Missouri Law Review

Volume 85
Issue 3 *Summer 2020*

Article 6

Summer 2020

Consent Decrees as Emergent Environmental Law

Tracy Hester

Consent Decrees as Emergent Environmental Law

Tracy Hester[*]

ABSTRACT

Consent decrees – the unheralded workhorses of regulatory law – play a critical role in environmental law. The bulk of major environmental disputes at the federal level are resolved through consent decrees lodged under judicial supervision, and key federal environmental statutes and policies directly require settling parties to use consent decrees to resolve their claims. These proposed decrees, however, typically receive only a restrained judicial review that does not yield a formal judicial opinion on the full merits of the agreement. Parties, in fact, will frequently insist that the decree will not involve an admission of liability or any conclusions of law. As a result, consent decrees operate as the dark matter of environmental law – an unseen supporting medium that surrounds and supports the statutory and regulatory directives that function within it, but which leaves few marks of its own. These decrees play a similar role in several other legal fields, including antitrust, consumer protection, class actions, labor, and bankruptcy.

Most of the public and scholarly scrutiny of consent decrees has focused on concerns about their potential effects on third parties and their constraints on future executive discretion or administrative action without proper democratic accountability or transparency. This Article reverses that perspective. It assumes that consent decrees can appropriately create and foster emerging legal principles, and it suggests strategies to identify these new legal holdings. This Article proposes three ways by which consent decrees substantially influence the development of environmental law and flag new emerging principles.

---

[*]Associate Instructional Professor, University of Houston Law Center; Co-Director of the Center for Carbon Management in Energy at the University of Houston; chair-elect of the American Association of Law School's Environmental Law Section; Regent, American College of Environmental Law; chair, Climate Change, Sustainable Development, & Ecosystems Committee of the American Bar Association's Section on Environment, Energy & Resources. My thanks for the excellent comments and assistance from commenters at the Vermont Law School Environmental Scholarship Colloquium in 2018, my faculty colleagues at the University of Houston Law Center who participated in workshop review sessions (in particular Teddy Rave, Gina Warren, and Victor Flatt), Michael Pappas, Seema Kakade, David Owens, Katrina Kuhl, Heather Payne, and my outstanding research assistants, Zach Scott and Srikaran Mahavadi.

First, consent decrees can serve as a platform to implement nascent regulatory policy prior to the formal promulgation of rules or regulations. In a sense, consent decrees in these circumstances provide a test bed for new environmental practices and expectations that later mature into full-fledged regulatory standards. This function of consent decrees tends to surface most visibly during coordinated enforcement initiatives involving industrial sectors at the federal level.

Second, consent decrees can generate new law through deferential review by the courts that lodge them. When courts weigh a proposed consent decree to determine whether to accept it, they use a relaxed review standard that does not require the court to closely assess the merits or legal conclusions of the settlement. Such a review parallels, in many respects, the deferential judicial review of administrative agency action under the federal Administrative Procedure Act. This historical deferential review of agency action nonetheless has sketched the contours of numerous important principles of environmental law; relaxed judicial determinations of the legality and fairness of consent decrees may play a similar role.

Last, and most controversial, consent decree judgments arguably can directly embody legal holdings that, at minimum, have persuasive value for subsequent court proceedings. These holdings, in certain circumstances, might even rise to the level of precedential rulings entitled to stare decisis *in future actions. This final role of consent decrees in generating environmental law, however, requires careful consideration to avoid the risks of manipulation or erosion of judicial authority.*

TABLE OF CONTENTS

I. INTRODUCTION

Consent decrees are the unheralded workhorses of United States regulatory law. In part due to their hybrid nature as mutual contracts and juridical decrees, these consensual judgments serve as a primary vehicle for judicial implementation and oversight of some of the largest and most significant disputes in civil rights, antitrust, labor, immigration, class actions, bankruptcy, and environmental law.[1] For example, the U.S. Department of the Interior alone entered into over 460 consent decrees and settlements between January 1, 2012, and January 17, 2017, that resulted in over $4.4

1. Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 46 (1987) (noting that nearly half of federal court dispositions in 1985 arose from either consent judgments or dismissals predicated on consent as tracked in the Federal Court Data Base maintained by the Administrative Office of the United States Courts); Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL. F. 327, 335 (1987) ("[m]ost environmental enforcement actions against private parties are resolved by negotiated consent decrees"); *see also infra* text accompanying notes 2–5 (overview of consent decree usage in federal court system).In one illustrative example, on July 16, 2019, the City of Houston and the U.S. Department of Justice formally announced a settlement of their protracted struggle over the city's alleged failure to comply with the federal Clean Water Act. Consent Decree, United States and State of Texas v. City of Houston, Texas (No. 90-5-1-1-08687/1 S.D. Tex., July 16, 2019), https://www.publicworks.houstontx.gov/wastewater-cd [https://perma.cc/TRS9-DGRD].. The proposed resolution requires a sweeping program to revamp the city's sanitary sewer systems, and it includes an eye-popping price tag: an increase in wastewater costs of over $2 billion spread out over fifteen years. Jasper Scherer & Mike Morris, *Council approves $2B upgrade with EPA to upgrade Houston's sanitary sewers,* HOUSTON CHRONICLE at A1 (July 24, 2019 4:56 PM) https://www.houstonchronicle.com/news/houston-texas/houston/article/Council-approves-2B-agreement-with-EPA-to-14121965.php [https://perma.cc/V46B-A8RN]. Beyond the increases in wastewater costs, the total cost of the consent decree commitments (including baseline costs) exceeds $5 billion. The settlement has already ignited protests that the parties negotiated it in secrecy without input from the public, and that it could saddle poor and disadvantaged communities with higher water bills. Jen Rice, *'Secrecy Provision' Prevented Public Input on Houston's $2 Billion Deal To Fix Sewers*, HOUSTON PUBLIC MEDIA (July 16, 2019 6:06 PM), https://www.houstonpublicmedia.org/articles/news/2019/07/16/339729/secrecy-provision-blocks-public-input-on-houstons-2-billion-deal-to-fix-sewers/ [https://perma.cc/4QZK-6UU9]. What is remarkable about this proposed decree – and many others like it – is that it is largely unremarkable, at least from a legal perspective, and fairly represents the type of sizable environmental disputes resolved by consent judgments.

billion in monetary awards.[2] The value of environmental remedies compelled by consent decrees in U.S. Environmental Protection Agency ("EPA") civil enforcement actions exceeded $4.5 billion in the first six months of 2019,[3] and the federal courts entered 109 consent decrees to resolve civil environmental lawsuits in 2018 alone.[4]

This widespread use of consent decrees has many causes.[5] Some federal statutes, regulations, and policies, for example, explicitly require the United States to use consent decrees lodged in federal courts to settle certain types of environmental claims.[6] In addition, consent decrees offer important benefits, including access to the court's contempt power to enforce the decree and the

---

2. U.S. DEPT. OF INTERIOR, ORDER. NO 3368, PROMOTING TRANSPARENCY AND ACCOUNTABILITY IN CONSENT DECREES AND SETTLEMENT AGREEMENTS (2018), https://www.doi.gov/sites/doi.gov/files/elips/documents/so_3368_promoting_transparency_and_accountability_in_consent_decrees_and_settlement_agreements_0.pdf [https://perma.cc/M2XW-BC45]. Unfortunately, the U.S. Department of Interior does not provide separate data for the number of consent decrees within this total figure.

3. U.S. Environmental Protection Agency, *Enforcement and Compliance History Online* database (2019), http://echo.epa.gov https://perma.cc/EBT5-BZBS (search for total value of complying actions required by judicial settlement in first six months of 2019).

4. Federal Judicial Center, *Integrated Civil Database* (2019), www.fjc.gov [https://perma.cc/KZ6N-RUDQ](search for all cases resolved in 2019 by settlement with verification of entry of consent decree).

5. This article focuses on the ways the consent decrees in federal courts can create new strands of environmental law. State courts and Article I federal courts also have the power to review and lodge consent settlements as decrees or judgments, but their potential effects vary according to the underlying organic federal statute or state laws where their legislatures and superior courts may dictate how much precedential power or effect a consent ruling might have.

6. EPA has long preferred to use consent decrees to resolve the bulk of its civil judicial enforcement actions. U.S. Environmental Protection Agency, *Guidance for Drafting Judicial Consent Decrees,* EPA General Enforcement Policy GM-17 (Oct. 19, 1983) ("[t]he settlement of a potential civil judicial action should almost always result in a negotiated consent decree"); U.S. Environmental Protection Agency, *Criminal Enforcement Priorities for the Environmental Protection Agency,* EPA General Enforcement Policy GM-14 (Oct. 12, 1982) (superseded on other grounds) ("[h]istorically, most of the EPA's civil litigation referrals have been settled in judicially-enforceable consent decrees containing requirements for plant modification, upgrading or installation of pollution control equipment, and other forms of injunctive relief."). Some environmental statutes also specifically require the use of consent decrees to resolve certain disputes. *See, e.g.*, 42 U.S.C.§9622(d)(1)(A) (2018) (cleanup agreements made under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) "shall be entered in the appropriate United States district court as a consent decree.").

ability to avoid sovereign immunity defenses that governmental defendants might potentially raise, over bare settlement agreements.[7]

One other key advantage makes consent decrees especially attractive to litigants: like other forms of settlements and arbitral decisions, they leave no footprints. Parties will often settle a case with the expectation – and stipulation – that the resolution contains no factual or legal admissions that could affect future proceedings between the parties and, by extension, future litigants. Consent decrees, by design, can therefore help resolve the largest disputes without disrupting existing environmental case law principles or creating unfavorable precedents that might haunt future litigation.

Because of their lack of precedential heft, consent decrees consistently get overlooked as sources of environmental law. Most public criticism of consent decrees,[8] as well as scholarly assessment of their proper role and use,[9] consistently elides their key role as a potential source of law and policy. Like settlements, private arbitral awards, and unreported opinions,[10] consent decrees get shelved in a jurisprudential netherworld where courts review, approve, lodge, and administer them, but they rarely act as a possible source of guidance or statement of legal principles to inform future judicial decisions. Effectively, consent decrees are discounted almost entirely as a source of organically persuasive legal guidance or precedential authority. The prospective deliberate use of consent decree judgments by courts or parties to shape useful and durable legal precedents and values consequently also gets short shrift.

---

7. *See* Whitfield v. Pennington, 832 F.2d 909, 913 (5th Cir. 1987) (en banc) (citing United States v. City of Miami, 664 F.2d 435, 439–40 (former 5th Cir. Dec. 1981)) ("[a] consent order, while founded on the agreement of the parties, is nevertheless a judicial act, enforceable by sanctions including a citation for contempt"); Frew v. Hawkins, 540 U.S. 431, 441–42 (2004) (state immunity did not bar enforcement of the consent decree because the decree was a federal court order that resulted from a federal dispute and furthered the objectives of federal law, and the officials voluntarily accepted the obligations set out in the decree).

8. *See, e.g.,* Senator Lamar Alexander, *Free the People's Choice,* LEGAL TIMES at 58 (April 4, 2005) (objecting to limits imposed by institutional consent decrees on democratic accountability, and advocating for passage of the Federal Consent Decree Fairness Act, S. 489, 109 Cong., 1st Sess.); *see also infra* text accompanying notes 49–51.

9. Several commentators have questioned whether consent decrees can, without more, have binding effects on non-litigant third parties without violating constitutional constraints for due process. Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 338 (1988); *see also infra* text accompanying notes 52–-53.

10. This article will not explore similar issues raised by the resolution of disputes through private settlement contracts, administrative consent orders, unilateral administrative orders, supplemental environmental projects, arbitral awards, or other non-judicial resolutions of contested actions. While fascinating, they lie beyond the modest scope of this analysis.

This Article explores the possibility that consent decrees, like other judicial instruments and opinions, deserve attention in their own right as a possible source of substantive principles, persuasive examples, or even authoritative precedents in environmental law. This expanded jurisprudential role for consent decrees would necessarily operate under different rules than traditional processes of persuasive authority, *stare decisis*, and the mechanisms of precedent. Because judges play a different role in the review and lodging of consent decrees than their usual dominant position in crafting opinions and remedies, the factors that give some consent decrees weight over others will differ as well. In addition, consent decrees may offer troubling opportunities for undue power and influence by certain parties who can insist on terms and provisions across multiple consent decrees in a strategic fashion to shape precedent by consensual design – including, notably, the United States.[11]

While consent decrees frame judicial oversight and enforcement in multiple legal arenas – most notably in antitrust and civil rights – this Article focuses on their role in environmental and natural resources law.[12] In this sphere, federal law requires their use for certain settlements and mandates public notice about the terms of the decrees. The United States has aggressively used consent decrees as a tool to implement environmental mandates, and these tactics have included the use of model consent decrees that set out the key terms and conditions that the federal government will accept.[13] As a result, environmental consent decrees offer a well-developed body of decisions lodged over a period of forty years in a relatively transparent process mandated by federal statutes or regulations – which should make it a strong test case to assess the possible role for allowing consent decrees to act as persuasive, or even precedential, authority in limited circumstances.

This Article proposes that consent decrees can create new environmental law through three parallel pathways.[14] First, consent decrees can serve as a

---

11. Litigants, of course, may already exercise a limited ability to mold judicial precedent and legal interpretations through the strategic use of conventional settlement agreements to foster or terminate appeals with the goal of protecting favorable rulings from appellate review or influencing the choice of judicial fora.

12. Interestingly, relatively few instances have arisen where consent decrees resolve claims that cut across more than one of these fields simultaneously. But it can occur; for example, class action lawsuit pressing environmental claims can result in consent decrees, and a larger antitrust consent decree can address environmental claims. *See, e.g.*, In re AT & T Mobility Wireless Data Servs. Sales Litig., 270 F.R.D. 330, 338 (N.D. Ill. 2010). Presumably, these multi-field consent decrees will generate new laws in their respective fields in the same ways, but exploring that assumption lies outside the scope of this article.

13. *See infra* text accompanying notes 68–70.

14. Apart from their generation of new environmental legal standards, consent decrees can also spark more general changes in expected standards of practice and care in an industry sector. As a result, the substance of consent decree settlements can alter duties owed to other parties in ways that can affect potential

platform to implement nascent regulatory policy prior to the formal promulgation of rules or regulations. In a sense, consent decrees in these circumstances provide a test bed for new environmental practices and expectations that later mature into full-fledged regulatory standards. This function of consent decrees tends to surface most visibly during coordinated enforcement initiatives involving industrial sectors at the federal level. Second, consent decrees can generate new law through deferential review by the courts. When courts weigh a proposed consent decree to determine whether to lodge it, they use a relaxed standard that does not require the court to substantively assess the merits or legal conclusions of the settlement. This type of review parallels, in many respects, the deferential review that federal courts use when assessing administrative agency action under the federal Administrative Procedure Act. The historical deferential judicial review of agency administrative action nonetheless has generated numerous important principles of environmental law. Judicial determinations of the legality and fairness of consent decrees may play a similar role.

Last, and most controversial, consent decree judgments arguably can directly embody legal holdings that, at a minimum, have persuasive value for subsequent court proceedings. These holdings, in certain circumstances, might even rise to the level of precedential rulings entitled to *stare decisis* in future actions. This last role of consent decrees in generating environmental law, however, requires close cabining and careful consideration to avoid the risks of manipulation or erosion of judicial authority. This Article concludes with a suggested test run on applying these concepts to the United States' recent consent decrees, including recent settlements of enforcement actions against automobile manufacturers for illegally installing defeat devices that produced fraudulent data in violation of the federal Clean Air Act. It then offers some suggestions for future research.

II. CONSENT DECREES IN ENVIRONMENTAL LAW

Weighing the generative role of consent decree judgments in environmental law raises difficult challenges because of the slippery nature of consent decrees themselves. Facially, a consent decree is simply defined as an agreement between parties that a judge then enters as a judicial order or court decree.[15] As a result, they range from largely private contractual

tort liability. This mechanism for legal impact arises from all settlements and legal resolutions, and its operation predates the rise of modern environmental law. While important and noteworthy, this pathway to new legal principles will not be explored separately by this article.

15. Resnik, *supra* note 1, at 43; BLACK'S LAW DICTIONARY, *Decree* (11th ed. 2019) ("consent decree (1831): A court decree that all parties agree to"); *Consent Decree*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/consent%20decree (last visited May 28, 2020) [https://perma.cc/9HP2-YZBL] ("[A] judicial decree that sanctions a voluntary agreement between parties in dispute"); *What is CONSENT DECREE?*, THE LAW

commitments approved by the court which resolve contested cases, such as settlement agreements simply lodged with the court, up to fully contested judgments crafted largely by the judge in an effort to broker a resolution.[16] They also clearly differ in a fundamental fashion from arbitration awards, mediation agreements, or other varieties of alternative dispute resolution.[17]

The authority of a court to enter a consent decree arises from an agreement of the parties and the court's inherent power to oversee and enforce

---

DICTIONARY, https://thelawdictionary.org/consent-decree/ (last visited May 28, 2020) [https://perma.cc/5TJF-7WV4] ("One entered by consent of the parties; it is not properly a judicial sentence, but is in the nature of a solemn contract or agreement of the parties, made under the sanction of the court, and in effect an admission by them that the decree [is] a just determination of their rights upon the real facts of the case, if such facts had been proved.").

16. By contrast, settlement agreements are private agreements that the court need not review or approve. This general rule has important exceptions which may lead a court to review proposed settlements in class actions, shareholder derivative suits, actions with appointed receivers, settlements of antitrust enforcement actions initiated by the United States, and "a variety of contexts where the settlement requires court action, particularly if it affects the rights of nonparties or nonsettling parties, or where the settlement is executed by a party acting in a representative capacity." MANUAL FOR COMPLEX LITIGATION (FOURTH) §13.14 (2020). Settlement agreements, including private agreements not brought before the court, obviously offer a broader universe of case resolutions of which consent decrees constitute only a subset. Settlement agreements not lodged in court, however, cannot provide a comparable platform to generate new legal principles. For example, while a large body of private settlements might serve as a test bed for emerging regulatory standards of care, those settlements will not enjoy judicial review (even under a relaxed standard of review) or offer potential persuasive or binding authority for future cases. *See infra* text accompanying notes 37–41.

17. Some jurists disagree on whether a court can enter a consent decree when the parties have agreed to resolve their underlying dispute, which arguably would thereby deprive the court of a case or controversy for judicial review. *See, e.g.*, United States v. Windsor, 570 U.S. 744, 786 (2013) (Scalia, J., dissenting). Chief Justice William Rehnquist had his own opinions on the issue. Dissenting in Maryland v. United States, Justice Rehnquist stated that once parties had agreed to withdraw or a settle a lawsuit, no constitutional Case or Controversy remained; thus, courts lacked the power to insist upon any particular agreement. 460 U.S. 1001, 1004 (1983) (Rehnquist, J., dissenting). In a subsequent dissenting opinion, Justice Rehnquist further muddied the waters when, in protesting a court's entry of a consent decree where the parties had negotiated but to which an intervenor objected, he suggested a new form of judgment – a "judicial decree" – may be entered over the objections of intervenors, questioning whether such a decree would properly be a "consent decree" or a coercive court order. Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 539 (1986) (Rehnquist, J., dissenting). For a more developed explanation of Rehnquist's theories on consent decrees, *see* Resnick *supra* note 1, at 61–62.

settlements of contested cases before it.[18] As a result, a judge need not adjudicate liability before entering a settlement, even over the objection of one of the parties to a multiparty decree.[19] This inherent authority in turn allows a court to approve a consent decree that includes remedial actions or relief accepted by the parties that the court could not order itself under the original claims.[20]

Past these straightforward predicates, the boundaries quickly blur. The difficulties mount particularly when parties and courts try to approve, enter, implement, or modify consent decrees because such judgments exist in a state of juridical superposition: they are simultaneously both binding contracts between litigants as well as official orders of the court.[21] Courts will consequently interpret the terms of consent decrees pursuant to contract law norms and strive to discern the intent of the parties as expressed by the terms of their agreement.[22] But judges also treat consent decrees as full-fledged judicial instruments subject to enforcement through the court's powers of contempt. As the U.S. Supreme Court has noted, "consent decrees 'have attributes both of contracts and of judicial decrees,' a dual character that has resulted in different treatment for different purposes."[23]

---

18. Pac. R.R. v. Ketchum, 101 U.S. 289, 297 (1879) ("[p]arties to a suit have the right to agree to any thing they please in reference to the subject-matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings"); *see also* Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 525 (1986) (noting that courts can lodge and enforce consent decrees that provide broader relief than the court could have awarded in the original action); Ho v. Martin Marietta Corp., 845 F.2d 545, 547 (5th Cir. 1988). Federal guidance, however, has narrowed the ability of governmental agencies to enter into consent decrees that provide payments to non-parties or that do not address directly remedy the harm underlying the lawsuit. *See infra* notes 49–51; *see also* Stop Settlement Slush Funds Act of 2016 H.R. 5063, 114th Cong. (2016) (proposed bill thats terms strongly influenced the subsequent DOJ and EPA guidance on consent decrees).

19. Lawyer v. U.S. Dep't of Justice, 521 U.S. 567, 578–79 (1997) (holding that the court did not need to resolve constitutionality of statute prior to entering consent decree and that the court properly lodged the decree over objection of an intervening party whose claims were not discharged or prejudiced by the decree). For all practical purposes, however, a federal court typically will not enter a consent decree over the objection of the U.S. government. S. Dabney, *Consent Decrees Without Consent*, 63 COLUM. L. REV. 1053, 1059 (1963) (noting general rule that consent decrees require consent of both plaintiffs and defendants, while noting some antitrust cases where court entered consent decrees over objections of United States).

20. *See supra* note 18.

21. *Ho*, 845 F.2d at 547.

22. *See, e.g.*, United States v. Swift & Co., 286 U.S. 106, 117–18 (1932).

23. Local No. 93 v. City of Cleveland, 478 U.S. 501, 519 (1986) (quoting United States v. ITT Continental Baking Co., 420 U.S. 223, 235–37, n. 10 (1975)).

The courts have constructed a general framework for approving consent decrees that draws on different sources depending on the subject matter of the decree. For consent decrees under statutes that do not specify standards for entry, federal courts will generally assess whether the decree is fair, reasonable, adequate, and consistent with applicable law.[24] Congress, in addition, has set out statutory requirements for trial court entry of consent decrees in several areas, including antitrust,[25] immigration,[26] banking,[27] and environmental law.[28] While many of these statutes do not provide substantive guidance on how the courts should review decrees prior to entry, some set out specific standards of review. For example, the Tunney Act requires that consent decrees that resolve antitrust enforcement actions must serve the "public interest."[29] Even these statutes, however, rarely offer any more specific standards beyond general terms for the court's review of a consent decree's entry.

The Federal Rules of Civil Procedure do not specify a particular procedure for the entry of civil consent decrees with the exception of consent decrees that settle class action lawsuits.[30] In that instance, Rule 23(e) sets out the standards that federal courts must use to review consent decrees or settlements that resolve class action litigation. While it requires federal courts to approve the dismissal or compromise of any class action and dictates the settlement must be "fair, reasonable, and adequate," the rule sheds little light on the standards that a judge should use to review the agreement.[31] The

---

24. United States v. Union Electric Co., 132 F.3d 422, 430 (8th Cir. 1997); United States v. Wisconsin Electric Power Co., 522 F.Supp.2d 1107 (E.D.Wis. 2007).

25. 15 U.S.C. § 16 (2018).

26. 8 U.S.C. § 1329 (2018).

27. 12 U.S.C. § 67 (2018).

28. 42 U.S.C. § 9622(d)(1) (2018).

29. 15 U.S.C. § 16(b)–(h) (2018).

30. *See infra* notes 31–36 and accompanying text (discussing FED. R. CIV. P. Rule 23 and class action lawsuit settlements).

31. FED. R. CIV. P. 23(e)(2) was amended in 2018 to provide that:

[i]f the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A)the class representatives and class counsel have adequately represented the class;

(B)the proposal was negotiated at arm's length;

(C)the relief provided for the class is adequate, taking into account:

(i)the costs, risks, and delay of trial and appeal;

(ii)the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii)the terms of any proposed award of attorney's fees, including timing of payment;

explosive growth of aggregate litigation and use of multidistrict litigation management has also spurred judicial review of consent decrees that resolve the claims of large numbers of individual plaintiffs in coordinated litigation.[32] In response, the Manual for Complex Litigation ("Manual")[33] relies on long-standing common law standards to create an additional framework for judicial review of settlements and consent decrees that resolve complex litigation.[34] The Manual essentially requires the court find that the settlement "is fair to the interests of the persons the court is to protect" and provide for fair notice of the agreement to affected parties.[35] The court, if circumstances warrant, can hold a hearing to allow public comment on the proposed settlement.[36]

(iv)any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

These elaborations on Rule 23(e)(2)'s standard of review, however, focus on procedural protections to assure that the class members receive fair notice and representation during the settlement process. They do not provide substantial new insight on the substantive content of the "fair, reasonable, and adequate" standard itself.

32. Multidistrict litigation now comprises over one-third of the entire federal civil docket. Andrew D. Brandt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 75 (2019). Notably, some of the largest recent environmental consent decrees have resolved complex litigation brought under the MDL process, including the BP Deepwater Horizon spill and the Volkswagen emission defeat device litigation. Andrew D. Brandt, *Multidistrict Litigation and Adversarial Legalism*, 53 GA. L. REV. 1375, 1381 (2019); Abbe R. Gluck, *Unorthodox Civil Procedure*: *Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1672 (2017). For a comprehensive recounting of the use of MDL procedures in a large complex environmental lawsuit that resulted in a successfully lodged consent decree, see John C. Cruden, Steve O'Rourke, & Sarah D. Himmelhoch, *The Deepwater Horizon Oil Spill Litigation: Proof of Concept for the Manual for Complex Litigation and the 2015 Amendments to the Federal Rules of Civil Procedure*, 6 MICH. J. ENVTL. & ADMIN. L. 65, 132–40 (2016).

33. The Manual is an authoritative and widely respected resource produced by the Federal Judiciary Center ("Center"), which is the research and education agency of the U.S. federal court system. Congress created the Service at the recommendation of the Judicial Conference of the United States in 1967. *See* 28 U.S.C. § 620 (2018).

34. Multidistrict litigation, complex litigation, and class action settlements often resolve tort claims and seek compensatory damages that lie outside the province of typical environmental compliance and cost recovery litigation. Nonetheless, the legal standards and principles that underlie the entry of environmental consent decrees in conventional litigation closely parallel the review of consent decrees that resolve MDL environmental litigation.

35. MANUAL, *supra* note 16, at § 13.14, at 172–73.

36. *Id.* at 173. Notably, the Manual's discussion of judicial review of settlements does not provide separate review standards or procedures for consent

These court-driven standards subsequently have influenced judicial review of consent decree entries involving smaller numbers of parties in other fields of law.[37]

Outside of these statutory exceptions, the federal courts have a relatively limited role in their review and approval of consent decrees for entry as judgments. Before it can enter a consent decree, a court must first confirm that it has subject matter jurisdiction over the dispute underlying the decree, the decree falls within the "general scope of the case made by the pleadings," and the decree accords with "the objectives of the law upon which the complaint was based."[38] After confirming that the decree meets these minimal requirements, the trial court cannot insist on any particular provision in the settlement that the parties have not reached themselves.[39] While a judge can approve a consent decree that provides broader relief than the court could have awarded after trial,[40] this authority does not extend to terms that conflict with or violate the statute underlying the complaint.[41] The court can hold a fairness hearing at its discretion, but it generally is not required to do so.[42]

---

decrees generally. It does, however, discuss consent decree review and approval in great detail for settlements lodged in specific subject matter areas, including consent decrees resolving litigation under CERCLA. *Id.* at § 34.33, pp. 686–687.

37. Resnick, *supra* note 1, at 57. .

38. Local No. 93 v. City of Cleveland, 478 U.S. 501, 525 (1986). Courts have rejected environmental consent decrees when they failed to further the objectives of the underlying statute. Friends of the Earth v. Archer Daniels Midland Co., 780 F. Supp. 95, 100 (N.D.N.Y. 1992) (consent decree awarding litigation expenses to environmental plaintiffs contravened objectives of the federal Clean Water Act); Sierra Club, Inc. v. Elec. Controls Design, Inc., 909 F.2d 1350, 1355 (9th Cir. 1990).

39. Evans v. Jeff D., 475 U.S. 717 (1986); Resnick, *supra* note 1, at 60 (noting the active participation of judges in settlement negotiations which might lead to consent decrees).

40. *Local No. 93*, 478 U.S. at 525;*see also* Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority,* 1997 WISC. L. REV. 873, 925 (1997).

41. Resnick, *supra* note 1, at 59 ("[m]oreover, parties may not obtain consent decrees that require action in violation of the statute under which the case was brought or is otherwise unlawful.") (citing *Local No. 93,* 478 U.S. at 526).

42. United States v. Charles George Trucking, Inc., 34 F.3d 1081, 1085–86 (1st Cir. 1994). Notably, the U.S. Department of Justice has promulgated regulations for its management of consent decrees to resolve claims involving the release of pollutants. 28 C.F.R. § 50.7 (2019); 28 C.F.R. § 50.23 (2019). *See also* 25 C.F.R. § 584.10 (2020) (Indian Gaming Commission). These regulations simply memorialize the Department's prior policy that assured public hearings and transparency for consent decrees entered under early iterations of the Clean Water Act, the Clean Air Act, and other federal environmental statutes in effect during the early 1970s.

When reviewing a district court's decision to enter a consent decree, an appellate court will only reverse for a manifest abuse of discretion.[43] In doing so, the reviewing courts have noted the hallmarks of consent decrees that affect their interpretation, modification, enforcement, and termination. For example, the modification or termination of settlement agreements may depend on the parties' intent as reflected in the language of the agreement, but the modification of consent decrees, due to their dual nature, is subject to the same standards as final judgments.[44]

Other features of consent decrees suit them to regulatory settlements. Most notably, they offer an expanded set of enforcement options when a party fails to comply with the decree. For example, a consent decree will offer a private litigant the opportunity to enforce its terms against the United States or other governmental entities without surmounting sovereign immunity defenses or equitable doctrines.[45] The parties to a consent decree can also invoke the court's civil and criminal powers to enforce the judgment, including requests to hold the non-compliant party in contempt.[46] The court will also exercise continuing jurisdiction over the agreement that assures continuity of oversight and consistency of legal determinations.[47] Last, consent decrees will also frequently contain stipulated penalties, damages

43. *Charles George Trucking, Inc.*, 34 F.3d at 1085; City of Bangor v. Citizens Communications Co., 532 F.3d 70, 93–94 (1st Cir. 2008). A reviewing court may use a more stringent standard if the trial court's decision on a consent decree effectively functions as the issuance of interim injunctive relief. Carson v. American Brands, 450 U.S. 79, 86–90 (1981) (granting review of district court's refusal to enter consent decree as functional equivalent of injunctive relief reviewable under 28 U.S.C. § 1253); Abbott v Perez, 138 S.Ct. 2305, 2319 (2018). The appellate court will review *de novo* a district court's findings of law underlying its entry of a consent decree, particularly on constitutional issues. United States v. Olin Corp., 107 F.3d 1506, 1509 (11th Cir. 1997) (reviewing *de novo* district court finding that EPA lacked jurisdictional authority under the federal Commerce Clause to enter into consent decree on CERCLA site located wholly intrastate).

44. Horne v. Flores, 557 U.S. 433, 450 (2009) (affirming the flexible approach to modification of consent decrees emphasized in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 381 (1992)); *Rufo*, 502 U.S. at 381 (adopting a flexible approach to modification of consent decrees based on "[t]he experience of the District Courts and Courts of Appeals in implementing and modifying such decrees has demonstrated that a flexible approach is often essential to achieving the goals of reform litigation"); *see also* United States v. S. Fla. Water Mgmt. Dist., No. 88-1886, 2010 U.S. Dist. LEXIS 142552, at *85 (S.D. Fla. March 31, 2010) (citing *Horne* for the standards of modification of consent decrees under FED. R. CIV. P. 60(b) in the context of environmental permitting for construction in the Everglades).

45. Courtney R. McVean & Justin R. Pidot, *Environmental Settlements and Administrative Law*, 39 HARV. ENV. L. REV. 191, 199–200 n.47 (2015).

46. *Id.* at 200.

47. *Id.*

determinations, or waivers of objections to enforcement options that make the selection and implementation of enforcement more predictable and less contentious.[48]

Governmental litigants bring additional values and desires to settlements that use consent decrees. Given the large number of claims that they may face, agencies or governmental defendants will likely place a high premium on regularity and consistency. These drives lead to several important facets of consent decree negotiations, including the wide use of model consent decrees or standardized terms.[49] Outside of formalized settlement language, federal and state litigants have also used guidance documents and policy directives to constrain the negotiation and content of consent decrees. For example, the U.S. Department of Justice ("DOJ"),[50] the EPA,[51] and the U.S. Department of the Interior[52] have each recently issued guidance to limit the entry of consent decrees if they pre-commit the government to regulatory actions without broader public participation and democratic input.

Given their large institutional role, consent decrees have unsurprisingly sparked fierce controversy. The criticisms arise in part from concerns that these decrees can allow colluding parties to pre-commit the government to a course of action.[53] This lock-in effect arguably frustrates the democratic

48. *See* Anthony DiSarro, *Six Decrees of Separation: Settlement Agreement and Consent Orders in Federal Civil Litigation*, 60 AM. U. L. REV. 275, 283 (2010).

49. *See, e.g.,* U.S. Environmental Protection Agency model consent decrees listed *infra* at note 73

50. U.S. DEPARTMENT OF JUSTICE, MEMORANDUM FROM ATTORNEY GENERAL JEFF SESSIONS TO HEADS OF CIVIL LITIGATION COMPONENTS OF U.S. ATTORNEYS, PRINCIPLES AND PROCEDURES FOR CIVIL CONSENT DECREES AND SETTLEMENT AGREEMENTS WITH STATE AND LOCAL GOVERNMENT ENTITIES (2018), https://www.justice.gov/opa/press-release/file/1109681/download [https://perma.cc/s7ky-fscd]. This policy extended a prior DOJ guidance that Attorney General Edwin Meese issued in 1986 which prohibited departments and agencies from entering into consent decrees that required the promulgation or revision of regulations. Timothy Jost, *The Attorney General's Policy on Consent Decrees and Settlements Agreements,* 39 ADMIN. L. REV. 101, 101–102 (1987). For a lengthy and well-reasoned response to concerns raised by the Meese guidance, *see* OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE, AUTHORITY OF THE UNITED STATES TO ENTER SETTLEMENTS LIMITING THE FUTURE EXERCISE OF EXECUTIVE BRANCH DISCRETION (1999), https://www.justice.gov/sites/default/files/olc/opinions/1999/06/31/op-olc-v023-p0126_0.pdf [https://perma.cc/TFJ6-2RYZ].

51. U.S. ENVIRONMENTAL PROTECTION AGENCY, DIRECTIVE PROMOTING TRANSPARENCY AND PUBLIC PARTICIPATION IN CONSENT DECREES AND SETTLEMENT AGREEMENTS (2017).

52. U.S. DEPARTMENT OF THE INTERIOR, ORDER NO. 3368, PROMOTING TRANSPARENCY AND ACCOUNTABILITY IN CONSENT DECREES AND SETTLEMENT AGREEMENTS, (2018).

53. *See supra* notes 50–52.

process if a future administration wishes to pursue a different policy course.[54] Consent decrees also purportedly entangle the judicial branch in decisions that do not always benefit from a full adversarial testing or a thorough analysis of their underlying legal claims. These features have led to a rising critique that "sue and settle" consent decrees unduly enlarge judicial participation and control of the political process, and these concerns in turn have spurred recurring legislative proposals to curb their use.[55] This Article, however, does not focus on environmental consent decrees to compel governmental rulemaking, but instead centers on actions against parties to compel compliance with environmental regulations or to collect costs and fees incurred during environmental response actions.

The development of U.S. environmental law, in particular, has relied on consent decrees. While consent decrees have played a role in environmental litigation from its earliest days in the United States,[56] they rose to prominence in environmental lawsuits after the beginning of the modern federal environmental era. After Congress promulgated the landmark environmental

54. *See, e.g.*, ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN Government (Yale U. Press 2014).

55. *See, e.g.*, Janette L. Ferguson & Laura Granier, *Sue and Settle: Citizen Suit Settlements and Environmental Law*, 30 NAT. RESOURCES & ENV'T 23, 23–24 (2015); Henry N. Butler & Nathaniel J. Harris, *Sue, Settle, and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism*, 37 HARV. J. L. & PUB. POL. 579 (2014); Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 SEATTLE U. L. REV. 891, 892–895 (2014).

56. For example, one seminal case of federal environmental nuisance law – the dispute between Illinois and Missouri over the City of Chicago's sewage discharges into the Mississippi River and, later, the excessive withdrawal of water from Lake Michigan – was resolved through a consent decree in 1967 that continues in effect today. Wisconsin v. Illinois, 388 U.S. 426 (1967). Several state attorneys general sought to invoke the court's continuing jurisdiction over the decree thirty-five years later by suing to force federal action against potential incursions of invasive Asian carp into the Great Lakes. Brief for the United States in Opposition, Wisconsin v. Illinois, (2010) (No. 1, 2, 3) (citing Wisconsin v. Illinois*,* 388 U.S. 426 (1967), and earlier public nuisance litigation a century earlier between the states over alleged cholera caused by Chicago's sewer discharges, Missouri v. Illinois*,* 200 U.S. 496 (1906)). Other keystone environmental rulings by the U.S. Supreme Court on interstate torts also resulted in consent decrees implemented under judicial supervision. The Court's role arose, in part, from its historical original compulsory jurisdiction over interstate disputes (which included tort lawsuits over interstate resources, such as rivers and airsheds) and the need for continuing judicial supervision to implement environmental remedies that required long periods of time to accomplish. *See generally* KIMBERLY K. SMITH, THE CONSERVATION CONSTITUTION (U. Kansas Press 2019); Dand Farber, *The Pro-Environment Lochner Court,* LEGAL PLANET (Sept. 30, 2019) https://legal-planet.org/2019/09/30/the-supreme-court-and-the-environment-in-the-lochner-era [https://perma.cc/T6UE-5FFX].

statutes in the 1970s through early 1980s, which remain the bedrock of modern U.S. environmental law, litigation initiated under the new laws frequently resulted in consent decrees that drove subsequent regulatory standards and practices. For example, the genesis of the Clean Air Act's Prevention of Significant Deterioration Program ("PSD") and the Clean Water Act's regulation of toxic water pollutants resulted from consent decrees that compelled action by EPA under judicial supervision.[57]

This practice continues in environmental law today. By one rough count, over fourteen percent of all federal environmental lawsuits filed since 1987 have been resolved through consent, and this share climbs to over ninety percent if one excludes environmental cases otherwise resolved by settlement or voluntary dismissal.[58] While this level of use reflects the flexibility and procedural advantages of consent decrees,[59] many parties – including the

---

57. *See, e.g.*, Citizens for a Better Env't v. Gorsuch, 713 F.2d 1117, 1127–1130 (D.C. Cir. 1983) (litigation under federal Clean Water Act resulting in Flannery consent decree, which required EPA to implement new water toxics regulatory program to advance the purposes of the statute); Percival, *supra* note 1 at 339.

58. The Federal Judicial Center's database tracking the resolution of federal civil litigation since 1987 shows that parties filed 33,485 environmental cases in all federal circuits. Of those cases, 4,827 were resolved by consent (14.4%). This subset excludes cases resolved by settlement or voluntary dismissal, which receive a separate tracking code. By comparisons, only 4996 cases reached substantive resolution by trials, motions before trial, jury verdicts, directed verdicts, and remands to agencies during that same time period. The FJC database is available at https://www.fjc.gov/research/idb/interactive/IDB-civil-since-1988 [https://perma.cc/NU8U-9PH7].

Outside of environmental law, other legal fields see even higher levels of consent decree use. The Equal Employment Opportunity Commission resolved 84.4% of its cases in 2017 by consent decree, which can be found at https://www.eeoc.gov/eeoc/litigation_reports/17annrpt.cfm#_Toc248558714 [https://perma.cc/P2HY-R859] at III(D)(1). The Federal Trade Commission resolved 80% of its antitrust actions by consent judgments, and the U.S. Department of Justice resolves a "vast majority" of its civil antitrust cases via consent decrees. Robert Khuzami, *Testimony on Examining the Settlement Practices of U.S. Financial Regulators* (May 17, 2012), https://ww.sec.gov/news/testimony/2012-ts051712rkhtm [https://perma.cc/42CX-JGEG] (citing U.S. EEOC, *Office of the General Counsel Fiscal Year 2009 Annual Report*, at 62 (2009); U.S. FTC, *The FTC in 2010*, at 2 (2010); John M. Nannes, *Termination, Modification, and Enforcement of Antitrust Consent Decrees*, 15 ANTITRUST 55, 55 (2000)).

59. Consent decrees' reliance on contractually negotiated terms between the parties offers the benefits of judicial oversight and enforcement, and the terms and implementation of these decrees can be more flexible and certain than either private settlement contracts or fully contested judgments. These advantages apply with equal force to environmental consent decrees. *See* discussion *supra* notes 45–52; *see also* Brandt & Rave, *supra* note 32, at 88–98 (advantages to "repeat

federal government – also routinely use them because underlying federal statutes, regulations, and policies either recommend or bluntly mandate their use.[60] For example, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") requires that settlements with the government specifying permanent remedy selections at cleanup sites must be lodged with the court through a consent decree.[61] The statute adds several specific substantive requirements for consent decrees as well, including restrictions on the use of covenants not to sue and the preclusive effects of consent settlements on contribution claims by other private cost recovery claimants or potentially responsible parties.[62]

In addition to constraining consent decree terms and establishing procedural mandates for their entry, the federal government has pursued strategic enforcement initiatives to establish new environmental obligations and industry practices through the strategic use of consent decrees. For example, the EPA historically selected programmatic enforcement priorities that, in the past, have targeted industrial sectors which allegedly posed special risks of non-compliance or environmental risks.[63] These initiatives often led to settlement strategies wherein a series of consent decrees would establish expected language and compliance obligations for subsequent litigants or future enforcement targets in the same sector.[64] This tactic, for example, underlaid the broad New Source Review enforcement initiative pursued by the EPA and DOJ to reduce purportedly unpermitted air emissions from coal-fired electric generation units, petroleum refineries, and mining operations.[65]

III. CONSENT DECREES AS A SOURCE OF LAW

If consent decrees can generate new principles of environmental law, how do they do it? Given the wide and varied use of consent decrees in environmental disputes, they unsurprisingly use similarly broad and distinctive pathways to influence and create environmental legal principles. Three in

players" in multidistrict litigation by relying on terms and expertise drawn from prior consent decree and settlement negotiations).

60. *See* discussion *supra* at note 6.

61. *See* CERCLA 42 U.S.C. § 9622(d)(1)(A).

62. 42 U.S.C. §§ 9621(e)(2), 9621(f)(2), 9622(e)(1), 9621(d), 9622(e)(6), 9622(f)(1)(C), 9622(g)(4), 9622(i)(3), 9622(l), 9622(m).

63. *See*, Consent Decree, United States v. Kern Oil & Refining Co. (No. 2:19-cv-02460-KJM-CKD, E.D. Cal. Dec. 19, 2019) at ¶¶ 19–20, https://www.justice.gov/enrd/consent-decree/file/1224896/download [https://perma.cc/K5ZH-AF48].

64. Consent Decree, United States v. Tesoro Refining and Marketing Company LLC (No. SA-16-cv-00722, W.D. Tex., July 28, 2016) at 74-77, https://www.epa.gov/sites/production/files/2016-07/documents/tesoro-cd.pdf [https://perma.cc/F6EY-YH58].

65. *See* discussion *infra* notes 80–85 (consent decrees arising from EPA enforcement initiatives against refineries and power plants).

particular stand out: (1) the *content* of consent decrees may result in changes to expected standards of care or regulatory compliance obligations from a substantive perspective, (2) the *process* of judicial review required to lodge consent decrees may generate corollary court decisions that contain implicit or explicit legal findings and principles, and – most controversially – (3) the *nature* of consent decrees themselves as judicial instruments may inherently offer the possibility of creating persuasive, or even precedential, legal holdings through the cumulative content of the decrees. This list is not meant to be exclusive, and consent decrees and agreements in other fora may generate environmental legal principles through additional means in narrower circumstances.[66]

Identifying this typology of consent decree holdings has grown much easier thanks to the recent development of new collections and search services that have made consent decrees readily available to the public. Historically, the federal court system did not routinely designate consent decrees for publication (except occasionally judgments that lodged the underlying consent decrees), and researchers needed to either obtain court files, submit requests under the Freedom of Information Act, or seek underlying documents from the parties themselves.[67] As a result, basic data – such as a comprehensive set of consent decrees or judgments for a particular subject area, or even the total number of consent decrees entered by a particular court or in a particular subject – were typically hard to locate. Given that the historical provenance of some consent decrees stretches back decades, vintage consent decrees can still prove difficult to identify and assess.

The rise of computerized databases and research services has made it much easier to assess consent decrees lodged by the federal courts since

66. For example, consent administrative orders and other consensual administrative settlements may provide a basis to allege administrative res judicata or collateral estoppel for issues fully contested in the agency proceeding. United States v. Utah Constr. & Mining Co., 384 U.S. 394, 420–22 (1966); *see also* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014) (discussing precedential value of administrative consent orders issued by the Federal Trade Commission). As noted earlier, this article will not focus on the legal precedential weight of administrative consent judgments. *See* discussion *supra* note 12.

67. The Trump Administration's recent executive order to promote transparency in consent decree usage arose, in part, from concerns that executive branch agencies had failed to provide sufficient transparency and access as dictated by the Administrative Procedure Act and the Freedom of Information Act. Section One (Policy), *Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication* (Oct. 9, 2019), available at https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-transparency-fairness-civil-administrative-enforcement-adjudication/.

1980.[68] These resources can sometimes include state environmental consent decrees, but their coverage focuses predominantly on federal environmental cases.[69] Last, the federal government has begun to catalog new consent decrees, log them into searchable databases, and provide notice to the public about the availability of these resources.[70] These new resources, however, have only begun to collect substantial numbers of new and prior consent decrees and include only a portion of the historical universe of consent decrees.

---

68. Despite the lack of a comprehensive resource for environmental consent decrees, several partial compilations offer a substantial collection for initial research work. These include the Environmental Law Institute's comprehensive database of environmental consent decrees, orders, agreements, and judgments dating to 1970, the LEXIS database for Environmental Consent Decrees dating to 1970, and the online compilation of consent decrees for the EPA, which provides settlements dating from 1998. *See* "Consent Decree," THE ENVIRONMENTAL LAW REPORTER, https://elr.info/search_keywords?keyword=consent+decree &search_topic=All&x=0&y=0 [https://perma.cc/KF6M-DUGL] (last visited June. 17, 2020); "Consent Decree," LEXIS ADVANCE RESEARCH, https://advance.lexis.com/search/ [] (last visited June 17, 2020); "Consent Decree," EPA, https://cfpub.epa.gov/enforcement/cases/ [https://perma.cc/388A-TQYN] (last visited June 17, 2020); s*ee also* U.S. DEP'T OF JUSTICE, PROPOSED CONSENT DECREES, https://www.justice.gov/enrd/consent-decrees (last visited June 17, 2020). Bloomberg also now offers one of the best database resources for searching court dockets that contain consent decrees, and in many cases the text of the decrees themselves. *See* BLOOMBERG LAW, https://www.bloomberglaw.com/product/blaw/ (last visited June 17, 2020). While numerous other services provide databases that include environmental consent decrees, their coverage is not as broad and their search functions were not as well suited for this research. Westlaw, for example, does not provide a specific data field to note when a legal document is a consent decree. The Government Printing Office website that publishes the Federal Register also does not offer a ready means to search for consent decrees other than Boolean logic searches through its entire database, which only reaches back to the mid-1990s. The Superfund Information Network, which previously provided a private database for use by industry parties negotiating consent decrees with the federal government, is apparently defunct and cannot be accessed online via a public search.

69. State law consent decrees pose greater challenges to researchers seeking to locate and collect authoritative compilations of prior decrees because of the large number of states, varying bodies of law, unique court procedural requirements and processes, and disparate reporting systems and archival resources. As noted earlier, this article will not attempt to include state law environment consent decrees in its analysis. *See* discussion *supra* note 5.

70. *See* discussion *supra* notes 2–3.

A. Creation Through Fostering Substantive Norms

While each consent decree results from the individual circumstances of its underlying litigation and preferences of particular litigants, many look startlingly similar. This aura of repetition is not surprising because litigants and courts will frequently turn to prior decrees to use as templates for subsequent settlements, which helps to reduce risks that courts will reject decrees that use novel terms or approaches.[71] This practice promotes other values as well, including consistency between case resolutions to assure fairness and stability.

The tendency to use repetitive terminology and settlement structures is especially pronounced with institutional litigants who face multiple lawsuits that either challenge or enforce similar policies and laws. For large institutional players (or small coalitions of similarly positioned litigants with common interests), the use of parallel language in multiple consent decrees helps assure fairness in resolutions, promotes consistency in interpretations, and avoids duplicative negotiations over repetitive terms.[72] This dynamic plays an especially important role with governmental litigants. The EPA, for example, has issued model consent decrees that contain specific terms and language that the agency expects in certain types of CERCLA settlements.[73]

---

71. *See* Brandt & Rave, *supra* note 32 at 93–98 (advantages to "repeat players" in multidistrict litigation by relying on terms and expertise drawn from prior consent decree and settlement negotiations).

72. For example, the Superfund Information Network explicitly aimed to maximize these advantages for a coalition of large CERCLA potentially responsible parties. *See* discussion *supra* at note 59; *see also* Brandt & Rave, *supra* note 32, at 93–98 (advantages to "repeat players" in multidistrict litigation by relying on terms and expertise drawn from prior consent decree and settlement negotiations).

73. .S. ENVTL PROTECTION AGENCY, CASHOUT CONSENT DECREE FOR ABILITY TO PAY PERIPHERAL PARTIES (CERCLA § 107) (2016), https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=386 [https://perma.cc/ZF4E-3SKM]; U.S. ENVTL PROTECTION AGENCY, CASHOUT CONSENT DECREE FOR PERIPHERAL PARTY SETTLEMENTS NOT BASED ON ABILITY TO PAY (CERCLA § 107) (2016), https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=542 [https://perma.cc/UB44-5BAT]; U.S. ENVTL PROTECTION AGENCY, CONSENT DECREE FOR RECOVERY OF PAST RESPONSE COSTS (CERCLA § 107) (2017), https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=385 [https://perma.cc/X8D5-YY2U]; U.S. ENVTL PROTECTION AGENCY, DE MINIMIS CONTRIBUTOR CONSENT DECREE (CERCLA § 122(G)(4)) (2016), https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=538 [https://perma.cc/B4JA-FF4A]; U.S. ENVTL PROTECTION AGENCY, DE MINIMIS LANDOWNER CONSENT DECREE (CERCLA § 122(G)(4)) (2016), https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=540; [https://perma.cc/KD5Q-5VQV]; U.S. ENVTL PROTECTION AGENCY, MUNICIPAL SOLID WASTE GENERATOR/TRANSPORTER CONSENT DECREE (2016),

While the DOJ has not promulgated model consent decrees for public comment or use, its internal guidelines set certain substantive requirements for its attorneys to include in consent decrees.[74] Other federal agencies with jurisdiction over environmental concerns or natural resources deploy consent decrees in a fashion similar to the EPA.[75]

The echoes of language between different consent decrees can also arise when governmental litigants seek strategic enforcement initiatives that pursue similar violations within a specific industrial sector. These strategic enforcement programs often explicitly seek to spur broad changes in behavior across an entire field of activity, and as a result, the federal government will often seek to harmonize its settlements to assure consistent and reinforcing actions by multiple settling parties. The EPA, in particular, has historically pursued strategic enforcement initiatives that target specific industrial sectors for general categories of potential environmental violations.[76] These enforcement efforts, for example, have previously focused on possible environmental violations by coal-fired electrical power generators, petroleum

---

https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=541 [https://perma.cc/87ZD-H2KQ]; U.S. ENVTL PROTECTION AGENCY, NON-EXEMPT DE MICROMIS PARTY CONSENT DECREE (CERCLA § 122(G)(4)) (2016), https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=513 [https://perma.cc/97NZ-55WR]; U.S. ENVTL PROTECTION AGENCY, RD/RA CONSENT DECREE (2019), https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=81 [https://perma.cc/TP4Z-UWKZ].

74. U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 1-18.200 (2018) (confidentiality provisions in consent decrees); U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 3-8.130 (2018) (negotiated consent decrees terms cannot obligate United States to expend funds in a fashion that would violate Anti-Deficiency Act); U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 4-3.410 (2018) (prohibition on confidential settlements); U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 5-12.613 (2018) (general requirements for negotiated terms in environmental consent decrees).

75. For example, the National Oceanic and Atmospheric Administration within the U.S. Department of Commerce uses consent decrees in a broad and systemic fashion to resolve natural resource damages claims. U.S. NAT'L OCEANIC AND ATMOSPHERIC ADMIN., NATURAL RESOURCE CONSENT DECREES/SETTLEMENTS (last visited June 18, 2020), https://www.gc.noaa.gov/natural-office1.html [https://perma.cc/KBY9-SP6L].

76. *See, e.g.*, U.S. ENVTL PROTECTION AGENCY, EPA ANNOUNCES NATIONAL ENFORCEMENT INITIATIVES FOR COMING YEARS (2016), https://archive.epa.gov/epa/newsreleases/epa-announces-national-enforcement-initiatives-coming-years.html [https://perma.cc/2Z85-AFZL] (announcing national enforcement initiatives in industrial water pollution, accidental releases at industrial and chemical facilities, hazardous air pollutants, large source air pollution, energy extraction activities, contaminated storm water and sewage discharges, and animal waste water pollution).

refiners, mining operations, municipal wastewater and stormwater systems, and many others.[77]

Given the broader range of relief available in enforcement settlements and consent decrees,[78] and the opportunities to leverage consistent changes through consistent use of settlement terms in numerous consent decrees within a single commercial sector or geographic community,[79] consent decrees have unsurprisingly acted as a test bed for institutional players, including government agencies, to implement emerging technologies or pending regulatory standards in advance of binding legislative or regulatory requirements.[80] For example, the EPA in the past has used consent decrees to seek controls on refinery flares that mirrored proposed – but not yet final – regulations,[81] to institute remote sensing at refineries and other facilities that went beyond continuous emission monitoring standards in existing regulations,[82] and to

77. U.S. ENVTL PROTECTION AGENCY, NATIONAL COMPLIANCE INITIATIVES https://www.epa.gov/enforcement/national-compliance-initiatives [https://perma.cc/DQW3-ZKWP] (last visited June 19, 2020). Recently EPA has recast its strategic enforcement priorities as national compliance initiatives which focus on promoting compliance as well as enforcement. The most recent National Compliance Initiative prioritizes efforts to control emissions of volatile organic compounds and hazardous air pollutants from stationary facilities near vulnerable communities (particularly in non-attainment areas), prevent unpermitted hazardous air emissions from hazardous waste facilities, reduce risks of accidental releases from industrial and chemical facilities, assure compliance with drinking water standards, and manage lead exposure. U.S. ENVTL PROTECTION AGENCY, FY2020-FY2023 NATIONAL COMPLIANCE INITIATIVES (2019), https://www.epa.gov/sites/production/files/2019-06/documents/2020-2023ncimemo.pdf.

78. *See* discussion *supra* notes 40–41.

79. *See* Brandt & Rave, *supra* note 32 at 89–91.

80. The influence can run both ways. The entry of a consent decree may spur the initiation of new regulatory standards or influence the development of a nascent regulation. Environmental litigation and consent decree negotiations can take years to complete, and federal agencies typically need just as much time to move a complex environmental rule through the regulatory development process. The lengthy overlap of the two processes allows each of them to potentially influence the other.

81. Standards of Performance for Petroleum Refineries*,* 73 Fed. Reg. 35838, 35845–50, 35855 (June 24, 2008) (codified at 40 C.F.R. pt. 60) (noting that many refineries had already installed many control devices required by Subpart Ja through their prior consent decree commitments).

82. For example, the United States has persistently sought to require infrared remote sensing of volatile organic compounds as either a compliance condition or a supplemental environmental project in refinery consent decrees. *See, e.g.*, Consent Decree, United States v. Kern Oil & Refining Co. (No. 2:19-cv-02460-KJM-CKD, E.D. Cal. Dec. 19, 2019) at ¶¶ 19–20, https://www.justice.gov/enrd/consent-decree/file/1224896/download; Consent Decree, United States v. CITGO Petroleum Corp. (No. 16-C-10484, N.D. Il., Nov.

mandate controls on greenhouse gas emissions that contemporaneous EPA regulations did not yet regulate.[83] Specifically, the EPA has sought to establish enhanced leak detection and repair ("LDAR") practices and refineries and other sectors predominantly through consent decrees,[84] while state agencies have proposed model rules for enhanced monitoring at petroleum refineries.

While these settlements did not purport to establish binding regulatory standards on third parties who were not included within the consent decree,

---

10, 2016) at ¶¶ 51, 53–58 and App. C, https://www.epa.gov/sites/production/files/2016-11/documents/citgopetroleumcorp-pdfmidwestrefininglc-cd.pdf. The United States has pursued other innovative remote sensing technologies in different industry sectors as well. *See, e.g.*, Consent Decree, United States v. Indiana Harbor Coke Co. (No. 18-cv-35, N.D. Ind., Jan. 25, 2018), at ¶ 30, App. 2 (requiring use of solar occultation flux for remote detection of volatile organic compounds), https://elr.info/sites/default/files/doj-consent-decrees/indiana_harbor.pdf. All of DOJ's lodged environmental consent decrees are available at THE ENVIRONMENTAL LAW REPORTER, *DOJ Proposed Consent Decrees* (last visited June 19, 2020), https://elr.info/doj-proposed-consent-decrees.

83. *See, e.g.*, Consent Decree, United States v. Tesoro Refining and Marketing Company LLC (No. SA-16-cv-00722, W.D. Tex., July 28, 2016) at 74–77, https://www.epa.gov/sites/production/files/2016-07/documents/tesoro-cd.pdf (flare combustion efficiency requirements); U.S. ENVTL PROTECTION AGENCY, U.S. REFINERS TO REDUCE AT SIX REFINERIES UNDER SETTLEMENT WITH EPA AND DEPARTMENT OF JUSTICE (2016), https://archive.epa.gov/epa/newsreleases/oil-refiners-reduce-air-pollution-six-refineries-under-settlement-epa-and-department.html [https://perma.cc/QTC9-9PTK] (consent decree requires reduction of "equivalent of 47,034 tons of carbon dioxide").

84. *See, e.g.*, Appendix A to Consent Decree, United States v. Lima Refining Co. (No. 3:17-cv-01320, W.D. Ohio, June 22, 2017) at 134–149 ("Enhanced LDAR Program"), https://www.justice.gov/sites/default/files/pages/attachments/2017/06/29/env_enforcement-2668745-v1-lodged_consent_decree.pdf; *see also* Inaas Durratt, *Enhanced LDAR in the Chemical Industry*, TRINITY CONSULTANTS (April 6, 2010), https://www.trinityconsultants.com/news/federal/enhanced-ldar-in-the-chemical-industry [https://perma.cc/2VSM-2CMU] ("[a]s a result of recent leak detection and repair (LDAR) audits and the associated issues. . ., EPA is initiating enhanced LDAR programs as part of the most recent consent decrees."); Mid-Atlantic Regional Air Management Association (MARAMA), *Model Rule for Enhanced Monitoring of Equipment Leaks at Petroleum Refineries* at p. 1 (Oct. 13, 2006) (MARAMA Technical Oversight Committee drew proposed rule language from most stringent limits contained in recent consent decrees), https://s3.amazonaws.com/marama.org/wp-content/uploads/2019/10/04184813/Refinery_Enhanced_Leak_Monitoring_Model_Rule-2007.pdf [https://perma.cc/EAH6-MH4F].

they nonetheless established an expectation that future consent decrees would include similar, or more stringent, terms.[85] This dynamic gained further strength when many of these emerging practices required under consent decree matured into regulatory standards supported by data and successful precedents established in part through consent decrees.[86] Similar patterns

85. This interplay particularly stands out in CERCLA settlement negotiations where parties, including the United States, will encourage early settlements by raising the specter of disproportionate shares of liability to recalcitrant parties who settle late or unsuccessfully litigate. This approach relies in part on CERCLA's reliance in most circumstances on joint and several liability when a party has contributed to an indivisible harm. *See* Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 610–15 (2009) (outlining principles for establishing divisibility and joint and several liability under CERCLA); Lynnette Boomgaarden & Charles Breer, *Surveying the Superfund Settlement Dilemma*, 27 LAND & WATER L. REV. 83, 100 (1993); Michael Hickok & Joyce Padleschat, *Strategic Considerations in Defending and Settling a Superfund Case*, 19 LOY. L.A. L. REV. 1213, 1231–32 (1986) (reservation on joint and several liability to recalcitrant CERCLA settlors). EPA has invoked a similar settlement strategy, however, with industry sector enforcement initiatives where it will offer more favorable terms to the first industry members who settle and reserve harsher conditions for late settlors.

86. The federal government's prior enforcement practices are replete with strategic sector initiatives designed to create quasi-regulatory impacts. For example, EPA and DOJ have sought to enhance emission control obligations at refineries through consent decrees that effectively equaled control requirements under its pending proposed regulations for refinery emissions under 40 C.F.R. Subpart Ja. *See e.g.*, United States v. Marathon Petroleum Company, LP, et al. (No. 1:12-cv-11544, E.D. Mich., June 9, 2016) at 3–4, https://www.justice.gov/opa/file/865816/download (amending an existing consent decree to satisfy emission requirements under a forthcoming rule that "in part as a result of knowledge and data arising out of the negotiation and implementation of the flare efficiency requirements of the Consent Decree, EPA recently finalized a new, industry-wide rule for flare controls as part of EPA's Petroleum Refinery Sector Risk and Technology Review Rule . . . ."). Consent decrees under CERCLA that direct remedial actions at contaminated sites have long contained standardized language drawn from model consent decrees which effectively impose quasi-regulatory standards on remedy selection and cleanup operations. *See* U.S. ENVTL PROTECTION AGENCY, ISSUANCE OF REVISED MODEL CONSENT ORDER AND NEW MODEL UNILATERAL ORDER FOR REMEDIAL INVESTIGATION/FEASIBILITY STUDY AND UPDATED FINANCIAL ASSURANCE AND INSURANCE LANGUAGE FOR ALL CERCLA RESPONSE ACTION SETTLEMENTS AND UNILATERAL ADMINISTRATIVE ORDERS (2016), https://www.epa.gov/sites/production/files/2016-10/documents/rifs-asaoc-uao-mods-mem-2016_0.pdf. Similarly, consent decree settlements under the federal Clean Water Act have effectively driven the development of treatment standards for contaminated sediments under its Total Maximum Daily Load standards. *See e.g.*, Clean Water Act Section 303(d): Preliminary Notice of Total Maximum Daily Load (TMDL) Development for the Chesapeake Bay, 74 Fed. Reg. 47,792,

surface as well in administrative settlements, supplemental environmental projects, and consent decrees negotiated under other parallel principles such as environmental mitigation demands by the DOJ, but the judicial ensconcement of these emerging practices in formal court decrees gives them added heft and persistence.[87] In addition to laying baselines for future regulatory requirements, consent decrees that require operators in a specific economic sector to adopt specific corrective practices may also effectively influence the standard of care required by tort law,[88] regulatory safety,[89] and the selection of specific technology standards under environmental laws.[90]

47,792–94 (Sept. 17, 2009) (public notice and initial request for public input, citing "the intent of EPA to establish a Chesapeake Bay-wide Total Maximum Daily Load (TMDL) for nutrients and sediment for all impaired segments in the tidal portion of the Chesapeake Bay watershed" whereby the "TMDL is being developed consistent with the requirements of two Consent Decrees . . . ."). This long history of this practice reaches back to some of the earliest consent decrees that helped establish fundamental federal environmental programs. For example, the Flannery Consent Decree that initially established discharge standards for toxic water pollutants under the federal Clean Water Act ultimately became the basis for statutory revisions by Congress in 1977. Natural Resources Defense Council v. Train, Civ. No. 2153-73, 6 ENVTL L. RPTR. 20,588 (D.D.C. 1976) (lodging of Flannery consent decree); U.S. ENVTL PROTECTION AGENCY, TOXIC AND PRIORITY POLLUTANTS UNDER THE CLEAN WATER ACT (last visited June 20, 2020), https://www.epa.gov/eg/toxic-and-priority-pollutants-under-clean-water-act [https://perma.cc/TQ2S-KMC2]; 42 U.S.C. § 7470 *et al*.

87. As noted earlier, parties wishing to modify a consent decree must meet higher standards than the simple mutual agreement needed to alter a contractual settlement agreement. *See supra* text accompanying note 44. The relative weight of a consent decree likely will also grow if a court reviews public comments or third-party submissions by convening a hearing on entry of the decree, or if the decree has been in place long enough to bolster the reliance interests of the parties or other individuals. *See supra* text accompanying notes 36, 42.

88. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTION HARM §§ 13, 14, 16 (AM. LAW INST. 2019) (role of custom and statutory compliance in determining negligence); David Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1678 (2007); Richard Epstein, *The Path to* "*The T. J. Hooper": The Theory and History of Custom in the Law of Tort,* 21 J. LEGAL STUDIES 1 (1992).

89. *See* 29 C.F.R. § 1902.1 *et. seq.* (numerous regulatory safety standards under the Occupational Safety and Health Act (OSHA)).

90. *See* Clean Air Act § 112(r), 42 U.S.C. §§ 7412(r) (2018) ("Prevention of Accidental Releases," requiring that EPA establish emission standards that require the maximum degree of reduction in emissions of hazardous air pollutants); §§ 165(a)(4), 169(3). 42 U.S.C. §§ 7475(a)(4), 7479(3) (2018) (establishing "Best Available Control Technology" (BACT) regulating major new sources and modifications in attainment areas under the Prevention of Significant Deterioration (PSD) program); § 112(d), 42, U.S.C. 7412(d) (2018) (establishing "Maximum Achievable Control Technology" (MACT) regulating sources of

Using consent decrees and settlements to effectuate new or emerging standards is, of course, controversial and raises important questions about transparency and democratic accountability. Recent legislative and policy initiatives to constrain settlements do not address this particular pathway for evolving environmental legal standards. For example, while recent DOJ and EPA guidances[91] forbid consent decrees that impair the discretion of future administrations to set regulatory policy, these guidances focus on regulatory settlements that compel the agency to issue formal rules of national scope within certain timeframes or with mandated content.[92] By contrast, the consent decree terms discussed above deal solely with individual parties who reach an agreement to their specific controversy and, generally, address retrospective applications of law. Any standards created by a constellation of consent decrees are essentially organic and emerge, in a common law-like fashion, from the full sphere of settlement terms. These consent decrees also generally do not fall afoul of other objections to supplemental environmental projects or citizen suit settlements which involve payments to third parties or provision of funds for agency use without congressional appropriation.[93]

EPA has historically sought to avoid using its enforcement powers to create or implement new environmental norms that lack any underlying regulatory or statutory standards, but it has not noted any such reservations in its use of its settlement authority.[94] This informal practice has generally, not

---

hazardous air pollutants under NESHAP); §§ 173(a)(2) and 171(3), 42 U.S.C. §§ 7503(a)(2), 7501(1) (2018) (establishing the "Lowest Achievable Emission Rate" (LAER) regulating major new sources and modifications in nonattainment areas under the Nonattainment New Source Review (NNSR) program); *see also* 33 U.S.C. §§ 1316(a)-(b) (2018) (establishing "Best Available Demonstrated Technology" (BADT), sometimes alternatively called the "New Source Performance Standards" (NSPS), for regulating new dischargers under the CWA); 40 C.F.R. § 268 (2019) (establishing Land Disposal Restrictions (LDRs) for hazardous waste under the Resource Conservation and Recovery Act (RCRA)).

91. An agency guidance is a statement of agency policy or interpretation concerning a statute, regulation, or technical matter within the agency's jurisdiction that the agency intends to have general applicability and affect regulated parties' future behavior. Such guidances, however, do not have force or effect of law in their own right. 36 U.S.C. § 1213.2(a) (National Archives and Records Administration's definition of "guidance").

92. *See supra* text accompanying notes 45–48.

93. Memorandum from J. Wood, Acting Assistant Attorney General, U.S. Department of Justice, to ENRD Deputy Assistant Attorneys General, *Settlement Payments to Third Parties in ENRD Cases* (Jan. 9, 2018), available at https://www.justice.gov/enrd/page/file/1043726/download .

94. SEP Guidance at 6–7 (noting restriction that SEPs in settlements must not duplicate existing legal requirements or obligations under injunctions or consent decrees); *see also* John Graham & James Broughel, *Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act,* 1 HARV. J.L. & PUBLIC POL'Y: FEDERALIST 30, 46–47 (2014) (noting that federal agencies create policy by exercise of enforcement discretion, and that the Office

substantively, restricted the flexibility of parties to voluntarily assume additional obligations as part of a settlement offer or resolution, and it ultimately does not change the outcome. The broad implementation of the same practices through a collection of consent decrees inevitably will shift the legal expectations and duty of care for remaining operators and facilities in the same sector.

B. Creation Through Deferential Judicial Review

While consent agreements can vary widely in their content and subject matter, they all must undergo a similar review process before a federal court will lodge them as judgments. As noted earlier, every lodged consent decree comes with an accompanying undemanding judicial decision: that the decree is reasonable, fair, adequate, and consistent with applicable law.[95] While this deferential standard of review preserves a large zone of autonomy to settling parties on how they resolve their disputes, it nonetheless sets parameters beyond which the parties cannot settle because the settlement conflicts with the underlying statute. The legality of a consent agreement, in turn, rests on the scope and obligations of the underlying statute, the terms and extent of proffered remedial action, the effects on third parties, or other factors. In making that assessment, the reviewing court must make an initial interpretation of the underlying statutes or legal rights affected by the parties' settlement. Those interpretations consequently create law and statutory interpretations as part of the lodging process.

When analyzing the legal effect of court decisions to lodge consent decrees, it is helpful to distinguish between two types of rulings. First, the court may reach a legal conclusion about the validity, scope, or enforcement of a consent decree without considering the contents of the decree itself or the assertions made by the parties.[96] These inquiries may turn on the constitutionality of the underlying statutory provision or the standing or competence of a party to seek a judgment. For example, in *United States v. Olin Corporation*, the district court concluded that the Commerce Clause of the U.S. Constitution did not provide a valid basis for the United States to regulate the cleanup of a waste site located wholly within state boundaries.[97] The court, therefore, refused to enter a proffered consent decree that would have governed that remedial action.[98] This type of judicial ruling relies wholly on legal conclusions outside the specific scope or contents of the decree itself, and as a result, appellate courts will typically subject such a decision to *de novo* review – the exact review standard used by the Eleventh Circuit to

---

of Information and Regulatory Affairs lacks the capacity and clear authority to review consent decrees for their potential policy and regulatory implications).

95. *See* discussion *supra* notes 24–44.

96. *See, e.g.*, United States v. Olin Corp., 927 F.2d 1502 (S.D. Ala. 1996).

97. *Id.* at 1532–33).

98. *Id.*

overturn the district court's conclusion.[99] These judgments, therefore, generate precedential law in conventional ways with expected levels of appellate review.

For consent decrees wholly between private parties, judicial review will follow the baseline requirements outlined earlier, that the proffered decree must be fair, adequate, and legal.[100] The court cannot substitute its preferences or demand specific provisions in the parties' agreement, and it will approve a proposed consent decree even if the court would not have fashioned the same remedy.[101] This standard reflects the strong historical presumption in favor of voluntary settlements of disputes without litigation.[102]

Federal courts will typically give an even more deferential review of a settlement's legal conclusions and assertions when a federal agency proffers the decree. Notably, the presumption in favor of settlement is especially powerful when the DOJ negotiates a consent settlement on behalf of a federal agency with substantial expertise in the subject matter at issue.[103] In many respects, this deferential review functionally parallels the arbitrary and capricious standard of review of administrative agency actions under the federal Administrative Procedure Act.[104]

This relaxed review of proposed consent decrees evokes instructive echoes of the deference that federal courts show to an agency's interpretations of statutes within its zone of authority and expertise.[105] To some extent, consent decrees – particularly institutional consent decrees or decrees that involve government agencies – incorporate decisions and values directly relevant to agency actions, including statutory interpretations, selection of actions from alternatives, and enforcement discretion. As a result, a court's

---

99. United States v. Olin Corp., 107 F.3d 1506, 1509 (11th Cir. 1997). The Eleventh Circuit remanded the consent decree for further consideration in light of its opinion. *Id.* at 1515; *see also* U.S. v. Witco, 76 F.Supp.2d 519, 529-31 (D. Del. 1999) (finding stipulated damages provision of consent decree unconstitutional and unenforceable to extent it imposed penalties during pendency of appeal before court). Similarly, a court will decline a consent decree, irrespective of its contents, if it results from collusion or improper process. United States v. BP Exploration & Oil Co., 167 F.Supp.2d 1045, 1049 (N.D. Ind.) (2001); Kelley v. Thomas Solvent Co., 717 F.Supp. 507, 515 (W.D. Mich. 1989).

100. *See supra* text accompanying notes 24–44.

101. United States v. Cannons Engineering Corp., 899 F.2d 79 (1st Cir. 1990); Kelley v. Thomas Solvent Co., 717 F. Supp. 507, 515 (W.D. Mich. 1989).

102. United States. v. Hooker Chemical and Plastics Corp., 776 F.2d 410, 411 (2d Cir. 1985).

103. United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1425–26 (6th Cir. 1991); *Hooker*, 776 F.2d at 411; United States v. Wisconsin Electric Power Co., 522 F.Supp.2d 1107, 1111–1112 (E.D. Wis. 2007).

104. 5 U.S.C. § 551 (2018) *et seq.*; *id.* at § 706(2) (scope of review).

105. *See* discussion *infra* note 112.

decision to lodge a consent decree may reflect similar deference to an agency interpretation of the statute or regulation that underlies the agreement.[106]

The degree of deference that a federal court should extend to agency determinations contained within consent decrees lies outside the scope of this analysis, but some preliminary approaches immediately suggest themselves. First, if a court reviews consent decree terms that rely on statutory interpretations proffered by federal agencies with authority and expertise in the field, the well-known *Skidmore* standard provides an appropriate degree of deference.[107] *Skidmore* provides that courts will give weight to an agency's interpretation of a statute according to its thoroughness, consistency, validity, and "power to persuade."[108] While it leaves the ultimate determination of a statutory or regulatory interpretation to the reviewing court, *Skidmore* directs the court to give an appropriate degree of weight to the agency's determination.[109] At least one federal appellate court has noted in dicta that a reviewing court should offer some deference to the EPA's statutory interpretations offered as part of a CERCLA consent decree review and lodging process.[110] Other federal courts in non-environmental cases have granted deference to statutory interpretations contained in prior consent decrees when reviewing later administrative actions against private parties.[111]

Important differences remain, and the analogy is imperfect. In particular, this rationale likely would not support an application of *Chevron* deference or *Auer*/*Seminole Rock* deference to judicial review of legal determinations contained in consent decrees with federal agencies.[112] The

106. While federal courts will also give a deferential review of consent decrees between purely private parties, that deference is less marked than decrees involving governmental agencies, and the arguments favoring deference to their interpretations of statutes or regulations are much less compelling. *See supra* text accompanying note 88.

107. Skidmore v. Swift & Co., 323 U.S. 134 (1954).

108. *Id.* at 140; *see also* Kristin Hickman & Matthew Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1240–41 (2007).

109. *Skidmore*, 323 U.S. at 139–40.

110. Arizona v. City of Tucson, 761 F.3d 1005, 1013 n.6 (9th Cir. 2014) ("[w]hile the courts of appeals agree that the EPA is afforded significant deference when it seeks judicial approval of a proposed CERCLA consent decree, courts have not established whether the deference that we afford the EPA is the deference described in [*Chevron*], the deference described in [*Skidmore*], or some other type of deference") (internal citations omitted).

111. *See infra* text accompanying note 121.

112. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). While the *Chevron* standard of judicial review focuses on agency interpretations of ambiguous statutory language, the *Auer/Seminole Rock* doctrine applies when an agency interprets ambiguous language contained in its own regulations. Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945). Under *Auer/Seminole Rock,* the Court previously held that the agency's interpretation merited an even higher degree of deference

extraordinarily rich and voluminous scholarship on *Chevron* resists a quick summary, but in general, the *Chevron* standard of review dictates that a federal court must defer to an agency's interpretation of ambiguous statutory language if the agency bears responsibility for implementing the statute and has offered an interpretation that is reasonable.[113] In reaching this standard, Justice Stevens found that agency interpretations of ambiguous statutory language benefited from implied delegation of authority from Congress to address the issue, a need to respect separation of powers between the judicial and legislative branches, enhanced democratic accountability of executive agencies charged with the statutory interpretation, and the enhanced flexibility of the executive branch to change and adapt to future circumstances.[114]

None of these *Chevron* rationales apply squarely to an agency statutory interpretation or legal conclusion contained in a consent decree. First, except arguably in narrow circumstances,[115] Congress typically does not expressly or implicitly delegate power to an agency to make binding statutory interpretations via the consent decree process, even if the underlying statutory language is ambiguous.[116] Second, even with opportunities for public comment and a fairness hearing, the process used to review and lodge federal consent decrees is inherently outside the democratic process and not directly responsive to elections.[117] Third, the incorporation of statutory interpretations into binding consent decrees would also make them difficult to change or adapt to evolving

---

in judicial review than under the *Chevron* standard. The Court, however, recently limited the *Auer* doctrine to a narrower range of cases in a highly fractured opinion that raises doubts about the doctrine's viability in the future. Kisor v. Wilkie, 139 S. Ct. 2400, 2423–24 (2019).

113. *Chevron*, 467 U.S. at 843–45

114. *Id*.

115. As noted above, some federal statutes provide that agencies must enter certain settlements and enforcement determinations as consent decrees. *See supra* text accompanying notes 25–29 (CERCLA, Tunney Act, immigration). None of these statutes specify that an agency can proffer binding statutory interpretations through the enforcement or consent decree process, and they do not explicitly address the degree of deference that a federal court must show to agency legal conclusions contained in a consent decree).

116. *Chevron*, 467 U.S. at 843–45, 864–66 (statutory ambiguity implies Congressional intent to delegate authority to agency to interpret the language at issue). This rationale has come under scholastic criticism. *See, e.g.*, Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 995 (1992); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 471 (1989).

117. *Chevron*, 467 U.S. at 865 ("Judges are not experts in the field, and are not part of either political branch of the Government . . . While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices.").

circumstances because of the demanding threshold requirements for modifying or revoking consent decree judgments.[118]

As a result, the flexible and non-binding review standard provided by *Skidmore* seems a more logical framework to weigh the persuasive power of legal determinations contained in consent decrees involving the federal government.[119] While the Court has noted that agency interpretations need not undergo notice-and-comment rulemaking to qualify for *Chevron* deference, it has still insisted that Congress' statutory language reflect an intent to delegate authority for the agency's determinations to have "the force of law" and "bind more than the parties to the ruling."[120] A subsequent court examining a prior consent decree – and, by implication, the judicial decision that lodged it – therefore would operate as if the lodging court had reviewed any legal determinations or interpretations in the decree under the *Skidmore* standard. While a judicial acceptance of an agency statutory interpretation under *Skidmore* may have less persuasive or precedential value to subsequent courts, it nonetheless would have some legal effect.[121]

118.*See supra* text accompanying note 44 (standards for modification of consent decrees).

119. The logical fit of the *Skidmore* standard does not mean, however, that other review frameworks could also apply instead. For example, if a court wished to grant more autonomy to the parties during the settlement negotiation process and encourage voluntary resolutions, it might instead adopt a review standard similar to the business judgment rule familiar from corporate law. This standard would effectively require the court to grant a safe harbor within which the parties could choose a resolution with little, or no, approval or review from the court.

120. United States v. Mead, 533 U.S. 218, 232 (2001). The Court also noted that the sheer volume and informality of the agency interpretations at issue (i.e., tariff classification rulings) made any attempt to categorize them as having "force of law" as "simply self-refuting." *Id.* at 233. While the federal government enters into numerous consent decrees in multiple subject areas, those decrees come nowhere close to the raw volume and informality of the tariff classification rulings at issue in *Mead. Id.* at 238 n.19 (10,000 to 15,000 tariff rulings annually from 46 different Customs offices).

121. United States v. Coeur d'Alenes Co., 767 F.3d 873, 876 (9th Cir. 2014); Tillman v. Midland Credit Management, Inc., No. 4:19-CV-4030, 2019 WL 6718985 at *4 n.4 (W.D. Ark. Dec. 10, 2019) (citing *Mead*, 533 U.S. at 200) ("Although consent decrees are neither formal rules nor formal guidance, 'an agency's interpretation of a statute may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency'"); United States v. Gibson Wine Co., No. 115CV01900AWISKO, 2018 WL 1305791 at *1 (E.D. Cal. March 13, 2018) (citing *Mead*, 553 U.S. at 227–28) (noting that courts should pay deference to EPA judgment to enter into CERCLA consent decree, including the agency's "construction of a statutory scheme"); Genova v. Total Card, Inc., 193 F. Supp. 3d 360, 368 (D.N.J. 2016) (citing *Mead*, 533 U.S. at 220; *Skidmore*, 232 U.S. at 134) (using judicial notice of identical language used by Federal Trade Commission and Consumer Finance Protection Bureau consent decrees as basis

A thought experiment can help illuminate how legal determinations in consent decrees might shape future judicial holdings. Assume, for example, that the EPA has entered into a series of consent decrees to resolve enforcement actions that allege a party has failed to report releases of a certain chemical that the EPA claims is a "pollutant" under CERCLA. While the EPA has not taken regulatory action to formally designate the chemical as a CERCLA pollutant, the consent decree includes allegations that the chemical meets the statutory definition and falls into that category. To enter the proffered decree, a federal court would only need to determine that the decree fell within the general scope of the pleadings and met with the objectives of the underlying statute (including a finding that the decree did not conflict with or violate the underlying statute).[122] If the court agrees to lodge the decree and issues an opinion approving the settlement, it will normally not independently review or second-guess the agency's legal determination as part of the consent decree entry process if that interpretation does not directly conflict with the relevant statutory language.[123] As a result, the lodging court's willingness to approve the decree could become relevant if that legal conclusion is contested by a future litigant.[124]

C. Creation Through Persuasion and Precedent

While consent decrees may develop law through their recurring content or their entry as judgments, the idea that they may directly bind or affect future court decisions is much more controversial. In part, this reaction reflects a fundamental inconsistency between the norms involved: the power of an earlier judicial opinion to persuade or bind a future decision rests in part on

---

to defer under *Skidmore* to agencies' endorsement of legal sufficiency of disclaimer language; "Although these consent decrees are neither formal rules nor formal guidance, 'an agency's interpretation' of a statute 'may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency"); *but see* Emma C. v. Eastin, No. 96-CV-04179-THE, 2014 WL 2989946 (N.D. Cal. 2014), *aff'd sub nom* Emma v Eastin, 673 F. App's 637 (9th Cir. 2016) (denying *Chevron, Skidmore*, and *Mead's* applicability to state agency's argument that it had legally satisfied requirements of consent decree; court held *Chevron* deference does not apply to a *state* agency determination, and compliance with a consent decree was not "legislative rulemaking" that incorporated a statutory interpretation which merited deference).

122. *See supra* text accompanying notes 38–41.

123. *See supra id.*

124. Notably, the court's willingness to defer to the agency's legal interpretation contained in the consent decree would apply even if the agency has the discretion to change its mind in the future on the underlying legal question. *See* United States v. Home Concrete & Supply, L.L.C., 566 U.S. 478, 486 (2012) (per curiam); Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005).

its reasoning and rationale, while a consent decree reflects the intent of the settling parties without necessarily offering an explicit *ratio* in the naked text of the decree. In a way, honoring a prior consent decree judgment as persuasive or binding is like reading a contract to find a narrative explanation. The two types of documents serve fundamentally different purposes. To allow settling parties to consensually create judgments that affect judicial consideration of future disputes also raises the specters of collusion, manipulation, and loss of judicial control over the adjudicative function.

Despite these concerns, consent decrees may nonetheless generate legally relevant rules, principles, and precedents in constrained and varying ways. Consent judgments do not impose a uniform legally constraining effect on future opinions in a rigid and predetermined way. Like the common law process itself, consent judgments can affect or bind future judgments along a spectrum of persuasion and force that turns on the individual circumstances and history of each case. In this regard, consent decrees can have degrees of impact that vary from persuasive effect, through the statement of useful principles, to encapsulations of a legal rule, to binding effects of precedent applied through *stare decisis*, to direct compulsory effects on parties, to the original decree through the law of the case doctrine or judicial estoppel. In a sense, the power of the consent judgment escalates gradually from broad yet diffuse effect (persuasion) to tight and compulsory (preclusion, judicial estoppel, and law of the case).

To draw useful distinctions between the varying effects of consent decrees on subsequent judicial considerations, precision in vocabulary helps to avoid conflation and confusion. At the lowest level, a judgment may have persuasive value if it offers insights and relevant rules for a decision that a future court finds wise or helpful. Persuasive prior decisions, however, obviously have no binding effect and cannot compel deference from future decision-makers. By contrast, a precedential opinion can require a court to apply its holding to future litigants through the operation of *stare decisis*. The force of this compulsion operates in both horizontal and vertical fashion: a lower court must follow the relevant precedential holdings of a superior court (vertical), while a court may constrain its decision in a current case by looking to its prior rulings to assure consistency and fairness in reaching a similar result for similarly positioned cases (horizontal).[125] Notably, this distinction

125. This brief description of the role of precedent and *stare decisis* skims over a broad and vigorous debate over the role of precedent in the evaluation of constitutional claims or the interpretation of constitutional provisions. *See, e.g.*, Richard Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 767 N.Y.U. L. REV. 570, 570–71 (2001); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 23–24 (1994); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 723 (1988); Charles Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 404 (1988). While this debate sheds important light on the fundamental nature of precedent, *stare decisis*, and deference owed to prior judicial judgments on

neither exerts precedential effects on sister courts at an equivalent level, nor grants precedential power to federal district court decisions other than horizontal deference to that court's own prior decisions. The operation of precedent and *stare decisis* has become regularized to an extent at the appellate level in the federal judiciary through the promulgation of formal rules by the appellant courts.[126] Some federal appellate courts use these rules to guide their discretion in choosing whether their opinions will formally have precedential or *stare decisis* effect.[127]

1. Preclusion

For the parties who directly enter into them and lodge them with the court, consent decree judgments function as wholly binding judicial decrees. In this untroubling context, the lodging parties face the same preclusive and binding effects of any other judgment issued by the court in their case. The entry of a consent decree judgment would impose issue preclusion, *res judicata*, and the law of the case consequences if they wished to relitigate their concerns in the future.[128]

This sweeping statement bears some important modulations. As noted earlier, the scope and preclusive effect of a consent judgment turns to an

---

similarly situated cases, the lodging of federal consent decrees rarely raises these types of constitutional issues. *But see* United States v. Olin Corp., 107 F.3d 1506, 1509 (scope of Congressional powers under Commerce Clause to regulate wholly in-state landfill under CERCLA).

126. Elizabeth Beske, *Rethinking the Nonprecedential Opinion*, 65 UCLA L. REV. 808, 816, 819–22 (2018). The Ninth Circuit has debated potential federal Constitutional constraints on the power of courts to issue nonprecedential opinions, but it has not reached a definitive conclusion. *Compare* Anastasoff v. United States, 223 F.3d 898, 905 (8th Cir. 2000), *vacated on other grounds as moot,* 235 F.3d 1054 (8th Cir. 2000) (en banc) (questioning constitutionality of nonprecedential unpublished judicial opinions) *with* Hart v. Massanari, 266 F.3d 1155, 1173 (9th Cir. 2001); *see also* K. Laretto, Note, *Precedent, Judicial Power, and the Constitutionality of "No-Citation" Rules in the Federal Courts of Appeals*, 54 STAN. L. REV. 1037, 1046 (2002).

127. Beske, *supra* note 126 at 819–20.

128. Congress can use statutes to specify the res judicata or other preclusive effects of a consent judgment or consent decree. For example, Congress has barred the use of a prior consent decree in an antitrust action as prima facie evidence of wrongful conduct in a future action, but only if the court enters the decree before any testimony has been taken. 15 U.S.C. § 16(a) (2018); *see also* 15 U.S.C. § 16(h) (2018) (barring introduction of prior consent decree as prima facie evidence against defendant when a court assesses whether settlement is in the public interest); Michael Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000); Lawrence Marshall, *Let Congress Do It: The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989).

important degree on the intent of the parties.[129] As a result, a consent decree may expressly stipulate that the parties do not intend to resolve or incur preclusive effects on identified legal or factual issues. By agreeing to enter the judgment, the lodging court presumably approves the consensual exclusion of these issues from the scope of the judgment's binding effect. In addition, the parties cannot subsequently modify a consent judgment simply by mutual agreement.[130] They instead need to gain the court's permission to modify the judgment and must meet the federal standards for modifications of judgments as specified in the Federal Rules of Civil Procedure and additional guidance from the U.S. Supreme Court for certain public consent decrees.[131] Last, if the parties make affirmative representations to the court on germane legal conclusions or factual statements, or if they actively litigate disputed points on which the court issues an interim judgment to resolve,[132] they may face separate legal constraints arising from the law of the case doctrine or judicial estoppel.[133]

Beyond the simple preclusive effects of judgment on the parties in the current dispute, consent decrees may also serve to establish binding rulings on parties on factual matters outside the four corners of the decree. For example, the entry of a consent decree may be admissible for proving facts, such as knowledge of underlying conditions or existence of a dispute, related to its entry. This narrow form of preclusive effect does not extend, however,

129. The parties' intent may not solely control the preclusive scope of a consent decree on their future claims if they potentially involve the interests of third parties. For example, the entry of consent decrees to resolve class action lawsuits or other aggregate litigation may involve fairness and due process constraints that reach beyond the limited scope of the parties' desires. *See supra* text accompanying notes 21–42

130. *See supra* text accompanying note 44.

131. *See supra id.*

132. For example, a simple settlement entered as a decree with no adversarial process, court hearing, or judicial determination of its content should not command the same preclusive effect as a fully litigated consent decree that drew close scrutiny from a reviewing judge during a contested fairness hearing. That judgment, however, may still retain persuasive power based on the fairness or wisdom of its resolution of the underlying claim.

133. In some limited circumstances, affirmative statements or concessions as part of entry of a consent settlement may trigger legal consequences under doctrines of judicial estoppel. New Hampshire v. Maine, 532 U.S. 748, 749–52 (2001) (finding that New Hampshire's prior acceptance of state boundary in river in a 1977 consent decree prevented it from urging a different position in a subsequent action in 2000). The federal government, however, is not subject to nonmutual issue preclusion effects from prior judgments. *See infra* text accompanying note 173.

to the judicial endorsement of alleged facts to which the parties expressly did not concur in the consent decree's terms.[134]

2. Persuasion

Beyond their direct binding effect on the relatively small universe of parties who personally enter into them, consent decrees also can have persuasive value as interpretations of law when a federal court conducts a hearing to determine the decree's fairness and legality. For example, a federal court might address the legality of a proffered decree at a fairness hearing or expressly require the parties to resolve a substantive legal issue underlying the settlement as a predicate for entry of the decree.[135] While that determination might not directly bind future third-party litigants, the court's rationale and conclusion to approve the decree would be available to provide helpful or persuasive guidance to future judges wrestling with a legal issue or considering the entry of a similar consent decree.[136]

The powers of persuasion usually receive far less attention in scholarly analysis than the mechanics of precedence and *stare decisis.* The impact of a non-binding decision on subsequent rulings, however, can be sweeping. While a prior decision may not pose a binding precedent that another court would need to distinguish or accept, it may still present a clear formulation of

134. Dent v. U.S. Tennis Ass'n, Inc., No. CV-08-1533 RJD VVP, 2008 WL 2483288 at *2 (E.D.N.Y. 2008) ("It is true that various cases have found settlement agreements and consent decrees admissible to prove matters other than the truth of the allegations that led to the settlements, including such issues as knowledge, motive, and intent. *See, e.g.*, United States v. Gilbert, 668 F.2d 94, 97 (2dCir.1981) (SEC consent decree admissible to prove knowledge of reporting requirements); Brady v. Wal-Mart Stores, Inc., 455 F.Supp.2d 157, 179–80 (E.D.N.Y. 2006) (consent decree admitted to prove knowledge of employer's obligations under Americans with Disabilities Act); Brotman v. National Life Ins. Co., No. 94 CV 3468, 1999 WL 33109, at *2 (E.D.N.Y. Jan. 22, 1999) (motive and credibility); United States v. Warren, No. CIV.A 7:04 CR 00021, 2005 WL 1164195, at *3–4 (W.D.Va. May 17, 2005) (knowledge of what was permissible under securities laws); Saford v. St. Tammany Parish Fire Protection Dist. No. 1, No. CIV.A. 02-0055, 2003 WL 1873907, at *3 (E.D. La. Apr.11, 2003) (discriminatory intent); Johnson v. Hugo's Skateway, 974 F.2d 1408, 1413 (4th Cir.1992) (discriminatory motive and intent)").

135. The federal judiciary's long-standing preference for parsimony in the exercise of its powers may constrain the willingness of some courts to explore corollary issues of legality underlying the decree unless absolutely necessary. John Roche, *Judicial Self-Restraint*, 49 AM. POL. SCI. REV. 762, 763–64 (1955) (reviewing historical practices of judicial self-restraint and parsimony).

136. To the extent that a court gives weight to opinions from different jurisdictions from other legal systems, states, or nations, considerations of comity may also support a grant of persuasive weight to decisions in other jurisdictions to enter or reject consent decrees or to note the specific terms of their consent decrees.

a new legal rule or principle that can guide the considerations of sister courts outside the initial court's ambit or scope of appellate jurisdiction. For example, a federal district court opinion approving the entry of a CERCLA consent decree specifying a particular technical remedy and oversight mechanism may not bind a future review of a similar CERCLA consent decree by another district court (or even that same district court). It would nonetheless provide relevant context for assessing the fairness and consistency of a proffered new decree that sets out similar terms and remedial selections.

The parties to a consent decree may also rely on prior decrees for their persuasive value during the negotiation process by pointing to prior decrees as a baseline for terms in the proposed decree. In addition, other stakeholders can highlight prior consent decrees in their comments or objections to a proposed decree during the public comment process or a fairness hearing. To some extent, this tactic has already surfaced in comments submitted on large environmental consent decrees with governmental entities.[137] The recent use of confidentiality constraints during consent decree negotiations, however, may constrain the ability of non-party stakeholders to emphasize persuasive earlier consent decrees or decisions prior to a fairness hearing or lodging of the decree.[138]

3. Precedent

Beyond the relatively clear case for coercively binding the parties of consent judgments to their decrees and for giving gentler non-binding persuasive power to consent rulings on future litigants, the prospect of consent decrees with precedential effects on third-party litigants provokes much sharper objections. To some extent, the pushback reflects the intense ongoing debate about the proper role in constitutional litigation of precedence itself, and how courts should apply the mechanics of *stare decisis*.[139] Most of this

137. For example, when Bayou City Waterkeeper commented on the proposed consent decree between the United States and the City of Houston to resolve numerous alleged violations of discharge limits in the city's Texas Pollution Discharge Elimination System wastewater permit, the Waterkeeper expressly pointed to terms contained in prior municipal wastewater consent decrees as persuasive demonstrations of the need for similar terms in Houston's consent decree. Letter from Jordan Macha, Exec. Dir. & Kristen Schlemmer, Legal Dir., Bayou City Waterkeepers, to Phillip Ledbetter, Assistant Attorney Gen., Tex. (Nov. 8, 2019) at 6 n.23 (referring to St. Louis consent decree terms), 13 n.28 (City of Atlanta consent decree), 19–21 (Louisville, Kansas City, Chicago), https://bayoucitywaterkeeper.org/wp-content/uploads/2019/11/2019.11.08-Comment-Letter-re-Consent-Decree.pdf [https://perma.cc/59XS-V772].

138. *See, e.g.*, Maxine Joselow, *California Uses Privacy Agreement to Shield Talks with Automakers*, ENV'T & ENERGY NEWS (Feb. 10, 2020), https://www.eenews.net/climatewire/stories/1062310669/ [https://perma.cc/576C-85S9]; *see also* Rice, *supra* note 1 at 1.

139. *See* discussion *supra* at n.105.

debate, however, has comparatively little relevance for typical environmental consent decrees.[140]

Despite fights over the outer boundaries of precedence, its core features have remained relatively stable in common law systems for centuries.[141] At its most basic level, *stare decisis* refers to the obligation of a court to obey either its prior case law ("horizontal precedence") or the holdings of a superior court ("vertical precedence").[142] A precedent, in turn, refers to a decision or action in a prior case that establishes a new principle or rule which can apply to similarly situated cases in the future.[143] *Stare decisis* does not predetermine the outcome of successor cases, and a court has the power either to distinguish prior precedents in ways that limit its future power or to simply overrule its horizontal precedents when it prove pernicious or incorrect.[144]

---

140. The heart of the controversy over the use of *stare decisis* in constitutional litigation is that the U.S. Supreme Court relies on the doctrine to constrain its ability to overturn controversial constitutional precedents. *See, e.g.,* Brandon Murrell, *The Supreme Court's Overruling of Constitutional Precedent,* CONG. RESEARCH SERV. RPT. R45319 (2018); Michael Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases,* 10 CONST. COMMENT. 67 (1993); William Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey, Dickerson, *and the Consequences of Pragmatic Adjudication,* 2002 UTAH L. REV. 53 (2002). While consent decrees may tackle highly controversial subjects, they are typically lodged by district courts or appellate courts that are clearly subject to the full force of vertical and horizontal *stare decisis.*

141. By contrast, civil code legal systems have not adopted *stare decisis* and do not rely on precedents in the same way as common law systems. D. NEIL MACCORMICK & ROBERT S. SUMMERS, INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (1997); Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 419–20 (1967).

142. *Stare decisis* is a truncation of the full Latin maxim *stare decisis et non quieta movere*, which means "stand by the thing decided and do not disturb the calm." James Rehnquist, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U.L. REV. 345, 347 (1986).

143. BLACK'S LAW DICTIONARY, *precedent* (11th ed. 2019) ("Precedent" defined as "[a]n adjudged case or decision of a court of justice, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law.") ("An action or official decision that can be used as support for later actions or decisions; esp., a decided case that furnishes a basis for determining later cases involving similar facts or issues").

144. Federal appellate courts can also limit the precedential value of their opinions by choosing not to publish them. Depending on the appellate courts rules, unpublished opinions can lack precedential value in future proceedings before that same court or other courts under its appellate review. *See infra* text accompanying note 126. In essence, this review process predetermines whether the judgment will have horizontal precedential value as well as vertical precedential effect.

The longevity and durability of precedent and *stare decisis* reflect the commonsense purposes that the doctrines promote. Some of these benefits apply to any decision-maker, such as the efficiency gained by not revisiting basic questions that have already been decided in every new dispute,[145] as well as ensuring the humility of later decision-makers who accord respect and due consideration to the rationales offered by earlier decision-makers.[146] Other benefits are more uniquely suited to judges and courts, such as the need to provide equal treatment to similarly positioned claimants, predictability in the application of laws and rules, and the discipline of providing a persuasive rationale for a decision that can serve future jurists.[147] All of these values help promote coherence and relevance in the body of decisions that make precedent overall a more useful and powerful tool for future litigants.

Giving prospective precedential effect to consent decrees in certain instances might serve similar goals. For example, looking to prior consent decrees that resolved similar disputes to guide subsequent decisions could promote efficiency, equal treatment, and predictability in recurring litigation. But the match is not entirely clean. The concept of humility – that current decision-makers should respect and, when warranted, defer to prior decision-makers as an acknowledgment of their insight and skill – may not make sense if the prior consent decree arises mostly from the contractual resolution of a dispute by private litigants.[148] Similarly, the virtue of discipline, which arises from a judge's desire to craft an opinion that can guide future decision-makers, may not play any role between purely private litigants who have no interest in future or current disputes by other parties.

The most telling objection to granting precedential effect to consent judgments, however, is that they typically lack a stated *ratio decidendi.*[149] At its most fundamental level, the exercise of judicial power through the rendering of a written opinion serves the express function of providing a rationale to justify the particular resolution reached by the court. This *ratio*,

145. Daniel Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1177 (2006) ("Unless most issues can be regarded as settled most of the time, coherent discussion is simply impossible.").

146. *Id.* at 1178.

147. *Id.* at 1178–80.

148. If a governmental agency or other sovereign body provides a legal rationale as the basis for its entry into a consent decree, however, a court may choose to grant it a larger degree of respect and comity. A consent decree judgment that reflects extensive participation by a court in drafting or entry may also merit a greater degree of respect and accord. *See id.*

149. A *ratio decidendi* is "[t]he principle or rule of law on which a court's decision is founded," or "the rule of law on which a later court thinks that a previous court founded its decision". BLACK'S LAW DICTIONARY DELUXE NINTH EDITION at 1376 (2009) (ed. Bryan Garner). A *ratio decidendi* is "[t]he principle or rule of law on which a court's decision is founded," or "the rule of law on which a later court thinks that a previous court founded its decision". *Ratio Decidendi*, BLACK'S LAW DICTIONARY (11th ed. 2019).

then, lies at the heart of the function of precedent and *stare decisis*. By providing a reasoned explanation of the judgment reached in a specific case, a judge offers a rationale for why that judgment is fair and worthy of respect and deference from both the public at large and future decision-makers. The judge's rationale, of course, also serves as the basis for any appellate review of the court's decision.

Consent decrees, by definition, need not offer any *ratio* beyond the simple agreement of the parties to resolve their dispute in a fashion that meets the minimal requirements for entry of a consent decree by the court. While the parties can offer their own legal conclusions in their agreement (or expressly disclaim the application of other legal doctrines or admissions of liability), their proffered rationale may not merit the same degree of respect, deference, or reliance as a *ratio* provided by a judicial officer vested with the power to authoritatively resolve disputes before a court. In a lengthy and complex consent decree, the parties may reach agreement through negotiated exchanges or "swaps" among provisions that would muddle a coherent or consistent narrative explanation. As a result, while a future court may find a rationale offered in a consent decree illuminating or even persuasive, the judge arguably need not necessarily extend the same degree of deference or concern for reliance interests that would accompany the application of *stare decisis*.[150]

The limited extension of precedential effect to consent decrees, however, may still make sense in certain circumstances, particularly when a governmental body is one of the settling parties and is adopting a consistent rationale for reaching similar consent agreements in future disputes. For example, at least one federal agency has arguably built its body of consent orders into a source of functional common law precedent for subsequent legal determinations.[151] The Federal Trade Commission ("FTC") has entered into numerous consent decrees and settlements to enforce Section 5 of the Federal Trade Commission Act ("FTCA"), which protects consumer privacy in transactions.[152] As a result, the FTC's enforcement actions have generated virtually no judicial decisions because the agency has chosen to settle almost all of its actions through consent agreements.[153] Companies now rely on the body of consent decrees to guide the formation of their privacy policies, and

150. To some extent, courts implicitly discount the legal impact of consent decrees on non-parties through *stare decisis* or other legal mechanisms when they refuse to allow movants to intervene as of right or permissively to challenge consent decrees during the negotiation or approval process. Courts frequently find that the movant has no right to intervene because the consent decree will not affect their legal rights or remedies in a substantive fashion that would merit permissive or mandatory intervention as a party.

151. Solove & Hartzog, *supra* note 66 (discussing precedential value of administrative consent orders issued by the Federal Trade Commission).

152. *Id.* at 599, 604–08.

153. *Id.* at 610 n. 114.

at least one commissioner has labeled this body of consent agreements as "a common law of privacy in this country."[154]

Some scholastic commenters have agreed and argue that the FTC's body of consent agreements "is functionally equivalent to a body of common law" and is the "most influential regulating force on information privacy in the United States – more so than nearly any privacy statute or any common law tort."[155] At least one judicial opinion has taken a similar position and relied on FTC consent agreement provisions to interpret a state consumer protection statute modeled on Section 5 of the FTCA.[156] The classification of FTC consent decrees as precedential statements of law, however, has drawn strong objections from other legal commentators who emphasize the substantive differences in the common law adjudication process. These objectors also raise fundamental constitutional concerns.[157] Notably, the number of privacy law settlements by the FTC is much smaller and focused on a discrete number of coherent legal issues than the expansive body of environmental consent decrees, which cut across a broad array of statutes and environmental media.[158]

The precedential power of prior consent decrees can especially influence the negotiation and review of successive consent decrees that target a single industrial sector or focus on a particular environmental practice. For example, the United States has initiated a series of enforcement actions against

154. Commissioner Julie Brill, *Privacy, Consumer Protection, and Competition* (April 27, 2012), available at https://www.ftc.gov/sites/default/files/documents/public_statements/privacy-consumer-protection-and-competition/120427loyolasymposium.pdf [https://perma.cc/N6ZB-T7ZG].

155. Professors Solove and Hartzog have compiled an extensive catalog of all FTC consent orders and their functional impact on subsequent enforcement actions and successive consent agreements. Given the lack of authoritative judicial precedent and the large number of consent orders that spelled out the parameters of the FTC's interpretations of corporate privacy policies, the consent orders essentially served the same role as a body of common law judicial holdings. Solove & Hartzog, *supra* note 66 at 587.

156. Veridian Credit Union v. Eddie Bauer, LLC, 295 F. Supp. 3d 1140, 1161 n.14 (W.D. Wa. 2017); Corey L. Andrews, *Federal Courts Embrace of FTC Data Breach Settlements as Common Law Treads on Due Process*, WASHINGTON LEGAL FOUNDATION (Dec. 19, 2017), https://www.forbes.com/sites/wlf/2017/12/19/federal-courts-embrace-of-ftc-data-breach-settlements-as-common-law-treads-on-due-process/#567e6a5f24d1 [https://perma.cc/VN9N-PLSM].

157. Geoffrey A. Manne & Ben Sperry, *FTC Process and the Misguided Notion of an FTC "Common Law" of Data Security*, ICLE DATA SECURITY & PRIVACY WORKING PAPER (2014), https://laweconcenter.org/resource/ftc-process-misguided-notion-ftc-common-law-data-security/ [https://perma.cc/PQR8-2FZW]; Andrews, *supra* note 156, at 1.

158. By comparison, the FTC lodged slightly over 170 privacy-related complaints between 1994 through 2014. Solove & Hartzog, *supra* note 66 at 600.

automobile manufacturers that installed "defeat devices" in their vehicles.[159] These devices manipulated the emissions of vehicles to produce misleadingly low levels of pollutants during federally mandated emissions testing procedures.[160] The enforcement initiative yielded a series of consent decrees against a string of automobile manufacturers, including Volkswagen,[161] Fiat Chrysler Automobiles,[162] Derive Systems, Inc.,[163] and Harley Davidson.[164] The first of these decrees to be lodged, entered into with Volkswagen, effectively influenced the terms for subsequent settlements and served as a partial template for future settlements with the other manufacturers.[165] By providing a convincing basis for future negotiations, the Volkswagen decree effectively led the parties and successive courts to treat it as if it had precedential (or, at least, strongly persuasive) value.[166]

If precedential effect is subject to statutory or judicial direction, it raises two logical questions: *can* a court choose to give or deny precedential effect to a consent judgment and decree as part of entering the judgment? If yes, a

159. Seema Kakade, *Remedial Payments in Agency Enforcement*, 44 HARV. ENV. L. REV. 117, 134 (2020) (publication pending).

160. *Id.*

161. The United States entered into a series of three partial settlements with Volkswagen AG, Audi AG, Dr. Ing. h.c.F. Porsche AG, Volkswagen Group of America, Inc., Volkswagen Group of American Chattanooga Operations, LLC, and Porsche Cars North America, Inc. The Northern District of California federal court lodged the first partial settlement on October 25, 2016. The court approved the other two settlements on May 17, 2017 and April 13, 2017 (regarding civil penalties and injunctive relief). U.S. ENVTL PROTECTION AGENCY, VOLKSWAGEN CLEAN AIR ACT CIVIL SETTLEMENT (last visited June 20, 2020), https://www.epa.gov/enforcement/volkswagen-clean-air-act-civil-settlement [https://perma.cc/6ZU4-69LC]..

162. U.S. ENVTL PROTECTION AGENCY, FIAT CHRYSLER AUTOMOBILES CLEAN AIR ACT SETTLEMENT INFORMATION SHEET (2019), https://www.epa.gov/enforcement/fiat-chrysler-automobiles-clean-air-act-civil-settlement-information-sheet [https://perma.cc/RQ6W-G7TW].

163. U.S. ENVTL PROTECTION AGENCY, DERIVE SYSTEMS CLEAN AIR ACT SETTLEMENT (2018), https://www.epa.gov/enforcement/derive-systems-clean-air-act-settlement#:~:text=(Washington%2C%20DC%20%2D%20September%2024,part%2C%20to%20defeat%20the%20emissions [https://perma.cc/G26D-AH63].

164. United States Motion to Enter Consent Decree, United States v. Harley-Davidson, No. 1:16-cv-01687 (D.C. Cir. Dec. 11, 2017); Brief for Petitioner, United States v. Harley-Davidson (No. 1:16-cv-01687, D.C. Cir., Dec. 11, 2017); Notice of Lodging of Proposed Consent Decree Under the Clean Air Act, 82 Fed. Reg. 34,977, 34,977 (July 27, 2017).

165. For example, the State of Wyoming and other states pointed to the terms of the Volkswagen partial consent decree as a reasonable basis to demand more from the Harley Davidson proposed consent decree. Kakade, *supra* note 159 at 149

166. *See supra* note 162.

judge's decision to designate a future consent decree as precedential may resemble the choice to publish an opinion because it offers a new rule for decision. Alternatively, can courts look to prior consent decrees to see if they help identify or incubate new legal principles or rules worthy of binding effect?

4. Retrospective Review

As an initial option to explore, courts might look retrospectively at the body of consent judgments already lodged in the public record to search for emerging persuasive principles or decisions that merit deference. This approach would effectively "mine" historical consent decrees as potential sources of legal principles or precedent from agreements entered prior to the endorsement of this approach.

To do so, a reviewing court could apply the same exegesis to consent decrees as it would to any other prior judicial opinion. Hallmarks of such an analysis might include a compelling rationale stated in the decree, a balance between the number of cases in the subject area decided via consent or trial, material judicial scrutiny of the consent decree during the original fairness hearing or entry determination, the number and scope of parties addressed by decree, the potential practical impact of the consent decree on third parties unaffiliated with the litigating parties, and any legislative direction or acquiescence in the consent judgment. As a default rule, consent decree judgments that fail to meet these prerequisites should have no precedential effect on future adversarial judicial proceedings (although it could retain preclusive power over the consenting parties themselves or offer residual persuasive value to future litigants).

One major hurdle to reviewing prior consent decrees for emergent precedent or persuasive principles is that consent decrees have not been organized, labeled, and tracked as potential legal sources. As a result, researchers will need to explore new strategies to identify unifying principles or holdings from the undifferentiated text in the decrees.[167] The large array of consent decrees on environmental disputes reached between private parties, and between federal agencies and private parties, will drive the use of creative and

167. This challenge might be met in the future with a growing set of tools used to extract syntactic relationships from raw texts in other fields. For example, software systems currently exist to track philological relationships among textual statements or compilations of textual materials. Similar linguistic analysis can detect relational links between texts using similar language or citations in successive versions. This assessment could emphasize, for example, structural similarities between consent decrees and chronological precedence for certain categories within consent decrees (such as findings of law). While this type of software platform could help identify recurring themes, word choices, and concepts, however, it cannot itself extract a precedential holding or *ratio*. But it arguably might help map out the contours and bases for a precedential analysis by a future judge or litigant.

innovative techniques to compile and assess the terms contained within the often voluminous and varied consent decrees. [168]

To the extent that it might bestow some degree of precedential legal force on consent judgments entered by parties who did not know (or expect) such an effect, a review of prior consent decrees to identify potentially relevant precedential holdings might raise constitutional concerns about retroactive effects, due process concerns due to the lack of notice or explicit consideration, and equal protection concerns because it would treat current and future litigants differently than past consent decree parties.[169] These concerns, however, surface any time a court changes its consideration of prior holdings or precedents.[170]

5. Prospective Designation

To the extent that the historical body of consent decree judgments and practices could support the creation of precedential authority, appellate courts and litigants could take the next step: deliberately designate which consent decrees judgments should be precedential for future litigants.[171] This process could draw on existing procedures used by the federal courts to designate particular opinions as non-precedential, but effectively in reverse. This strategy, however, would need to navigate potentially difficult shoals of constitutional restrictions on Article III powers, risks of party manipulation, and concerns over the retroactive effects of such judgments on other litigants.

In addition to exploring prior consent decrees as a potential source of useful precedential values, courts and parties might adopt a deliberate strategy to identify, construct, and submit consent decrees designed to be precedential

---

168. As noted earlier, consent decrees reached with governmental entities that arguably create emergent principles or precedents may require separate consideration under *Skidmore* or other deference doctrines. *See supra* text accompanying notes 77–91. By contrast, lawsuits to force governmental agencies into regulatory action would require subsequent administrative action to implement the decree's directives. Such decrees would not pose the same procedural and separation of powers concerns as episodic enforcement litigation to clarify and enforce legal standards of conduct through judicially approved settlement decrees with specific parties. *See supra* text accompanying note 85.

169. These concerns are especially strong when one of the parties to the earlier consent decree is a governmental party subject to the full force of the U.S. Constitution's limits on enumerated federal parties and the Bill of Rights. Consent decrees between purely private parties may not evoke similar levels of concern.

170. Beske, *supra* note 126 at 812, 848–852.

171. Typically, a rendering court cannot dictate whether future courts will give precedential effect to one of its decisions. To the extent that a rendering court can decide whether to "publish" its opinion in non-precedential form, however, it does have at least some ability to define the universe of potential opinions that subsequent courts can consider for precedential effect.

vehicles. Parties could prospectively request the court to enter their consent agreements as judgments with precedential effect, and then calibrate the approval hearing and record to buttress its precedential value. A judge might also retain the discretion to designate a consent decree judgment as a precedential opinion *sua sponte*. This power would parallel the discretion that courts currently enjoy choosing whether to publish their opinions and, effectively, grant them precedential weight.[172] Notably, even for opinions that a court declines to publish, other judges may nonetheless accord them "as merited" effect.[173]

This approach to accord persuasive or precedential weight to consent decrees would offer several advantages over the retrospective mining of prior consent decrees. First, by allowing parties to identify and adopt consent decrees as potential precedential vehicles, the litigants could negotiate and accept terms without risk of unfair surprise or unintended side effects. Second, consent decrees labeled as potentially precedential would likely receive additional scrutiny from the reviewing court and deeper public comment and participation by interested parties. Third, the court would retain ultimate control over whether consent decrees would prospectively have precedential effect. Allowing the court to designate a consent decree as publishable – because of its possible instructive or persuasive effect – and precedential would preserve the court's power over its holdings even when that judgment relies on terms drafted or adopted by the litigants rather than the court.

To assure that only those consent decrees meriting such impact or where the consenting parties and the court wish to extend a precedential value to their agreement,[174] consent decrees likely would not have a precedential effect

172. Beske, *supra* note 126, at 816–818. The decision to publish an opinion can have special impact for consent decrees entered by appellate courts. While district court opinions only have horizontal precedential effect, appellate court judgments also bind lower courts through vertical *stare decisis*. *See supra* text accompanying note 123. Notably, even the U.S. Supreme Court has attempted to exercise explicit control over the precedential effect of its own decisions, including some of the Court's most momentous rulings. *Bush v. Gore*, 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."). But even in this case, some appellate courts have nonetheless cited *Bush v. Gore* in equal protection challenges to voting arrangements by states which allegedly discriminated against protected populations. Despite the Court's caution, lower courts have already cited *Bush v. Gore* in 468 cases as of May 2020 according to a Westlaw search.

173. Beske, *supra* note 126 at 816 n.41 (noting circuit appellate court rules that allow citation of unpublished opinions for their persuasive value or guidance, but denying them precedential force).

174. The critical role of the court in reviewing a proposed consent decree's fairness and legality will also need to explicitly assure that the proposed decree does not suffer from collusive strategic behavior by the litigants or inadequate

as a default unless the court or parties affirmatively seek to create it. If so, the failure by the parties – or the court – to move to designate a consent decree for publication or precedential value would effectively mean that the decree held no outright persuasive or precedential effect. But such unpublished or undesignated consent decree opinions could remain available as sources of persuasive argument or information for future cases at the discretion of the court.

One possible complication to this approach might arise if the parties disagree on whether to seek the court's designation of their consent agreement as precedential, but this scenario appears extremely unlikely. In part, the consensual predicate necessary to reach a consent decree might include an agreement to seek precedential value as an integral part of the underlying judgment. In addition, under their current rules of procedure, the federal appellate courts reserve the discretion to publish an opinion and give it precedential value solely for themselves.[175]

Current procedures used to review and enter consent decrees could readily be modified to incorporate additional elements for published or precedential consent decrees. Given their potential effects on third parties not before the court, the parties should expect either to provide broader notice through public media or, if the United States has an interest in the litigation, official publication of notice in the Federal Register. The court may also need to allow the introduction of statements, evidence, or information for judicial notice if the record supporting the consent decree's entry requires expansion to support its potential legal effect on future proceedings. Appellate review of the legal aspects of the consent decree would, like any other trial court legal determination, remain subject to *de novo* review, although other aspects of the consent decree that incorporate factual findings or compromise of the adverse parties' interests may require a more deferential review.

The controversy over sue-and-settle consent decrees, which involve decrees that bind the United States to future regulatory action allegedly without the constraints of legislative direction or full regulatory process, involves parallel but distinct issues.[176] The availability of special procedures

representation. For example, if parties seek to "manufacture" favorable precedent through collusively entering into a consent decree, a reviewing court may find that the decree either is unfair or that the underlying parties lack an adversarial dispute that would support standing and justiciability.

175. Notably, some appellate court decisions not to publish an opinion have sparked dissenting opinions. Beske, *supra* note 126 at 819–20 n.56 ("Nonprecedential decisions frequently include dissents, even in circuits whose rules specify that an opinion "shall be designated" precedential if it alters, modifies, or clarifies existing law") (footnotes omitted). None of these challenges, however, have resulted from direct objections by parties to the court's decision not to publish the underlying opinion.

176. Similar concerns have limited the use of nonmutual issue preclusion against the United States. *See, e.g.,* United States v. Mendoza, 464 U.S. 154, 159–63 (1984).

and legal scrutiny of consent decrees that may create a persuasive or precedential effect, however, may offer a solution for the concerns raised in the sue-and-settle context. By requiring such settlements to undergo a similar level of heightened scrutiny and enhanced public input and comment, the court may minimize the concerns that such decrees frustrate constitutional interests in separation of powers, due process, and democratic accountability.

IV. TEST RUNS, CAUTIONS, AND CAVEATS

Using these principles as a base, the next step in exploring the legal weight of consent decrees would focus on the terms and parameters of specific decrees that address a shared topic or concern. By comparing the overlapping and contrasting terms of varying consent decrees on a common topic, it should be possible to identify an emerging consensus on standards of expected care in their substantive terms, judicial endorsement of liability or management principles embedded in deferential reviews of the decrees' fairness and legality, and any persuasive or precedential rationales contained in decrees that a future court may note. Some logical candidates for this type of comparative analysis, for example, might include decrees that set out emerging standards for remediation or treatment of perfluorooctanoic acid ("PFOA") or perfluorooctane sulfonate ("PFOS contamination"),[177] expected operational standards for control flares or monitoring devices at electrical power plants and refineries,[178] emerging standards for valuing injuries arising from cultural or religious aspects of natural resources injuries,[179] or liability arising from the use of defeat devices to skew mobile source emissions testing.[180]

177. *See, e.g.,* United States v. Fisher Scientific Company, L.L.C. et al, Docket No. 2:20-cv-00135 (D.N.J. Jan 03, 2020) (entry of consent decree specifying remediation obligations for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) contamination by relying on New Jersey drinking water criteria); Michigan Department of Environmental Quality v. Wolverine World Wide, Inc., Docket No. 1:18-cv-00039 (W.D. Mich. Jan 10, 2018) (clean-up criteria for spilled PFOA pursuant to Michigan state standards).

178. *See supra* text accompanying notes 80–84 (enforcement actions centered on emissions monitoring and flare combustion efficiency at refineries and power plants).

179. Connie Sue Manos Martin, *Spiritual and Cultural Resources as a Component of Tribal natural Resource Damages Claims*, 20 PUBLIC LAND & RESOURCES L. REV. 1, 8–11 (1999).

180. *See, e.g.,* United States v. Punch It Performance and Tuning LLC et al, Docket No. 6:19-cv-01115 (M.D. Fla. Jun 14, 2019); United States v. Derive Systems, Inc., Docket No. 1:18-cv-02201 (D.D.C. Sept 24, 2018); Montana Department of Environmental Quality v. Volkswagen Aktiengesellschaft, Docket No. 6:17-cv-00003 (D. Mont. Jan 13, 2017); Davila et al v. Volkswagen Group of America, Inc. et al, Docket No. 7:16-cv-00695 (S.D. Tex. Dec 22, 2016); State of Tennessee v. Volkswagen Aktiengesellschaft, Docket No. 3:16-cv-06546 (N.D.

This path, of course, has potential pitfalls, and giving legal weight to consent decrees in future disputes raises several potential concerns. The most immediate objection is that this process will open the courts to strategic consent decree initiatives that will seek to manufacture or manipulate precedential authority. Allowing parties to agree to language with precedential or persuasive effect, that a court will then enter as a formal judgment, may open the pathway to conscious efforts to enter strategic consent decrees that will create new threads of holdings to favor particular parties or interests in future litigation.

This concern has merit, but it overstates the risk. In part, this type of manipulation of the litigative process to create favorable precedents or authority already routinely occurs. For example, plaintiffs in high-profile environmental cases may choose to give defendants settlement terms in exchange for not appealing a favorable ruling.[181] On a lesser scale, parties may choose not to bring or to appeal judgments involving contentious legal issues if they fear an unfavorable ruling with greater import from an appellate court.[182] This type of precedent sculpting by litigants currently occurs largely outside any judicial scrutiny or review. By contrast, a judicial review of a consent decree tagged for precedential effect by the parties can expressly come under judicial review for exactly these concerns prior to entry of the decree.[183]

Second, the court may have more latitude when approving consent decrees than it does when issuing a judgment after a contested proceeding. In some circumstances, the parties can agree to remedial actions in a consent decree which a judge cannot order under the underlying statute.[184] This

---

Cal. Nov 10, 2016); State of Tennessee, ex rel. et al v. Volkswagen Aktiengesellschaft, Docket No. 3:16-cv-02767 (M.D. Tenn. Oct 21, 2016); Massachusetts v. Volkswagen AG, Docket No. 1:16-cv-11690 (D. Mass. Aug 19, 2016); United States v. Volkswagen AG, Docket No. 3:16-cv-00295 (N.D. Cal. Jan 19, 2016).

181. North Carolina v. Tenn. Valley Auth., 615 F.3d 291 (4th Cir. 2010)) (appellate court judgment in favor of Tennessee Valley Authority); *Federal Court Gives Final Approval to TVA Pollution Control Settlement,* BLOOMBERG ENVIRONMENT & ENERGY REPORT at 1 (June 30, 2011); U.S. Environmental Protection Agency, *Tennessee Valley Authority Clean Air Act Settlement* (April 14, 2011) (announcing settlement of parallel lawsuit with EPA), available at https://www.epa.gov/enforcement/tennessee-valley-authority-clean-air-act-settlement .

182. This calculus occurs routinely in decisions by environmental advocates not to seek certiorari review of appellate decisions because they fear an adverse decision from the U.S. Supreme Court with greater coverage and impact.

183. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

184. Even if the parties resolve their differences through a consent decree, the court's authority to issue an injunction to enforce that decree obviously remains subject to constitutional limits. *See* United Transportation Union v. State Bar of

penumbra of supplemental authority arises from the court's preference to approve settlements and resolve disputes, the lack of objection by the parties to the extraordinary relief, and the inherent authority of courts to approve and oversee settlements.[185] If the parties – or court – have identified a consent decree as a candidate for persuasive or precedential effect, the scope of the decree's proffered relief or extra-statutory terms may require special scrutiny by the court during the fairness hearing or comment period.

Consent judgments that incorporate or work in tandem with criminal plea agreements require separate consideration. Given that civil violations of regulatory requirements can also theoretically lead to criminal prosecution in many circumstances, criminal plea agreements that incorporate consent decree terms can raise issues similar to civil environmental consent decrees. But there are deep concerns evoked by the need to protect defendants' constitutional rights in criminal prosecutions,[186] the structural complexities created by parallel enforcement proceedings,[187] and the growing circuit conflict over the scope of permissible environmental criminal liability for misdemeanor *malum prohibitum* offenses rooted in simple negligence or strict liability.[188] Courts may choose in these cases to either decline requests to promulgate criminal consent settlements (or non-prosecution agreements) as judicial opinion with precedential value or to subject them to much deeper scrutiny than their review of civil consent decrees.

Beyond these operational risks and concerns, some larger cautions and observations remain. From a pragmatic perspective, the negotiation of consent decrees is hard enough, and adding the potential risk of precedential effects could make the negotiation process even harder. But if consent decrees already potentially have these effects without the parties' consideration or careful intent, making this element explicit during the consent decree lodging process would help rationalize the process and avoid unwanted impacts from decrees. More abstractly, if consent decrees wield influence from all three mechanisms outlined in this Article at the same time, the three pathways may

---

Michigan, 401 U.S. 576, 581, 586 (1971) (state court injunction issued pursuant to consent decree violated First Amendment free speech protection).

185. *See supra* text accompanying note 18.

186. *See* Richard J. Lazarus, *Mens Rea in Environmental Criminal Law: Reading the Supreme Court Tea Leaves*, 7 FORDHAM ENVT'L L.J. 861, 867–70 (1996).

187. *See* Memorandum, *Parallel Proceedings Policy*, Granta Nakayama, Assistant Administrator, Office of Enforcement, September 24, 2007 (most recent Parallel Proceedings Policy guidance affirming the Agency's "policies regarding coordinated use of EPA's civil and criminal authorities to achieve environmental compliance."), available at https://www.epa.gov/sites/production/files/documents/parallel-proceedings-policy-09-24-07.pdf [https://perma.cc/2T9N-NLUF].

188. Richard Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2446–47, 2453–54, 2480, 2523 (1995).

influence each other or have unexpected synergistic effects. And if courts will give consent decrees some influential authority through fairness hearings or public comments, the consent decree approval process should be more transparent and easier to access. This step should include judicial scrutiny, or express restrictions, on non-disclosure agreements or other devices to cloak consent decree negotiations and lodgings in secrecy.

But even with these concerns, consent decrees may offer an opportunity for courts to hew legal precedent and doctrines from terms struck directly by the parties themselves (with some judicial oversight and participation). This Article assumes that consent decrees are worth the effort, and their benefits in resolving environmental disputes and assuring proper implementation of remedies outweigh their costs and procedural hurdles. These suggested reforms allow a conscious and rational extension of their benefits to future litigants. Equipped with this analytical framework, we should welcome further empirical analysis and assessment of existing decrees as well as the additional study of the entry of future decrees to shed light on how consent decrees can discover and generate new and useful principles of environmental law.