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CONSENT DECREES AND THE RIGHTS OF THIRD PARTIES

Larry Kramer*

Until recently, consent decrees were thought of primarily as part of antitrust law. But settlement by consent decree has lately become common in other public law areas: environmental cases, prison cases, school and housing desegregation cases, and especially employment discrimination cases.¹ This, in turn, has generated a great deal of new commentary about consent decrees. Since one of the outstanding characteristics of public law litigation is its tendency to affect individuals and groups who are not parties to the litigation,² a large part of this burgeoning literature concerns the effects of consent decrees on third parties.³

The problem can be illustrated with a simple hypothetical. A plaintiff representing minority interests sues an employer for unlawful discrimination in hiring and promotions. Rather than litigate, the employer finds it cheaper and easier to settle, granting the plaintiff con-

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1. See Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL F. 327, 328 & n.5; Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 888.

2. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

3. See, e.g., Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL F. 103; Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincers Movement on Due Process*, 1987 U. CHI. LEGAL F. 155; Epstein, *Wilder v. Bernstein: Squeeze Play by Consent Decree*, 1987 U. CHI. LEGAL F. 209; Schwarzschild, *supra* note 1; Sullivan, *Enforcement of Government Antitrust Decrees by Private Parties: Third Party Beneficiary Rights and Intervenor Status*, 123 U. PA. L. REV. 822 (1975); Zimmer & Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 1976 DUKE L.J. 163; Comment, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. CHI. L. REV. 147 (1986) [hereinafter Comment, *Collateral Attacks*]; Comment, *The Automobile Pollution Case: Intervention in Consent Decree Settlement*, 5 HARV. C.R.-C.L. L. REV. 408 (1970). See also Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291, 337-42 (1988); Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 30-41.

cessions in the form of affirmative action. This gives the plaintiff what he wants, but at the expense of nonminority employees who are not represented in the litigation. These employees believe that the affirmative action plan violates their rights under Title VII. If the settlement has been entered as a consent decree, what can they do about it?

Such situations are ubiquitous: they arise anytime *A* and *B* find it easier to reach a mutually beneficial settlement by sacrificing the interests of *C*, who is unrepresented in the litigation.⁴ If *A* and *B* agree to an ordinary settlement, *C*'s recourse is to bring an action alleging that the settlement, which is an ordinary contract, violates his rights. If *A* and *B* enter their settlement as a consent decree, however, *C* has a different set of options.

In some ways, *C* is better off with a consent decree than with an ordinary settlement. The court will hold a "fairness hearing" before entering a consent decree to consider whether the settlement is "fair, adequate, and reasonable" to *C*; although the court will not consider the merits of legal claims at this hearing, it may ask the parties to revise the agreement to make its effects on *C* less harsh.⁵ In other ways, however, *C* is worse off. Most importantly, if *C* brings an independent action alleging that the settlement violates his rights, it will be dismissed as an "impermissible collateral attack."⁶ Under this so-called "collateral attack bar," *C* must intervene in the consent decree proceedings under Federal Rule of Civil Procedure 24. If intervention is denied, *C* will be stuck with a disadvantageous and possibly unlawful arrangement that he had no say in making. If intervention is granted, on the other hand, at least some courts assume that in addition to raising claims that the settlement violates his rights, *C* can force an adjudication of *A*'s claim against *B*.⁷

This peculiar set of rules has received mixed reviews in the litera-

4. Additional illustrations are easy to find. For example, in *Harrisburg Chapter of ACLU v. Scanlon*, 500 Pa. 549, 458 A.2d 1352 (1983), the plaintiff brought an action against school officials alleging an establishment of religion by allowing student prayer groups to meet on campus; the defendants settled by agreeing not to allow these groups to meet on campus in the future. In *Wilder v. Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986), *affd.*, 848 F.2d 1338 (2d Cir. 1988), the City of New York was sued for discriminating on the basis of race in placing children in foster homes and residential care facilities. This discrimination allegedly resulted from the City's cooperative arrangement with private Jewish and Catholic agencies which gave preferential treatment to co-religionists, who were predominantly white. The City settled by agreeing to withhold money from the religious agencies, which were dependent on these funds, unless they ceased this practice. See Laycock, *supra* note 3, at 103-10.

5. See *infra* notes 154-55 and accompanying text.

6. See *infra* notes 48-50 and accompanying text.

7. See *infra* notes 134-35 and accompanying text.

ture. Commentators generally approve of fairness hearings,⁸ though some contend that these do not provide much protection.⁹ Most of the attention has been on the collateral attack bar, which everyone agrees is both undesirable and unconstitutional.¹⁰ There is less agreement on what to do about it. Assistant Attorney General Cooper proposes that courts simply abolish this bar and allow third parties to maintain separate actions attacking a consent decree.¹¹ Professor Laycock advances a more dramatic solution. He proposes that courts refuse to enter a consent decree that affects the "arguable rights" of some known or foreseeable third party unless the litigating parties join the third party as a defendant and either submit an agreement that the third party has approved or prove that the third party has no rights in the matter.¹² Other commentators have offered more modest alternatives, such as eliminating the timeliness requirement for intervention in the context of third-party attacks on a consent decree,¹³ or broadening the rights of parties to litigate *jus tertii*.¹⁴

What is missing from these accounts is a well-developed conception of what a consent decree is and why it should be treated specially. Such a conception is necessary to determine what rights third parties should have to attack a consent decree that affects their interests. Accordingly, I begin in Part I by describing the dynamics of the consent decree process: why parties want consent decrees and why courts agree to enforce them. On the basis of this description, I construct a model of the consent decree as a device that encourages settlement by facilitating enforcement of the parties' agreement.

The remainder of the article then applies this model to third-party claims. Part II considers whether there is any reason to prevent third parties from bringing an independent action attacking a consent decree. Part II concludes that the collateral attack bar is a form of abstention, serving interests of comity and judicial economy by channeling third-party attacks to the court that entered the consent decree. However, requiring mandatory intervention shortens the time third parties have to seek relief. Because courts lack authority to mod-

8. See, e.g., Schwarzschild, *supra* note 1, at 929-30; Zimmer & Sullivan, *supra* note 3, at 210-24; Comment, *Consent Decrees and the Judicial Function*, 20 CATH. U. L. REV. 312, 327 (1970).

9. See Laycock, *supra* note 3, at 137-39; Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 93-96.

10. See, e.g., Laycock, *supra* note 3; Cooper, *supra* note 3; Comment, *Collateral Attacks*, *supra* note 3; Mengler, *supra* note 3, at 319.

11. See Cooper, *supra* note 3, at 176.

12. See Laycock, *supra* note 3, at 128-29.

13. See Comment, *Collateral Attacks*, *supra* note 3, at 173.

14. See Epstein, *supra* note 3, at 228-31.

ify substantive rights, I suggest replacing the collateral attack bar with a simpler procedure of consolidating third-party claims and consent decree proceedings. Part III then addresses the distinct issue of whether the collateral attack bar is constitutional. I discuss this issue despite the conclusion in Part II because the Supreme Court has agreed to hear a case presenting it this Term,¹⁵ and because, unlike other commentators, I believe that, properly applied, the collateral attack bar is constitutional. The remainder of the article then fleshes out the details of third-party challenges to the legality of a consent decree. Part IV discusses the substantive claims that third parties can raise and the form of the remedy if they are successful. Part V addresses the need for fairness hearings and concludes that such hearings should not be required. The result is a comprehensive description of how third-party rights should be protected in the context of consent decrees.

I. THE NATURE OF CONSENT DECREES

What exactly is a consent decree? Opinions have varied over the years, and there is still no consensus.¹⁶ One view is that a consent decree is merely a private contract between the parties.¹⁷ Another view treats a consent decree as a judgment of the court.¹⁸ The dominant modern view is that a consent decree is a hybrid, with elements of both contract and judgment.¹⁹ This view requires the court to decide whether a particular problem implicates the contract or judgment aspect of a consent decree; once the proper category is identified, the rules applicable to that category are applied.²⁰

But a consent decree is neither a contract nor a judgment — and it

15. *Martin v. Wilks*, cert. granted, 108 S. Ct. 2843 (1988).

16. Mengler, *supra* note 3; Resnik, *supra* note 9, at 54-56.

17. See, e.g., *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971); *South v. Rowe*, 759 F.2d 610, 613 (7th Cir. 1985); 3 A.C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 1350, at 2773 (5th ed. 1925); Easterbrook, *supra* note 3.

18. See, e.g., *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932); *Railway Employees v. Wright*, 364 U.S. 642, 650-52 (1961); 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.409[5], at 330-31 (1984); Fiss, *Justice Chicago Style*, 1987 U. CHI. LEGAL F. 1, 3, 12.

19. See, e.g., *Local 93, Intl. Assn. of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-37 & n.10 (1975); *United States v. American Cyanamid Co.*, 719 F.2d 558, 563 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984); Schwarzschild, *supra* note 1, at 894-95.

20. See, e.g., *Ho v. Martin Marietta Corp.*, 845 F.2d 545, 547 (5th Cir. 1988); *Dunn v. Carey*, 808 F.2d 555, 559 (7th Cir. 1986); *Williams v. City of New Orleans*, 729 F.2d 1554, 1559 & n.6 (5th Cir. 1984); *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 561 (6th Cir. 1982), *revd. on other grounds sub nom. Firefighters Local Union 1784 v. Stotts*, 467 U.S. 561 (1984); *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224, 226 (10th Cir. 1979).

is both. This whole way of thinking about consent decrees is improper, for it leads courts to focus on outer appearance rather than underlying purpose. A consent decree is what it is: an agreement between the parties to end a lawsuit on mutually acceptable terms which the judge agrees to enforce as a judgment. What is critical is why the parties want judicial assistance and why the court agrees (or should agree) to provide it. If contract or judgment rules apply to consent decrees, it is because the nature of the parties' agreement or the reason for judicial assistance is such that the justification for a particular contract or judgment rule also makes sense for consent decrees. But the fact that consent decrees often resemble contracts or judgments does not mean that this will always be the case. There may be instances in which the appropriate rule for a consent decree is different from both contract and judgment rules.

In order to understand consent decrees properly, then, we need a fuller appreciation of the dynamics of the consent decree process: Why do parties want consent decrees? Why should courts agree to enforce them?²¹

One party files a lawsuit against another. Rather than spend time and money and still risk losing at trial, the parties will usually negotiate a settlement. Negotiating a settlement is like negotiating any agreement against a background of uncertainty. If the plaintiff's minimum offer is less than the defendant's maximum offer, and if excessive second-guessing does not cause the bargaining process to falter, an agreement will be reached and the case will be voluntarily dismissed.

In this, the typical settlement, there is no further judicial involvement. The agreement by which the plaintiff agrees to dismiss his lawsuit is an ordinary contract, and it can be enforced, modified or set aside as such.

Sometimes, however, the parties ask the court to enter their settlement as a decree. This has some rather important consequences. If either party fails to live up to the agreement, the other party can obtain contempt sanctions without having to file an independent lawsuit on the contract. This allows the party seeking enforcement to avoid some of the expense of a separate lawsuit. Perhaps more importantly, it enables the party seeking enforcement to avoid the court's docket queue and obtain sanctions more quickly than if a new lawsuit had to be filed. In addition, if the settlement is entered as a decree, the court may provide additional assistance (like appointing a monitor to over-

21. A similar account of this process is given by Mengler, *supra* note 3.

see implementation) and will interpret the decree to help the parties resolve disputes before they reach the point of formal litigation.

It is easy, in light of these benefits, to see why a plaintiff might prefer a consent decree to a private contract. By speeding up the process and lowering the cost of enforcement, consent decrees enhance the plaintiff's ability to hold the defendant to his bargain. Indeed, the benefits of a consent decree are often indispensable to plaintiffs in public law or institutional reform litigation.²² The plaintiffs in these cases are frequently short on resources; they are typically represented by *pro bono* counsel or by counsel financed through government legal aid; often the class is unorganized and each member has only a small stake in the outcome. In addition, settlements providing for the installation of pollution control devices, the implementation of affirmative action, or the construction of new facilities to house prisoners or mental health patients can be extremely complicated. The parties often anticipate taking years to fulfill the agreement. Moreover, as the agreement grows more complex, it becomes increasingly likely that there will be disputes over its interpretation. Consequently, the availability of a consent decree may make a significant difference in the willingness of the plaintiff to settle.²³

The defendant's reasons for agreeing to a consent decree are somewhat different. Except in rare instances, the plaintiff's side of the bargain is simply to drop the lawsuit, and the defendant does not need a device to facilitate enforcement. Indeed, if anything, such devices are to the defendant's disadvantage. But the reduced expense of resolving

22. See Neuborne & Schwarz, *A Prelude to the Settlement of Wilder*, 1987 U. CHI. LEGAL F. 177.

23. A few commentators have suggested that plaintiffs favor consent decrees because these may provide broader relief than would be available after a trial. See, e.g., Flynn, *Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals*, 53 IOWA L. REV. 983, 1003 (1968); Note, *The Modification of Antitrust Consent Decrees*, 63 HARV. L. REV. 320 (1949). But this only explains why the parties might choose a consent decree over litigation. Parties cannot do more if they settle by consent decree than they could do if they settle by private contract. See Local 93, Intl. Assn. of Firefighters v. City of Cleveland, 478 U.S. 501, 515-18, 529-30 (1986) (an affirmative action plan in a consent decree could not exceed the limits established for a "purely private contractual agreement" in *United Steelworkers v. Weber*, 443 U.S. 193 (1979)). The argument about broader relief thus does not explain why a plaintiff might prefer a consent decree to a private contract.

There is one rather important exception to the rule that parties cannot do more substantively in a consent decree than they could do in an ordinary settlement: limitations on the extent to which one government administration can bind its successors by contract are not applied if the contract is entered as a consent decree. See Shane, *Federal Policymaking by Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241; McConnell, *Why Hold Elections? Using Consent Decrees To Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295. Other commentators have criticized allowing consent decrees to bind subsequent administrations. See *id.*; Easterbrook, *supra* note 3, at 30-41. Their criticisms are consistent with the approach to consent decrees discussed here insofar as they suggest that there is no justification for giving consent decrees greater effect than contracts.

disputes in the implementation phase is advantageous to the defendant as well as the plaintiff. Moreover, it is generally easier to obtain modification of a consent decree than a contract if circumstances change.²⁴ Most importantly, if the plaintiff wants a consent decree badly enough, the defendant can obtain additional bargaining concessions in return.

But why should the court enter a consent decree? The answer, already suggested by the analysis above, is that making consent decrees available facilitates the settlement of difficult cases that might otherwise go to trial, furthering the strongly held policy favoring settlement over litigation. The reasons for this policy are well known.²⁵ Settlement is more efficient for the parties, giving them more of what they hoped to gain at less cost. More importantly, settlement allows already overburdened judges to devote time to cases that are not settled voluntarily.

The chief difficulty with this justification is that there is no assurance that consent decrees do in fact facilitate settlement and conserve judicial resources.²⁶ Judith Resnik recently pointed to the dearth of empirical support for the assertion that cases settled by consent decree would not have settled otherwise.²⁷ She also observed that entering a consent decree is not costless.²⁸ The court must interpret the agree-

24. See Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEXAS L. REV. 1101 (1986); Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 752-57.

25. See W. BRAZIL, *SETTLING CIVIL SUITS* (1985); Easterbrook, *supra* note 3, at 21-30; Mengler, *supra* note 3, at 327-32; Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363 (1983-1984); Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

26. Owen Fiss challenges the policy favoring settlement on the ground that there is more "justice" in litigation. See Fiss, *supra* note 18; Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). His position, which has been criticized elsewhere, see Easterbrook, *supra* note 3, stands in contrast to the overwhelming consensus among courts and lawmakers. The policy favoring settlement has been recognized — and acted upon — by both the Supreme Court, see, e.g., *Evans v. Jeff D.*, 475 U.S. 717 (1986); *Marek v. Chesny*, 473 U.S. 1 (1985); *Carson v. American Brands, Inc.*, 450 U.S. 79, 86-90 (1981), and numerous lower courts, see, e.g., *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 555 (1982), *revd. on other grounds sub nom. Firefighters Local Union 1784 v. Stotts*, 467 U.S. 561 (1984); *United States v. City of Alexandria*, 614 F.2d 1358, 1362 (5th Cir. 1980); *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826, 846-49 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *Patterson v. Newspaper & Mail Deliverers' Union*, 514 F.2d 767, 771 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976); *Wilder v. Bernstein*, 645 F. Supp. 1292, 1308 (S.D.N.Y. 1986), *affd.*, 848 F.2d 1338 (2d Cir. 1988). The purpose of Rule 68 of the Federal Rules of Civil Procedure is to encourage settlements, and a primary reason for the 1983 amendments to Rule 16 was to enhance the power of the federal judiciary to facilitate settlements. Federal Rule of Evidence 408 excludes evidence of settlement offers and statements made while negotiating settlements in order to promote "the public policy favoring the compromise and settlement of disputes." FED. R. EVID. 408 advisory committee's note. Given the present judiciary and its caseload, the policy favoring settlement is indispensable — a point even sympathizers of Professor Fiss have been willing to concede. See Sarokin, *Justice Rushed Is Justice Ruined*, 38 RUTGERS L. REV. 431, 433-34 (1986).

27. Resnik, *supra* note 9, at 67-69.

28. *Id.* at 69-85.

ment if the parties seek judicial assistance before litigation and adjudicate disputes that remain unresolved. Thus, even if some cases are settled only because the parties obtain a consent decree, we still do not know that this results in a net savings of judicial resources.

Professor Resnik is correct that little empirical evidence demonstrates the net benefits of consent decrees. On the other hand, there is no empirical evidence that consent decrees do not produce such benefits. Until such evidence is produced, the better assumption seems to be that consent decrees are worth the effort needed to enforce them. This assumption is supported by the analysis above, which suggests that consent decrees are probably indispensable in settling at least some cases. And it is generally agreed that the fact that consent decrees are negotiated voluntarily but can be enforced by contempt sanctions makes them the most effective — and cheapest — way to implement a remedial plan.²⁹ Even Professor Resnik concedes that “there is some intuitive appeal to believing that consent decrees have . . . more persuasive force than court decrees imposed after adjudication”³⁰ Finally, both these points and the conclusion that consent decrees are an efficient allocation of judicial resources are supported by judicial experience and by what limited evidence we do have.³¹

This description of the consent decree process provides a basis for thinking about how to administer consent decrees. Given a choice between alternative rules, a court should first consider which alternative better facilitates voluntary settlement. This is where (and why) contract law is often useful, since it is generally designed to enable parties to reach binding agreements.

For example, a consent decree is interpreted like a contract.³² Ac-

29. See, e.g., *United States v. City of Miami*, 664 F.2d 435, 442 (5th Cir. 1981) (*en banc*) (Rubin, J., concurring); *United States v. City of Jackson*, 519 F.2d 1147, 1152, n.9 (5th Cir. 1975); Anderson, *supra* note 24, at 748-52; McEwen & Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC. REV. 11, 47 (1984); Note, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 YALE L.J. 1811, 1830 (1986).

30. Resnik, *supra* note 9, at 70.

31. See Neuborne & Schwarz, *supra* note 22, at 180-81; Anderson, *supra* note 24 (case study of three consent decrees); McEwen & Maiman, *supra* note 29. Congress examined the Department of Justice's use of consent decrees in antitrust cases in the late 1950s and again in the early 1970s. See ANTITRUST SUBCOMM. OF THE HOUSE JUDICIARY COMM., 86TH CONG., 1ST SESS., REPORT ON THE CONSENT DECREE PROGRAM OF THE DEPARTMENT OF JUSTICE (Comm. Print 1959); H.R. REP. NO. 1463, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6535. Although Congress eventually decided to regulate the negotiating process, see Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 16(b)-(h) (1982), there was general agreement that consent decrees were a cost-effective device for obtaining settlements.

32. See *South v. Rowe*, 759 F.2d 610, 613 (7th Cir. 1985); *Brown v. Neeb*, 644 F.2d 551, 557 (6th Cir. 1981); Handler, *Twenty-Fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 22-24 (1972).

according to the Supreme Court, this is because a consent decree is negotiated like a contract.³³ But the terms of an ordinary judgment are often negotiated by the parties after liability has been determined through litigation,³⁴ and the Court has never suggested that a litigated decree should be interpreted like a contract. Rather, the reason it makes sense to interpret a consent decree like a contract is that a consent decree represents only what the parties have agreed to do, and the court's participation in enforcing the decree is simply a means of encouraging the parties to make such agreements. The policy protecting justified party expectations that underlies contract law is thus fully applicable. With a litigated decree, by contrast, judicial participation is compelled by one party's invocation of right under substantive law. The court must therefore interpret the decree in light of what the substantive law requires to remedy a proven violation.

But contract law will not always be appropriate for consent decrees, and the court's participation may sometimes require the development of special procedures. For instance, in *Local 93, International Association of Firefighters v. City of Cleveland*,³⁵ the Supreme Court held that a court cannot approve a consent decree unless it (1) determines that the consent decree "spring[s] from and serve[s] to resolve a dispute within the court's subject-matter jurisdiction"; (2) ensures that the consent decree comes "within the general scope of the case made by the pleadings"; and (3) satisfies itself that the consent decree "further[s] the objectives of the law upon which the complaint was based."³⁶ The exact reason for these requirements has puzzled some commentators,³⁷ but they follow naturally from an understanding of consent decrees as a method of facilitating settlement by making judicial resources available, under certain circumstances, to help the parties enforce their agreement. The court is not "a recorder of contracts" from whom parties can freely purchase injunctions.³⁸ The court only agrees to "record" and enforce a particular kind of contract: one that saves judicial resources by settling a lawsuit. The re-

33. *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-37 (1975).

34. See Jost, *supra* note 24, at 1103; Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 653-54 (1982); Diver, *The Judge as Political Power Broker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 82-83 (1979).

35. 478 U.S. 501 (1986).

36. 478 U.S. 525 (quoting *Pacific R.R. Co. v. Ketchum*, 101 U.S. 289, 297 (1880)).

37. See, e.g., Resnik, *supra* note 9, at 59, 83-84.

38. 1B J. MOORE, J. LUCAS & T. CURRIER, *supra* note 18, ¶ 0.409[5]. See also *System Fedn. No. 91 v. Wright*, 364 U.S. 642, 651 (1961) ("parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction").

quirements for approval set forth in *Local 93* help insure that only such contracts are entered as consent decrees.³⁹

Moreover, the court is concerned with other interests in addition to facilitating settlement, and the pursuit or protection of these interests may impose limits on the consent decree device. Consider, for example, the question of modifying a consent decree over the objection of one of the parties. One might extend the argument for interpreting consent decrees according to principles of contract law to modification. But the Supreme Court held contract law inapplicable to consent decree modification in *United States v. Swift & Co.*⁴⁰ The Court explained that a consent decree is a "judicial act,"⁴¹ an unsatisfying explanation made even more so by the fact that the Court articulated a test for modifying a consent decree that is stricter than the test for modifying judgments entered after litigation.⁴² How, then, does one explain the rules governing consent decree modification?

An argument can be made that entering the parties' agreement as a judgment associates the court with a consent decree in a way that is not true of ordinary contracts.⁴³ This, in turn, gives the court an institutional stake in the consent decree beyond protecting the parties' expectations, and justifies retaining additional power to modify the decree if, in the words of Justice Cardozo, the court is "satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong."⁴⁴

The hard question is deciding how broad this power should be. The *Swift* Court apparently thought that a narrow power would suffice.⁴⁵ Courts today are often willing to modify consent decrees on a less stringent showing.⁴⁶ I do not address this issue here. My point is

39. These requirements obviously measure the need for a consent decree imperfectly. The court has discretion to refuse to enter a proposed consent decree, *Kasper v. Board of Election Comms.*, 814 F.2d 332 (7th Cir. 1987); *Zimmer & Sullivan*, *supra* note 3, at 212, and judges could — and perhaps should — refuse to enter a consent decree when there is no genuine dispute or when resolving a dispute does not require assistance from the court.

40. 286 U.S. 106 (1932).

41. 286 U.S. at 115.

42. See Jost, *supra* note 24, at 1111; Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1022-26 (1986).

43. Mengler, *supra* note 3, at 320; Rotunda, *The Public Interest Appellant: Limitations on the Right of Competent Parties to Settle Litigation Out of Court*, 66 NW. U. L. REV. 199, 223-24 (1971).

44. *Swift & Co.*, 286 U.S. at 114-15.

45. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. . . . Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.
286 U.S. at 119.

46. See, e.g., *New York State Assn. for Retarded Children v. Carey*, 706 F.2d 956, 968-70

simply to illustrate that beyond the question of whether a particular rule facilitates settlement lies the additional question of whether further adjustments are necessary because of the court's involvement in the enforcement process.

II. THIRD-PARTY RIGHTS TO CHALLENGE CONSENT DECREES

What implications does this model of the consent decree process have for rules governing third-party attacks on a consent decree? Recall the hypothetical case described in the introduction: A plaintiff representing minority interests (*A*) sues an employer (*B*) for employment discrimination, and they settle. *A* drops the lawsuit in exchange for *B*'s agreement to implement affirmative action. The judge enters this settlement as a consent decree. Nonminority employees (*C*) learn of the consent decree and conclude that what *B* has agreed to do violates their rights under Title VII. What can *C* do?

Given the analysis in Part I, the answer would seem to be that *C* can file a lawsuit to enjoin *B* from violating *C*'s rights — just as *C* could have done if the contract between *A* and *B* had not been entered as a consent decree. The court's willingness to enter the contract as a judgment to encourage *A* and *B* to settle says nothing about any rights *C* may have. And the court's stake in protecting the agreement from attack (or, if illegal, from being undone) is no greater than if the settlement had been by private contract and *C* was now attacking the contract in court.

Nonetheless, most courts will dismiss *C*'s separate action challenging a consent decree and advise *C* to seek relief from the court that entered the decree by becoming a party to that proceeding.⁴⁷ As noted

(2d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983) (Friendly, J.) ("[A] consensus is emerging among commentators in favor of modification [of consent decrees] with a rather free hand."); *United States v. City of Chicago*, 663 F.2d 1354, 1359-60 (7th Cir. 1981) (*en banc*); Jost, *supra* note 24, at 1113-20.

47. See, e.g., *Marino v. Ortiz*, 806 F.2d 1144 (2d Cir. 1986), *affd. by an equally divided Court*, 108 S. Ct. 586 (1988); *Deveraux v. Geary*, 765 F.2d 268 (1st Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982), *cert. denied*, 464 U.S. 900 (1983); *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 558-59 (6th Cir. 1982), *revd. on other grounds sub nom. Firefighters Local Union 1784 v. Stotts*, 467 U.S. 561 (1984); *Society Hill Civic Assn. v. Harris*, 632 F.2d 1045, 1050-51 (3d Cir. 1980); *Black & White Children v. School Dist.*, 464 F.2d 1030 (6th Cir. 1972); *Prate v. Freedman*, 430 F. Supp. 1373 (W.D.N.Y. 1977), *affd. without opinion*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); *McAler v. American Tel. & Tel. Co.*, 416 F. Supp. 435, 438 (D.D.C. 1976); *O'burn v. Shapp*, 70 F.R.D. 549 (E.D. Pa. 1976), *affd. without opinion*, 546 F.2d 417 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977). The Seventh and Ninth Circuits initially endorsed the collateral attack bar, but recent statements suggest that they may not adhere to this position. Compare *Burns v. Board of School Comms.*, 437 F.2d 1143, 1144 (7th Cir. 1971), and *Dennison v. City of Los Angeles Dept. of Water & Power*, 658 F.2d 694, 695 (9th Cir. 1981), with *Dunn v. Carey*, 808 F.2d 555, 558-60 (7th Cir. 1986), and *County of Orange v. Air California*, 799 F.2d 535, 538 (9th Cir. 1986), *cert. denied*. 107 S. Ct. 1605 (1987). Only the Eleventh Circuit has expressly rejected the bar. See *In*

in the introduction, this doctrine is called the "collateral attack bar." The name is somewhat inapt because "collateral attack" ordinarily refers to a party's attempt to avoid a judgment rendered against that party in a different action. Since *C* was not a party to the action between *A* and *B*, it is strange to think of *C*'s lawsuit against *B* as a "collateral attack": no judgment was ever rendered against *C*. Having said that, I will conform to practice and use the label.

The collateral attack bar does not apply to every claim that *C* has against *B*, or even to every claim that is related to the dispute settled in the consent decree. It is limited to claims that (1) seek to enjoin the implementation of a consent decree (2) on the ground that the decree requires *B* to take action that violates *C*'s rights.⁴⁸ Thus, it does not bar an independent action alleging that a consent decree breached prior contractual rights of *C* if the remedy sought is damages.⁴⁹

The collateral attack bar affects *C* in two distinct ways. First, it limits *C*'s choice of forum: *C* is allowed to seek relief only in the proceeding in which the consent decree was entered. Second, it shortens the time *C* has to bring his claim. This is because courts require *C* to join the consent decree proceeding by intervening. Federal Rule of Civil Procedure 24 requires that a motion to intervene be "timely," and in practice Rule 24's time limit is invariably shorter than the applicable statute of limitations.

A justification for the collateral attack bar is not immediately apparent. Unless precluded by *res judicata*, a party can ordinarily have his claim adjudicated by any court with jurisdiction. Since *C* was — by hypothesis — not a party to the lawsuit that was settled by the consent decree nor in privity with a party to that lawsuit, *C*'s claims are not barred by *res judicata*. *C* therefore ought to be able to sue in any court with jurisdiction. Had *A* and *B* settled their lawsuit with an ordinary contract, *C*'s right to sue would not be limited. Why should the result be different simply because the court agreed to enter that contract as a judgment?

Courts that enforce the collateral attack bar have answered in two ways. First, they note that the threat of subsequent third-party attacks discourages parties from agreeing to settle.⁵⁰ Second, they point

re Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1498 (11th Cir. 1987), cert. granted sub nom. Martin v. Wilks, 108 S. Ct. 2843 (1988); United States v. Jefferson County, 720 F.2d 1511, 1518 (11th Cir. 1983).

48. See Highland Petroleum, Inc. v. United States Dept. of Energy, 798 F.2d 474, 477-80 (Temp. Emer. Ct. App. 1986).

49. E.g., W.R. Grace & Co. v. Local Union No. 759, Intl. Union of United Rubber Workers, 461 U.S. 757 (1983).

50. See, e.g., *In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492,

out that adjudicating a lawsuit that attacks the provisions of a consent decree duplicates work already done by the court that entered the decree, and creates a risk of inconsistent or conflicting injunctions from different courts.⁵¹

The argument that separate third-party lawsuits should be barred because they discourage settlement is consistent with the justification for consent decrees discussed in Part I. From this perspective, the collateral attack bar is a procedural rule that furthers the goal of facilitating settlement. But one can have too much of a good thing. Settlement is not the ultimate end of the legal process; the ultimate end is the just disposition of parties' claims. Settlement is merely a means to this end. It may be a preferred means because it is fast and inexpensive, and to this extent facilitating settlement may justify some limitations on parties' rights.⁵² But it would be an obvious distortion of the legal process to say that the claims of some parties should be forfeit in order to make it easier for other parties to settle. It is no less a distortion to make it harder for some parties to obtain a hearing solely to achieve this end. Without a reason to prefer the claims of the parties who settle to the claims of third parties affected by the settlement, the collateral attack bar cannot be justified on the ground that it discourages third-party claims.

The argument that separate third-party lawsuits should be barred to prevent duplication of effort and conflicting judgments fares better. The judge who entered a consent decree is familiar with the dispute, and it is obviously desirable to take advantage of this familiarity by bringing related disputes before the same judge.⁵³ More importantly, a successful third-party attack will necessarily result in conflicting injunctions, since the judgment in the second action will enjoin compliance with the consent decree. *B* must then seek to have the consent decree modified. But the judge who entered the consent decree may

1498 (11th Cir. 1987), *cert. granted sub nom.* *Martin v. Wilks*, 108 S. Ct. 2843 (1988); Schwarzschild, *supra* note 1, at 919, 922-23; Comment, *Collateral Attacks*, *supra* note 3, at 168-72.

51. See, e.g., *Marino v. Ortiz*, 806 F.2d 1144, 1146 (2d Cir. 1986), *affd. by an equally divided Court*, 108 S. Ct. 586 (1988); *Thaggard v. City of Jackson*, 687 F.2d 66, 68-69 (5th Cir. 1982).

52. See, e.g., *Marek v. Chesney*, 473 U.S. 1 (1985) (interpreting Federal Rule of Civil Procedure 68 to include attorney's fees as part of "costs" in order to facilitate settlement).

53. The common wisdom used to be that judges enter consent decrees with little or no inquiry into the substance of the dispute. See, e.g., *Donovan & McAllister, Consent Decrees in the Enforcement of Federal Anti-trust Laws*, 46 HARV. L. REV. 885, 914-15 (1933); Note, *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 HARV. L. REV. 1314, 1316 (1959). Statements to this effect are still found in the secondary literature, but rubber-stamping is in fact much less common. While the degree of participation probably varies from judge to judge, most judges participate to some extent in the negotiation and entry of a consent decree settlement. Resnik, *supra* note 9, at 60. This is consistent with the general trend in the federal courts toward increased judicial management.

disagree with the ruling in the second case or may think that the remedy ordered there was excessive. That judge may refuse to modify the consent decree, leaving *B* to seek modification of the litigated decree. If neither judge ends the tennis match, *B* will be subject to conflicting obligations under the threat of contempt from two courts.

We could just ignore this possibility on the theory that parties should sleep in the beds they make for themselves. But that is hardly a desirable solution from the standpoint of either comity or judicial economy. The collateral attack bar avoids these problems by channeling related claims into the same court. We get one judgment from one judge applicable to all concerned parties. We save time and effort and avoid the tricky jurisdictional and comity issues raised by competing injunctions.⁵⁴

The bar on third-party collateral attacks thus turns out to be an abstention doctrine: one court dismisses an action in favor of the concurrent jurisdiction of another court that is deemed to provide a more appropriate forum.⁵⁵ Explaining the justification for the collateral attack bar exposes what is wrong with it. As noted above, the collateral attack bar disadvantages third parties in two ways: it limits their choice of forum, and it shortens the time within which they must seek relief. But, this account of the bar only justifies remitting third parties to the consent decree proceeding. It does not justify requiring them to seek relief sooner than they would have to otherwise.

It might be possible to defend the collateral attack bar by arguing that its benefits are great enough to justify imposing this additional burden on third parties. But courts lack the competence to make this judgment. The assessment of costs and benefits necessary to make this defense depends on factual data that are not available to courts deciding cases: How much are third parties disadvantaged by this bar? How costly is the duplication of effort and how likely is it that courts will issue conflicting judgments without the collateral attack bar? Moreover, the judgment that must be made requires a choice between incommensurate values: the benefits to the judicial system in terms of comity and economy versus the costs to third parties from having to take legal action more quickly.

In addition to lacking competence, courts also lack authority to create the collateral attack bar. Courts can modify procedural rights

54. This explains why the collateral attack bar does not extend to suits seeking damages, since an award of damages will not create these problems. See *supra* note 49 and accompanying text.

55. An appropriate analogy could also be drawn to the doctrine of *forum non conveniens*. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

and require parties to bring their claims in a particular forum or proceeding — all abstention doctrines have this effect. But the collateral attack bar modifies the substantive rights of third parties by superseding the ordinarily applicable limitations period with Rule 24's timeliness requirement.⁵⁶ As such, it exceeds the courts' narrow authority to fashion abstention doctrines.⁵⁷ Whether the goal of facilitating settlement is important enough to justify altering otherwise applicable limitations periods is a decision that must be made by Congress.⁵⁸

These criticisms of the collateral attack bar are limited to the fact that it shortens the time third parties have to seek relief. But the courts that developed the collateral attack bar simply assumed that intervention is the only way third parties can join the consent decree proceeding. There is another way, however, one that does not suffer from this defect: transfer a third party's case to the district in which the consent decree was entered (if transfer is necessary⁵⁹) and consolidate it with the consent decree proceedings. This will channel the third party's action to the appropriate court without affecting that party's substantive rights.

The option to transfer and consolidate third-party claims is available throughout the life of the decree. Most consent decrees include express retention of jurisdiction clauses empowering the court to hear all disputes concerning the decree as long as it continues in effect.⁶⁰ But courts retain jurisdiction to modify or terminate a consent decree even without such a clause.⁶¹

Transfer can be effected pursuant to 28 U.S.C. § 1404(a), which permits the court to transfer a case "[f]or the convenience of parties and witnesses, in the interest of justice." Alternatively, a third-party challenge can be transferred under 28 U.S.C. § 1631, which provides

56. The right modified depends on the nature of the third party's claim. For example, if an employment discrimination claim is based on Title VII, the collateral attack bar modifies the period established in 42 U.S.C. § 2000e-5(e) (1982), which permits a charge to be filed within a given number of days (usually 180) after the employer takes specific action that affects the plaintiff (not after the employer agrees with someone else in a consent decree to take such action). If the claim was against a government employer under the fourteenth amendment, the collateral attack bar would alter the limitations period applicable under 42 U.S.C. § 1988 (1982).

57. See *Murray v. Carrier*, 106 S. Ct. 2639, 2679 (1986) (Brennan, J., dissenting); Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

58. See also 28 U.S.C. § 2072 (1982) (rules of civil procedure "shall not abridge, enlarge or modify any substantive right"). While abstention doctrines are treated as interpretations of statutes conferring jurisdiction rather than as applications of the rules of civil procedure, the sentiment expressed by this limitation is applicable.

59. Most third-party claims are filed in the district where the consent decree was entered simply because most controversies are local.

60. See Anderson, *supra* note 24, at 736.

61. See *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932); *Sarabia v. Toledo Police Patrolman's Assn.*, 601 F.2d 914, 917 (6th Cir. 1978).

that whenever the court finds that "there is a want of jurisdiction" — the usual result of abstaining under the collateral attack bar — the court "shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action . . . could have been brought" Consolidation is then permitted under Federal Rule of Civil Procedure 42 "[w]hen actions involving a common question of law or fact are pending before the court."

Ordinarily, the decision to transfer or consolidate a case rests in the discretion of the trial judge.⁶² But if the alternative is to dismiss on the ground that the case should be heard in a different forum, failure to exercise that discretion should be deemed an abuse. Courts can abstain from hearing separate third-party actions in order to channel these actions to the consent decree proceedings in the interests of comity and judicial economy. In doing so, however, they must utilize procedures like the provisions for transfer and consolidation that preserve the substantive rights of third parties.

This simple alternative to the collateral attack bar seems so obvious that it is surprising that it has been overlooked.⁶³ Perhaps the answer is, as Professor Laycock and Assistant Attorney General Cooper evidently believe, that the real agenda behind the collateral attack doctrine is to enable some parties to settle by bargaining away third-party interests.⁶⁴ In any event, the collateral attack bar should be invalidated because the legitimate purposes it serves can be fully vindicated in a way that does not affect the substantive rights of third parties.

Federal Rule of Civil Procedure 19 provides another alternative to the collateral attack bar. Under Rule 19, the defendant can compel joinder of any party who

claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.⁶⁵

62. *Jarvis Christian College v. Exxon Corp.*, 845 F.2d 523, 528 (5th Cir. 1988); *Manuli, U.S.A. v. United States*, 659 F. Supp. 244, 247 (Ct. Intl. Trade 1987); *Comptroller of the Currency v. Calhoun First Natl. Bank*, 626 F. Supp. 137, 140 n.10 (D.D.C. 1985).

63. The court in *Bolden v. Pennsylvania State Police*, 578 F.2d 912, 916-17 (3d Cir. 1978), noted that a district court transferred two civil actions challenging the validity of a consent decree to the district where the consent decree was entered, and the cases were assigned to the judge who had heard the original case (although they were not consolidated). Neither the Third Circuit nor any other court has recognized the significance of this solution or adopted it as standard practice. No commentator has even mentioned this option.

64. See Laycock, *supra* note 3; Cooper, *supra* note 3.

65. FED. R. CIV. P. 19(a)(2).

Although this right is generally treated as a defense that can be waived by the parties,⁶⁶ there is a narrow category of cases (involving what used to be called indispensable parties) in which courts will order joinder *sua sponte*.⁶⁷ This category could be expanded to include consent decree cases, making the duty to join third parties mandatory and eliminating the need for a bar on independent third-party claims.⁶⁸

This alternative is inferior to a consolidation procedure for several reasons. First, it requires the court to identify which third parties need to be joined, a task that turns out to be rather difficult.⁶⁹ As Professor Laycock — who advocates a Rule 19 approach — admits, [t]he effects of a consent decree may ripple outward, with smaller and smaller effects on more and more people, many of whom cannot feasibly be joined. Injunctive litigation could rarely proceed if it were necessary to join every third party who might be affected. [It is necessary to develop] criteria for identifying those third parties whose stake in the litigation is so great that no consent decree should be entered without their consent.⁷⁰

But Professor Laycock can do no better than to require the joinder of a third party “if it is foreseeable [that he] will be significantly affected by the proposed decree and that he has an arguable legal claim that he cannot be so affected.”⁷¹

Second, the court must make difficult choices with respect to who shall represent individuals who must be joined. In an employment discrimination case, for example, it may be unclear whose interests a union can or should represent if it has members on both sides of the dispute. And if there is no union, or if the case involves applicants or employees who are not union members, how is the court to choose an appropriate class representative? More importantly, how is the court to choose (and who is going to pay) the attorneys for such a class?

Third, requiring joinder of all third parties who may be affected by a consent decree will probably result in more litigation than eliminating the collateral attack bar and giving consent decrees no special effect whatever. There will almost certainly be third parties who do not

66. See FED. R. CIV. P. 12(b)(7), (h)(2).

67. See 3A J. MOORE, J. LUCAS & G. GROTHEER, JR., MOORE'S FEDERAL PRACTICE ¶ 19.05[2], at 19-80 (1987); 7 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1609 (1986) [hereinafter WRIGHT, MILLER & KANE].

68. A few commentators read Rule 19 already to impose such a duty. See, e.g., Laycock, *supra* note 3, at 130-31; Mengler, *supra* note 3, at 338-39; Comment, *Collateral Attacks*, *supra* note 3, at 164, 174-75.

69. See Laycock, *supra* note 3, at 121-24; Comment, *Collateral Attacks*, *supra* note 3, at 175-76.

70. Laycock, *supra* note 3, at 121.

71. *Id.* (footnote omitted).

care enough about the adverse effects of a consent decree to initiate litigation but who will litigate once they have been made parties to an ongoing lawsuit. There is no reason to encourage such litigation.

Finally, while requiring joinder under Rule 19 assures that third-party claims are heard, it does so in a way which — like the collateral attack bar — forces third parties to litigate sooner than they would have to otherwise.

Consolidation, then, is a better way to secure the advantages of the collateral attack bar in terms of comity and judicial economy without unnecessarily disadvantaging third parties. Because the collateral attack bar does make it harder for third parties to challenge a consent decree, however, this proposal may result in fewer successful settlements by consent decrees. Indeed, Professor Laycock suggests that the parties will find a consent decree worthless if it cannot bind third parties, and that without the collateral attack bar, consent decrees will seldom be used.⁷² This probably overstates the case. Litigants do not agree to settle by consent decree only to disadvantage third parties. As explained in Part I, many reasons for seeking a consent decree have nothing to do with third parties.⁷³ These reasons remain even without the collateral attack bar. But if removing unnecessary obstacles to the ability of third parties to protect their rights makes consent decrees less desirable than they would be otherwise, so be it. As Judge Easterbrook noted, “[i]f the ‘attraction’ of the decree comes from an unauthorized source, a diminution in its attractiveness is hardly objectionable.”⁷⁴

III. THE COLLATERAL ATTACK BAR AND DUE PROCESS

Suppose that Congress enacted a statute providing that third parties could challenge a consent decree only by intervening in the consent decree proceedings. Since Congress is competent to make the judgment that such a rule is desirable, this statute would not be subject to the infirmities discussed in Part II. But other commentators have objected to the collateral attack bar on the ground that it violates the due process clause.⁷⁵ Presumably, then, these commentators would invalidate the bar even if established by Congress.

72. See Laycock, *supra* note 3, at 112, 117-20.

73. See *supra* notes 22-25 and accompanying text.

74. Easterbrook, *supra* note 3, at 38; *Rodriguez v. East Tex. Motor Freight*, 505 F.2d 40, 66 (5th Cir. 1974), *vacated*, 431 U.S. 395 (1977).

75. See, e.g., Laycock, *supra* note 3; Cooper, *supra* note 3; Comment, *Collateral Attacks*, *supra* note 3; Mengler, *supra* note 3, at 319; see also *Ashley v. City of Jackson*, 464 U.S. 900, 901-02 (1983) (Rehnquist, J., dissenting from denial of *certiorari*); *In re Birmingham Reverse Discrimination Employ. Litig.*, 833 F.2d 1492, 1498-99 (11th Cir. 1987), *cert. granted sub nom.*

Last Term, the Supreme Court granted *certiorari* to consider the constitutionality of the collateral attack bar, but affirmed the judgment of the lower court by an equally divided Court.⁷⁶ The Court recently agreed to hear another case posing this issue.⁷⁷ Therefore, although I have already argued that the collateral attack bar should be abolished, I will discuss its constitutionality. Unlike other commentators, I conclude that the collateral attack bar does not violate the due process clause.

A third party subject to the collateral attack bar must intervene in the consent decree proceedings under Federal Rule of Civil Procedure 24. Because an independent action is barred, the third party will be unable to obtain judicial relief if intervention is denied. It does not necessarily follow that due process has also been denied, for the due process clause does not guarantee every party with a claim the right actually to litigate. If it did, compulsory counterclaim rules and statutes of limitations would be unconstitutional. Due process requires only that every litigant have an opportunity to be heard. The question is whether the opportunity to intervene under Rule 24 satisfies this requirement.

According to Rule 24(a)(2), a party has a right to intervene if (1) the party has "an interest relating to the property or transaction which is the subject of the action," (2) the party is "so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest," (3) intervention has been sought in a "timely" manner, and (4) the interest is not "adequately represented by existing parties."⁷⁸ As the discussion below explains, allowing a party to be heard on the merits only if he satisfies these requirements does not deprive that party of due process.

A. *Interest and Impairment*

The requirements that the prospective intervenor have an interest

Martin v. Wilks, 108 S. Ct. 2843 (1988); United States v. Jefferson County, 720 F.2d 1511, 1517-19 (11th Cir. 1983).

76. Marino v. Ortiz, 108 S. Ct. 586 (1988).

77. Martin v. Wilks, *cert. granted*, 108 S. Ct. 2843 (1988). The Court granted two related petitions at the same time. See 108 S. Ct. at 2843 (grant of *certiorari* in Personnel Bd. v. Wilks, No. 87-1639; and Arrington v. Wilks, No. 87-1668).

78. I have reordered these requirements for ease of analysis. The actual language of FED. R. Civ. P. 24(a)(2) provides:

Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and [the applicant] is so situated that the disposition of the action may as a practical matter impair or impede [the applicant's] ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

relating to the action and that his ability to protect this interest may be impaired are minimally restrictive. According to the Supreme Court, the "interest" must be "a significantly protectable" one.⁷⁹ Although the precise meaning of this concept is obscure,⁸⁰ it encompasses any interest that constitutes liberty or property under the due process clause or that could provide the basis for an independent action.⁸¹ There are cases suggesting that Rule 24 is satisfied by any interest sufficient to confer standing under Article III.⁸²

The requirement that the intervenor's ability to protect this interest may be impaired is satisfied "whenever disposition of the present action would put the applicant at a practical disadvantage in protecting his interest."⁸³ Most courts hold that the possibility of prejudice due to *stare decisis* meets this requirement.⁸⁴ Other kinds of "practical" impairment are also sufficient, so long as the litigation could leave the applicant for intervention worse off in some way.⁸⁵

Given these definitions, it is not surprising that third parties subject to the collateral attack bar have experienced little difficulty in satisfying the interest and impairment requirements. *C* alleges that the consent decree violates his legal rights — indeed, he would prefer to file a separate lawsuit. And *C* may argue that he will be unable to protect his rights if intervention is denied because the collateral attack bar precludes him from bringing this separate action. More important for the present discussion, it is clear that conditioning intervention on *C*'s ability to satisfy these requirements does not violate due process

79. *Donaldson v. United States*, 400 U.S. 517, 531 (1971).

80. See 7C WRIGHT, MILLER & KANE, *supra* note 67, § 1908, at 270-88; 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 24.07[2], at 24-57 (1987).

81. 3B J. MOORE & J. KENNEDY, *supra* note 80, ¶ 24.07[2], at 24-57. See, e.g., *Triax Co. v. TRW, Inc.*, 724 F.2d 1224 (6th Cir. 1984); *Gilbert v. Johnson*, 601 F.2d 761 (5th Cir. 1979).

82. See, e.g., *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777 (D.C. Cir. 1984); *Smuck v. Hobson*, 408 F.2d 175, 178-82 (D.C. Cir. 1969) (*en banc*); *Shreve, Questioning Intervention of Right — Toward a New Methodology of Decisionmaking*, 74 NW. U. L. REV. 894, 906-07 (1980); *Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 737-38 (1968). In *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986), the Supreme Court expressly refrained from addressing the relationship between the interest required to intervene and the interest required to confer standing.

83. 7C WRIGHT, MILLER & KANE, *supra* note 67, § 1908, at 302.

84. See, e.g., *United States v. Oregon*, 839 F.2d 635, 638 (9th Cir. 1988); *New York Pub. Interest Group v. Regents of the Univ. of the State of N.Y.*, 516 F.2d 350 (2d Cir. 1975) (*per curiam*); *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967); *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 829 (5th Cir. 1967); 3B J. MOORE & J. KENNEDY, *supra* note 80, ¶ 24.07[3], at 24-65 & n.13 (citing cases).

85. See, e.g., *United States v. Oregon*, 839 F.2d 635, 638-39 (9th Cir. 1988); *Ford Motor Co. v. Bisanz Bros.*, 249 F.2d 22, 28 (8th Cir. 1957); *United States v. Reserve Mining Co.*, 56 F.R.D. 408, 412 (D. Minn. 1972); *Shreve, supra* note 82, at 907.

since intervention will be denied only if *C* does not have a liberty or property interest that is threatened with impairment.

B. Timeliness

1. *Providing a Reasonable Opportunity To Be Heard*

Suppose that *C* satisfies the first two requirements of Rule 24, but that intervention is denied because *C* failed to make a timely motion. As noted above, that fact alone does not mean that *C* has been denied due process even if the collateral attack bar precludes any other relief. The state may restrict the right to judicial relief, including limiting the time during which relief can be obtained; hence, statutes of limitations are constitutional.

On the other hand, to say that the state may limit the availability of relief does not mean that the state can do whatever it pleases. A law requiring *C* to file within 30 seconds after *C*'s claim accrued would be unconstitutional, as would a law allowing a limitation period to run before *C* had reason to know of his claim.⁸⁶ Due process requires that a party have a reasonable period of time to seek relief after that party knows or should know that legal action is necessary. The question is whether Rule 24's timeliness requirement satisfies this standard.

In passing on the timeliness of a petition for leave to intervene, courts consider four factors: (1) the length of time the intervenor knew or should have known of his interest in the case before he sought to intervene; (2) the extent of the prejudice to existing parties caused by the intervenor's delay in intervening; (3) the extent of the prejudice to the intervenor if his motion is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.⁸⁷

In practice, the first two factors — whether the intervenor delayed in seeking to intervene after he knew or should have known that intervention was necessary, and whether the existing parties were

86. See *Wilson v. Iseminger*, 185 U.S. 55, 62 (1902). The requirements of procedural due process apply even if the state need not have given *C* a claim in the first place: "While the legislature may elect not to confer a property interest . . . , it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring)).

87. *Stallsworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977); *Fiandaca v. Cunningham*, 827 F.2d 825, 833-35 (1st Cir. 1987); *South v. Rowe*, 759 F.2d 610, 612-13 (7th Cir. 1985); *Reeves v. Wilkes*, 754 F.2d 965, 969 (11th Cir. 1985). Although some courts have described the factors in slightly different ways, e.g., *Stotts v. Memphis Fire Dept.*, 679 F.2d 579, 582 (6th Cir. 1982) (five factors), *cert. denied*, 459 U.S. 969 (1982); *Nevilles v. EEOC*, 511 F.2d 303, 305 (8th Cir. 1975) (*per curiam*) (three factors), the considerations actually taken into account are the same everywhere.

prejudiced by his failure to act sooner — tend to be determinative; the other factors are usually mentioned in passing, and then only to reinforce a conclusion already suggested by the court's analysis of the first two factors.⁸⁸ As a result, Rule 24's timeliness requirement resembles the equitable doctrine of laches more than it resembles an ordinary statute of limitations.⁸⁹ But this difference does not affect the due process analysis. The question is still whether the timeliness requirement of Rule 24 provides third parties who cannot file an independent lawsuit because of the collateral attack bar a reasonable period of time to seek judicial relief after they know or should know that such relief may be necessary.

It is not particularly fruitful to answer this question by examining what courts have done in practice. Courts that enforce the collateral attack bar have ignored its due process implications. Third parties have not invariably been denied due process, but there certainly are cases in which they have been treated unfairly.⁹⁰ Therefore, rather than attempt to explain the decisions, I will describe how Rule 24's timeliness requirement should be applied if the collateral attack bar is to be enforced in a way that assures third parties minimal due process protection.⁹¹

The first step is to determine when *C* knew or should have known that his interests were threatened. At what point, in other words, can the state impose a duty on *C* to take legal action within a reasonable time or lose the right to relief? The simplest answer is when *B* actually injures *C*. This is how ordinary statutes of limitations are triggered. Thus, *C* would not have to think about intervening until *B* implemented the consent decree by taking the action that *C* believes is unlawful. In the employment discrimination hypothetical, for example, this would occur when *B* instituted affirmative action and denied *C* a promotion or deprived him of seniority.

Courts that apply the collateral attack bar begin measuring the timeliness of a motion to intervene earlier. Specifically, they measure timeliness from when a consent decree is entered.⁹² Under this inter-

88. See, e.g., cases cited *supra* note 87.

89. For a discussion of laches, see 1 J. POMEROY, A TREATISE ON EQUITABLE REMEDIES §§ 19-36 (1905).

90. See, e.g., Cooper, *supra* note 3, at 160-64, 171-74 (discussing *Devereaux v. Geary*, 596 F. Supp. 1481 (D. Mass. 1984), *affd.*, 765 F.2d 268 (1st Cir. 1985)); Laycock, *supra* note 3, at 139-41 (citing cases).

91. Rule 24 was intended to be used flexibly to reach pragmatic solutions in the multitude of possible intervention situations. See FED. R. CIV. P. 24 advisory committee's note (1966); *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984) (Friendly, J.); 7C WRIGHT, MILLER & KANE, *supra* note 67, § 1904, at 239.

92. See, e.g., *United States v. City of Chicago*, 798 F.2d 969, 975 (7th Cir. 1986), *cert. denied*,

pretation of Rule 24, *C* must anticipate injury and begin to plan legal action before it is actually inflicted.

Generally speaking, a rule that triggers the duty to intervene from the time a consent decree is entered will satisfy due process. Once *C* learns of the consent decree, *C* has notice that *A* and *B* will act. If the effect of their action on *C* is apparent, all that stands between *C* and injury is the possibility that *B* might fail to perform (an unlikely event since entry of a consent decree subjects *B* to contempt sanctions). That being so, *C* can be required to take legal steps before the injury is actually inflicted — especially if there is some reason for wanting the legality of *A* and *B*'s agreement settled. *C* has a full and fair opportunity to protect his interests and may be deemed to waive any further claims when he fails to take advantage of that opportunity.⁹³

One cannot, however, draw a bright line saying that the determination of timeliness can always begin after the consent decree is entered. For example, most consent decrees are entered in class actions, and notice to the class typically reaches interested third parties.⁹⁴ But there may be cases in which a third party has no occasion to learn of the consent decree until after it is entered. In such cases, the timeliness of a motion to intervene should be measured from when the party learned or should have learned about the consent decree.

There may also be cases in which knowledge that a consent decree has been entered is not enough to trigger a duty to intervene. Sometimes, for instance, a third party may not acquire an interest until after the consent decree has been approved: the hypothetical case of an applicant denied a job or promotion under a consent decree entered when he was a child, a favorite in the literature,⁹⁵ is an example. Other times, notice of a consent decree may not put a third party sufficiently on notice that his interests are threatened. For example, affirmative action plans seldom indicate which employees will be

108 S. Ct. 771 (1988); *Corley v. Jackson Police Dept.*, 755 F.2d 1207, 1210 (5th Cir. 1985); *Bolden v. Pennsylvania State Police*, 578 F.2d 912, 919 (3d Cir. 1978); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-65, 267 (5th Cir. 1977); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 289, 294-95 (N.D. Calif. 1976), *affd. sub nom. Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978).

93. *Cf. Yakus v. United States*, 321 U.S. 414 (1944) (does not violate due process to require defendant to challenge regulation when passed rather than waiting until it is applied); *Peabody Coal Co. v. Train*, 518 F.2d 940, 942 (6th Cir. 1975); *Granite City Steel Co. v. EPA*, 501 F.2d 925 (7th Cir. 1974); *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

94. *Schwarzschild*, *supra* note 1, at 920. Thus, in employment discrimination cases, notice of the consent decree is posted at the workplace where both minority and nonminority employees can be expected to see it.

95. *See, e.g., Cooper*, *supra* note 3, at 163; *Schwarzschild*, *supra* note 1, at 925-26. It does not appear that this case has ever arisen in the real world.

affected; they establish employment goals that call for some places to be held for minority applicants, leaving many employees unaffected. This may be enough to impose a duty on a union to intervene, but not enough to impose a similar duty on every individual who could lose an employment benefit. Assistant Attorney General Cooper argues that the claim of an individual in this situation is so uncertain that he could not intervene because his claim would not be "ripe" for adjudication.⁹⁶ Although Cooper may be wrong,⁹⁷ one need not go so far to conclude that an employee in this situation should be allowed to wait until it is clear that he will be affected before challenging a consent decree.

Finally, this analysis suggests that it would violate due process to begin measuring the timeliness of a motion to intervene before a consent decree is entered.⁹⁸ Even if *C* knows that *A* and *B* are negotiating and might settle at *C*'s expense, the threat to *C*'s interests is too uncertain to trigger a duty to intervene. The likelihood of injury increases once *A* and *B* reach agreement and offer to have that agreement entered as a consent decree. But the settlement still may not go through because the court may refuse to enter the decree.

The second step in applying Rule 24's timeliness requirement consistently with the due process clause is to determine what constitutes a reasonable period of time after *C* knew or should have known that intervention was necessary. As noted above, timeliness in this context is determined like the equitable doctrine of laches, on the basis of how long *C* waited to intervene and how much *A* and *B* were prejudiced by *C*'s delay. It is hard to generalize about what is necessary to satisfy due process, since what is reasonable here necessarily differs from case to case. In general, courts have been fairly lenient in allowing parties time to intervene after they should have known that intervention was

96. Cooper, *supra* note 3, at 171-74.

97. These claims probably are ripe for adjudication. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-10 (2d ed. 1988) (for a general overview of the ripeness requirement). In any event, the better position is not to impose a rigid ripeness requirement and to allow third-party intervention upon entry of the decree. See *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986) (leaving open whether an intervenor's claims need to satisfy the requirements of an independent action before an Article III court).

98. See, e.g., *County of Orange v. Air California*, 799 F.2d 535, 538 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987); *Stotts v. Memphis Fire Dept.*, 679 F.2d 579, 583 (6th Cir.), *cert. denied*, 459 U.S. 969 (1982); *Culbreath v. Dukakis*, 630 F.2d 15, 21 (1st Cir. 1980) (the court measured timeliness from when the lawsuit was filed). In the Ninth Circuit case, the court's analysis was clearly dependent on the assumption that future litigation was not barred. In reaching this conclusion, the court apparently overlooked *Dennison v. City of Los Angeles Dept. of Water & Power*, 658 F.2d 694 (9th Cir. 1981), which held that collateral attacks were barred. It is not clear whether this signals an abandonment of the collateral attack bar or whether the court will modify its approach to timeliness in light of *Dennison*.

necessary.⁹⁹ However, in the context of the collateral attack bar, judges need to be sensitive to the time it may take unorganized third parties to decide to litigate.¹⁰⁰ Relevant guidance for determining how much time is reasonable can be found in cases dealing with amendments under Federal Rule of Civil Procedure 18 as well as common law laches cases.

2. *Mullane and the Requirement of Formal Notice*

Other commentators argue that the standards described above are not enough to protect the due process rights of third parties subject to the collateral attack bar. These commentators maintain that third parties are also entitled to notice of the consent decree that complies with *Mullane v. Central Hanover Bank & Trust Co.*¹⁰¹ In *Mullane*, a trust company petitioned for a judicial settlement of accounts which would bind everyone with any interest in the trust funds; the only notice to trust beneficiaries was by newspaper publication. The Supreme Court held this notice inadequate, imposing an affirmative duty on plaintiffs to give defendants formal notice of legal proceedings. *Mullane* held that the defendant is entitled to such notice even if he already knows that proceedings are pending. Thus, the trust beneficiaries represented by Mullane had actual notice of the proceedings before final judgment was entered.¹⁰² The Court held that this did not satisfy due process because trust beneficiaries were entitled to notice from the bank.¹⁰³ According to the *Mullane* Court, the plaintiff must provide "the best notice practicable"¹⁰⁴ under the circumstances. The means chosen "must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."¹⁰⁵ If a defendant's identity and whereabouts are known, the plaintiff must mail or personally serve specific notice of the action; otherwise publication no-

99. See generally 7C WRIGHT, MILLER & KANE, *supra* note 67, § 1916, at 430 & n.11; 3B J. MOORE & J. KENNEDY, *supra* note 80, ¶ 24.13.

100. In employment discrimination cases, for example, minority plaintiffs tend to be organized through the litigation system itself. That is, their attorneys will do the organizational work, either for ideological reasons or for attorney's fees or both. Unless there is a well-financed union, the same is not likely to be true for nonminority workers, who, even if they prevail, will not get attorney's fees (though they may have to pay their opponents' fees if they lose, see *Zipes v. Trans World Airlines, Inc.*, 846 F.2d 434 (7th Cir. 1988)).

101. 339 U.S. 306 (1950). See Laycock, *supra* note 3, at 139-43; Cooper, *supra* note 3, at 161-68; Comment, *Collateral Attacks*, *supra* note 3, at 154-62.

102. Mullane appeared specially before final judgment to contest the failure of the bank to notify the trust beneficiaries of the proceedings. 339 U.S. at 311.

103. 339 U.S. at 319.

104. 339 U.S. at 317.

105. 339 U.S. at 315.

tice will suffice.¹⁰⁶

Applying *Mullane* to third parties subject to the collateral attack bar means that *A* and *B* must notify potential *C*s of a proposed consent decree. Absent such notice, *C* must be permitted to intervene even if *C* knew about the consent decree and regardless of how long *C* waited to act.

It is not apparent why third parties must receive such notice. Opponents of the collateral attack bar observe that notice under *Mullane* is always required before an adjudication that is to be accorded finality, and argue that a consent decree between *A* and *B* that affects *C*'s rights is just that — a binding judgment against *C*.¹⁰⁷ Of course, this is not literally true: no one has ever suggested, for example, that the consent decree renders *C*'s claims *res judicata*. But opponents of the collateral attack bar reason that if the effect of the bar together with Rule 24's timeliness requirement precludes *C* from challenging a consent decree, it is as if the decree was a judgment against *C*. Therefore, *Mullane* applies, and *C* is entitled to "the best notice practicable" from *A* and *B* before the consent decree is entered.

This argument overlooks an important difference between a judgment against *C* and a consent decree that affects *C*. The judgment forecloses *C*'s claim with respect to something that occurred prior to its entry. The consent decree gives rise to *C*'s claim in the first place. When intervention is denied on timeliness grounds, it is not because *C*'s rights were determined when the consent decree was entered: it is because *C* waited too long *after* entry of the decree to make his claim.

Rule 24's timeliness requirement is thus more properly analogized to a statute of limitations: *A* and *B* have done something — made an agreement — that *C* believes violates his rights, and *C*'s challenge to that agreement is dismissed because *C* waited too long to bring it. To be sure, *A* and *B* have entered the agreement as a judgment to facilitate its enforcement as between themselves. But they have not brought an action or sought or obtained a judgment against *C*. On the contrary, it is *C* who is suing. Entering the agreement as a consent decree restricts *C*'s options in bringing this suit: whereas *C* could ordinarily challenge the agreement at any time within the applicable statute of limitations, *C* must now intervene in the consent decree proceedings within the time allowed by Rule 24. But that means only that the limitations period on *C*'s claim has been shortened, not that a judgment has been rendered against *C*.

106. 339 U.S. at 317, 318.

107. See authorities cited *supra* note 75.

The proper question, then, is whether *Mullane*-type notice ought to be required to bar a party's claims under a statute of limitations. Given current practice, the answer to this question seems obviously to be no.¹⁰⁸ However, the Supreme Court's recent decision in *Tulsa Professional Collection Services v. Pope*¹⁰⁹ can be read to suggest that notice under *Mullane* is required for limitations periods that (like the collateral attack bar) are triggered by legal proceedings. Therefore, further investigation of the notice requirement is merited.

The opinion in *Mullane* does not explain why formal notice from opposing parties is essential before a court can issue a binding judgment. Certainly such notice is not essential to ensure the "fundamental fairness" at the heart of the due process clause. As described by the Court in *Mullane*, the essence of the notice requirement is that a party should know that his liberty or property is threatened so that he "can choose for himself whether to appear or default, acquiesce or contest."¹¹⁰ Why should it matter whether this knowledge comes directly from one's opponent? The critical issue is whether a party knows or should know that his interests are threatened and that he has an opportunity to be heard. The source of that information is unimportant.

The more stringent requirements of *Mullane* can be justified on the basis of administrative costs: the cost of requiring *A* to give *B* formal notice when *A* seeks a judgment against *B* is low in comparison to the potential cost of adjudicating disputes about when *B* knew or should have known of *A*'s action. On this view, *Mullane* establishes a prophylactic rule that imposes a duty on plaintiffs to give defendants notice in order to eliminate the need for case-by-case inquiries into when defendants knew or should have known about proceedings.

But the fact that formal notice is cost-effective does not explain why it is constitutionally required. The due process clause ought to leave the decision to adopt more efficient procedures to the legislature. Due process requires only that the procedures employed in adjudication not be "fundamentally unfair." As explained above, the notice required by *Mullane* is not necessary to satisfy this requirement. If the state wants its courts to engage in case-by-case inquiries, that is its business — so long as no one is barred without a reasonable opportunity to be heard after he knows or should know that legal action is necessary.

108. The Supreme Court so held in *Texaco, Inc. v. Short*, 454 U.S. 516, 531-38 (1982).

109. 108 S. Ct. 1340 (1988).

110. 339 U.S. at 314.

The most persuasive justification for *Mullane* is that formal notice of a lawsuit is an established part of due process by history and tradition — “process” in its original sense (the thing the process server brings). But while tradition is a perfectly acceptable basis for the rule, there is no reason to extend the constitutional requirement of *Mullane*-type notice beyond its historical confines: a suit by *A* to obtain a binding judgment against *B*.

*Tulsa Professional Collection Services v. Pope*¹¹¹ is not to the contrary. *Tulsa* concerned Oklahoma’s so-called “nonclaim statute,” which required creditors to file contract claims against an estate within two months of published notice that probate proceedings had been commenced. Failure to file within two months barred a claim whether or not the estate had been closed. Appellant, a creditor whose claim was barred by this provision, argued that it was entitled to notice of the probate proceedings from the estate. Appellee responded that because the nonclaim statute was a statute of limitations, notice under *Mullane* was not required.

Writing for the Court, Justice O’Connor explained that *Mullane*-type notice is not required for ordinary statutes of limitations because the state’s “limited involvement” in the running of a “self-executing” statute of limitations “falls short of constituting the type of state action required to implicate the protections of the Due Process Clause.”¹¹² The nonclaim statute, however, was triggered by the initiation of proceedings in the probate court and the issuance of an order from that court directing that notice be published.¹¹³ According to the Court, “[w]here the legal proceedings themselves trigger the time bar, even if those proceedings do not necessarily resolve the claim on its merits, the time bar lacks the self-executing feature . . . necessary to remove any due process problem.”¹¹⁴ The Court then balanced the creditors’ need for notice against the state’s interest in expeditious resolution of probate proceedings and held that publication notice was inadequate to bar appellant’s claim.

The Court’s reasoning in *Tulsa* is debatable. For example, the holding that *Mullane* does not apply to statutes of limitations because dismissal on this ground does not entail state action seems plainly wrong.¹¹⁵ But the important point is that *Tulsa* does not hold that,

111. 108 S. Ct. 1340.

112. 108 S. Ct. at 1345.

113. 108 S. Ct. at 1345-46.

114. 108 S. Ct. at 1346.

115. The Court recognizes that a cause of action is property protected by the due process clause, 108 S. Ct. at 1344-45, but reasons that it is the passage of time and not the state that deprives the plaintiff of this property. But the passage of time merely establishes the condition

where there is state action, only notice under *Mullane* will satisfy the due process clause. It does not hold that Oklahoma could not — if it chose — allow its courts to make a case-by-case inquiry and bar those creditors who had or should have had actual notice of the probate proceedings from any source. Such an approach was neither advocated by the parties nor considered by the Court in *Tulsa* because it would have been inconsistent with the nonclaim statute. Oklahoma did not want case-by-case inquiries: Oklahoma wanted an irrebuttable presumption that all claims not filed within two months of the opening of an estate were barred. The Court quite rightly held that publication notice was inadequate for this purpose: such a presumption requires formal notice.¹¹⁶ The Court's analysis in *Tulsa* simply does not speak to whether Oklahoma could have limited its statutory bar to creditors who waited more than two months after they knew or should have known that probate proceedings were initiated. For the reasons explained above, I think it could have.¹¹⁷

C. Adequate Representation

The final requirement for intervention of right under Rule 24 is that the applicant's interest is not "adequately represented by existing parties."¹¹⁸ This requirement is actually more troubling from the standpoint of the due process clause than the requirement that a motion to intervene be timely, since it may deny a hearing to a third party who has diligently pursued his interests. Indeed, where a separate suit is barred by the collateral attack bar, denying intervention to a party

that authorizes the deprivation. A cause of action is a right to judicial relief. The plaintiff is deprived of this right when the court dismisses his complaint. That is state action.

The Court relies on *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978). In *Flagg Bros.*, a warehouseman proposed to sell the plaintiff's goods to recover unpaid storage charges. Plaintiff brought an action alleging that this sale deprived her of property without due process. The Court reasoned that the state law permitting the sale did not deprive plaintiff of any property: the deprivation occurred when her goods were sold. The state was not involved in the sale. Therefore, the plaintiff was not deprived of property by the state.

The *Tulsa* Court apparently reasoned that the running of a limitations period is analogous to the sale in *Flagg Bros.* Unlike a sale of goods, however, the passage of time does not deprive the plaintiff of any property. Rather, as noted above, the plaintiff is not actually deprived of his right to relief until the court dismisses his complaint. It is this dismissal, then, that is analogous to the sale in *Flagg Bros.*, and that plainly involves state action since it is ordered by the court.

116. Challenges to a consent decree could similarly be barred if *A* and *B* did give potential *C*s formal notice under *Mullane*.

117. This approach would not have changed the result in *Tulsa*. The nonclaim statute required the executor to publish notice in "some newspaper" in the county once each week for two consecutive weeks. 108 S. Ct. at 1342. There was no showing that appellant had seen the newspaper or had actual knowledge of the commencement of probate proceedings, and appellant was not negligent in failing to see such notice or to monitor filings in the state courts.

118. FED. R. CIV. P. 24(a)(2).

who has an interest that will be impaired and who has sought judicial relief in a timely fashion is indistinguishable from *res judicata*.

However, while it is generally true that a prior adjudication cannot bar a litigant who was neither a party nor in privity with a party, this is not always true. Due process permits the preclusion of other litigants if their interests are sufficiently close to the interests of the parties.¹¹⁹ This, for instance, is what makes class actions possible.

The history of Rule 24's representation requirement makes clear that "adequate representation" under Rule 24 means adequate to permit preclusion under the due process clause. The original version of Rule 24 authorized intervention of right when "the representation of the applicant's interest by existing parties is or may be [in]adequate and the applicant is or may be bound by a judgment in the action."¹²⁰ In *Sam Fox Publishing Co. v. United States*,¹²¹ the Supreme Court held that a party was "adequately represented" within the meaning of this provision only if the party could be bound by a judgment.¹²² This interpretation made it impossible to satisfy the Rule: if a party was not adequately represented — as required by the first clause of the Rule — that party would not be bound as a matter of due process — thus failing to satisfy the second clause. And the only way a party could show that he might be bound was by showing that he was adequately represented by existing parties — in which case intervention would again be denied. This "Catch-22" was eliminated in 1966 by amending the requirement that the applicant be bound, to require only that he have an interest that will be impaired "as a practical matter."¹²³ The 1966 amendment did not change the meaning of "adequate representation," however, so representation sufficient to bind as a matter of due process is still required.¹²⁴ Therefore, if Rule 24 is properly applied, denying intervention to a third party subject to the collateral attack bar on this ground will not violate the due process

119. See *Hansberry v. Lee*, 311 U.S. 32 (1940); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Bruszewski v. United States*, 181 F.2d 419, 423 (3d Cir. 1950) (Goodrich, J., concurring), *cert. denied*, 340 U.S. 865 (1950); RESTATEMENT OF JUDGMENTS § 83 comment a (1942); *Developments in the Law — Res Judicata*, 65 HARV. L. REV. 818, 855-56 (1952).

120. The original Rule 24 is set out in 3B J. MOORE & J. KENNEDY, *supra* note 80, at ¶ 24.01[1.-1].

121. 366 U.S. 683 (1961).

122. 366 U.S. at 691 (citing *Hansberry v. Lee*, 311 U.S. 32 (1940)).

123. See FED. R. CIV. P. 24(a)(2); Rule 24 advisory committee's note (1966).

124. See 3B J. MOORE & J. KENNEDY, *supra* note 80, ¶ 24.07[4], at 24-68; 7C WRIGHT, MILLER & KANE, *supra* note 67, § 1909, at 313. Thus, intervention may be denied where there is representation by a fiduciary, such as an executor or a trustee; where a group, like a corporation or a labor union, speaks for its members; or where the interests of existing parties are otherwise identical to those of the applicant for intervention. *Id.* at 330-45.

clause.¹²⁵

There is one respect in which precluding litigation under Rule 24's "adequate representation" requirement may differ from other contexts in which litigation is precluded on the basis of representation by others: the way in which the burdens of pleading and persuasion are allocated. *Res judicata* is ordinarily an affirmative defense, and the party seeking to preclude litigation must plead and prove that the party now seeking to litigate was adequately represented in the earlier action.¹²⁶ In only one instance does the party seeking to litigate have the burden of showing inadequate representation: when a member of a class is not satisfied with the results achieved by the class representative and seeks to relitigate.¹²⁷ But shifting the burden of proof in this context may be justified by the class representative's demonstration, at the outset of the case, that he could adequately represent the interests of the class.¹²⁸

The courts are currently divided over how to allocate the burden of proving inadequate representation under Rule 24.¹²⁹ Some courts require the party or parties opposing intervention to show that they already adequately represent the prospective intervenor's interests. In these jurisdictions, preclusion under Rule 24 is no different from an ordinary defense of *res judicata*. In other jurisdictions, however, the burden is on the would-be intervenor to show that his interests are not adequately represented. Since there has been no prior showing to justify even a rebuttable presumption of adequate representation, as in a class action suit, we must ask whether this violates due process.

The burden of proof should not be critical. Burdens of proof matter only in close cases, and none of the cases in which third parties have been denied the right to intervene and challenge a consent decree have been close on the issue of adequate representation. Representa-

125. As noted above, courts have not always been sensitive to the relationship between Rule 24 and the due process clause. There are cases (none involving the collateral attack bar) in which intervention was denied even though representation by existing parties probably would not have permitted preclusion under the due process clause. See, e.g., *Ionian Shipping Co. v. British Law Ins. Co.*, 426 F.2d 186 (2d Cir. 1970) (mortgagee of ship denied intervention in suit between shipping company and its insurer); 7C WRIGHT, MILLER & KANE, *supra* note 67, § 1909, at 351 & n.46. This would not be permissible in cases subject to the collateral attack bar.

126. FED. R. CIV. P. 8(c).

127. See *Hansberry v. Lee*, 311 U.S. 32 (1940); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

128. See FED. R. CIV. P. 23(a)(4).

129. Compare 7C WRIGHT, MILLER & KANE, *supra* note 67, § 1909, at 314-15 & nn.5-6 (citing cases) (burden on party opposing intervention) with 3B J. MOORE & J. KENNEDY, *supra* note 80, ¶ 24.07[4], at 24-70-71 & nn.9-11 (citing cases) (burden on party seeking to intervene) and Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 KY. L.J. 329, 353-54 (1969) (same).

tion is inadequate whenever there is a "significant possibility" that the interests of the applicant may be given short shrift by the parties.¹³⁰ Both courts and commentators have recognized that this standard is met anytime two parties can settle their lawsuit at the expense of a third party.¹³¹ Consequently, Rule 24's adequate representation requirement is satisfied almost automatically in cases falling under the collateral attack bar. There is no reason to think that current class action practice establishes the outer limits of representational litigation, and — much as I hate to use the cliché — it would exalt form over substance to hold the opportunity to litigate provided by Rule 24 unconstitutional for reasons that never matter in practice.

In addition, the burden placed on prospective intervenors to show inadequate representation is "minimal."¹³² It is hard to believe that requiring the prospective intervenor to make this minimal showing renders mandatory intervention under Rule 24 unconstitutional. If it does, the solution is to shift the burden of proof to parties opposing intervention in cases where the applicant is barred from bringing an independent suit by the collateral attack bar. As noted above, Rule 24 is flexible enough to accommodate this sort of change.¹³³

IV. AND THEN WHAT?

What can third parties do once they are before the court? What claims can they raise? What remedies can they obtain? These questions arise whether third parties are present as intervenors under Rule 24 or whether their separate lawsuit is consolidated with a consent decree proceeding.

A. *Third-Party Claims and the Power To Prevent a Settlement*

The reasons for wanting third-party challenges to a consent decree brought before the court that entered the decree are procedural: to avoid wasteful duplication of effort and to prevent jurisdictional conflicts that arise from contradictory judgments. It follows that once

130. 7C WRIGHT, MILLER & KANE, *supra* note 67, § 1909, at 316 & n.7, 346 & n.43; *see* Foster v. Gueory, 655 F.2d 1319 (D.C. Cir. 1981); Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967).

131. *See In re Birmingham Reverse Discrimination Employ. Litig.*, 833 F.2d 1492, 1499 (11th Cir. 1987), *cert. granted sub nom. Martin v. Wilks*, 108 S. Ct. 2843 (1988); Bolden v. Pennsylvania State Police, 578 F.2d 912, 923 (3d Cir. 1978); Laycock, *supra* note 3, at 110-13; Cooper, *supra* note 3, at 156, 168-70.

132. *See* Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972); 7C WRIGHT, MILLER & KANE, *supra* note 67, § 1909, at 346; 3B J. MOORE & J. KENNEDY, *supra* note 80, ¶ 24.07[4], at 24-71 & n.10.

133. *See supra* note 91.

third parties are before the court that entered the consent decree, they should be able to raise whatever substantive claims they could have raised in a separate action. In the hypothetical employment discrimination case, for example, if *C* thought that an affirmative action plan agreed to by *B* violated his rights under Title VII or the fourteenth amendment, he could present these claims to the court that entered the decree.¹³⁴

But what if the court held that the affirmative action plan did not violate any of *C*'s rights? Would that end the matter, or could *C* do more? A number of courts and commentators assume that once a third party has intervened and been made a "party" to a consent decree proceeding, the third party can force adjudication of the primary dispute even though the other parties want to settle.¹³⁵ This means that if *C* is permitted to intervene in an employment discrimination suit brought by *A* against *B*, *C* can force litigation of *A*'s discrimination claim even if *A* wants to settle. No one has considered whether *C* could also do this if he was before the court by way of consolidation rather than intervention. There is no need to dwell on that question, however, for the assumption that an intervenor can litigate other parties' claims is unfounded.

Start with a case in which *A* and *B* sign an ordinary contract requiring *B* to do something that *C* believes violates his rights. If *C* brings a separate lawsuit and fails to prove this claim, *C*'s case will be dismissed and the contract will remain in force. This is true even if the agreement "injures" *C* by leaving him somehow worse off. Thus, if *C* alleged that *B*'s agreement to institute affirmative action violated Title VII, but the court concluded that the plan was permissible under *United Steelworkers v. Weber*,¹³⁶ *C*'s complaint would be dismissed even though the affirmative action disadvantaged *C*. Not every "injury" gives rise to a right to judicial relief. *C* must plead and prove that the facts causing the injury violate some rule of positive law that *C* is entitled to enforce, *i.e.*, *C* must have a cause of action.

134. See *Local 93, Intl. Assn. of Firefighters v. City of Cleveland*, 478 U.S. 501, 530 (1986).

135. See, *e.g.*, *Sanguine, Ltd. v. United States Dept. of Interior*, 798 F.2d 389, 390-91 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 927 (1987); *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981) (*en banc*); *Culbreath v. Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980); *United States v. Simmonds Precision Prods.*, 319 F. Supp. 620, 621 (S.D.N.Y. 1970); 3B J. MOORE & J. KENNEDY, *supra* note 80, ¶ 24.16[4]; Schwarzschild, *supra* note 1, at 921; see also Note, *The ITT Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 COLUM. L. REV. 594, 623 (1973); *cf.* Epstein, *supra* note 3, at 228-29. But see *Youngblood v. Dalzell*, 804 F.2d 360, 364 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 1576 (1987). A few commentators assume that an intervenor can force litigation of the main claim, and then suggest that this can be prevented by conditioning intervention on the intervenor's waiver of this right. See Schwarzschild, *supra* note 1, at 932-33; Comment, *Collateral Attacks*, *supra* note 3, at 180.

136. 443 U.S. 193 (1979).

Now suppose that instead of (or in addition to) an unsuccessful Title VII claim, *C* asked the court to declare the contract between *A* and *B* void on the ground that *B* made the contract only to avoid *A*'s lawsuit and *A*'s claim was meritless. Relief should again be denied: allegations that *B* made a foolish or unnecessary contract do not state a claim upon which relief can be granted.¹³⁷ Nor could *C* argue that he wants to litigate *A*'s claim for *A*, since *C* cannot litigate *jus tertii*.¹³⁸

Now suppose that *A* and *B* have their contract entered as a consent decree and that there is no collateral attack bar. Once again, *C* brings a separate action alleging that the terms of the consent decree violate his rights but fails to prove the claim. If *C* then seeks to have the agreement set aside by showing that *A*'s claim had no merit, should the result be any different? The fact that the contract was entered as a consent decree alters the manner in which it will be enforced and implemented as between *A* and *B*, but it has no bearing on what rights *C* has — or ought to have — to set the contract aside.

Now assume that *C*'s separate claim is consolidated with the consent decree proceedings. Should that change the result? Consolidation is ordered to ensure comity between courts and to conserve judicial resources. Thus, while *C* may still raise whatever claims *C* could have raised against *A* or *B* if a separate lawsuit was permitted, there is no reason to alter or expand *C*'s substantive rights beyond that.

Finally, suppose that rather than filing an independent lawsuit, *C* makes a successful motion to intervene in the action between *A* and *B*. If, once again, we assume that *C* fails to prove an independent cause of action, why should *C* suddenly acquire the right to force an adjudication of the claim between *A* and *B*? Commentators have assumed that this right follows from the fact that an intervenor is a "party."¹³⁹ But attaching the label "party" does not determine what the intervenor's

137. If *B* is a government agency subject to the Administrative Procedures Act, *C* may be able to argue that *B*'s foolish contract is "arbitrary and capricious." Alternatively, *C* can try to prove an implicit contract between himself and *B* that limited *B*'s power to act. Suppose, for example, that *C* worked for *B* but that *C*'s employment contract did not expressly protect seniority rights. If *B* settled a lawsuit by agreeing to promote *A* over *C*, *C* could try to show an implicit agreement that *B* could not deprive *C* of seniority without adequate justification and argue that settling a frivolous lawsuit did not meet this condition.

138. Some commentators have suggested that existing limitations on the power to litigate *jus tertii* are too stringent. See, e.g., Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 314 (1984); Note, *Standing To Assert Jus Tertii*, 88 HARV. L. REV. 423, 443 (1974). These criticisms are addressed to cases in which the parties whose rights are infringed cannot protect themselves and a third party wants to do it for them. It is hard to argue that *C* should be able to litigate *A*'s claim when *A* wants to settle, and *C*'s reason for wanting to litigate is to deprive *A* of the benefits of the settlement.

139. See *supra* note 135 and accompanying text.

rights as a party are. In ordinary litigation, if two plaintiffs bring independent claims against a single defendant, those claims may be joined so that all three parties and both claims are dealt with in a single proceeding. It does not follow that either plaintiff can litigate the other plaintiff's claim if the other plaintiff chooses to settle. Both plaintiffs are "parties" — but this means only that each plaintiff has full procedural rights in the action to pursue his claims, present his evidence and seek whatever relief he deserves. Whether a party becomes a "party" by joinder, consolidation or intervention should not matter. As a party, the intervenor can litigate the same claims that he could have litigated in a separate lawsuit, but only those claims. Limits on litigating *jus tertii* are no less applicable to intervenors than to every other party. Indeed, any other result would make Rule 24 invalid under the Rules Enabling Act.¹⁴⁰

This interpretation does not render the right to intervene useless in cases where the intervenor has no cause of action.¹⁴¹ The right to intervene may prove valuable if *A* and *B* do not settle, as the intervenor's right to put in evidence, cross-examine witnesses and generally make its concerns known to the court may influence the shape of any remedy finally awarded. If *A* and *B* wish to settle, however, *C* cannot prevent them from doing so; *C* can only force an adjudication of claims that *C* could have raised in a separate lawsuit.

This understanding of intervenors' rights explains the Supreme Court's much-misunderstood opinion in *Local 93, International Association of Firefighters v. City of Cleveland*,¹⁴² which presented the facts of the employment discrimination hypothetical used throughout this article. The Vanguard of Cleveland, an organization of black and Hispanic firefighters, sued the City of Cleveland alleging race discrimination in violation of Title VII and the fourteenth amendment. After prolonged negotiation, the Vanguard and the City reached a settlement, which they sought to have entered as a consent decree. Local 93 of the International Association of Firefighters intervened on behalf of white firefighters opposing the decree. Arguing that once intervention was granted it became a party to the action, the Union maintained that no consent decree could be entered without its consent. The Union

140. 28 U.S.C. § 2072 (1982) ("Such rules shall not abridge, enlarge or modify any substantive rights . . .").

141. Intervention is often permitted in such cases. An obvious example is private intervention in an enforcement proceeding that can be brought only by a government agency or official. See, e.g., *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972).

142. 478 U.S. 501 (1986). Professor Laycock, for example, apparently believes that the Union (*C*) should have been able to block entry of the consent decree unless the plaintiffs (*A*) and the City (*B*) proved some sort of claim against it. See Laycock, *supra* note 3, at 108-113.

never claimed that the terms of the proposed decree violated the rights of its members under Title VII or the Constitution or anything else.¹⁴³ Indeed, despite several express requests from the judge that it make a legal claim, the Union failed to do more than protest that the consent decree was unreasonable because a less drastic remedy might suffice.¹⁴⁴ The Court held that the Union could prevent the Vanguard and the City from settling and thus block the consent decree only if it could prove that the decree violated its legal rights.¹⁴⁵

B. *Determining the Proper Remedy for Successful
Third-Party Claims*

What remedy should the court grant if *C* succeeds in proving that the terms of a consent decree violate his rights? It is useful again to begin with a private contract case. Thus, suppose *A* and *B* make a contract to initiate affirmative action. If *C* sues *B* and proves that this contract violates his rights under Title VII, *C* is entitled to relief in the form of an injunction prohibiting further discrimination.¹⁴⁶ The fact that this relief would render *B*'s contract with *A* unenforceable poses no obstacle. *B* cannot act illegally, and the fact that *B* agreed with someone else to take illegal action does not make the action any less illegal. This is true whether the affirmative action settled litigation or served some other purpose. Of course *A* and *B* remain free to make a new agreement that is not illegal.

Now suppose that the affirmative action plan settles litigation and that the parties have it entered as a consent decree. *C* joins the litigation — it does not matter for these purposes whether *C* joins via Rule 24 or through a consolidated lawsuit — and proves that the agreement violates his rights. The result should be the same: *C* is entitled to an injunction prohibiting further discrimination. The fact that the court agreed to enter the settlement as a judgment does not extend power to *B* to engage in unlawful activity.

There is a difference, however, between the private contract and the consent decree. If the affirmative action plan was embodied in a private contract, the court would simply declare the contract unenforceable and entitled to no effect.¹⁴⁷ There would be no agreement,

143. 478 U.S. at 504-08.

144. 478 U.S. at 507, 511, 530.

145. 478 U.S. at 528-30.

146. See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Lilly v. City of Beckley*, 797 F.2d 191 (4th Cir. 1986); *Lanphear v. Prokop*, 703 F.2d 1311 (D.C. Cir. 1983).

147. See, e.g., *McMullen v. Hoffman*, 174 U.S. 639, 670 (1899); *Duncan v. Black*, 324

and *A* and *B* would have to renegotiate. They might reach a new agreement that was not illegal. Or, if the changes necessary to make their agreement legal were more than one or both parties was willing to accept, they might end up litigating after all. If the agreement had been entered as a consent decree, by contrast, the court would have the additional option of modifying the decree, even over the objection of one of the parties, to bring it within the limits of the law.¹⁴⁸ Exercising this option results in enforcing a bargain different from the one made by the parties.¹⁴⁹

Should the court exercise its power to modify the decree and bind the parties to a revised agreement? This presents again the question of whether to treat a consent decree as a contract or a judgment. If consent decrees are contracts, a successful third-party challenge to the legality of a decree should lead the court to vacate the decree.¹⁵⁰ If consent decrees are judgments, the court can vacate but can also modify when warranted by the facts of the case.¹⁵¹ So far, and for reasons that are best described as tautological, the Supreme Court has opted for the judgment label.¹⁵²

As discussed in Part I, the question is not whether the consent decree is a contract or judgment, but what rule best advances the reason for offering the consent decree option: *viz*, facilitating settlement.¹⁵³ Here we have three alternatives: (1) declare the decree unenforceable, leaving no agreement in place; (2) modify the decree to comply with the law, enforcing the modified agreement in place of the agreement made by the parties; or (3) leave the court discretion to choose between these two options depending on the equities of the case and the extent to which modification alters the original bargain.

S.W.2d 483 (Mo. Ct. App. 1959); *Everet v. Williams*, Y.B. 12 Geo. 1, fo. 43 (Ex. 1725), discussed in Note, *The Highwayman's Case*, 9 LAW Q. REV. 197 (1893); RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 197 (1981); E.A. FARNSWORTH, CONTRACTS ch. 5 (1982); Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679, 680 (1935); Shand, *Unblinking the Unruly Horse: Public Policy in the Law of Contract*, 30 CAMBRIDGE L.J. 144 (1972).

148. See *supra* notes 40-46 and accompanying text.

149. Alternatively, both parties might agree to a modification, which would be the same thing as making a new contract, or both might agree to litigate.

150. The court would have to decide whether a party to the consent decree who had given consideration could get restitution. The general rule seems to say no, although as with all contract law there are exceptions. See authorities cited *supra* note 147. If the consideration was an agreement not to sue, vacating the decree would restore the right to sue. Under the "no-effects" rule, the statute of limitations would have continued to run while the consent decree was in force.

151. See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 430-32 (1856); *System Fedn. No. 91 v. Wright*, 364 U.S. 642, 646-50 (1961).

152. See 364 U.S. at 646-51; *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932).

153. This does not appear to be a case in which the goal of facilitating settlement must give way to other judicial interests. See *supra* Part I.

The option least likely to impede the settlement process is the one that appears most likely *ex ante* to prove beneficial in the event of a successful third-party challenge. This will vary from case to case depending on the costs of enforcing a modified decree versus the costs of having no decree and either litigating or negotiating a second agreement. If the part of the consent decree most likely to be challenged by a third party is one on which there is no room for give-and-take, the parties might favor the first option. If, by contrast, the part most likely to be attacked did not require any controversial compromises, the second option might seem preferable. This may suggest choosing the third alternative and leaving the court discretion to take whatever action is appropriate. The problem with that solution, of course, is that there is always uncertainty over how (and how well) courts will exercise such discretion.

There is no simple solution to this problem. The choice of options depends upon empirical data which are not available. Perhaps the best solution is to have the judge require the parties to choose the remedy they want in the event the consent decree is subsequently found unlawful before entering it. If the parties fail to make a choice, the court could exercise discretion to choose the proper remedy.

V. ADDITIONAL PROTECTION: THE FAIRNESS HEARING

Abandoning the collateral attack bar and replacing it with a consolidation approach, as suggested in Part II, would insure third parties basically the same right to challenge a consent decree that they have to challenge an ordinary contract. The final question is whether this is sufficient or whether third parties are entitled to additional protection.

Presently, all courts hold a fairness hearing before entering a consent decree.¹⁵⁴ This is a hearing at which interested third parties and *amici* may comment on the advantages or disadvantages of a settlement; after hearing their objections, the court may refuse to enter the proposed decree unless the parties revise it to take third-party concerns into account.¹⁵⁵ The Supreme Court assumed without actually holding that a fairness hearing was required in *Local 93*.¹⁵⁶

There is no doubt that courts have authority to hold fairness hear-

154. See, e.g., *Ibarra v. Texas Employment Commn.*, 823 F.2d 873, 878-79 (5th Cir. 1987); *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 484 (6th Cir. 1985), *aff'd.*, 478 U.S. 501 (1986); *Bass v. Federal Sav. & Loan Ins. Corp.*, 698 F.2d 328, 330 (7th Cir. 1983); *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (Rubin, J., concurring); *Culbreath v. Dukakis*, 630 F.2d 15, 23 (1st Cir. 1980).

155. See Epstein, *supra* note 3, at 216 n.20; Laycock, *supra* note 3, at 137; Schwarzschild, *supra* note 1, at 911, 914-16.

156. 478 U.S. 501, 528-29 (1986).

ings and to refuse to enter a proposed consent decree unless changes are made. The court has discretion to refuse to enter a consent decree altogether.¹⁵⁷ Because the court will be closely associated with the decree and will be involved in its enforcement, the court may withhold its assistance if it considers the agreement inequitable.¹⁵⁸

But fairness hearings undermine the goal of encouraging settlement. The hearings themselves can be expensive and time-consuming,¹⁵⁹ and any restrictions the judge imposes on the parties' power to settle make settlement more difficult and hence less likely.¹⁶⁰ Fairness hearings may make sense at present, since the collateral attack bar has the practical effect of limiting the ability of third parties to protect themselves. But if the collateral attack bar is abandoned, and third parties can attack the decree if it violates their rights, why should courts interfere further on their behalf? No one has suggested requiring a fairness hearing before two parties make an ordinary contract. Why is this different?

There are three possible justifications for requiring fairness hearings prior to approving a consent decree. First, there may be practical differences between consent decrees and contracts that make it more difficult for third parties to protect themselves even when they can seek judicial relief; such differences, if they exist, might justify additional *ex ante* protection. Second, there may be a judicial integrity concern: because the court will be more closely involved in the enforcement and implementation of a consent decree than it would a private settlement, it should ensure that the agreement is fair to all affected parties. Third, there is a utilitarian argument that the benefits of fairness hearings exceed their costs in terms of time, money and lost settlements. Benefits in this context include tangible gains from the accommodation of additional economic and social interests and simple justice from insuring that third parties are treated more fairly. Each of these justifications is considered below.

157. See, e.g., *Kasper v. Board of Election Commrs.*, 814 F.2d 332 (7th Cir. 1987); *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984) (*en banc*).

158. See *Kasper*, 814 F.2d 332; *Williams*, 729 F.2d 1554; *Zimmer & Sullivan*, *supra* note 3, at 212; Note, *Private Participation in Department of Justice Antitrust Proceedings*, 39 U. CHI. L. REV. 143, 156 (1971).

159. See, e.g., *Local 93, Intl. Assn. of Firefighters v. City of Cleveland*, 478 U.S. 501, 508-10 (1986) (four days of hearings over a two-year period); *Williams v. City of New Orleans*, 729 F.2d 1554, 1556 (5th Cir. 1984) (*en banc*) (four-day fairness hearing).

160. See *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826, 876 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *Schwarzschild*, *supra* note 1, at 932. This is borne out by cases in which parties have incurred the cost of appealing a district court's refusal to enter a proposed consent decree rather than revise the decree. E.g., *Kasper v. Board of Election Commrs.*, 814 F.2d 332 (7th Cir. 1987); *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984) (*en banc*).

A. *Practical Obstacles*

Professor Laycock suggests that the mere existence of a consent decree prevents or hinders third parties from protecting their interests in ways that an ordinary contract does not.¹⁶¹ He cites the following examples: (1) if *C* objects to what *B* has agreed to do, *B* can point to a judicial decree and tell *C* that it settles the issue conclusively; (2) *B* will be more reluctant to give in to *C*'s demands if faced with contempt sanctions; (3) the judge will be reluctant to spend time on a case he thought was off his docket and will therefore "not be favorably disposed to plaintiffs who subsequently reopened the matter and sought to litigate it";¹⁶² and (4) the court is likely to give the consent decree undue weight in subsequent litigation.¹⁶³

The first and fourth examples — that *C* will be daunted by the fact that *A* and *B* have a judicial decree, and that the court will give the decree undue weight against *C* in litigation — depend on the misperception that consent decrees are quasi-judgments entitled to special deference. Articulating the justification for consent decrees reveals why a consent decree should have no more force against *C* than any other agreement: entry as a decree is a service provided by the court to make it easier for *A* and *B* to settle their dispute, and (with the single exception of limiting *C*'s choice of forum) the decree limits only their rights against one another.¹⁶⁴ Assuming that judges and litigants are not incapable of understanding this analysis, these two problems should cease to exist.

The objection that *B* will be more reluctant to give in to *C*'s demands if the agreement has been entered as a consent decree because *B* will fear contempt sanctions may be true, but that fact neither entitles *C* to a fairness hearing nor renders *C*'s right to protect himself by bringing a lawsuit inadequate. Finally, the objection that the judge will not look kindly on parties who insist on reopening a case the judge thought was ended (assuming that it is true and that a few strongly worded reversals would not obviate the problem) applies equally when the case was settled by private agreement.

B. *Judicial Integrity*

The judicial integrity argument is also unpersuasive. To be sure,

161. Laycock, *supra* note 3, at 119-20.

162. *Id.* at 120.

163. Professor Laycock adds that a consent decree will complicate the remedial process if third parties bring a successful claim. *Id.* That objection is answered *supra* in Part IV.B.

164. *See supra* Part I.

the court has an interest in ensuring that it does not tie itself up administering an agreement that threatens its institutional integrity.¹⁶⁵ For this reason, the court can and should refuse to enter a consent decree that is illegal or of dubious legality on its face.¹⁶⁶ Beyond that, it is doubtful that enforcement of a consent decree poses any threat to the court's institutional integrity, particularly if the third party can bring an action to protect its legal rights.

C. *Utilitarian Gains*

This leaves the argument that by involving affected third parties in the consent decree process, fairness hearings produce net social benefits and a better quality of justice.¹⁶⁷ The notion that adding voices improves the quality of the adjudicatory process is generally accepted today,¹⁶⁸ and this assumption has led most courts and commentators to embrace fairness hearings without more.

The way the story is usually told,¹⁶⁹ adjudication used to be devoted to the resolution of simple disputes; lawsuits were bipolar, private and uncomplicated, and the results affected only the parties before the court. This "private law" litigation naturally gave rise to a procedural system that treated each case as an isolated and independent controversy. Today, adjudication is different. Today, lawsuits are multipolar and complex, often requiring the court to restructure and oversee public institutions that affect enormous numbers of people. This "public law" litigation requires a fundamentally different approach to procedure — one that anticipates and takes into account the "polycentric" effects of a case. This can only be done properly by ensuring a broader representation of interests before the court. The fairness hearing for consent decrees is a product of this new approach.

It is not true, however, that traditional adjudication was limited to isolated bipolar disputes without broader implications.¹⁷⁰ Then, as now, there were lawsuits with significant effects on public policy and

165. See *supra* notes 44-45.

166. *Columbia Artists Mgmt., Inc. v. United States*, 381 U.S. 348, 350 (1965) (*per curiam*) (Harlan, Stewart, Goldberg, JJ., dissenting); *Kasper v. Board of Election Commrs.*, 814 F.2d 332, 341-42 (7th Cir. 1987).

167. Note that this argument does not explain why third-party participation is not also required in the making of contracts generally.

168. See e.g., Fiss, *supra* note 2; Weinstein, *Litigation Seeking Changes in Public Behavior and Institutions — Some Views on Participation*, 13 U.C. DAVIS L. REV. 231 (1979-1980); Diver, *supra* note 34; Chayes, *supra* note 2.

169. The most well-known accounts are by Owen Fiss and Abraham Chayes. See *supra* note 168.

170. See Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

important consequences for public institutions.¹⁷¹ Moreover, there is every reason to believe that the lawyers and judges of the time perceived the implications of these lawsuits.

The real difference between traditional "private law" adjudication and modern "public law" adjudication is less in the implications and effects of litigation than in the way courts address these implications and effects.¹⁷² Traditional adjudication assumes that the best results are reached by fragmenting disputes into one-on-one or a-few-on-a-few controversies, carefully preserving the rights of affected third parties to bring their own lawsuits later.¹⁷³ Accordingly, traditional adjudication is characterized by very narrow provisions for joinder and intervention and very strict rules of *res judicata* and collateral estoppel. Modern adjudication, by contrast, presumes that better results are reached by resolving the disputes of many parties simultaneously. Hence, modern procedure permits, and often requires, broad joinder of claims and parties; makes intervention easy; and utilizes broad principles of claim and issue preclusion. The goal is to enable the court to take account of and settle the claims of all affected parties in a single proceeding.

Once we recognize that the choice between a public law and a private law model of procedure is to a large extent a choice between two different ways to adjudicate a dispute that affects many parties, we may question the assumption that "more" (more parties, more evidence, more remedies, more representation) is necessarily "better." To be sure, the practical effects of a lawsuit sometimes are such that the ability to bring a later action is inadequate to protect all affected parties. In many cases it is both fairer and more efficacious to all con-

171. Drawing only on well-known constitutional cases, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), and *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87 (1810), had significant "polycentric" effects on large numbers of land owners. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), *Ex Parte Young*, 209 U.S. 123 (1908), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), had important consequences for public institutions. Indeed, a number of studies have demonstrated the existence of complex controversies prior to the twentieth century. See, e.g., Oevlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43 (1980); Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Comment, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581 (1984). The dispute has been over whether these cases were heard by chancery or common law courts.

172. This is not to deny that there have been changes in the substantive nature of litigation. Courts today adjudicate claims that would have been unheard of a century ago. But these developments are not unrelated to the changes in procedural law. New procedures facilitate the development of new substantive claims by making it possible to bring novel lawsuits. This, in turn, creates pressure to develop still new procedures to accommodate these new substantive claims better, and so on. It is probably not possible to separate cause and effect here.

173. See Comment, *supra* note 171, at 606-08 (arguing that there were no complex cases in the common law courts because the procedures in these courts were designed either to break those cases up into smaller disputes or to shift them to the equity courts).

cerned to treat matters comprehensively in one proceeding rather than in a series of smaller, related adjudications. But there may be times when it is better to decide the smaller chunk while carefully preserving the rights of other parties to bring a later action than it is to try and accommodate all affected interests in one proceeding.

The fairness hearing in consent decree cases may be an instance where making a proceeding larger does not produce a better quality of justice. The argument for fairness hearings depends on a number of assumptions, none of which has been tested empirically because they have not been recognized by courts and commentators. First, how often will the agreement reached by the parties treat third parties fairly without judicial interference? Are there many cases in which, even if the parties could have been more generous to third parties, the difference is not important enough to disturb affected third parties? Second, how many settlements that would have been successfully completed will be prevented if courts raise third-party issues *sua sponte* or insist that third parties be joined? Might we create adversaries and antagonism that would not otherwise exist?¹⁷⁴ Third, in addition to lost settlement opportunities, how significant are the costs of fairness hearings in terms of time, expense and complication associated with third-party participation?¹⁷⁵ Finally, how great are the benefits to third parties from judicial oversight? How often will court-ordered changes in a settlement actually be detrimental because the court makes a mistake?

It is hard to answer these questions with confidence. But I suspect that the costs of fairness hearings exceed their benefits, particularly once third-party rights to challenge consent decrees have been clarified. The right to challenge the decree will protect third parties from the worst abuses. More importantly, once the parties understand that

174. Participating in an adversarial procedure itself creates adversariness. Consider, for example, Curtis Berger's account of the remedial stages of a school desegregation case in Berger, *Away from the Courthouse and into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978). Berger describes how he succeeded through informal negotiations with all the interested parties in formulating a plan that everyone seemed willing to accept. The plan was submitted to the court, and a hearing was scheduled. In several fascinating pages, Berger describes "the excitement, the tension, [and] the rivalry that accompanies a trial"; how "the atmosphere felt charged, even though I was surrounded by individuals with whom—for the most part—I had worked quite comfortably over several months"; and how "stunned" he felt when all parties on every side objected to the plan. *Id.* at 731-33. People in this country are taught that the judicial system requires each side to present the most extreme version of its case to a neutral arbiter who will sift these versions for the truth. Human nature being what it is, people tend to persuade themselves of the positions they advocate. As a result, simply invoking the adversarial system creates tensions.

175. In addition to the expense of preparing for whatever hearings the court holds, the liberal discovery permitted by the federal rules is likely to generate enormous costs — particularly in multiparty disputes as everyone begins seeking discovery from everyone else.

third parties can attack and upset a consent decree, they will also see that it is in their interest to anticipate and account for third-party interests *ex ante*. Thus, the costs of fairness hearings may be great while they probably produce only marginal benefits.

CONCLUSION

There is nothing mysterious about consent decrees. They are simply one more way courts can facilitate settlement. There is no judicial stake in consent decrees beyond this, and no need to give consent decrees any special force or treatment except as necessary to serve this goal. Entry of a consent decree should no more affect the rights of a third party than settlement by ordinary contract. To the extent that special treatment is required, it is only that necessary to protect the procedural interests of the court in avoiding duplication of effort and conflicting injunctions. These problems can be avoided by channelling third-party challenges to the validity of a consent decree to the court that entered the decree. Presently, this is done with the collateral attack bar, which requires third parties to intervene in consent decree proceedings. Although commentators who argue that this doctrine is unconstitutional overstate their case, the collateral attack bar should be abandoned since a simpler solution of transfer and consolidation adequately protects these judicial interests. Once before the court, third parties should be allowed to make the same claims they could have made if an independent lawsuit were allowed. But no more than this is necessary. Third parties should not be able to force adjudication of the claim settled by the consent decree, and there is no reason to require a fairness hearing before entering the decree.