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Wilder v. Bernstein: Squeeze Play By Consent Decree

Richard A. Epstein†

I. BIND OR COMPROMISE?

One of the major concerns with consent decrees is their capacity to bind third parties. The point is an old one. If consent decrees are variants of contracts, then their scope and power should be subject to the same limitations that are appropriate to private contracts. It is settled today that no contract between A and B can bind C. It should follow that consent decrees are subject to the same limitation for the protection of strangers. This proposition can be defended from two perspectives. As a matter of general political theory, any alternative rule would lead to intolerable social consequences. To be sure, today there are few contracts that in overt form seek to bind strangers. But if the legal rule were otherwise, the primary conduct of many people would change, and a new full scale industry would emerge: everyone would enter into comfortable agreements with their friends in order to expropriate the wealth of their enemies, only to discover that they are victims of the same ploy as done by others. A risk so substantial to the social fabric is rightly expected to elicit some powerful legal response, and so it has. The effort by A and B to bind C by contract fares no better than an effort by A and B to take what C owns. Both are forms of theft. Within the judicial arena this substantive argument is bolstered by a constitutional point: any system of justice which allows A and B to bind C is subject to serious procedural due process concerns, where C has no opportunity to defend himself, and thus to invoke the principle that contracts cannot bind strangers.

† James Parker Hall Professor of Law, University of Chicago. I would like to thank Frank Easterbrook, Larry Kramer, Michael McConnell, and David Strauss for their extremely helpful comments on an earlier draft of this paper. They have saved me from many serious errors. The usual caveat applies with respect to those errors which still remain.


The power of this principle is, however, limited by the scope of its key term: the capacity to bind others by contract. There are ways to hurt other parties without binding them. When parties understand that some strict legal or constitutional rule prevents them from binding strangers, they are not necessarily driven to inaction. They may search for some way to compromise or prejudice the interests of others, even as they do not diminish their legal rights. In a sense, it is a tautology to say that efforts to impose such costs upon others must be regarded as lawful precisely because they do not limit the rights of those whose welfare has been reduced. The common law notion of damnum absque injuria, for example, was but a Latin formulation of the general principle that some hurts are simply not compensable: certain harms (damnum) did not constitute legal injury (injuria) cognizable by our courts. Yet the ability to inflict these external costs is a serious social concern if it leads to a pattern of challenge and response that in the end reduces the welfare of all parties to the game. There may be no way to change legal rights to deal with this risk, but an increased social awareness of the problem involved may create a set of informal social sanctions that will cope with the problem of real losses inflicted upon strangers.

The distinction between binding strangers and compromising their interest by consent decree is critical for understanding the protracted litigation in *Wilder v. Bernstein*. The consent decree entered by the American Civil Liberties Union ("ACLU") and the City of New York in *Wilder v. Bernstein*, represents a case where the parties to the consent decree labored with considerable success to impose substantial costs upon third parties, here chiefly Catholic and Jewish charities with whom the City had long done business. It is therefore useful to discuss the case briefly to give some sense of the dangers (some might say possibilities) that lurk behind consent decrees, especially in the context of public interest litigation.

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3 645 F. Supp. 1292 (S.D.N.Y. 1986). Earlier stages in this massive litigation are reported in *Wilder v. Sugarman*, 385 F. Supp. 1013 (S.D.N.Y. 1974), and *Wilder v. Bernstein*, 499 F. Supp. 980 (S.D.N.Y. 1980). The named plaintiffs were black Protestant children who were represented by the ACLU, which controlled the litigation for the class. Frederick A. O. Schwarz, Jr. was at the time Corporation Counsel, the chief lawyer for New York City. Burt Neuborne, a Professor of Law at New York University, headed the ACLU efforts in this litigation. The use of "ACLU" is a convenient shorthand for the plaintiffs in this case.

4 Presentation by Burt Neuborne at the University of Chicago Legal Forum symposium, November 15, 1986.
II. WILDER v. BERNSTEIN

The basic situation in *Wilder* was as follows. For many years the city of New York had entered into contracts with both the Catholic and Jewish charities of New York for the joint operation of certain efforts to help poor and needy children in the city of New York. Prior to these contracts both religious groups had maintained extensive child-care facilities of their own. Their efforts were supported with moneys raised largely from voluntary contributions from their memberships. The Charities used these funds to provide welfare assistance to their coreligionists. The City provided welfare assistance to other children in the City; black Protestant children were the chief beneficiaries of these programs. It was agreed on all sides that the religious organizations were far better at providing needy children with the appropriate services. The outgrowth was a series of one-year contracts—the length of the contract term becomes critical to the legal analysis—between the City and the Charities whereby the City agreed to fund some of the costs associated with the operation of religious institutions, while the religious Charities in exchange agreed to provide services to the children for whom the City had primary responsibility of care. Over time the extent of public support for the religious Charities grew, until at present it accounts for about 70 percent of their total budgets. As their responsibilities increased, the Charities committed a larger and larger fraction of their resources to facilities that could operate only with continued City support.

The program was, at least by some measures, a success. It was agreed on all sides that the religious organizations continued to offer care to their coreligionists, which was superior to the care that these same organizations provided to the City's children under

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6 The dynamics of the *Wilder* consent decree negotiations between the ACLU and the city of New York was the subject of a presentation by Burt Neuborne and Frederick A. O. Schwarz, Jr. at the University of Chicago Legal Forum symposium, “Consent Decrees: Practical Problems and Legal Dilemmas,” held at the University of Chicago Law School on November 15, 1986. A somewhat expanded version of their presentation can be found in Burt Neuborne and Frederick A. O. Schwarz, Jr., A Prelude to the Settlement of *Wilder*, 1987 U. Chi. Legal F. 177.

7 “It is undisputed that those contracts typically are of one year's duration and are renegotiated at the end of the contract period.” *Wilder*, 645 F. Supp at 1344.


8 I use the term “City's children” with some trepidation because of the possible inference that the City is the parent of the children in question. The reference here is only shorthand for the obvious point that these are children brought into the system through the City agencies. Black Protestant children constitute the bulk of the City's children, but others are clearly involved.
contract, which was in turn superior to the levels of care which the City had been able to provide for its own children. The exact nature of the differences in services provided for coreligionists and City children is somewhat difficult to ascertain from the reported opinion. It is very clear that one source of difference had to do with access to the system. Before the litigation the Charities gave preference in admission to their coreligionists. In effect there were two separate queues; to make the differences most stark, the last person in the first, coreligionist queue always had an advantage over the first person in the second queue. There may have been some differences in quality of services provided after admission to the facility, but this is not evident from the language of the consent decree (which concentrates heavily on the access point). And it is very difficult to see how the Charities could, even if they were so inclined, have systematically varied the standard services—quality of food, cleanliness of common areas—that coreligionists and City children had within a single facility. It is of course possible to envision different levels of support being provided for ancillary services, such as counselling, which are provided on a discretionary and individual basis. But again, on this point the record itself is silent.

For our purposes, however, the sources of the difference in service quality between coreligionists and City children does not bulk very large. The fact of the difference seems to be more important to the analysis than the source of that difference. Hence, I shall look at the case on the simplified assumption that coreligionists received "better" care than city children from the Charities, but that City children received "better" care from the Charities than they would have received if the City had run its own separate operation.

It is dangerous of course to attach numerical values to the quality of care that was provided in the alternative states of the world. Nonetheless, it becomes instructive simply to postulate certain values which are in rough agreement with the above assumptions. Assume, therefore, that before the joint agreement between the City and the Charities, the level of care provided by the Charities to their children was at 20, while the level provided by the

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* Note that this strong assumption is not necessary to show the difference in access. It would be quite sufficient to show that the probabilities of getting certain types of care were simply a function of which queue a child was in. But those complications, while relevant on the question of the extent of the differences, do not seem critical for the exposition that follows, which turns only on an access preference. Hence the complications are ignored.
City to its children was 5. Assume afterward that the Charities were able to provide a care level of 24 to their own children, and a level of 10 to the City's children. To make the analysis easy, at least for the moment, assume that there were no changes in the total resources committed to the care of the poor, either by the Charities or the City. On these assumptions, both sides gained from the bargain solely by the more efficient deployment of available resources.\textsuperscript{10} As stated, the numbers suggest that the City children gained more from the deal than did the Charity's, but the numbers could be altered to make the reverse true, without altering the basic structure of the argument.

These arrangements between the City and the Charities were attacked in a suit by the ACLU. For our purposes there were three essential components to the ACLU's overall position. First, there was an Establishment Clause issue. The question was whether it was proper for the City and the Charities to enter into any long-term cooperative arrangement at all. This issue could appear in one of two guises. Foremost, there was a serious question of whether the \textit{preexisting} arrangements between the City and the Charities ran afoul of the Establishment Clause. Here the key concern was that private religious organizations were using public financing to advance religious purposes.\textsuperscript{11} There was the further question of whether any altered plan, such as the one approved by the consent decree, was inconsistent with the Establishment Clause because it contemplated a heightened supervision and involvement of public aid officials in the operations of religious charities.\textsuperscript{12} Establishment Clause law is often regarded as an impenetrable jungle, from which no short article can promise any means

\textsuperscript{10} This analysis ignores any conflicts of interest that might occur within either the Charities or the City. On the question of whether government officials should be able to bind future administrations, see Easterbrook, 1987 U. Chi. Legal F. at 33-41 (cited in note 1).

\textsuperscript{11} See Wilder, 645 F. Supp. at 1302-03.

Plaintiffs allege specifically that the [child-care] system involves government financing of agencies that are controlled by or responsible to religious organizations; that certain of these agencies employ clerics or members of religious orders, or give preference in employment to those of the same religion; that many of them offer religious services only of their own faith; that children in their care attend parochial schools or yeshivas; that they prominently display religious symbols on their premises and on special days of religious observance; that many of the agencies share or adjoin premises occupied by a religious order or organization; and that the stated purpose of many Catholic or Jewish agencies is to care for children of their own religion.

\textsuperscript{12} See id. at 1829-40.
of escape.\textsuperscript{13} It is enough to note that the general tests used to approach this question derive from \textit{Lemon v. Kurtzman}:\textsuperscript{14} “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”

The second of the ACLU’s concerns was with the Free Exercise Clause. In principle, free exercise issues could be raised both by the plaintiff children and by the Charities on behalf of their own children. Here the plaintiffs’ case was that there were no Protestant charities in New York City, and that Protestant children were denied their free exercise of religion when placed in Catholic or Jewish charities. The Charities, for their part, asserted that the provision of religious services for their coreligionists is a central part of their own mission, which is to preserve the total religious environment found in the families of their coreligionists.\textsuperscript{15} That religious environment can be preserved only if the City is limited in the control that it exerts over charitable institutions. The final settlement as approved by the Court acknowledged that these claims by the Charities placed some limitations upon the ability of the City to assign children to particular care facilities on a “first come, first serve” basis. But the exception so recognized was narrowly limited to “extraordinary circumstances [where] religious beliefs and practices so pervade a child’s life that a particular religious placement is required.”\textsuperscript{16}

The third, and most insistent, element of the ACLU suit was an “equal access claim,” premised upon the Equal Protection Clause. The gist of this claim was that it was wholly impermissible for the City to sponsor and support with public funds, private organizations that provided higher levels of care to white Catholic and Jewish children than they did to the Protestant black children for whom the City had primary responsibility.\textsuperscript{17}

\textsuperscript{13} For a more complete discussion of Establishment Clause law, see Michael W. McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 1.

\textsuperscript{14} 403 U.S. 602, 612-13 (1971).

\textsuperscript{15} The full extent of the limitations placed on the internal operations of the Charities is unclear from the court’s opinion, but the account in the \textit{New York Times} suggests that the provision prohibiting the religious organizations from imposing their religious beliefs on others “when translated from the legal language—means that children in foster care agencies must be given access to contraception and abortion services.” Joyce Purnick, O’Connor Says He’ll Drop Some Foster-Care Pacts With City, N.Y. Times, Jan. 24, 1987 pp. 29-30, col. 2.

\textsuperscript{16} Wilder, 645 F. Supp. at 1305.

\textsuperscript{17} See id. at 1302.
These three issues in the complaint suffered very different fates in the consent arrangement between the ACLU and the City. Both parties agreed that the Establishment Clause issue would not be pressed. They also agreed that the equal access claim was sound, indeed indubitably so, and required that a strong presumption in favor of equal access, on a first come first serve basis, be established in all facilities supported by City funds—subject only to those few cases in which the Charities would be allowed to prefer their own coreligionists in placement issues. The final consent decree embodied very detailed determinations of the types of arrangements that the City was entitled to enter into with the Charities, and severely limited the rights of the Charities to make placement decisions within their own facility, transferring that power to either City official or neutral experts, consistent with the broader understandings set out above.

This settlement was worked out after protracted litigation and negotiation between the ACLU and the City. The consent decree was vigorously opposed by the Charities, whose efforts as objecting defendants to block its approval were decisively rebuffed by the trial judge. The reason for the Charities' failure has to do with the standards of intervention applicable in these cases. Quite simply, the Charities were not parties who had full-fledged legal interests that entitled them to intervene as a matter of right in the underlying dispute between the ACLU and the City. The simplest explanation for this result is that the City had entered into no long-term contractual arrangements with the Charities but had instead entered into a series of one-year renewable (and hence cancellable)
contracts with them. The Charities were not, however, wholly out in the cold, but were instead entitled to a "fairness hearing," which essentially allowed them to challenge the entire proceeding if they could show that it was wholly unreasonable and unresponsive to their needs. Why even that type of hearing should be given if the Charities have no legal interest in the settlement struck between the ACLU and the City is far from self-evident. It could well be "no legal interest" simply means "no right to attack" the decree. Nonetheless, the showing required to sustain such an attack by an outsider who is not formally bound by the settlement is very high. It is clearly not met by the simple showing that the Charities opposed to their last breath the provisions of the consent decree to which the ACLU and the City had agreed. Given that the proposed decree acknowledged their free exercise interest, the fairness claim did not provide the Charities any protection at the trial level. It seems unlikely that the position would have changed even if the Charities had taken an appeal, as the same showing required by the fairness test would have to be made. The Charities are quite understandably "furious" over the end run around their economic and social position. In and of itself this could be no more than the anguished cries of any disappointed litigant. But there is a social side to the story which requires telling as well.

### III. CONSTITUTIONAL BARGAINING

The consent decree between the City and the ACLU raises both legal and tactical issues. It is important to note that each of the different types of constitutional challenges raised against the cooperative agreement between the City and the Charities points to very different remedial structures. Start with the Establishment Clause claim. On its face the claim seems plausible. The Charities had kept their religious orientation. Therefore, if the agreement

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20 Fairness hearings, at which interested parties and amici may comment on the advantages and disadvantages of a particular settlement arrangement, commonly are held by judges to assist them in determining whether the proposed settlement is fair, adequate and reasonable. Although such hearings are not explicitly required by Rule 23, courts generally rely on them to comply with the Rule's requirement that they approve the dismissal or settlement of class actions. See generally Armstrong v. Board of School Directors, 616 F.2d 305, 314 (7th Cir. 1980). Indeed, in some cases, failure to hold a hearing could constitute an abuse of judicial discretion. See Mendoza v. U.S., 623 F.2d 1338, 1348 n. 8 (9th Cir. 1980).

21 See Purnick, N.Y. Times, Jan. 24, 1987 p. 29, col. 2 (cited in note 15), noting that the remarks of Cardinal O'Connor suggested that the Archdiocese would not appeal. And as of this writing, no appeal has been taken.

22 The word was used by Burt Neuborne in his presentation at the 1986 University of Chicago Legal Forum symposium (see note 5).
made available additional funds to provide better care for their co-religionists, then the agreement seems to "advance" religion in ways that the Lemon test condemns. And it matters little whether the additional moneys came in the form of direct payments from the City or from the assumption by the City of certain obligations which allowed the Charities to redeploy their own resources in new directions. Second, any joint operation seems to call for extensive cooperation between the City and the Charities, which could easily rise to the "excessive government entanglement with religion" that Lemon decries.

The recent cases, moreover, have taken a very hard look at any shared financing arrangements between the state and the religious agencies. Grand Rapids School District. v. Ball, for example, invalidated a "Shared Time" program in which the City financed remedial reading programs for parochial school children on the parochial school premises, even though there had been over the years no detectable bias in the administration of the program. The concern was that the religious teachers might "infuse" their instruction with religious messages in ways that ordinary evidence could not detect. Similarly, in Aguilar v. Felton, the Court used the Lemon tests to strike down programs funded by federal moneys under Title I of the Elementary and Secondary Education Act of 1965, whereby New York City parochial school students received guidance from volunteer public teachers on parochial school premises. To be sure, one could argue that more entanglement is allowable in a total care facility than in a school setting, if only because the costs of separation of secular and religious activities is higher. But that result is hardly foreordained given the evident confusion in the present law. It is surely possible that the strict standard from the school cases could carry over with enough vigor to lead to the invalidation of the joint arrangement between the City and the Charities for running any total-care facility. And the judgment in Wilder avoided the clear thrust of these opinions by subjecting the consent decree to a relaxed standard of review—comparable to that which appellate courts use in reviewing jury determinations on matters of fact—that made it all but impossible to strike the decree down.

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26 The District Court noted that Grand Rapids and Aguilar could be read as simply the latest in a narrow line of cases involving state aid to nonpublic schools. Wilder, 645 F. Supp.
Why then did the consent decree not call for this result? The answer is that neither the City nor the ACLU wanted it. While the lawsuit itself looks like an adversary proceeding, the interests of the parties were in reality no more adverse than those of the buyer and seller who executed a collusive common recovery at common law. In order to understand the common interest between the ACLU and the City, it is instructive to go back to the numbers set out above. Under the Establishment Clause theory, the remedy must be a return to the status quo ante. If the numbers above are correct, then everyone is a net loser. The City children's level of care is reduced from 10 to 5, while the Charity children reduce from a care level of 24 to 20. In essence, the Establishment Clause argument would undo all the joint benefits which the program has hitherto provided. Clearly, it is neither in the interest of the City nor the ACLU to pursue that course of action even if they regard the black Protestant children as their sole clients.

The equal access theory has very different consequences for the joint arrangement. On its face, this theory does not call for any invalidation of the program; to the contrary, it only requires that the benefits afforded to both Charity and City children be equal. To understand the importance of that constraint, however, it is useful to ask the question of how the City and the Charities would bargain, ex ante, if the Establishment Clause claims were groundless while the equal access claims were irrefutable. Here I shall assume that there are no internal conflicts within either the City or the Charities which would lead their bargaining agents to act

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at 1331. Yet even this line was unconvincing to the district court, which recognized the Supreme Court's preoccupation with subtle influences and the potential risks of sectarian behavior. If anything, the establishment clause argument against either the preexisting arrangement or the proposed settlement should follow a fortiori from the Supreme Court's opinions in *Grand Rapids* and *Aguilar* because of the pervasive religious nature of the child care facilities and the extensive government supervision and support of their activities. The opposite result was reached largely because of the onerous burden placed upon the objecting defendants: "[t]he Court is not persuaded, however, that the proposed settlement clearly violates the Establishment Clause when all relevant constitutional interests are taken into account." Wilder, 645 F. Supp. at 1331. The relevant interest that weighed most heavily upon the court was the free exercise claim of the Protestant children, which it thought might justify the increased control over the Charities. Id. at 1338. Yet, the Supreme Court precedents suggest that the effort to reconcile conflicting claims of members of different religions only increases the fear of entanglement under *Lemon*. It seems evident that there is something clearly amiss in the Supreme Court's analysis of Establishment Clause cases. See generally McConnell, 1985 Sup. Ct. Rev. 1 (cited in note 13).

27 For the mechanics of these devices, which use judgments to secure transfers of rights binding on third parties, see A.W.B. Simpson, A History of the Land Law (2d ed. 1986).
against the interest of their principals, so that each side bargains in order to maximize solely the gains to its own constituents.

On these assumptions, the Charities and the City will be able to enter into a gainful bargain only if each side is left better off with the agreement than without it; otherwise why enter into the agreement at all? On the numbers given, therefore, the Charities must be able to receive benefits for affiliation that are greater than 20, while the City must receive benefits for its children that are greater than 5. If this were the only effective constraint, then so long as the transactions costs of reaching an agreement are less than the gains provided, the two sides will enter into some affiliation agreement. Given that the Charities were, by assumption, much better than the City at running child-care facilities, those gains from trade seem to be large indeed. Hence, this is the probable explanation for the series of one-year contracts between the Charities and the City.

The equal access requirement, if it had been made explicit ex ante, would have had radically altered the bargaining relations between the parties. In order to achieve equal access, the ultimate care level for both sides must be equal, notwithstanding the original gross disparities. The Charities would not, however, have consented to any arrangement which reduced the level of care which they could provide for their coreligionists. It follows therefore that the equal access condition and the mutual benefit condition both can be satisfied only if the Charities and the City are each left with net benefits of greater than the original level of care provided by the Charities to their own coreligionists—20 in our example—after taking transaction costs into account.

It now becomes clear why any bargain would have been difficult to conclude. First, no bargain is possible unless the total net gains are greater than 15—the City children must move from 5 to 20—for if they are less than 15, then equality cannot be met unless the Charities accept some net loss. A wide range of Pareto-superior outcomes are therefore precluded when the equality condition is imposed ex ante—to wit, all bargains where the total benefits to both sides are greater than 25 but less than 40. The numbers suggest this irony: the greater the initial inequality, the less likely it is

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28 The assumption is clearly controversial with respect to the City, given that there was a change of administration between the original formation of the contracts and the subsequent decision to enter into the consent decree. The change points up a systematic difficulty in doing business with public bodies. The legal entity remains the same, but the persons who govern it do not.
that any bargain at all could be struck.

Second, the equal access condition necessarily requires that there be a highly unequal division of the surplus even where bargains could be struck. The greater the initial inequality, the larger the surplus necessary to have a viable bargain. In the instant illustration, the City must obtain 15 units of benefits before the Charities can obtain any. Thereafter the precise division of any additional gains is somewhat uncertain, assuming those gains could be generated at all, net of transaction costs. Presumably, the constitutional constraint would require any gains in excess of 15 to be divided evenly. As the valuation of benefits from bargains is a tricky business, it seems as though there would be few instances in which the Charities could exceed the break-even point. Why then should they contract at all?

The conclusion is quite clear. The equal access claim, asserted ex ante, would have the probable effect of dooming all cooperative efforts between the Charities and the City, precisely because of the large differences in the levels of care that the two organizations had been able to provide. Ironically, in practice the public insistence upon equal access ex ante would be likely to have the same effect as prohibition of such joint arrangements as wholly illegal under the Establishment Clause. There simply would be no bargains because the equality constraint would operate as a prohibitive tax on both the City and the Charities.

The bargaining games are very different if the equal access claim is introduced into the picture only after the City and the Charities have entered into some long-term arrangement. In order to see why, it is critical to remember that there were no long-term contracts between the City and the Charities that governed their interactions. Instead the Charities made heavy long-term capital investments in their own care facilities, which they knew could only be covered if they received continued support from the City—support which the City was not bound by contract to provide. At this point we have a classical situation in which one party to a trading relationship makes long-term investments in specific capital, which are funded by short term, discretionary cash payments from its trading partner. This type of relationship has been extensively analyzed in the law and economics literature under the heading of contractual opportunism or the expropriation of quasi-rents. The theory works perfectly here.

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\(^{29}\) See Wilder, 645 F. Supp. at 1344.

\(^{30}\) See, for example, Benjamin Klein, Robert G. Crawford and Armen A. Alchian, Verti-
The basic theme identified by this analysis runs as follows. Where party A (the Charities) makes the long-term investment, it runs the risk of an expropriation of its investment by its trading partner, B (the City). The costs incurred in the original investment are sunk, so that the opportunistic trading partner can demand a set of favorable prices that does not permit the opposite side to recoup its original costs over the life of the deal. The best (if not only) way to prevent that risk from developing is to enter into a long-term contractual arrangement whereby the continued support from the trading partner is secured. It is the length of the mismatch of contractual commitments, not the nature of the underlying services, which sets up the problem.

An example from the literature illustrates the point.\textsuperscript{31} Suppose there is an undeveloped mining site that can be developed only if an exclusive railroad spur line is built. Before the mine is opened, the railroad takes a substantial risk if it builds the spur solely on the mining company’s reputation for fair and responsible dealing. That mining company, if not bound by a long-term contract, will know that the railroad cannot convert its investment in track and equipment to any other use. The mine therefore has the powerful incentive to insist that it will do business with the railroad only if it reduces its haulage charges to a level which is just above the variable costs of haulage. Its threat is that if the railroad does not accept that arrangement, it will not open the mine, or it will find some other hauler to ship its ore to market. It should be noted that the railroad need not necessarily lose all its sunk investment if it has not protected itself by contract, for it may have some bargaining power of its own, especially if the other alternatives available to the mine are not costless. Nonetheless, once the railroad has built its spur, it finds itself in a “no win” situation because of its heavy sunk costs. The only way in which the railroad can protect itself ex ante is to enter into a long-term arrangement with the mining company that protects its capital committed to the construction of the special spur line. And the mine, which wants to have the track built, will normally be willing to enter into such an

\textsuperscript{31} Discussed in Palay, 13 J. Legal Stud. at 270-86.
agreement before the spur is built or the mine is opened. An agreement negotiated before either side commits its capital to a specific venture will be far less traumatic, as the possibility of expropriation is substantially reduced.

There is of course a real question as to whether the Charities left themselves open to this expropriation. If there had been any type of understanding between the two sides about renewals, it might have been possible for the Charities to have entered into the suit as of right if they could have shown the breach of some “master” agreement, which bound both sides to enter into renewals of the formal annual contracts.

It may well be that the informal understandings were quite the opposite, so that the Charities took the conscious risk on renewal. If so, their great business mistake was to make long-term investments on their side without receiving the protection of a comparable long-term contract from the City. The Charities may have been reassured by the City’s reputation for fair dealing; they may have been told informally not to worry about the renewal; or they may have thought that long-term contracts cost too much to negotiate, given that they would in any event have to have some open terms to take into account future, uncertain events. Both sides could expect some incremental change in the nature of the relation, for example, if and when the levels of City funding of the Charities increased. But whatever the reason, without the long-term protection, the Charities exposed themselves to an expropriation by the City of their wealth once the equal access claim was raised ex post. Here, as with the railroad spur line, the payoff structures are quite different from what they were before. If the agreement had, for example, provided benefits of 24 for the Charities, and 10 for the City, then the ex post equal access claim would work to raise the share of the City to 17 and to reduce that of the Charities to 17 as well. The Charities not only lose their anticipated gain from contract, but they are left worse off (by 3 units) than they were ex ante, even on the assumption that their transaction costs were zero.32 Since the stakes in this bargaining game are

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32 Note the assumption in the text is made for simplification of the analysis. It is quite possible that the gains from the original contract arrangement were so great that the City’s belated insistence on equality could have left the Charities with a net gain from the transaction—that is, on the numbers originally given, a level of care greater than 20. The shift in payoffs will, however, be very substantial whether or not the Charities’ welfare is reduced below its initial endowment level of 20, and the litigation will produce exactly the same type of factional struggle that we have here, given the massive disagreement between the two sides. In addition, if one had to guess, the issue of equal access seems so hotly contested that...
extensive, these transaction costs are not only positive but large as well. If they were set at 3 units for each party, for example, then the total loss to the charity is now 6. If the City’s costs were the same, then its gains are also reduced to 14, but its net overall gain is still substantial, 4 units (14 minus 10).

Thus far the argument has not accounted for the critical role of the ACLU in this bargaining game. To understand its role, we must ask how the City can achieve its bargaining goal of equalizing access to the system—that is, of trying to develop a payoff structure which (in the example given) yields 17 units of net benefits to both it and the Charities. If the City simply announces that it demands a renegotiation of its joint care arrangement with the Charities, it will be met with powerful resistance on the other side. The Charities clearly have some political clout of their own, and they also could claim with considerable force that there was a clear, albeit unenforceable, understanding that contract renewals occurred as a matter of course. The elusive idea of a “moral” obligation to continue business is a powerful one for long-term relations, even in politics. In addition, the Charities have bargaining levers of their own. They could insist that the original agreement was unfair and should be renegotiated in their favor, to provide say a 26 to 8 split in benefits. The City may be able to overcome that reply, but it is not clear ex ante that its potential gains are worth the additional costs required for the fight. The institutional situation may be stable even though the contracts run year-to-year. Indeed, this was the case before the litigation ensued.

The suit by the ACLU changes the bargaining game, at least if the consent decree can be entered over the objections of the Charities, as *Wilder* held. More concretely, the decree now binds the City so as to require that it only accept a deal which provides for a 17 to 17 distribution of the net gain. It is a classic case of successful precommitment, which allows the side that binds itself to gain the lion’s share of the cooperative surplus. The vital point is that the agreement with the ACLU prevents the City from making any concessions that might otherwise be demanded from it within the political framework. By casting the agreement between the plaintiffs and the City as a consent judgment binding the City, the ACLU thereby improves the City’s bargaining position vis-a-vis the Charities. Without this constraint the new distribution of outcomes could have been anywhere from 6 for the City, and 28 for

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*it is quite plausible to believe that the Charities would never have entered the original cooperative arrangement if they thought that this question could have been put on the table.*
the Charities, or 13 for the City and 21 for the Charities. The former holds if the City captures the surplus, and the latter if the Charities do. Now that the consent decree is in place, the range takes on a very different form: at first approximation 17 to 17, only. It becomes easy, therefore, to understand why the City and the ACLU were able to reach an agreement, first, to drop the Establishment Clause case and, second, to accept unequivocally the equal access element. They were on the same side of the case for both those issues.

Nonetheless, it is not entirely certain that the City and the ACLU will be able to achieve the equal division of resources that their consent decree contemplates, as there is still another round to the bargaining game. The Charities are still not parties to the decree, and while their bargaining position has been sharply compromised, it has not been totally destroyed. Thus, the Charities are still not bound to continue with the arrangement at all. They could simply decide to throw up their hands and say that they will go it alone, as Cardinal O'Connor has publicly stated. If that happened, the results for both sides would be truly disastrous. The Charities could not go it alone and could only provide, say, 10 units in benefits to their coreligionists. The City would be forced to operate its own child-care facilities, so that the care levels for its children would reduce, at best to the 5 units that existed before it had entered into the contract, and probably below that. Now the possibility of bargaining breakdown is such that the belated acceptance of the equal access principle might result not in 34 units of total service, but in 15 or fewer units, divided unequally between the City and the Charities. In an odd sense, therefore, the bargaining range remained quite large yet the set of possible outcomes for both sides were worse than they were before.

Once the consent decree is entered, the Charities might seek to keep their original position. They must, however, be able to exert some threat against the City to make their opposition credible. The only possible approach is to threaten to adopt a "scorched earth" posture to derail the consent decree. It is an open question whether any such threats could be taken at face value given the enormous amounts that the Charities have to lose. Yet the position may not be the same here for the Catholic as for the Jewish Charities for reasons that no outsider could easily understand or predict. It is therefore very difficult to decide whether and if the Charities

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are bluffing, or whether they will blink first and accept some smaller expropriation from the decree in order to avoid the larger loss.

Either way there will be substantial dislocation. No matter what the exact path of negotiations, the destructive scenarios promised in *Wilder* hardly offer a strong endorsement of public interest litigation. The success of the child care jointly provided by the City and the Charities depends on the faith and trust that are essential for the operation of all long-term, or "relational" contracts. It is difficult to understand how that trust could possibly flourish, or even survive, given the battering that the relationship has received in *Wilder*.

IV. CONTRACT OR CONSENT DECREE

One remaining question is why the ACLU and the City chose to seek a consent decree. They could have entered into a contract that specified the terms on which the City can do business with the Charities. In principle those terms could imitate those in the consent decree, and thus allow the City to precommit and to extract critical concessions from the Charities. If so, it seems to follow that the consent decree does nothing more than a contract would do. On this view, political and social commentary and not legal issues should dominate the agenda.

Yet I suspect that there is more to the complete analysis. One must ask why the City and the ACLU want the consent decree if they could have obtained all their objectives through a contract. Judicial proceedings were costly and protracted, and risked at least minimal third-party involvement in the fairness hearings. If the contract alternative was cheaper than the consent decree, both sides would have been well-advised to adopt it. As they did not, the question is what did they hope to gain that made it wise for them to have incurred the additional costs and risks of a lawsuit.

Part of the explanation has to do with the theory of contract as it applies to both private and public parties. In private law, the institution of contract is often said to rest on the idea that values are subjective. In Hobbes's famous formulation, "[t]he value of all things contracted for, is measured by the Appetite of the Contractors; and therefore the just value, is that which they be contented to give."34 In every exchange each party gives up something that it values less in order to acquire something that it values more. The

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question of value is internal and subjective. The legal system does not try to monitor those subjective valuations directly but instead rests upon a sensible, rough and ready assumption that each party knows its own interest. As a result, consent (cases of force, fraud and incompetence aside) is conclusive evidence that each party believes that it has gained from the exchange. The legal system makes no effort to determine which needs are appropriate and which are not. The courts simply do their best to follow the road map which is set out by the parties.

Accordingly, the City and the ACLU could have entered into any agreement they pleased. They could have been quite explicit about their intentions as well. A hypothetical contract could read: "Whereas both sides desire to regulate the relationships that the City has with certain named Charities on a year-to-year basis, the following agreement is set by the parties." And the contract could then provide that the City would be required to make extensive payments into the ACLU coffers, all by way of liquidated damages, to the extent that it later breaches.

Any agreement of that form seems to have real advantages over the consent decree. One critical point is that the simple contract totally dispenses with any need to show that there was something improper, much less unconstitutional, about the City’s prior course of dealing with the Charities. There would be no occasion for the ACLU to raise the thorny questions of equal access, free exercise or establishment. It could concede that the original understandings between the City and the Charities were perfectly proper, and glory in its ability to exploit the opening left in the previous casual way of doing business. After all it is only the "appetite" of the parties which insures the fairness of the exchange.

This strategy does not sit well, however, because the City does not have the absolute freedom of contract. The subjective theory of value, which works quite well for two private persons, A and B, does not apply to the City, which is far from an atomistic person. Instead, the City is a complex network of institutional arrangements, each of which places effective fiduciary obligations upon City officials. As a public office is a public trust, City officials cannot act simply as their appetites might direct. They must have reasons for their actions as they are accountable to other people in other arenas. They cannot act on the basis of naked will—they must show cause. In this case, resort to the judicial process provides the cause to justify the course of conduct. Now the City lawyers are no longer engaged in simple business opportunism that befits a robber baron. They have recognized that their past con-
duct was wrongful and have taken prudent, limited responses to correct their errors. The use of the judicial process and the consent decree thus powerfully legitimates what might otherwise be condemned as a misuse of public office.

The second advantage is closely tied to the first. Given that the City is a complex organization and not a single individual, it is necessary to determine who should act as its agent on any particular occasion. It might be the City Council, or perhaps whatever government department that had negotiated the original contracts or their renewals. The City Corporation Counsel would have some say in the matter, but perforce it would have far less control over those contract renegotiations than it would have over litigation in which the City is named as a party defendant. By bringing suit against the City, the ACLU was thus able to select the individuals within the City with whom it had to do business. The matter was now one of constitutional law, and not one of general policy. The settlement therefore assumes the color of a judicial act, and less the color of a political one. In a word the political process is bypassed. It is all well and good to say that the Charities could not have challenged the agreement if it had been arrived at through the political process, so why should they be in a better position if it is made through the judicial process? But that objection assumes that the outcome of the negotiations would have been the same in the two different forums. The shift from contracting to litigation reduced the Charities' chances of success. In so doing, it gave additional reasons why it was wise for the ACLU to use litigation instead of negotiation.

Indeed the reasons may go deeper. Suppose the City had decided to enter into a long-term contract with the ACLU about future City contracts with the Charities. Is it so clear that the City has the power to enter into this agreement?\(^3\) If the matter is purely legislative, it is at least an open question whether the City can delegate to any private organization the power to determine future City policy.\(^4\)

Surely there would be something amiss if the City Council passed an ordinance which made the ACLU the City's agent in any

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\(^3\) For a good general discussion of this question, see Peter M. Shane, Policy Making by Consent Decree, 1987 U. Chi. Legal F. 241; and Michael W. McConnell, Why Have Elections? Using Consent Decrees to Insulate Policies from Political Change, 1987 U. Chi. Legal F. 295 (responding to Shane). Given the difficulties we encounter in the outcome of the Wilder litigation, the use of consent decrees may insulate policies not only from political change, but constitutional attack as well.

future negotiations between the City and the Charities. The ACLU represents only a tiny section of the public, so that any delegation to it would have resulted in a radical shift in the choice of the City’s agents. Why then is it appropriate to allow the City to enter into a once-and-for-all contract with the ACLU, which binds present as well as future administrations? Might such contracts be necessary for the funding of capital improvements? Yet even then, each administration has a chance to bind some other future administrations, as new projects are always being considered. The steadiness of the flow means that no administration can dominate its successors. The Wilder decree, however, is designed to foreclose all future innovation in that area. There is an old observation about the way in which subpoenas are used to “protect” willing witnesses from the charge that they eagerly testified against their friends. Here, the consent decree gets the City some protection against the otherwise telling criticism that government activity is arbitrary and capricious.37

V. INTERVENTION AND SUBSTANCE

A. Intervention

On the procedural side, the problem lies with the standards appropriate for legal intervention. The traditional view is that intervention is to be allowed as a matter of right only if the intervenor has some “legal interest” at stake in the litigation. In the ordinary case the legal interest is an interest in real property or in a contract right between the two parties.38 In Wilder, for example,

37 There may be other strategic advantages that consent decrees give against third parties. As Professor Laycock has observed, the consent decree gives at the very least the illusion of a comprehensive settlement of the case, and it opens use of contempt sanctions against the City if it (i.e., the next administration) wants to back off the decree. It might also raise the costs to the Charities if they tried to bring any independent action to challenge the legality of the decree. See Laycock, 1987 U. Chi. Legal F. at 106-8 (cited in note 1). I suspect that the reasons developed in the text carry more weight in this particular context at least. What is clear is that there must be some explanation as to why consent decrees are preferred to contracts, for why else would parties use them?

38 There are other types of interests that might be involved as well, for example the rights of all persons to have access to public schools, as was an issue in Harrisburg Ch. of Am. Civ. Lib. Union v. Scanlon, 500 Pa. 549, 458 A.2d 1352 (1983). There the court disallowed a consent decree between the ACLU and the state which precluded certain religious organizations from having access to public schools. See also the consent decree in Local Number 93 v. City of Cleveland, 106 S. Ct. 3063, 3079-80 (1986), in which the white firefighters had arguable rights under the various collective bargaining statutes. Nonetheless the Court approved of the consent decree between the Vanguards, an organization of black firefighters, and the City without the consent of the Union. See also Samayoa By Samayoa v. Chicago Bd. of Educ., 798 F.2d 1046 (7th Cir. 1986), reh’g denied #86-1355 (Easterbrook,
it seems undeniable that the Charities could have intervened as a matter of right if they had entered into a long-term contract with the City which might not survive the equal access claim. This standard of legal intervention is sufficient to allow persons a chance to defend themselves in court where there is a threat of partial confiscation of their property and wealth. It might have been applicable here if the Charities could have argued that there was some "implied master contract" whose terms were necessarily compromised by the terms of the consent decree. But the district court was quite insistent that no legal obligation was generated by any course of dealing, given the rapid changes in the ethnic composition of New York City and its policy toward child care generally.

Still, should the legal position of the Charities depend upon whether they can make out such an implied agreement? Note the source of the dilemma. At one level it seems clearly improper to allow intervention by any C who is "adversely affected" by a judgment between A and B. The settlement of any large antitrust suit, for example, will affect the price that consumers might have to pay for certain goods, and yet their uniform intervention is normally not tolerated in any legal proceeding. If any venture beyond the traditional category of legal interest necessarily entailed that all third persons who thought themselves worse off could intervene, then the legal system would grind to a halt. The legal interest approach may be too narrow, but surely that is preferable to an overly broad approach.

Nonetheless, there are costs that result from ignoring those cases where bargaining strategies between A and B are designed to expropriate the long-term investments of C, which were (unwisely) left unprotected by contract. The key point here is that interven-

J. dissenting), where the settlement which allocated places in desirable Chicago city schools, entered into between the Chicago School Board and the federal government, was held to preclude an attack on the decree brought by a student who was denied access to a particular school by the terms of that decree.

These cases all raise the real question of the relative positions of cart and horse. If the religious students in Scanlon, the white union workers in Local Number 93 or individual students in Samayoa have no rights, then why should they be allowed to intervene? But where their claim looks at least plausible, then they should be allowed to intervene as of right to see whether the substantive claims are established.

The point was well recognized by the district court: "the Stipulation could not be approved over the objection of most of the defendant agencies if it altered specific contractual rights of the agencies that the City or SSC could not otherwise abridge, for example by ordinance or new agency regulations." Wilder, 645 F. Supp. at 1343.

40 Id. at 1343.
tion as of right could only be extended to persons at risk for expropriation. Members of the general public, who have not made any specific investments in dealing with the City, could not intervene as of right under this standard. To be sure, some people may be left worse off by the consent decree, but ex ante there is some substantial probability that these same people will be left better off as well. In any event, their stake seems so small that there is hardly any reason to allow them to intervene, as they do not face the extensive and systematic risk consciously imposed upon the Charities in this case, for which the fairness hearings provide but scant protection.41

I am not quite sure whether this proposal to tie standing to the risk of expropriation is generally workable. But I do think that in this case intervention might be allowed on another ground, which would be open to the Charities as well as members of the general public. The normal settlement dispute involves a controversy between two parties over a sum of money owed by one to the other, or the status of title to some asset. If we applied the rules of standing as applicable to private parties, we might conclude that strangers to the contract cannot challenge its settlement, no matter what their economic stake in the outcome. But Wilder did not involve a private contract between A and B. One party represented the state, and was subject to the limitations on actions which are generally contained in the Constitution. And there is a serious question whether the consent decree requires an impermissible entanglement of religious and secular activities. That matter should be resolved. Today the general law of standing is such that citizens and taxpayers generally are not allowed to challenge government actions simply because they are ultra vires. Usually it is necessary to show the infringement of some interest in property or contract at common law.42 There is something of a muddled exception to this rule in the Establishment Clause cases which, under Flast v. Cohen,43 allowed taxpayers to challenge public school expenditures

41 It should be noted, for example, that the consent decree specifies that the City shall have powerful controls over the placement decisions of individual children into particular care facilities, something which the charities had previously been able to decide pretty much for themselves. Wilder, 645 F. Supp. at 1305-06 ("SSC would have final administrative authority over all placement decisions '[s]ubject to the terms of [the] Stipulation,' and would reimburse agencies only for placements made according to the Stipulation's terms.") The decision thus works to expand the control and influence of the SSC.


43 392 U.S. 83 (1968).
because of "a logical nexus between the status asserted and the claim sought to be adjudicated." Flast is largely unintelligible because it is an effort by the Court to carve out a narrow exception to the general rule that denies taxpayer standing. Under the more sensible approach, standing should be recognized in any case wherein the plaintiff seeks an injunction against government action which is claimed to exceed its constitutional authority. By that view there is little reason to be concerned with the obscure linguistic refinements in Flast.

The nature of the concern is well illustrated by the recent Establishment Clause case, Valley Forge College v. Americans United, where the grant of private property to a religious organization could not be challenged by another organization dedicated to the principle of separation of church and state. The only conceivable person who might have a recognized interest is the next highest bidder for property so conveyed (assuming there is one); but his interest would be limited to the difference between its private valuation of the property and the amount he had bid to acquire it. This bidder would hardly be interested in pursuing the structural issues that are raised in the case. Here the interested political group is surely in a better position to litigate the issue than anyone else, and to bring to it that "concrete adverseness" that the traditional doctrines of standing are thought to advance.

A private law analogy might help. Ordinarily, a corporate shareholder should surely be allowed to attack any action of the corporation as ultra vires, without showing any special injury or harm. There is no obvious reason why any standing doctrine should require a different result in this case, where the matters of institutional structure, and distribution of powers, are paramount to all parties. If this is correct, then ironically the Charities do not have to claim any special status to challenge the agreement under the Establishment Clause. They, or any of their individual members, should be allowed to challenge the agreement without regard to their special status, so long as they seek to enjoin actions that are beyond the power of government to perform. Indeed, if they are not let in, then we have the tragic situation in which a major realignment of government power—which raises serious questions under the Establishment Clause—can be challenged by no one at all. Surely in a system of limited government, these constitutional questions deserve some judicial resolution.

44 Id. at 102.
B. Substance

The second substantive question goes to the soundness of the equal access claims. Stated otherwise, did the preexisting contracts between the City and the Charities offend the Equal Protection Clause because they did not provide for equal access to all children within the system? Both the City and the ACLU regarded this claim as self-evident, if only because race is a deeply suspect classification which correlated highly with the distinction between Charity and City children. The argument can be cast into symbolic terms: *no City funds should be invested in programs that treat these children differently.* The point has its most vivid application if the levels of care that various children receive differ in some substantial degree. But they are also raised by the equal access cases that dominated the case.

I am far from sure that this constitutional challenge to the prior practices of the City and the Charities has merit. The problem lies in finding the proper baseline by which to measure the equal protection claim. Assume that a religious charity is prepared to give *A*, its coreligionist, 10 units of support, but to give none to *B*, a stranger. Assume that the City has 20 units of support of its own to allocate. Does the Equal Protection Clause require that the City contribute only 5 units to the coreligionist and 15 to *B*? This is the equality of outcome, notwithstanding differences in initial position. Alternatively, does it require that the City give 10 units of benefit to both *A* and *B*, so as not to disturb the original imbalance which was created solely by a selective private generosity typical of most charitable giving? The problem here is that the Equal Protection Clause demands generally that like cases be treated alike; but it does not make the same command with respect to unlike cases. Are the positions of *A* and *B* alike, or different? Does one look solely at the ultimate distribution of benefits, without taking into account the source of funds? Or does one look at some ratio between the two of them?

In the context of *Wilder v. Bernstein*, the best answer seems

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48 Symbolic arguments are always difficult to deal with. Here there are two such problems. First, there are many symbols generated by this case, including the message of indifference and hostility that the City shows to the Jewish and Catholic charities. Second, there are real costs to needy people if the overall level and quality of care actually provided are reduced. The situation in New York would clearly be better if the imbalance between the Jewish and Catholic Charities on the one hand, and Protestant charities on the other, could be redressed, even in part, by some increase in Protestant charitable activity in New York City.
to be that the Equal Protection Clause is not offended when the state enters into a contract with a private party which promises to improve the position of all children in both the public and the religious systems. Surely if we dealt with public aid to education, it would be odd to insist that religious schools could not give any preference to their own members once they accept any government assistance. As a general matter, it seems very difficult to insist that the state is under a duty to redress all inequalities in wealth as a precondition for providing any public aid for all its citizens. It is of course utterly unthinkable that the state could make differential uses of its own resources, based on race or religion, so it is hardly the case that the restrictive interpretation advanced here reads the Equal Protection Clause out of the Constitution. But *Wilder* does not present any such issue. Where the City and the Charities have entered into bargains that work general Pareto improvements, therefore, it seems most unwise to strike down that claim on the ground that it does not guarantee equal access to all individuals to facilities under their joint care. To recognize the equal access claim ex ante is to impose substantial, if not fatal, restrictions upon the capacity of the City to improve the level of care that it provides. To impose them ex post is to double-cross (legally, of course) the Charities, to work a substantial expropriation of their committed resources, and to threaten the durability of the cooperative arrangements that the City and Charities have developed over the years. The consent decree between the City and the ACLU was a masterful piece of lawyering: the Charities were powerfully restricted from ever having a chance to argue their case in full on the merits. And there is no obvious reason why the result is wrong, at least given the structure of existing law.

*Wilder v. Bernstein* shows in the most vivid form possible how risky it is today to rely upon informal understandings or past practices in fashioning long-term, stable relations. It shows how so-called public interest litigation can undo the ties that bind. The successful litigation strategies of the City and the ACLU in *Wilder* have adverse consequences that go beyond the institutional dislocations that will result in that particular case. The decision gives a clear signal that long-term, fragile social arrangements can be undone by sustained legal assault. Other private and religious entities can be expected to alter their conduct to take into account the increased risks of resting business arrangements on informal understandings. *Wilder* thus forces us all to bear the heavy costs of the
increasing legalization of social relations. And it was all so avoidable. 

47 Or so I might have thought before reading the brief responses prepared by Messrs. Neuborne and Schwarz. Their silence on crucial issues speaks volumes for their position. Neither explains how their desired system of equal access could have been obtained by prospective voluntary negotiations between the City and the Charities. Neither recognizes that the greater the initial inequalities, the less the City can do to help black children, if all children must get equal after-the-fact care. And neither justifies transferring negotiations on contract renewal from the political to the legal realm.

Both papers also seriously misrepresent my own position. Professor Neuborne writes, “Professor Epstein argues that the aggregate utility was diminished by the settlement because the white, in-religion children suffered a greater loss in utility than the black, out-of-religion children gained.” Burt Neuborne and Frederick A. O. Schwarz, Jr., Two Brief Responses to Professor Epstein, 1987 U. Chi. Legal F. 235, 235. Everything after the “because” is wrong. First, he ignores all ex ante arguments, where my point is that both black and white children benefited from the preexisting arrangements. Neuborne chides me for the failure to justify the numbers used to analyze the social losses of the Wilder, but he fails to understand that nothing of principle turns on the numbers chosen. My analysis depends only on the fact that one group has an ex ante utility, a, which is greater than the ex ante utility, b, of the second group. If any bargain between the two parties must result in both having an equal utilities ex post, then it necessarily follows that all bargains with a surplus of less than a-b will never take place, because the first party will not consent to any arrangement that leaves it with a utility of c<a. The foregone gains of a-b are a social loss.

Finally, Neuborne also blunders in dealing with the ex post arguments. My argument is that even if one (as one should) values the utility of all children equally, the total wealth in the system will be reduced by the costs of litigation and the disruption of long-term care arrangements, as has happened. With less total wealth, less can be done for all children, and hence the overall utility loss.

For his part, Mr. Schwarz gave some explanation as to why the City fought the Establishment Clause claim raised by the ACLU. But he gives no explanation as to why it did not resist the equal access claim. Clearly, Mr. Schwarz regards the City’s position as wholly untenable; indeed, he goes so far as to raise the spectre that my criticism of the City’s legal position in “Wilder could just as well serve as an attack upon the Supreme Court’s decision in Brown v. Board of Education.” Id. at 237. His point is absurd, unless he thinks that segregation in the South did improve, and was intended to improve, the position of black children in public school systems. His unfortunate analogy inflames and misleads, but does not inform.

Neuborne and Schwarz both appeal to certain noneconomic values, notably “equality” and “freedom of religion.” As to the first, they show no awareness of the serious baseline problems that have to be addressed. As to the latter, their conception of “freedom of religion” apparently requires Catholic charities to counsel Protestant children on birth control and abortion, all in the name of “family planning.”

Neuborne ends with a high-minded appeal: “Bread is important; but so are roses.” Strange, when the consent decree in Wilder means that all children will get less of both.