive; it is one of the principal reasons why voters select one candidate over another. As Hamilton wrote to Washington, it is “of the utmost importance” that the President “should trace out in his own mind such a plan as he thinks it would be eligible to pursue and should endeavor by proper and constitutional means to give the deliberations of Congress a direction towards that plan.” To allow a President’s predecessors to limit his political discretion in this way does every bit as much violence to the “framers’ design” as a promise to pardon perpetrators of particular offenses—probably more.

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93 U.S. Const. art. II, § 3, cl. 1.
There is no calculus for determining which of the President's constitutional powers are more important than the others. But even if there were, this would not explain how those "less important" powers could be stripped away short of constitutional amendment. Neither the acts of presidential predecessors nor laws passed by Congress are of greater dignity than the Constitution itself. The defenders of consent decrees limiting constitutional discretion have yet to explain what higher authority permits consent decrees to take from the President discretion vested in him by the Constitution.

B. "Statutorily Vested" Discretion

Under Professor Shane's schema, discretion vested in the President by statute receives even less protection. Indeed, it can be overridden by any consent decree "reasonably in the interests of the United States." Professor Shane cites Citizens for a Better Environment as an example of a consent decree that legitimately impinges on the President's "statutorily vested" discretion. Professor Shane sees no reason not to enforce, in 1983, a promise made in 1976 by President Ford's lawyers that future Administrators would deploy their investigative resources in a particular way. This was a fairly minimal intrusion into the ordinary discretion of the EPA, Professor Shane assures us, even though, as he explains, the selection of targets for investigation is an ordinary part of law enforcement discretion and there was not the slightest suggestion that the underlying statute curtailed it.

This approach provides essentially no protection for "statutorily vested" discretion. It will virtually always be possible, except when the terms of the decree violate independent legal requirements, to find some basis for arguing that the decree reflects a "reasonable" enforcement strategy and is in the public interest. Whether executive discretion is to receive protection thus depends entirely on whether the discretion is classified as "constitutionally vested" or "statutorily vested."

Most troubling about this approach, therefore, is its failure to recognize that the President's discretion to supervise the enforce-

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89 Id. at 262.
90 Id. at 246-48.
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ment of statutes passed by Congress is constitutionally as well as statutorily based. Professor Shane states that “the executive’s entire decision-making authority” in cases of domestic social and economic regulation “comes from Congress.” It does not. Congress determines the content of the law, and determines which subordinate officials shall enforce it; but the Constitution vests responsibility for overseeing their performance in the President alone. Article II, Section 3 provides that the President “shall take Care that the Laws be faithfully executed.” This he cannot do if his predecessors have made judicially enforceable promises that he will not change their enforcement strategies without the agreement of a private interest group. The “take Care” responsibility is a vital aspect of the “framers’ design.” It may not be bartered away by former officials, transferred to courts, or delegated to private parties.

In one important respect, interference with the “take Care” responsibility is a more complicated matter than is interference with other constitutional powers of the President. The precise scope of the President’s “take Care” power in any given circumstance is determined by the “laws” he is entrusted with executing. The content of those laws, in turn, is set by Congress. Thus, if Congress passes legislation changing the law, the nature and scope of the “take Care” authority is modified. This makes it difficult, in the abstract, to rule out the possibility that Congress could delegate legislative-type authority to an executive in such a way as to enable a predecessor’s decisions to affect the scope of his successor’s “take Care” authority. None of the cases, and nothing in Professor Shane’s article, suggests any actual instance that raises this problem. Outside this hypothetical possibility, consent decrees that invade the President’s “take Care” responsibility should be

100 This is not the occasion to explore whether Congress could vest this discretion in an “independent” agency. I agree with my colleagues Geoffrey Miller and David Currie that it could not. See Geoffrey P. Miller, Independent Agencies, 1986 Sup. Ct. Rev. 41; David P. Currie, The Distribution of Powers After Bowsher, 1986 Sup. Ct. Rev. 19, 34-36. But whether or not this position is correct, the Constitution does not contemplate that executive discretion be vested in the dead hand of past government lawyers, subject to modifications approved by particular private interest groups.
101 For example, Congress might enact a new regulatory statute under which the executive issues regulations with the force and effect of law. Arguably it might be constitutional, at least with sufficient justification, for Congress to provide that once the initial regulations were promulgated they would remain in force for the next ten years. If so, then the successor President’s discretion to interpret the new statute could be limited by the preceding administration’s regulations.
treated under the same standard as all others.

V. AN ANALOGY TO IMPAIRMENT OF CONTRACTS

Professor Shane's attempts to distinguish among various forms of consent decrees that interfere with executive discretion is reminiscent of a long period of constitutional jurisprudence under the Contracts Clause of Article I, Section 10, which forbids the states from passing any laws "impairing the obligation of contracts." Well over 200 times the Supreme Court has wrestled with how to enforce state contracts without interfering with the State's sovereign prerogative to change its policies. Of all the lines of constitutional doctrine, this provides the closest parallel to the consent decree problem.

The variations on the theme are infinite, but the essentials of the scenario are the same. A State contracts with a private party. If the private party will do something beneficial to the State (build a bridge, open a factory), then the State will make certain concessions (exemption from tax, guarantee against regulation). Years later, the State no longer wishes to comply with its side of the bargain. It wishes to impose the tax, or enforce the regulation. Absent the contract, the State would have the sovereign authority to change its tax laws and its regulatory programs. Which will prevail: the private party's contract right, or the State's sovereign power?

As an original matter, one might be tempted to say that the Contracts Clause has no bearing on the matter. There are strong indications in the history that the Clause was intended to apply only to private contracts, not to contracts entered by the government. Notwithstanding this history, the Contracts Clause has

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102 The original proposal, by Rufus King, was in the language of the Northwest Ordinance: "no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, bona fide and without fraud previously formed." 32 Journal of the Continental Congress 340 (1936) (Northwest Ordinance); Max Farrand, ed., 2 The Records of the Federal Convention of 1787 at 439-440 (1911) (King proposal). Debate in the Convention centered entirely on whether this proposal "would be going too far." Id. (Gov. Morris). There is no reason to infer that the later deletion of the word "private" was intended to bring government contracts within its ambit. A leading South Carolina delegate to the Convention explained to his state convention that the Clause would prevent states from "interfering in private contracts." Jonathan Elliot, ed., 4 Debates in the Several State Conventions on the Adoption of the Federal Constitution 334 (1888) (Charles Pinckney) ("Debates"). The only unequivocal statements that the Clause applied to public contracts were made by opponents of the Constitution who used this expansive interpretation of the Clause as an argument against ratification. 4 Debates at 190 (James Galloway); 3 Debates at 474 (Patrick Henry). One of them, Patrick Henry, appeared to be answering an unrecorded assertion to the contrary by James Madison, and both were immediately contradicted by participants in the Convention. 4 De-
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long been held to encompass contracts between state governments and private parties. Not surprisingly, many of the cases involving government contracts turn out to display the same clash, already seen with regard to consent decrees, between today’s power to enter agreements and tomorrow’s power to change policy. While this is not the occasion for an extended account of how the Supreme Court has dealt with the Contracts Clause, a brief summary may serve as a useful corrective to the current ad hoc approach to the constitutional law of government consent decrees.

In 1810, when the Court first addressed the question, it took the position that a contract is inviolable, whatever may be the consequences for the sovereign power of the state. This position may be compared to the view today that consent decrees are binding, no matter how severe may be their interference with executive discretion.

During the ensuing decades, the Court tempered this approach, without abandoning its doctrinal position, by employing the rule that a State’s contract must be strictly construed in favor of the State. It thus avoided most egregious impositions on governmental authority by holding that the State could not have intended to bargain its sovereign authority away. This position is comparable to the Seventh Circuit’s decision in Alliance to End Repression. There, confronted with a consent decree that appeared to bargain away the FBI’s investigatory discretion, the court held that that could not have been the government’s intention when it signed the decree.


See text at note 70.
Beginning in 1848, and increasingly often as the 19th Century proceeded, the Court began to make exceptions to its obligation of contract doctrine. First, the Court held that a State could not sign a contract bargaining away its sovereign power of eminent domain.\(^\text{109}\) Later, other powers of the states were deemed to be so vital that they could not be alienated by contract: they included the protection of public health;\(^\text{110}\) the promotion of safety;\(^\text{111}\) the preservation of public morals;\(^\text{112}\) and regulation of the use of the streets,\(^\text{113}\) and rivers.\(^\text{114}\) This position I find quite close to that put forward by Professor Shane. It allows some contracts that invade governmental discretion to be enforced, and disallows others, relying on an apparently ad hoc, common-sense understanding of which governmental powers are important, and which are not.

The history of the impairment of contracts clause in this period is not encouraging for the ad hoc approach. There turns out to be no satisfactory basis for determining which state powers are fundamental, and which are not, or for determining how much interference with sovereign power can be tolerated.\(^\text{115}\) By the end of this period, prior contracts were no longer held to be a serious constraint on the power of a state government to change its mind about the exercise of its sovereign powers. As the Supreme Court stated in *Chicago & Alton R. R. v. Tranbarger*,\(^\text{116}\)

It is established by repeated decisions of this court that [the impairment of contracts clause does not] have the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away.

The only exception has been the rare case when a State has in effect taken property by its refusal to comply with the bargain.\(^\text{117}\)

\(^{109}\) The West River Bridge Company v. Dix et al., 47 U.S. 507 (1848).

\(^{110}\) Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878); Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1884).

\(^{111}\) Pierce Oil Corp. v. City of Hope, 248 U.S. 498 (1919).


\(^{113}\) Atlantic Coast Line v. Goldsboro, 232 U.S. 548 (1914).


\(^{115}\) Compare Baltimore v. Baltimore Trust Company, 166 U.S. 673 (1897), with Grand Trunk West'n Ry. v. South Bend, 227 U.S. 544 (1913). For an equivalent modern problem, see Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (attempts to distinguish "traditional state functions" from others are "unworkable").

\(^{116}\) 238 U.S. 67, 76-77 (1915).

\(^{117}\) See United States Trust Co. v. New Jersey, 431 U.S. 1 (1976). In these cases it would be preferable to restore the contracting parties to the position they would have been
We can spare ourselves a repetition of this analytical confusion by recognizing what the Court in 1810 did not see: allowing agreements with private parties to block democratic change is inconsistent with the structure of our political system; and attempting to draw lines based on what may appear to us to be "minimal," "limited," or "substantial" interference with the democratic process is hopelessly ad hoc and subjective. Consent decrees are, for relevant purposes, like contracts. The same logic that drove the obligation of contracts cases will inevitably drive the consent decree cases as well.

CONCLUSION

The democratic structure of government requires that policies set through an exercise of discretion must be subject to political change by the same means. Recent cases have created the possibility, however, that policies adopted by the executive branch can be insulated from change at the hands of future executive officers by incorporating them in the terms of a consent decree with a private party. It is necessary, therefore, to distinguish between consent decrees as a legitimate tool of compromise and settlement, and consent decrees as an instrument for precluding democratic change. I have proposed a simple rule. To be enforceable, a consent decree must either (1) be justifiable as a judicial remedy in the case; or (2) be within the authority of the government signatory, wholly apart from the decree. Adherence to this standard will not inhibit good faith settlements of litigation against the government, but will preserve the constitutional discretion of the elected President.