1987

Justice and Contract in Consent Judgments

Frank H. Easterbrook

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
In an ideal world people either obey all legal rules or quickly make amends. This means keeping one's contracts or paying damages. Few protest when people obey the rules or compensate those they injure. Those who do not do this face suits, and once sued they may comply in whole or part (that is to say, they may settle) or demand judgment. Injured parties by and large prefer compliance sooner to compliance later—thus the preference for obedience over litigation.

The process of settlement is like the process of compliance with the law. Each person must determine what the law requires, which as a practical matter means to determine what a court faced with the problem will declare. To comply with the law is to do what the court would require. Settlement is the same process of prediction from both sides: the plaintiff and the defendant each predict what the court will do. If the predictions agree, they can settle at once. If the predictions do not agree, they still may settle if the value of the divergence is less than the cost both sides will incur in obtaining the court's answer—costs that include legal fees, the expenses of discovery, the expenses of waiting, and the uncertainty of putting the matter to a court. The settlement saves these costs, which the parties can divide, making each better off than it expects to be after a trial. If the parties do not settle at the begin-

† Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago. I thank Barry E. Adler, Albert W. Alschuler, Douglas G. Baird, Jules Coleman, Geoffrey Miller, Richard A. Posner, Charles Silver, Eric Simonson, David Strauss, and Alan O. Sykes for helpful comments on an earlier draft.

This is a restatement of the standard economic model of settlement, which produces similar conclusions whether or not one includes strategic conduct. The approach was developed by John Gould and William Landes. See John P. Gould, The Economics of Legal Conflicts, 2 J. Legal Stud. 279 (1973); William M. Landes, An Economic Analysis of the Courts, 14 J.L. & Econ. 61 (1971). Important developments and extensions include: Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Stud. 399 (1973); Robert Cooter, Stephan Marks and Robert Mnookin, Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior, 11 J. Legal Stud. 225 (1982); George L. Priest and Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1 (1984). The best available data suggest that settlements are rational compromises in light of the anticipated verdicts at trial, just as the economic model predicts. Patricia Munch Danzon and Lee A. Lillard, Settlement Out of Court: The Disposition of Medical
ning, they may settle as discovery and interim rulings of the court enable them to agree on the likely outcome of the case. Any legal system that finds compliance with law attractive should find settlement of disputes attractive, for the same reasons.

Most settlements take the form of contracts. The contract may be enforced like any other. Compliance is desirable, and there are remedies for breach. Disputes may arise about the meaning of the contract, especially if it is executory, novel, complex, or all three. The parties may want to speed up the process of construing and enforcing such a contract. Then they arrange for the entry of a consent decree, the settlement contract in the form of a court order. When the settlement includes a court order the parties can resolve disputes and get enforcement without filing a new suit and starting at the end of the queue. The consent decree is different in three ways from a private contract: the speed of enforcement, the court of enforcement, and the remedy for breach. It is a contract all the same. Its force comes from the parties’ agreement, not from the law that was the basis of the suit. So any legal system that finds both voluntary compliance and voluntary contracts attractive should find consent decrees attractive. (The consent decree may have other attributes, such as preclusive effects on third parties and enlarging the set of permissible contracts, that call into question the relation between contract and decree. I discuss these in Part II.)

Because voluntary compliance and contracts are thought desirable, it is surprising to hear voices opposing settlements and their embodiment in consent decrees. The opposing argument de-
finishes the outcome of contested litigation as the "just" result. Settlements do not mimic the outcome of any given trial; the parties compromise their differences; therefore, the settlements are not just, and decrees implementing settlements snarl the courts in administering the details of injustice. This is an unattractive view of settlements. There are, nonetheless, problems with consent decrees in some kinds of cases, and Part II explores these problems.

I

Those who settle a suit get neither all they want nor exactly what the court would have done. Settlement is compromise. Thus the argument that the settlement is unjust. What the court would have done is justice. Even though courts err, their decisions are as close to the proper result as the results of any other process we are likely to invent. We know that the results of settlements diverge from the results of trials, and therefore settlements are unjust.

This attack on settlements depends on the assumption that the court's disposition is the just result. Suppose, however, we define the just result as the one likely to occur in a case, or the one that occurs most often in a group of similar cases. Treating likes alike is another common definition of justice. This is a reasonable view because trials are designed in part to deal with uncertainty that cannot be dissipated. The trial is a process for rounding a probability that falls somewhere between 0.01 and 0.99. Probabilities greater than 0.50 ("more likely than not," the civil burden of persuasion) are rounded up so the plaintiff wins, and the rest are rounded down. Trials resolve uncertainty about the law and the facts by rounding because it cannot be handled in any other way. Many legal questions do not have answers that can be derived axiomatically, and problems the legal answers to which are debatable are overrepresented among cases fully litigated. (Otherwise there is likely to be compliance or quick amends.) When the facts are known the disposition may be problematic. When the law is known the facts may be problematic. People may disagree about important facts; memories may be weak; documents may conflict or escape notice. In the end the court will know less than the parties do (because information cannot be transmitted or absorbed perfectly), and the parties collectively will not know everything. Truth lies beyond the realm of legal processes. So the legal system contains rounding rules: a probability of 0.51 or more is rounded up. In a
significant percentage of cases, the trial court's opinion begins "The evidence in this case conflicts" and the appellate opinion ends "The trial court's findings are not clearly erroneous." If the court had found the facts the other way, that would not have been clearly erroneous either.

There are at least two kinds of uncertainty. One is difficulty in ascertaining what actually happened, and the other is difficulty in predicting what the court will declare the law requires given the facts. Consider the first of these. One party is "in the right" under existing law (the defendant ran a red light or he did not), but it is hard to tell which. Assume there are 100 cases, in each of which the evidence cuts both ways and a careful observer would evaluate the evidence at roughly 60/40 in the plaintiff's favor. If all of these cases go to trial the plaintiff will win every one, because in each the evidence preponderates for the plaintiff. The result is unjust to defendants as a group: it is exceedingly unlikely that the plaintiff is in the right in all cases in which there is substantial evidence for the defendant. Turn the example around. Suppose the evidence just barely cuts for the defendant in each case. Then all plaintiffs will lose. Again the results are not just; we know that in close cases all-or-nothing over large numbers cannot be right. The dispositions of many of these cases are "unjust"—but because settlements mirror the parties' expectations about what will happen at trial, the settlements will be equally unjust. Cases in the first group may settle for close to 100 cents on the dollar, cases in the second group for close to nothing.

Now consider the more common kind of uncertainty, which may come from but is not limited to uncertainty about the facts—the difficulty of predicting what the court will do. The judge may err in finding the facts; genuine ambiguity may make decisions difficult; the law governing those facts may be unclear or may call for an exercise of equitable judgment; and so on. The parties may be unsure what will happen to their case, and cases that look identical to the parties may come out differently in the end. Each case will have a probability distribution attached to it, say with a median that may be 0.40 or 0.60, and a dispersion of outcomes. Think of a bell-shaped probability curve. The median may be placed at 0.60 (implying that evidence preponderates for the plaintiff), but the dispersion of the distribution reflects uncertainty about the outcome. The defendant will prevail in the portion of the distribution that falls to the left of 0.50. The larger the dispersion of possible results, and the closer the median to 0.50, the more frequently the defendant will prevail. In a population of 100 cases
with probability distributions centered on 0.60, reflecting a preponderance but not a certainty, the plaintiffs are “in the right” 60 times. But unless the probability distribution is a horizontal line, more than 60 percent of the curve falls to the right of 0.50. Plaintiffs will win, say, 80 percent of the time (the portion of the area under the curve to the right of 0.50). This is still “too often” but closer to being right on average. The “excess judgments” for the plaintiffs in this group will be matched against a reduction in judgments when the median falls under 0.50. (If the median falls at 0.25, each plaintiff has a colorable claim and perhaps 25 percent ought to win; but unless the dispersion is substantial, all may lose.)

Return to the group of plaintiffs with a probability distribution centered on 0.60. Eighty or so in the group will recover if there is a trial, and given the difficulty of defining “right” and “wrong” in a world of uncertainty we may assume that 80 of the plaintiffs are “in the right.” This accepts the assumption that the outcome of the group of trials defines justice. But will the right 80 win? It would be sheer happenstance if they did. By assumption the 80 cases will look identical, so it is possible to think of the decision process as taking blind draws from an urn that contains balls colored to reflect the probabilities. If there are 80 red and 20 green balls (reflecting the 80 percent chance that each case should be decided for the plaintiff) and you draw out 80 balls (reflecting the fact that 80 plaintiffs will prevail), you are likely to get 64 red balls (plaintiffs who should win and did), 16 green balls (plaintiffs who should have lost yet won), and leave 16 red balls in the urn (plaintiffs who should have won yet lost). This is not very comforting. I have made things look worse than they need be; perhaps the legal system is good enough to push the median of the probability distribution in each case higher and to reduce the dispersion. Then there will be fewer mistakes. But the process will never be free of error so long as the trial is a method of rounding to zero (loss) or one (win) a probability that falls somewhere in between.

A different way to think about the cases is to treat each party as entitled to the disposition afforded other litigants similarly situated. That means each party is entitled to the average outcome. If a party is “like” another in a population that wins 60 percent of the time, the party is “entitled” to his probability of success, not to an actual victory or loss. The holder of a right to $1.00 if a die comes up 1 to 4 (and to nothing if the roll is 5 or 6) is entitled to $1.00 or nothing after the roll, but before the roll the holder’s entitlement is worth a little less than 67 cents. That’s if the holder is risk-neutral. If the holder of the entitlement dislikes risk, then he
would think himself better off if he could sell the entitlement for 65 cents. He would sell the entitlement for less still if he had to pay 10 cents to roll the die, the equivalent of paying legal fees or waiting to have a trial. The person with the right to be paid if the roll is 1 to 4 could save the 10 cents and still be better off by accepting anything over 55 cents. The person on the other side—obliged to pay 10 cents to roll and to pay $1.00 if the result is 1 to 4—would think himself better off paying any sum less than 77 cents. There is obviously room to compromise without rolling the die and to make everyone better off, all without reducing the amount of justice in the world.

Surely, though, it is wrong to think of the legal process as the rolling of dice. It is not random; it is deliberative and informed by facts; and judges are constrained by rules. All true, none pertinent. The purpose of the legal process is to classify cases correctly, according to the law and facts as we know them. The classifications will be imprecise. It is like a postal clerk trying to sort envelopes written by people with bad handwriting. The more astute the clerk, the more clues he can glean from the envelopes, the more he can send to the right destination. But some error will remain, and no matter how careful or deliberate the process there is a probability that an envelope will be sent to the wrong address. So with cases. The legal system drives the median of the probability distribution in each case toward 1.00 or 0.00 but never quite gets there. If on average the system gets the medians only to 0.60 with wide distributions around the medians, there will be error galore; if it gets the medians to 0.99 with narrow distributions, there will be very little error; the closer the medians to 1.00 or 0.00, and the smaller the distributions, the “better” the legal system.

The success of legal rules and fact-finding processes is irrelevant to settlement because at any given level of uncertainty, parties who agree on the probable outcome may make themselves better off by settling rather than demanding a trial. If they settle in the face of great uncertainty, we may conclude that there are serious problems with the legal system. But the problem is not the settlement. The problem is that there may be more than one result of litigation. The results of trials do not mimic the results that an omniscient adjudicator would produce. That, and not the parties’ reactions to uncertainty, is the source of any perceived injustice. Given any level of error, settlements are at least as just as the outcome of the trials. So, too, the objection to mandatory “alternative dispute resolution” is not that it may facilitate more settlements, but that the “alternative” processes are less successful than cur-

HeinOnline -- 1987 U. Chi. Legal F. 24 1987
rent legal procedures in separating wheat from chaff, and thus settlements in the shadow of the less accurate procedure will be less just. The defect lies in depriving parties of their entitlement to an accurate and low-cost method of resolving their disputes. The selection of the appropriate cost and accuracy of the dispute resolution process is independent of the desirability of settlements. Given what they believe is the likely outcome of trial, parties can get there quicker by settlement, avoid the rounding error, and save the legal costs of obtaining a decision. Each party is better off, and we should applaud a procedure that makes everyone better off without making anyone else worse off. Settlements are desirable not only because they “save the time of courts” (a social benefit) but also because all parties to the settlements prefer them to the results they anticipate obtaining from the court. Why would anyone hold the outcome of a compulsory legal proceeding to be preferable to the outcome the affected parties unanimously desire? Whether the ethical system is based on utility, autonomy, respect, or some variant, the result is the same: things all affected people desire are desirable.

None of this depends on a belief that legal outcomes ought to mimic “the market.” Settlements in the shadow of the law reflect the content of the law. The rule against trading in stocks on the basis of material inside information reverses the results that obtained in the absence of the law. Still, if the SEC catches Ivan Boesky in the act, a settlement and consent decree can make both better off: both avoid the protracted litigation that would eat up much of the $100 million stake; the SEC obtains a pile of money it can distribute, and it frees up its legal staff for other work. The consensual disposition both enforces the legal rule and leaves benefits for the parties to share.

There is still another way to see the point. Suppose dispute-resolution services were costly and almost random. Then we should prefer settlements as a way of obtaining peace at lower cost, even though we would deplore the fact that these settlements (like the legal system they mirrored) would not do much for those who had been wronged. Suppose dispute-resolution services were free and

---


perfectly accurate. Then we should prefer settlements because they would speed up the inevitable. A party certain to win (at no cost to himself) at trial would not settle for less, but because everyone may want to get things out of the way a settlement may be advantageous even to the other party. Perfect justice produces perfect settlements. What is true at the extremes is no less true for good, but still imperfect, legal systems such as ours.

One response is to abandon the assumption that courts must give all-or-nothing answers to legal questions. Perhaps when the evidence is closely balanced courts should divide the stakes. In criminal cases judges give lower sentences to defendants who have been shown guilty under the “reasonable doubt” standard but about whom some doubt remains. Some torts can be stated only in probabilistic ways—the ingestion of a drug or exposure to radiation does not produce injury through any process we can identify, but it increases the probability of injury. Perhaps the legal system should compensate people for the change in probabilities rather than try to determine whether a person with cancer should receive compensation for the whole cost of the disease. But if such an approach were adopted, the benefit of settlement would remain: if the court is going to split the difference eventually, what’s wrong with the parties splitting the difference at once and saving the costs and emotional agony of trial?

What of precedent? Resolving disputes is only one of the two principal functions of the legal system. The other is shaping legal rules for use in the future. The molding of the common law, the construction of statutes, and so on define “the law” with which people must comply. If every case were settled, there would be no ongoing process of elucidation. True enough, but again not dispositive. When there are “too few precedents” uncertainty may increase, reducing the likelihood that parties will agree on the likely disposition of the case. This in turn reduces the probability of settlement. More cases will go to judgment and produce new precedents. When there are “enough” precedents the parties will be able to settle.

---


7 There are many models of the interaction among settlement, litigation, and precedent. For example, Landes and Posner, 8 J. Legal Stud. at 259-84 (cited in note 6); George L. Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. Legal Stud. 65 (1977); Paul H. Rubin, Why is the Common Law Efficient?, 6 J. Legal Stud. 51 (1977). In
JUSTICE AND CONTRACT

Precedents exist principally to help people conform their conduct to law. They are meant to be used. One use is in planning conduct; another is in making amends; and another is in settling cases. When to create a precedent and when to use existing precedents is a difficult problem but fundamentally no different from the question when investors should seek out new information about a stock and when they should trade at the market price. If everyone traded at the market price all the time the price would be unreliable, because it would not reflect the underlying values; but as soon as the price becomes unreliable some people find it worthwhile to do more investigation and restore the accurate price that makes uninformed trading practical.

It is difficult to say that too many cases are settled. Few of the fully-litigated cases produce precedents. Juries decide without stating reasons. District courts dispose of most non-jury cases without published opinion. Of cases appealed in the federal system and decided on the merits, more than half are handled by unpublished order. State courts publish opinions in a lower proportion of contested cases than do federal courts. Judges apparently believe that the existing supply of litigated cases offers more than enough opportunities to make or embellish legal rules. And we should not overlook the possibility that more precedents will increase rather than reduce the uncertainty in the law.

Even if there were "too few precedents" this would not demonstrate that settlements are unjust. To say that there are "too few precedents" is to say that the law is obscure or, if known, is in need of alteration. It is to say, in other words, that we either do not know or do not approve the prevailing rules. The application of a novel rule to an existing dispute cannot confidently be described as "more just" than the settlement of that dispute under existing rules, and if the purpose of litigation is to clarify rather than change the rule, then the litigation produces benefits for third parties at the expense of the litigants who must bear the costs of their own case. The litigation may increase social welfare, but the parties may be excused for thinking that justice does not require them to produce this uncompensated benefit for strangers.


Frank H. Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802 (1982).
tion is subsidized in part because of the public good aspect of precedents, but the offer of a subsidy does not compel the parties to accept when they find themselves worse off even after taking full advantage of the benefit.

Owen Fiss offers another reason for being wary of settlements. He characterizes this as “imbalance of power,” by which he means that settlements reflect the parties’ wealth or some variable other than the anticipated outcome of trial. If a party’s wealth enables him to wear the other side down, the argument goes, this affects the outcome of the trial less than the outcome of the settlement. Let us assume this is right. Nothing follows—nothing pertinent to settlements, anyway. It is to say that given a range of outcomes in settlements the “stronger” party will obtain an outcome at the favorable end of the range. The “weaker” party still prefers the settlement to the expected outcome of trial; to force him to go to trial is to make him worse off still. If the “imbalance” is that a plaintiff in the right is desperate for money (say, to meet medical bills), while the defendant can afford to wait, this may reduce the price to be paid in settlement, but a rule requiring the case to go to trial could not make the plaintiff better off. The plaintiff’s desperation comes from the delay in the legal system. If a plaintiff has a case worth $100,000 (or a 2/3 chance of recovering $150,000) but will die next week unless he gets $10,000 for an operation, this may induce him to settle for $10,000—but a rule barring settlement would leave him dead. The defendant could not be expected to hand over the $150,000, and even $100,000 would be a settlement. The necessitous or overmatched party is a familiar figure in contract law, and the same rules that apply to ordinary contracts should apply to settlement contracts. We do not often patrol the terms of contracts to reduce monopoly prices or improve the bargains adults negotiate. Perhaps we should make rights of action more freely saleable to banks and lawyers, for this would enable professional risk-bearers to assume the risk of litigation while paying plaintiffs their due. Claims are “sold” to insurance companies via subrogation; attorneys can advance the medical expenses of their clients, staving off necessitous settlements; maybe claims should be transferrable in other ways. But this is another problem.

The proposition that the big grind down the small in litigation also strikes a discordant note. One could put the claim the other way around with greater support. In a suit between the penurious

10 Fiss, 93 Yale L.J. at 1076-78 (cited in note 3).
and the wealthy, money will flow in one direction only, no matter who is in the right. The judgment-proof are plaintiffs, not defendants. Data show convincingly that the deeper the defendant's perceived pockets, the larger the plaintiff's recovery, holding gravity of injury constant. Most statutes that authorize the award of attorneys' fees are biased in favor of plaintiffs; losing (big) defendants pay automatically, but losing plaintiffs pay rarely. The threat of fees enhances the settlement value of the case for the plaintiffs. Contingent fee contracts enable attorneys to finance suits and assume much of the risk of failure; this facilitates litigation by the poor against the rich but never in the opposite direction. In many cases discovery is a lever to obtain compensation. Wealthy defendants also have voluminous files, and a demand to search those files imposes large costs. The defendant cannot impose equivalent costs by asking the (small) plaintiff to search his own records. Litigation has proven an effective strategy to impose costs on business rivals, and it is often said (though rarely proved) that strike suits extract decent sums from innocent parties. When the large litigant is the government, it may have difficulty giving its agents the right incentives (on which more below). The Tunney Act, which established judicial supervision of consent decrees in antitrust litigation, stemmed from concern that the government was giving away the store, and many people think that criminal plea bargains offer scandalously low sentences to guilty people who have no discernable way to put the government over a barrel. The picture one draws from all of this is not the big beating up the small in settlements or litigation as a whole.

Settlements therefore fare well—better than other contracts, because the settlement contract reflects the likely outcome of a

---

11 See Audrey Chin and Mark A. Peterson, Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials 43, table 4.5 (Rand Inst. for Civil Justice 1985), showing that after establishing a defendant's negligent maintenance of property a civil plaintiff collects, on average, $37,000 from a person, $98,000 from a governmental agency, and $161,000 from a corporation. See also James K. Hammitt, Stephen J. Carroll and David A. Relles, Tort Standards and Jury Decisions, 14 J. Legal Stud. 751 (1985); Wittman, 29 J.L. & Econ. at 156 (cited in note 1).


14 A proposition that I have disputed, see Easterbrook, 12 J. Legal Stud. at 309-16 (cited in note 1), but a common belief all the same.
process that vindicates legal entitlements. The picture becomes more complex when the settlement takes the form of a judicial decree. This is not because judges aren’t entitled to become involved in private orderings or extended disputes.\textsuperscript{15} Bankruptcy proceedings may last for a decade or more, yet they are largely about solving complex disputes under private contracts. The construction or enforcement of contracts is a mainstay of litigation, and it does not become suspect just because the contract is born in court instead of being fetched there. It is because consent decrees often are designed to affect the rights of strangers. Plaintiffs may negotiate on behalf of a class, unions on behalf of members, and attorneys for the executive branch on behalf of the legislative branch or the future. When the legitimacy of a decision rests on consent, the authority to give consent is of great moment. Professor Fiss and several other participants in this symposium express concern that consent may not be authoritative.\textsuperscript{16} I share the concern.

II

Lawyers who negotiate consent decrees are agents of the parties. The parties may be agents in turn. The managers of corporations are agents of investors; union officials are agents of workers; the representatives in class actions are agents of the class; holders of public office are agents of the branch of government they represent and indirectly of the people who elected them. Agents have private agendas, which may include personal goals (from political objectives to leisure) that conflict with their principals’ interests. The costs of this divergence of interest inhere in any agency relationship, but there are palliatives. Corporate officers may hold stock in the firms they manage, and the value of this stock (and their bonuses) depends in part on their performance. Lawyers are interested in their reputations, which affect the fees for their services and the likelihood of repeat business. These and other devices align the interests of principals and agents, so that they flour-

\textsuperscript{15} This is one of Fiss’s objections to settlements. See Fiss, 93 Yale L.J. at 1082-85 (cited in note 3).

ish or suffer together. When the interest-alignment devices are weak, there is cause for concern.

The representative of a class may be a poor agent, because any one member’s stakes are much less than those of the class as a whole. The representative may settle for too little (or for ideological reasons may hold out for too much). Lawyers for a class (or in a shareholders’ derivative suit) may settle in exchange for high legal fees and little relief, or may not conscientiously press for the terms best for the class, or may find that what is best for the class is not best for the representative plaintiff. The lawyers’ reward (legal fees) is not well aligned with the plaintiffs’ interest (the merits of the case). But all of this is old hat, as are the devices used to deal with divergence of interest. These include each class member’s right to opt out of a suit for damages, judicial review of any settlement, and the requirement that the members of the class have identical interests and that the representative plaintiffs (and their lawyers) be adequate to the task. These devices may work well or poorly, and they work less well with respect to settlements than they do with respect to dispositions on the merits, but there is nothing novel here and nothing to suggest that consent decrees pose greater risks than settlements that do not end in judicial decrees.

Sometimes, however, the purpose of entering a consent decree is to affect third parties, those not represented even in principle. A union may settle a case on terms that affect people who are not yet employees or who are employees but not members of the union. Officials of the Executive Branch of a government may consent to a decree that affects the powers of their successors or of the Legislative Branch. When the parties adversely affected by the decree are willing to bear the costs, they may attack it just as they could a private contract. The analogy to contract prevents treating the decree as an authoritative expression of legal entitlements. The settlement and consent decree are neither better nor worse than,

---


18 See Local Number 93 v. City of Cleveland, 106 S. Ct. 3063, 3079-80 (1986), holding that consent decrees do not bind parties who withhold their consent and may be challenged by nonparties in the same way a contract may be challenged. See also Evans v. Jeff D., 106 S. Ct. 1531, 1537 (1986); Comment, Collateral Attacks on Employment Discrimination Consent Decrees, 83 U. Chi. L. Rev. 147 (1986). As the remainder of this essay shows, I agree with Coleman and Silver, Laycock, McConnell, and Cooper that a party should not be able to do by consent decree what he may not do by contract.
say, a collective bargaining agreement that affects people who do not belong to the union. Efforts to do more through consent decrees should be rebuffed.\(^{19}\)

One should not overstate the parties' ability to affect others. Professor Laycock expresses concern that employers will settle discrimination litigation by selling out their employees.\(^{20}\) Laycock gives us a picture of an employer—threatened with exposure to large back pay awards to applicants—who satisfies the applicants' claims by giving them preference in employment over existing workers or other applicants. This is said to be free to the employer, costly to the unrepresented employees. Not so. The employer and employees have a long-term relation, and the employee must receive the market price of his work. If the employer imposes on the employee onerous conditions, such as exposure to a greater risk of layoff, the employer must pay in higher wages; if the employer hires as new employees people whose skills are not at the level of the old, the employer is paying the same money for less work and again pays for the decree. To see the point clearly, suppose an employer that had lost a discrimination case proposed to raise the money to pay the plaintiffs by reducing the wages of existing employees 10 percent. Would this remedy come solely at the expense of the employees? If the employer was formerly paying the competitive wage, it could not get away with the reduction (without losing its good employees, those with opportunities elsewhere). If the employer was formerly paying more than the market wage, it might be able to make the 10 percent reduction—but then it could have made the reduction with or without the need to pay damages. The employer could have reduced the wages and kept the money, but for the need to pay it to the plaintiffs. In either case, the employer bears most of the cost of the judgment, even though the money nominally comes from the employees. So too with arrangements that involve making employees worse off but do not change their money wage. The employer must either raise the money wage to compensate employees or forego an opportunity to reduce the wage to the market level. Of course, the employer may strike a deal under which only new employees are adversely affected by the con-

\(^{19}\) A point that I have made in a different forum and do not elaborate here. See Kasper v. Board of Election Commissioners, 814 F.2d 332 (7th Cir. 1987); Dunn v. Carey, 808 F.2d 555 (7th Cir. 1986); Samayoa v. Chicago Bd. of Educ., 807 F.2d 643, 645 (7th Cir. 1986); compare Morgan v. South Bend Community School Corp., 797 F.2d 471, 477-78 (7th Cir. 1986). See also Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 695-97 (7th Cir. 1986) (en banc).

sent decree. Then it is crystal clear that the employer is dealing with its own money. The deal is like the two-tier wage system now in use at some airlines, in which new hires make less than existing employees doing the same jobs. An employee who accepts the lower tier gets the market wage; there is no way the employer can pay less, whether the lower tier gets a lower salary or a greater possibility of layoff because of a consent decree. Many consent decrees that appear to create third-party effects therefore do not, because the “third-parties” are in privity with the parties to the decree. When they are, the Coase Theorem tells us, their private bargains will eliminate the “externalities.”

When the consent is given by an official of the government, however, no one may have the interest or the authority to challenge the decree. The executive officials cannot engage in side bargains with other affected people. What “internalizes” the effects in the employer-employee case is an adjustment in wages or an alteration in who works for whom. There are no similar adjustments inside the government—at least no lawful ones. (We call the remaining ones bribes.) Sometimes adjustments are not possible even through side payments. Legislative officials cannot block consents given by executive officials in charge of litigation, and the successors of these officials (legislative and executive alike) are unknown and cannot participate in the bargaining. The concern about the use of consent decrees should be greatest when the devices that cause parties to take account of third party effects are weakest.

The separation of powers inside a government—and each official’s concern that he may be replaced by someone with a different agenda—creates incentives to use the judicial process to obtain an advantage. The consent decree is an important element in the strategy. Officials of an environmental agency who believe that the regulations they inherited from their predecessors are too stringent may quickly settle a case brought by industry (as officials who think the regulations are not stringent enough may settle a case brought by a conservation group). A settlement under which the agency promulgated new regulations would last only for the duration of the incumbent official; a successor with a different view

---

could promulgate a new regulation. Both parties to the litigation therefore may want a judicial decree that ties the hands of the successor. It is impossible for an agency to promulgate a regulation containing a clause such as "My successor cannot amend this regulation." But if the clause appears in a consent decree, perhaps the administrator gets his wish to dictate the policies of his successor. Similarly, officials of the executive branch may obtain leverage over the legislature. If prison officials believe their budget is too small, they may consent to a judgment that requires larger prisons, and then take the judgment to the legislature to obtain the funds (the alternative is a jail delivery). The rules against sham litigation do not control these practices. It is not a sham for the executive branch to consent to relief when existing practices are illegal or unconstitutional, and a court cannot separate the appropriate consents from the politically motivated ones without deciding the cases on the merits.

There are safety valves. One is that a change in the legislation on which the suit was founded requires the consent decree to be reopened or set aside; another is the willingness of courts to modify decrees based on changes of circumstance; a third is collateral attack by affected third parties. None is wholly satisfactory, because each supposes that the consent decree accurately reflects the existing legal entitlements, that it is like a plea of guilty, that its authority comes from "law" rather than from consent. Thus courts say that there must be a change in law or circumstance—an important one at that—to justify a change in the decree. Many courts put hurdles in the path of collateral attack by third parties.

The strategy does not depend on settlement. Officials may roll over and play dead when sued, hoping that the court will enter a judgment from which they will not appeal. In one case senior military officials tried to undermine a statute by testifying that there was no military need for what Congress had done and then, when the court held the statute unconstitutional because it served no military purpose, recommending no appeal. (The Solicitor General nonetheless directed that the case be appealed, and the case became moot when Congress repealed the statute.) But this essay is about consent judgments, so I do not press the point.

See Williams v. Atkins, 786 F.2d 457 (1st Cir. 1986) (collecting cases dealing with changes in legislation); Duran v. Elrod, 760 F.2d 756 (7th Cir. 1985) (collecting cases dealing with changes in circumstance); Note, The Modification of Consent Decrees in Institutional Reform Litigation, 99 Harv. L. Rev. 1020 (1986); Ashley v. City of Jackson, 464 U.S. 900, 901-02 (1983) (Rehnquist and Brennan, JJ., dissenting from the denial of certiorari) (discussing the scope of collateral attack); United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983) (same); Comment, 53 U. Chi. L. Rev. at 147 (cited in note 18).

See, for example, Berger v. Heckler, 771 F.2d 1556, 1578-80 (2d Cir. 1986); Citizens for Better Environment v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983).

is consent and not the merits of the case that validates a consent decree, however, that has implications for altering or reopening
decrees.

To take seriously the proposition that the decree depends on
consent is to require a court to ask whether the consent was au-
thoritative. If a class representative consents to a judgment or dis-
missal, that is not authoritative because the representative may
not speak for the absent members; the "settlement" sets the stage
for a judicial inquiry into the merits of the case; even then ob-
jecting class members may be allowed to opt out, and the resulting
judgment will be worthless if the representative was not a faithful
champion. If a lawyer settles a case without the consent of his
client, the settlement will be undone. So too with other agents.
The logical question is whether a person making a contractual un-
dertaking to settle a case has the authority to enter into the con-
tract. If he does, the consent is effective. If he does not, the non-
contract does not get any additional force by being filed with a
court. This assimilates the law of contracts and consent decrees;
consent plays the same role in each, and defenses to contracts be-
come grounds on which to reopen or alter decrees.28

A government may change the rules. One legislature may undo
the work of an earlier legislature; an administrator may repeal the
regulations of his predecessor.29 A pledge by the sitting administra-
tor of the EPA never to revise a regulation would be ineffectual.
Many acts are out of bounds to the executive branch—from seizing
steel mills without statutory authority to pledging the payment of
money without an appropriation to promulgating "irrevocable"

27 Hansberry v. Lee, 311 U.S. 32 (1940); Mullane v. Central Hanover Trust Co., 339
Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest, 4 J. Legal Stud. 47,
56-61 (1975).

28 I have not overlooked the possibility that the court's approval of the decree resolves
questions of authority to contract, precluding later denials by those who sign the decree. See
Delaware Valley Citizens' Council v. Commonwealth of Pa., 755 F.2d 38 (3d Cir. 1985). This
is a misuse of principles of preclusion. Those who sign the decree have no incentive to chal-
lenge their own authority, and it should not be possible for a faithless agent who lacks
authority to bind the principal by the expedient of neglecting to point out his own inability
to act. Principles of preclusion do not apply unless the litigants have an incentive to litigate
an issue; here they do not. See Morgan v. South Bend Community School Corp., 797 F.2d
471, 477-78 (7th Cir. 1986) (disagreeing with Delaware Valley). See also United States v.

29 Wilbur v. United States, 281 U.S. 206, 217 (1930); Antonin Scalia, The Role of the
regulations. These rules serve some important purposes. They preserve the character of a republican government by allowing today's majorities to work their will; they recognize the fact that executive officials have a temporally limited mandate. If restraints on the power of the executive to bind the government are desirable—and I am assuming that without independent inquiry—then these restraints must be reflected in the power to contract in or out of litigation.

This is not to say that all exercises of governmental power lapse with the term of the officeholder. Some acts are final in the sense of once-for-all; a pardon has this quality. Some acts are locked in by the Constitution. A promise of immunity from prosecution, in exchange for incriminatory testimony, is made binding by Constitution and statute alike. Some acts have extended duration because that duration has been authorized. Executive officials may sign long-term contracts for the building of aircraft carriers, contracts that expose the government to damages if cancelled. Some decisions have extended life because of procedures that retard change. A valid regulation may be revoked or altered only by the same procedures—and with the same support—that is necessary for a new regulation. On the other hand, executive officials do not have actual authority to waive the polity's immunity from suit, to promise to act at variance with statutes, to pledge that the President will support or sign legislation, or to curtail the discretion of their successors, however much they would love to. All of these rules depend on remembering that the officeholders in the government are agents, and temporary ones at that. Natural people can speak for their own future; the time limits imposed on officeholders are designed in part to prevent them from guiding the polity's behavior for more than a few years, and the substantive constraints on their discretion reflect internal apportionment of powers among officeholders. The question in each case is one of authority. The power of any governmental official is determined by the domestic law of his jurisdiction, and officials in some states may have more extensive powers than federal officials.


The duration of official acts varies with the nature of the act and the need to have long-term commitments in order to carry on the business of government. These limits exist independent of the form in which the government’s action is to be pledged. The question here is whether there is any reason why things should be different if the action is pledged in a consent decree. One reason might be that decrees offer a place in which officials may pledge to administer their statutes properly. This is not a difference, however. Each officeholder can “do right”—and if that means doing what the plaintiffs want, the officeholder can do it and moot the litigation. If the decree promises compliance with the law, then the law is itself the source of obligation to adhere to the decree; if the decree promises more, then the difference must be justified as a contractual pledge.

By and large even authorized contracts may not be specifically enforced against governments. The remedy is a suit for damages for breach of contract, perhaps for a “taking” if the contract establishes property rights. To the extent a consent decree promises specific performance as the remedy for breach, this too is problematic. If a contract with the government fails, the remedy is either damages (if a valid contract was broken) or nothing. “Nothing” here means a vacation of the decree and a restoration of the suit, which may proceed to judgment. Perhaps a consent decree entered in excess of authority (and promising specific performance if there is a breach) could be enforced under the rubric of “estoppel of the government.” The Supreme Court has not held that estoppel is possible, however, and it has concluded that if estoppel is available the minimum requirements include affirmative misconduct and detrimental reliance. This would mean a serious diminution in the ability to litigate the case if it should be reopened.

A second line of argument is that settlement is good in its own right. The arguments developed in Part I of this essay have led courts as well as parties to prefer settlement to litigation. The greater the parties’ leeway to strike bargains, the more cases can be

---

33 See Newport News Shipbuilding, 571 F.2d at 1283 (vacating an unauthorized settlement). Compare United States v. 119.67 Acres of Land, 663 F.2d 1328, 1336-37 (5th Cir. 1981) (holding a settlement effective because specifically authorized by statute); Alliance to End Repression v. City of Chicago, 742 F.2d 1007 (7th Cir. 1984) (en banc) (reading a consent decree to allow the executive branch to change its regulations, thereby avoiding the question).
resolved amicably. If, on the other hand, the executive branch cannot bind the future and can walk away from consent decrees (in the absence of authority to make contracts about regulations), settlement would be less attractive to plaintiffs. So, the argument would conclude, the executive branch must be free in litigation to make promises sufficient to settle cases effectually.\textsuperscript{35} This is a non sequitur. Contracts of all sorts are favored, but restrictions on the power to contract serve purposes of their own. For example, an agent usually needs actual authority to bind the principal. The benefits of contract as an institution do not imply that these restrictions are to be overridden. If an agent could commit the principal without authority, contracts would become even harder to negotiate, because principals would appoint fewer agents and keep them on shorter leashes.

The existence of a good end does not imply much about means. If the executive branch could draw on the Treasury without an appropriation, that would facilitate settlements; if the executive branch could promise not to enforce valid statutes, or vary the terms of statutes, that would facilitate settlements; if the executive branch could sign away the rights of unrepresented parties, that too would facilitate settlements. The list can be extended, all without implying anything about which of these limits on authority should be relaxed in the course of litigation. The status of decrees as contracts cuts both ways. Treating decrees as contracts enables defendants to offer relief that a court could not order and that plaintiffs may greatly prefer.\textsuperscript{36} It is hard to have things both ways; if contractual analogies work to plaintiffs' favor they may work the other way too; legal rules do not depend on which side of the contest reaps the benefit.

If the "attraction" of the decree comes from an unauthorized source, a diminution in its attractiveness is hardly objectionable. We have a complex of rules that determine when one person may bind another. If these rules preclude the adoption of favorable contracts, they should be changed rather than ignored in the course of litigation; if the rules are desirable, they should apply to consent decrees as well as to other contracts. So if it is a good idea that people be forbidden to sell their children into slavery, it remains a good idea even if the parents propose to do so to settle litigation. If it is a good idea that executive officials be able to contract only

\textsuperscript{35} See, for example, Badgley v. Santacroce, 800 F.2d 33, 38 (2d Cir. 1986).
\textsuperscript{36} Local Number 93 v. City of Cleveland, 106 S. Ct. 3063 (1986).
when they have actual authority to do so, it remains a good idea when they propose to settle litigation.

One could argue that the judicial scrutiny preceding approval of the consent decree should enlarge the set of permissible contractual choices. Maybe we ban certain contracts only because we fear they will be adopted improvidently, and judicial examination is a substitute for the prudence of the contracting parties. This is an implausible approach to consent decrees, however, because when the parties settle a case they will not present the judge with the information necessary to enable him to make a judgment about the prudence of the agreement. No external review is available. On top of that, many restrictions on the ability to contract have nothing to do with paternalistic fears of imprudent behavior. They have to do with effects on third parties or on future officeholders. These officeholders are not identifiable even in principle. Elections are unpredictable a few months in advance; consent decrees attempt to govern longer periods. The approval of unidentified voters and officeholders cannot be obtained directly or vicariously through the judge. (It would be weird to portray the judge as a stand-in for future politicians.) The judge cannot easily look out for these third parties, because they will be unrepresented and often will be unidentifiable. Judicial scrutiny of consent decrees therefore is not a good reason to enlarge the set of permitted choices.

Then there is 28 U.S.C. § 518, which authorizes the Attorney General to control the litigation of the United States. Professor Shane believes that Section 518 supplies the authority to make pledges in settlement. Yet all Section 518 does is name the Attorney General as the official responsible for conducting the litigation of the United States. It controls the who, and not the what, of litigation. Neither the text nor the history of this statute suggests that the Attorney General may make in the course of litigation binding commitments that the executive branch as a whole lacks the power to make outside of litigation.

Ultimately there is no good reason to allow consent decrees to make binding promises that exceed the authority the parties would have in the absence of litigation. This is a minority view so far. The unwillingness of courts to take seriously the contractual basis

---

37 Walton v. United Consumers Club, Inc., 786 F.2d 303, 306-07 (7th Cir. 1986), discusses one statute that puts certain contracts (to work for less than the minimum wage) off limits yet authorizes settlements that may pay less than the minimum wage. The rationale is that the Secretary of Labor must approve the settlement. The Secretary's review adds a layer of scrutiny that is missing when parties fully control their own litigation.

of consent judgments has led the Department of Justice, which controls litigation against the United States, to forbid settlements that pledge the government to promulgate or maintain regulations.\footnote{Memorandum from Attorney General Edwin Meese III to all Assistant Attorneys General and all United States Attorneys Re: Department Policy Regarding Consent Decrees and Settlement Agreements (March 13, 1986), reprinted in Review of Nixon Presidential Material Access Regulations: Hearing Before the Subcomm. on Government Information, Justice, and Agriculture of the House Comm. on Government Operations, 99th Cong., 2d Sess. 182 (1986), reprinted in part in 54 U.S.L.W. 2492 (April 1, 1986).} By putting a category of settlements off limits, these regulations make consent decrees even less “attractive” than would a rule allowing the government to settle but retaining the executive branch’s ability to change the rules and resume the litigation.

If the option of binding decrees is unavailable (when binding contracts are unavailable), the principal alternatives are litigating the case to judgment and temporary cessation of hostilities. The defendants may change their practices to plaintiffs’ satisfaction even though they cannot commit their successors to follow the same policies. This may not make the case moot, but it could make litigation unnecessary (from the plaintiffs’ perspective) or improvident (from the courts’).\footnote{Compare Chicago Teachers Union, Local Number 1 v. Hudson, 106 S. Ct. 1066, 1075 n.14 (1986), with Watkins v. Blinzinger, 789 F.2d 474, 483-84 (7th Cir. 1986).} The favorable exercise of discretion may be all the plaintiffs wanted or could hope to receive. This puts litigants on a par with others who seek to influence administrative conduct. A person who persuades the FDA during rule making that a statute requires a particular outcome may find that the agency later changes its mind. Those who obtain laws through political muscle know that legislation and regulations are rented, not bought. So it is with regulations or administrative actions obtained by persuading an official that the statute requires a particular disposition. Tomorrow’s officeholder may conclude that today’s is wrong, and there is no reason why embedding the regulation in a consent decree should immunize it from reexamination when embedding it in C.F.R. does not.

The search for consent also informs the process of revising existing consent decrees. These decrees may be long-term relational contracts, much as twenty-year pacts between electric utilities and coal producers establish frameworks for bargaining and do not resolve all hard issues.\footnote{See Oliver E. Williamson, The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting (1985); Paul L. Joskow, Vertical Integration and Long-Term Contracts: The Case of Coal-Burning Electric Generating Plants, 1 J.L. Econ. & Org. 33 (1985).} If some fundamental supposition of the contract breaks down, there may be nothing to do except dissolve the
relation, which means restoring the case to the docket for trial. If the dispute concerns smaller, unanticipated matters, the court acts more as mediator than adjudicator. The court properly asks whether if this were a private contractual dispute the contract should be avoided or interpreted, and if interpreted how much leeway the adjudicator possesses. What could not be justified as interpretation of a contract also may not be justified as modification of a decree, but the line between reformation and interpretation of a relational contract is not easy to draw. The answer will be found in the nature of the relationship rather than in abstract principles.

42 United States v. Board of Educ. of City of Chicago, 799 F.2d 281, 297-98 (7th Cir. 1986).