CONSENT OF THE GOVERNED OR CONSENT OF THE GOVERNMENT? THE PROBLEMS WITH CONSENT DECREES IN GOVERNMENT-DEFENDANT CASES

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ABSTRACT

Consent decrees raise serious Article III concerns. When litigants agree on their rights and jointly seek the same relief from a court, they are no longer adverse and a justiciable controversy no longer exists between them. In the absence of an actual controversy between opposing parties, it is both inappropriate and unnecessary for a court to issue a substantive order declaring or modifying the litigants' rights. Whether Article III's adverseness requirement is seen as jurisdictional or prudential, federal courts should decline to issue consent decrees and instead require litigants that wish to voluntarily resolve a case to execute a settlement agreement, which, as a private contract, does not implicate the same justiciability problems.

Consent decrees raise unique separation-of-powers issues in lawsuits against government entities concerning the validity, proper interpretation, or enforcement of statutes or regulations. Government agencies and officials may accede to such decrees to entrench their policy preferences against future change, impose legal restrictions and obligations on their successors, and constrain those successors' discretion—all without a court determining that such relief is legally necessary. Such concerns would not arise if government defendants resolved such cases through settlement agreements, because the reserved powers doctrine and general prohibition on specific enforcement of government contracts prevent government entities from using settlement agreements to improperly limit their (and their successors') discretion and authority.

If courts are not willing to refuse to categorically decline to issue consent decrees on Article III grounds then, at a minimum, they should require litigants in government-defendant cases to demonstrate that the plaintiff has stated valid claims and that the requested relief is required to remedy the legal violations at issue. Courts must ensure that government defendants do not use consent decrees to circumvent the traditional legislative and regulatory processes and establish binding requirements for which there is not actually any constitutional or legal basis.

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INTRODUCTION

In 1996, Secretary of the Interior Bruce Babbitt ordered the Bureau of Land Management ("BLM") to prepare an inventory of 5.7 million acres of federal land in Utah to determine whether any of it was "wilderness."[1] The State of Utah and other plaintiffs sued to enjoin the inventory, but the United States Court of Appeals for the Tenth Circuit held that they lacked standing to bring their challenge because the inventory would not cause them any injury-in-fact.[2]

A few years later, shortly before the end of Secretary Babbitt's tenure, BLM issued a handbook that extended the rules and protections governing wilderness areas to other BLM-designated regions that were similar to wilderness, but did not meet certain technical statutory requirements for being categorized as such.[3] The State of Utah challenged both BLM's designation of these quasi-wilderness areas and its decision to treat them like wilderness.[4] Several environmental groups moved to intervene in the case to defend BLM's actions.[5]

The day after the environmental groups filed their intervention motion, the State of Utah and BLM—now under a new presidential administration—submitted a proposed consent decree declaring that BLM lacked statutory authority to continue conducting wilderness inventories, prohibiting BLM from designating new wilderness or quasi-wilderness areas, rescinding the handbook, and stipulating that the rules and protections governing wilderness could not apply to quasi-wilderness areas.[6] The district court entered the proposed order.[7]

By entering into the consent decree, the new Administration attempted to lock in its narrow interpretation of the federal laws governing wilderness areas[8] and allow the plaintiffs to obtain broader relief than the court itself could have ordered. For example, BLM agreed in the consent decree that it lacked the authority to perform new wilderness inventories,[9] despite the facts that it recently had con-

1 Utah v. Babbitt, 137 F.3d 1193, 1199 (10th Cir. 1998). For a detailed treatment of this incident, see Sarah Krakoff, *Settling the Wilderness*, 75 U. COLO. L. REV. 1159, 1166–68 (2004).

2 *Babbitt*, 137 F.3d at 1214–15.

3 Utah v. U.S. Dep't of Interior, 535 F.3d 1184, 1189 (10th Cir. 2008).

4 *Id.* at 1189–90.

5 *Id.* at 1190.

6 *Id.*

7 *Id.* at 1191.

8 *See* Federal Land Policy and Management Act, 43 U.S.C. §§ 1711–12, 1782 (2006).

9 *Dep't of Interior*, 535 F.3d at 1190.

ducted such an inventory and that the Tenth Circuit had held that the plaintiffs lacked standing to challenge it.[10]

One commentator argued,

> [I]t seem[s] as if the [Bush] Administration was pursuing a "Trojan Horse" approach to changing public land policy: first inviting litigation from industry; then, once a case was filed, avoiding a court decision on the merits through settlement agreements that gave the industry everything it could have hoped for through litigation, while undermining environmental controls in the process.[11]

That critique is unduly narrow. Local, state, and federal agencies and officials of both political parties, as defendants in litigation, have entered into consent decrees—often with ideologically aligned interest groups—in a wide variety of contexts. Such decrees allow agencies and officials to achieve and entrench policy outcomes that would have been difficult or impossible through the legislative or regulatory process.[12]

Most academic analysis of consent decrees focuses on so-called "structural" or "institutional" decrees, which mandate "broad policy changes, substantial administrative reorganizations, or large increases in institutional expenditures . . . for, among other things, desegregating school systems, improving prison conditions, decentralizing public mental health institutions, . . . [and] expanding special education

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10 Utah v. Babbitt, 137 F.3d 1193, 1214–15 (10th Cir. 1998). The district court in *Department of Interior* ultimately allowed the environmental groups to intervene, and they succeeded in having the consent decree vacated. 535 F.3d at 1191. Such third-party intervenors, however, are not always available. Furthermore, many state and federal courts do not allow private intervenors to join pending cases to defend legal enactments when a governmental defendant fails to do so, particularly when they lack Article III standing. *See infra* Section IV.B. Even when such groups are permitted to join a case, they often cannot prevent the court from approving a consent decree. *See* Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 502 (1986) ("[A]n intervenor . . . does not have the power to block the decree merely by withholding its consent.").

11 Michael C. Blumm, *The Bush Administration's Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands*, 34 ENVTL. L. REP. 10397, 10397 (2004); *see also* Krakoff, *supra* note 1, at 1160–61 (arguing that the Bush Administration's strategy of "settling environmental disputes" through consent decrees and other means "raises questions of constitutional significance"). The Environmental Protection Agency ("EPA") under the Reagan Administration also was accused of entering into "sweetheart" consent decrees with industry. Justin Vickers, Note, *Res Judicata Claim Preclusion of Properly Filed Citizen Suits*, 104 NW. U. L. REV. 1623, 1627 (2010).

12 Ideological opponents of an administration also sometimes use the threat of prolonged, burdensome, and publicity-generating litigation to compel governmental defendants to enter into consent decrees that provide greater relief than those groups could have obtained in court. *See, e.g.*, Eric A. Rosand, *Consent Decrees in Welfare Litigation: The Obstacles to Compliance*, 28 COLUM. J. L. & SOC. PROBS. 83, 83–84, 101 (1994) (stating that consent decrees allow plaintiffs in cases concerning welfare programs to obtain relief "that probably could not have been ordered by a court").

programs."[13] A voluminous body of literature[14] and case law[15] address the numerous problems that can arise from federal courts overseeing (and sometimes micromanaging) public institutions, potentially for decades, under institutional consent decrees.

Far less attention has been given to the numerous issues implicated by non-institutional consent decrees—decrees that arise from cases challenging a particular legal provision, policy, administrative determination, or discrete executive action.[16] For example, a decree

13 Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1020–21 (1986).

14 *See, e.g.*, Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 46 (1979) (arguing that institutional reform litigation requires the judge to assume the role of "political powerbroker"); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 637 (1982) ("[S]ince trial court remedial discretion in institutional suits is inevitably political in nature, it must be regarded as presumptively illegitimate."); Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 788–89 (1978) ("A court cannot weigh the competing demands for government resources to determine how much can be raised for the institutions . . . ."); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1294–95, 1305 (arguing that government "defendants are sometimes happy to be sued and happier still to lose" when a consent decree is "a shortcut around political constraints"); Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 897 (2011) (arguing that, in "institutional-reform litigation," a consent decree "may not embody [a] negotiated compromise over a genuine dispute but instead lock in the results of collaboration between the government and a particular interest group"); *see also* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1297 (1976) (explaining that equitable relief in public law cases often resembles a legislative act); *see generally* ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003).

15 *See, e.g.*, Horne v. Flores, 557 U.S. 433, 448 (2009) (noting that "institutional reform injunctions often raise sensitive federalism concerns" and can have "the effect of dictating state or local budget priorities"); Lewis v. Casey, 518 U.S. 343, 385 (1996) (Thomas, J., concurring) ("Article III cannot be understood to authorize the Federal Judiciary to take control of core state institutions like prisons, schools, and hospitals, and assume responsibility for making the difficult policy judgments that state officials are both constitutionally entitled and uniquely qualified to make.").

16 *See, e.g.*, Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203, 276–77 (1987) (identifying certain types of consent decrees to which governmental litigants should not be permitted to consent); David W. Swift, *A State's Power to Enter Into a Consent Decree that Violates State Law Provisions: What "Findings" of a Federal Violation are Sufficient to Justify a Consent Decree that Trumps State Law?*, 10 TEX. J. ON C.L. & C.R. 37, 41 (2004) (arguing that federal courts generally may approve consent decrees sought by state officials or agencies, but may approve decrees permitting or requiring violations of state law only if "such a remedy is necessary to rectify a violation of federal law"). Many of the seminal works on this issue appeared in a 1987 symposium in the *University of Chicago Legal Forum*. *See* Judge Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 31, 33 (arguing that a government litigant should not be permitted to enter into a consent decree requiring it to take actions that it would lack the authority to perform in the absence of the decree); Michael W. McConnell, *Why Hold Elec-*

may bar a governmental defendant from enforcing a particular statute, regulation, or ordinance, either generally or under certain circumstances, on purportedly constitutional grounds.[17] Or it may stipulate that certain regulations or other administrative issuances are illegal because they violate the agency's organic statute or some other substantive law, or the process through which they were enacted did not fully comply with the Administrative Procedure Act or other deliberative requirements.[18] Still other decrees require the signatory to promulgate or modify regulations or other issuances, typically by a certain date;[19] seek particular legislation;[20] enforce certain statutes or

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tions? Using Consent Decrees to Insulate Policies from Political Change, 1987 U. CHI. LEGAL F. 295, 302 (arguing that government defendants may submit to a consent decree if the court could have imposed a comparable order following adversarial litigation); Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL F. 327, 351 (stating that the Justice Department's restrictions on consent decrees in cases against the government "discourages settlements" by unreasonably restricting the range of commitments the government may offer in settlement of litigation"); Peter Shane, *Federal Policy Making By Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241, 272 (arguing that agencies should have broad discretion to enter into consent decrees that limit their statutorily conferred discretion); *see also* Alan Effron, Note, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 COLUM. L. REV. 1796, 1803–04 (1988) (concluding that the same federalism-related factors "that weigh against the granting of equitable relief in the form of an injunction" against a state entitie "should also militate against a federal court's entering or enforcing the identical measures in the form of a consent decree").

17 *See, e.g.*, Baldwin v. Cortes, 378 F. App'x 135, 137 (3d Cir. 2010) (reaffirming the validity of a consent decree overriding a statutory deadline by which minor political parties to file ballot access petitions); Adens for Green v. Schweiker, 773 F.2d 545, 547–48 (3d Cir. 1985) (discussing a consent decree invalidating an intestacy law concerning illegitimate children); ACORN v. New Orleans, 606 F. Supp. 16, 18 n.1 (E.D. La. 1984) (discussing a consent decree invalidating "a permit scheme for charitable solicitation").

18 *See, e.g.*, Turtle Island Restoration Network v. U.S. Dep't of Commerce, 834 F. Supp. 2d 1004, 1010 (D. Haw. 2011) (approving a consent decree vacating regulations concerning loggerhead and leatherback sea turtles because they were based on an allegedly insufficient biological opinion); Home Builders Ass'ns of N. Cal. v. Noron, 293 F. Supp. 2d 1, 2 (D.D.C. 2002) (approving a consent decree vacating critical habitat designation for the California red-legged frog).

19 *See, e.g.*, Conservation Law Found. of New England, Inc. v. Franklin, 989 F.2d 54, 58, 61 (1st Cir. 1993) (affirming a consent decree that required the Secretary of Commerce to create and implement a groundfish rebuilding plan if the regional fishery management council failed to do so); Berger v. Heckler, 771 F.2d 1556, 1579–80 (2d Cir. 1985) (enforcing a consent decree requiring the Secretary of Health and Human Services to "promulgate regulations which are in accordance with the decree"); Ferrell v. Pierce, 743 F.2d 454, 465–66 (7th Cir. 1984) (affirming a consent decree requiring the U.S. Department of Housing and Urban Development ("HUD") to adopt a particular mortgage foreclosure relief program); Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1121 (D.C. Cir. 1983) (affirming the validity of a consent decree requiring the EPA to "promulgate guidelines and limitations governing the discharge by 21 industries of 65 specified pollutants"); Wildearth Guardians v. Jackson, No. 11-cv-00001-CMA-MEH, 2011 U.S. Dist. LEXIS 109800, at *4, *13 (D. Colo. Sept. 27, 2011) (approving a consent decree establish-

regulations—either in general, or with regard to particular targets;[21] or take other specified discrete acts.[22] As government agencies increasingly hire "cause lawyers" from both sides of the political spectrum who seek to promote ideological or social goals, consent decrees may be used even more frequently to effectively nullify disfavored laws and regulations, entrench preferred policies, and incur enforcement-related obligations that future administrations will be hard-pressed to undo or avoid.[23]

The Department of Justice's ("DOJ") Office of Legal Counsel ("OLC"), in a still-binding 1999 opinion that has been mentioned in only a handful of articles[24] and has never been subjected to academic scrutiny, vigorously defended the practice of government defendants executing consent decrees.[25] It concluded that "[i]n general . . . the Attorney General is free to enter into settlements that would limit the future exercise of executive branch discretion when that discretion

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ing a schedule by which the EPA must either approve improvement plans governing regional haze that had been submitted by various states, or issue its own federal improvement plan).

20 *See, e.g.*, Sierra Club v. Hankinson, 351 F.3d 1358, 1363 (11th Cir. 2003) (discussing a consent decree "requiring the state Department of Transportation to seek legislation instituting an inspection program" for vehicle emissions); Se. Pa. Transp. Auth. v. Pa. Pub. Util. Comm'n, 210 F. Supp. 2d 689, 707 (E.D. Pa. 2002) ("The parties entered into a Consent Decree under which the Commonwealth defendants were obligated to seek legislation establishing and implementing" a vehicle emissions program.).

21 *See, e.g.*, Bragg v. Robertson, 83 F. Supp. 2d 713, 718 (S.D. W. Va. 2000) (approving consent decree requiring the director of the state environmental protection division to "enforce state surface mining laws").

22 *See, e.g.*, Chisom v. Jindal, No. 86-4075, 2012 U.S. Dist. LEXIS 130153, at *12–13 (E.D. La. Sept. 1, 2012) (interpreting a consent judgment requiring the State to create new districts for the election of state supreme court justices); Indus. Commc'ns & Elecs., Inc. v. Town of Alton, 710 F. Supp. 2d 189, 193–96 (D.N.H. 2010) (discussing a consent decree requiring defendant municipality to issue a zoning variance); Sansom Comm. v. Lynn, 735 F.2d 1535, 1539 (3d Cir. 1984) (rejecting a challenge to a consent decree requiring federal agencies to facilitate the rehabilitation of certain townhouses "with maximal participation by interested members of the public").

23 *See* Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649, 654 (2012) ("By drawing on state power, cause lawyers in government positions may make the state a more favorable context in which to pursue movement goals . . . .").

24 *See* Krakoff, *supra* note 1, at 1187 n.177; Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. REV. 327, 347 n.98; Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1035 n.77 (2001); *see also* Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 374 n.228 (2008).

25 Memorandum from Acting Assistant Attorney General Randolph D. Moss to Associate Attorney General Raymond C. Fisher (June 15, 1999), *available at* http://www.justice.gov/olc/consent_decrees2.htm (last accessed Feb. 20, 2013) [hereinafter "OLC Consent Decree Opinion"].

has been conferred pursuant to statute."[26] Thus, although DOJ has special approval mechanisms for consent decrees in many types of government-defendant cases,[27] it generally does not view them as problematic.

This Article contends that consent decrees raise serious Article III concerns due to the lack of adverseness between or among the parties seeking them. When parties have reached accord as to the proper disposition of a lawsuit, there is no longer a live controversy for a court to resolve. Rather than entering a consent decree, the court should require the parties to memorialize their understanding in a settlement agreement—*i.e.*, a private contract—and dismiss the case without entering a substantive order that specifies or alters the parties' legal rights and obligations.

Although the legal consequences of settlement agreements and consent decrees differ, those distinctions often have limited practical impact on litigants. In government-defendant cases,[28] however, the distinction can be crucial. Contracts that purport to limit government agencies' or officials' statutory discretion often are unenforceable under the reserved powers doctrine, and potentially even the sovereign acts doctrine, and seldom are subject to specific enforcement.[29] Because consent decrees are court orders, however, government agencies and officials can use them to bind their (and their successors') discretion in ways that otherwise would be unenforceable. Likewise, because courts are not required to consider the merits of most proposed consent decrees before approving them,[30] government defendants may use them to create and entrench requirements and restrictions that lack a valid constitutional or statutory basis.

Some commentators argue that consent decrees in government-defendant cases violate Article II. This Article demonstrates that, in addition to the underlying lack of adverseness that applies to all consent decrees, the unique concerns that arise with consent decrees in

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26 *Id.*

27 Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys 3, 4 (Mar. 13, 1986), *reprinted in* U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POL'Y, GUIDELINES ON CONSTITUTIONAL LITIGATION 150, 152–53 (Feb. 19, 1988) (codified at 28 C.F.R. § 0.160(c)(3)–(5)).

28 The term "government," as used in this Article, includes federal, state, and municipal governments, unless context dictates otherwise. References to suits against government officials mean suits naming them in their official capacity. The term "government defendant" embraces counterclaim and third-party defendants, as well.

29 *See infra* Section IV.A.

30 Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986).

government-defendant cases are purely statutory, rather than constitutional. It further argues that, whether on justiciability or statutory grounds, courts should refuse to enter consent decrees in government-defendant cases. Recognizing that courts may be reluctant to adopt such an extreme reform, this Article also offers an alternate approach for considering proposed consent decrees in such cases[31]—drawing on diverse fields such as civil procedure,[32] criminal procedure,[33] and antitrust[34]—to ensure that they are not used to improperly evade the traditional legislative or regulatory processes.

As suggested earlier, this Article's main focus is non-institutional consent decrees—consent decrees aimed primarily at the validity, interpretation, or enforcement of particular legal provisions,[35] decisions, or actions of governmental entities. The distinction between such orders and institutional consent decrees is somewhat subjective, however, and much of this Article's analysis likely applies to institutional decrees, as well.[36]

Part I begins by explaining the law governing consent decrees and demonstrates that such decrees raise greater concerns than other procedural vehicles through which parties may seek judicial relief without contesting certain issues. Part II challenges federal courts' authority under Article III to enter such decrees at all, due to the absence of adverseness between the parties seeking such orders. Part III demonstrates that consent decrees raise special concerns in government-defendant cases, allowing government agencies and officials to make commitments to which they lack legal authority to agree. In contrast to some earlier commentators, this Part argues that the problem generally lies in a lack of statutory authorization, rather than infringing on the President's Article II prerogatives.[37]

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31 *See infra* Part IV.

32 *See* FED. R. CIV. P. 23(e), 24.

33 *See* Anders v. California, 386 U.S. 738 (1967); Prison Litigation Reform Act, 18 U.S.C. § 3626(c) (2006).

34 *See* Tunney Act, 15 U.S.C. § 16 (2006).

35 This Article uses the phrase "legal provision" broadly to refer to a statute, regulation, ordinance, or policy at the federal, state, or local level.

36 This Article does not address the related, but conceptually distinct, problems associated with monetary settlements in government-defendant cases. *See* Peterson, *supra* note 24, at 332 ("[T]he settlement authority of the Department of Justice creates continuing loopholes in Congress's appropriations authority.").

37 Specifically, this Part argues that Article II prohibits only consent decrees that purport to restrict a power that the Constitution specifically and directly confers upon the President without legislative intermediation, such as the pardon power. Article II does not similarly bar the vast majority of decrees, which impose limits, requirements, or conditions on statutorily conferred discretion.

Part IV proposes a variety of remedies for these challenges.[38] It begins by arguing that, under Article III, courts should not entertain requests for consent decrees due to lack of adverseness, but rather require litigants to execute settlement agreements. This would be particularly beneficial in government-defendant cases, because a range of doctrines limits the enforceability of contracts through which governmental entities improperly attempt to contract away their statutory powers or discretion.[39]

In the event courts are not willing to completely discontinue the use of consent decrees, they should require a litigant seeking such a decree in a government-defendant case to demonstrate that the plaintiff has stated valid claims, and that the requested relief is necessary to remedy the legal violations at issue. Courts also should loosen the requirements for intervention in such cases. Through adversarial presentation of the issues, an intervenor can help ensure that a proposed decree satisfies these suggested new standards and, if necessary, take an appeal. Such precautions would help ensure that government defendants do not use consent decrees to exceed the scope of their statutorily delegated authority. Part V briefly concludes.

I. CONSENT DECREES IN CONTEXT

This Part lays the foundation for the rest of the Article by explaining the law governing consent decrees. Section A discusses the lax standards courts apply when considering proposed consent decrees, with a particular focus on the various approaches courts take when a proposed decree would prohibit a government litigant from enforcing a statute on purported constitutional grounds. This Section also explains the stringent requirements the Supreme Court has established for modifying consent decrees. Section B places consent decrees in their broader context, contrasting them with other procedural vehicles parties may use to attempt to obtain substantive court

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38 Because many of these proposals are equally applicable to state courts, the concepts mentioned in this discussion should be understood as including their state-level analogues, as well.

39 As discussed later, a future administration is free to abide by a settlement agreement if it agrees with its predecessor's interpretation of the law. *See infra* Section IV.A. If, however, the future administration concludes that the restrictions imposed by the settlement agreement are not legally or constitutionally appropriate, then the agency may resume the challenged actions, and either the same plaintiffs or new ones may continue the underlying litigation or file a new case. If a court, following adversarial litigation, concludes that the government defendant's actions or policies are improper, it may issue appropriate injunctive and other relief to prevent recurrences.

orders without having the court pass on the merits of a case, or certain issues within a case.

A. *The Law of Consent Decrees*

When government defendants settle lawsuits against them, they often do so through consent decrees. A consent decree is a court order that terminates a lawsuit (or certain claims in a lawsuit) and imposes obligations on one or both litigants.[40] It is enforceable through summary contempt proceedings before the court that issued it,[41] rather than in a separate breach-of-contract suit like a settlement agreement.[42] A court may approve a consent decree among the litigants that agree to it, even if other parties to the lawsuit, including intervenors, object.[43]

The Supreme Court has emphasized that a consent decree draws its force from "the agreement of the parties, rather than the force of the law upon which the complaint was originally based."[44] In deciding whether to approve a consent decree, a court does not determine whether "the plaintiff established his factual claims and legal theories."[45] Thus, a court may enter a consent decree against a government defendant without finding that a statutory or constitutional violation has occurred,[46] "inquir[ing] into the precise legal rights of the parties," or "reach[ing] and resolv[ing] the merits of the claims or

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40 The Supreme Court's characterization of consent decrees has varied. Early cases emphatically reject the characterization of consent decrees as contracts. United States v. Swift & Co., 286 U.S. 106, 115 (1932). The Court later softened this position, stating that, because of their "dual character, consent decrees are treated as contracts for some purposes but not for others." United States v. ITT Cont'l Baking Co., 420 U.S. 223, 236–37 n.10 (1975); Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986) (holding that consent decrees are "hybrid[s]" that can be characterized as both contracts and judgments); *see generally* Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 891 (1988) (arguing that a consent decree cannot be treated either as a traditional contract or court order). Judge Frank H. Easterbrook argues that a consent decree should be thought of as a contract, except for three main differences: "the speed of enforcement, the court of enforcement, and the remedy for breach. It is a contract all the same. Its force comes from the parties' agreement, not from the law that was the basis of the suit." Easterbrook, *supra* note 16, at 20.

41 *Local No. 93*, 478 U.S. at 518.

42 *See infra* Section IV.A.

43 *Local No. 93*, 478 U.S. at 529 (holding that an intervenor "does not have power to block the decree merely by withholding its consent"); *accord* Lawyer v. Dep't of Justice, 521 U.S. 567, 578–79 (1997).

44 *Local No. 93*, 478 U.S. at 522; *accord* Easterbrook, *supra* note 16, at 20.

45 United States v. Armour & Co., 402 U.S. 673, 682 (1971).

46 Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 389 (1992); *Armour & Co.*, 402 U.S. at 682–83.

controversy."[47] A court also may order broader relief than the plaintiffs originally sought in the complaint, or than they could have obtained following an adversarial trial.[48]

In *Local No. 93, International Ass'n of Firefighters v. City of Cleveland*, the Supreme Court established four requirements for a consent decree to be approved.[49] First, the court must have subject-matter jurisdiction of the underlying dispute.[50] Second, the decree must "come within the general scope of the case made by the pleadings."[51] Third, the decree "must further the objectives of the law upon which the complaint was based."[52] Finally, the decree cannot affirmatively require "unlawful" action,[53] although in constitutional challenges, courts sometimes will approve consent decrees that require or allow conduct that otherwise would be proscribed by the allegedly unconstitutional legal provision. A few circuits have held that it is an abuse of discretion for a district court to reject a consent decree that satisfies *Local No. 93*'s requirements.[54]

As a practical matter, these standards do not substantially limit the range of consent decrees to which government defendants may agree. Agencies and officials may consent to wide-ranging relief in cases in which they ultimately could have prevailed on either the facts or the law, or where the court may have awarded much narrower relief. A consent decree also may require government defendants to perform acts that are not otherwise legally mandated, thereby constraining the constitutionally and statutorily conferred discretion of executive officials and, perhaps more importantly, their successors.[55]

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47 Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983); *see also Lawyer*, 521 U.S. at 579 n.6.

48 *Rufo*, 502 U.S. at 389 ("[P]etitioners could settle the dispute . . . by undertaking to do more than the Constitution itself requires . . . [and] also more than what a court would have ordered absent the settlement.").

49 *Local No. 93*, 478 U.S. at 525.

50 *Id.*

51 *Id.* (quotation marks and brackets omitted).

52 *Id.*

53 *Id.* at 525–26.

54 *See, e.g.*, Durrett v. Housing Auth. of Providence, 896 F.2d 600, 604 (1st Cir. 1990) (reversing the district court for refusing to enter a consent decree that "would give plaintiffs far more comprehensive relief than they could have achieved with a victory after trial," because it satisfied *Local No. 93*'s requirements).

55 *See, e.g.*, Sansom Comm. v. Lynn, 735 F.2d 1535, 1539 (3d Cir. 1984) (recognizing the validity of a consent decree containing terms which "far exceeded the relief available" under the federal statutes at issue in the underlying case); *cf.* Nobels v. Sec. Fin. Corp. of Ga., 431 F. App'x 835, 843 (11th Cir. 2011) (affirming a consent decree between private litigants that "grant[ed] a form of relief that a court could not have granted had it entered a judgment on the merits").

In effect, government defendants may use consent decrees to not only create new legal rights and obligations, but also do so outside the normal legislative and regulatory processes, and in a way that entrenches their decisions, largely immunizing them from reversal by later administrations.

Many federal courts—though not the Supreme Court—have established one narrow check on this power, holding that a government defendant may not enter into a consent decree that ignores or invalidates a statute unless the court first concludes that the statute actually is unconstitutional or (for state laws) violates federal law.[56] Courts applying this principle also reject consent decrees that grant relief that the government defendant does not otherwise have the independent legal authority to offer.[57] In *Perkins v. City of Chicago Heights*, for example, plaintiffs sued the City of Chicago Heights and the Chicago Heights Election Commission, alleging that the nonpartisan, at-large electoral system for city council violated § 2 of the Voting Rights Act.[58] After the district court rejected the plaintiffs' motion for summary judgment, the defendants and most of the plaintiffs entered into a consent decree which switched the city from a "[m]anagerial" form of government to a modified "[s]trong [m]ayor" system.[59] The district court approved the decree because it found that the plaintiffs' claims had "a significant basis in evidence and law."[60]

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56 Keith v. Volpe, 118 F.3d 1386, 1393 (9th Cir. 1997) (vacating a consent decree enjoining the enforcement of a state billboard law because "the district court could not supersede California's law unless it conflicts with any federal law"); *see also* PG Publ. Co. v. Aichele, 705 F.3d 91, 116 (3d Cir. 2013) (affirming the district court's refusal to approve a consent decree barring enforcement of a state law restricting access to polling places because "the parties cannot circumvent valid state laws by way of a consent decree"); Nat'l Rev. Corp. v. Violet, 807 F.2d 285, 288 (1st Cir. 1986) (holding that the judgment was void because the Attorney General had no authority to stipulate "that an act of the legislature is unconstitutional").

57 St. Charles Tower, Inc. v. Kurtz, 643 F.3d 264, 270 (8th Cir. 2011) (holding that a government entity may agree to a consent decree that is inconsistent with state law only if that "remedy is necessary to rectify a violation of federal law") (emphasis omitted); League of Residential Neighborhood Advocates v. City of Los Angeles, 498 F.3d 1052, 1055 (9th Cir. 2007) ("A federal consent decree or settlement agreement cannot be a means for state officials to evade state law."); Kasper v. Bd. of Election Comm'rs., 814 F.2d 332, 342 (7th Cir. 1987) ("An alteration of the statutory scheme may not be based on consent alone; it depends on an exercise of federal power, which in turn depends on a violation of federal law."); Martin v. Greenville, 369 N.E.2d 543, 546 (Ill. App. 1977) ("A municipality may not, under the guise of compromise, impair a public duty owed by it, and neither municipal officials nor the trial court may usurp the legislative process.").

58 47 F.3d 212, 214 (7th Cir. 1995).

59 *Id.* at 215.

60 *Id.* at 217.

The non-consenting plaintiffs appealed the consent decree, and the Seventh Circuit vacated it.[61] The court held that a consent decree may override state law only if "such a remedy is necessary to rectify a violation of federal law."[62] Because the Illinois Constitution stipulated that a municipality's form of government may be changed only through a referendum, the defendants lacked authority to agree to such a change unless the existing system was illegal or unconstitutional.[63] The district court's "generalized statements" about the plaintiffs' claims did not "constitute sufficient findings of a violation of federal law" to warrant overriding state law and "direct[ing] changes normally requiring voter approval."[64]

The Seventh Circuit's approach, requiring an actual adjudication of illegality or unconstitutionality before allowing a consent decree to override state law, is the strictest. The D.C. Circuit, in contrast, has held that a consent decree may override a statute if *either* the district court determines that the plaintiffs established the existence of a federal violation, *or* the government defendants admit such a violation.[65] Some courts have gone even further, holding that government defendants may enter into consent decrees or other settlements declaring legal provisions to be invalid so long as the plaintiffs' claims are "substantial."[66]

One district court, for example, held,

> [T]he Attorney General may settle a case which arises from a good faith federal challenge to a state law without admitting that the law violates federal law. As long as there is sufficient evidence to show that the challenge to the state law is reasonable, it is consistent with the Attorney General's duties to allow him or her to determine that it is in the inter-

61 *Id.* at 218.

62 *Id.* at 216.

63 *Id.* at 216–17 (citing ILL. CONST. art. VII, § 6(f)).

64 *Id.* at 217.

65 Cleveland Cnty. Ass'n for Gov't By the People v. Cleveland Cnty. Bd. of Comm'rs, 142 F.3d 468, 477 (D.C. Cir. 1998) (holding that state law cannot "stand in the way" of a consent decree if the decree is remedying "an admitted or adjudged violation" of federal law).

66 DEG, LLC v. Township of Fairfield, 966 A.2d 1036, 1045 (N.J. 2009); *see also* Feeling v. Kelly, 152 F.R.D. 670, 672–73 (D.D.C. 1994) (reaffirming the propriety of a consent decree construing a federal statute governing Aid to Families with Dependent Children ("AFDC") without assessing the validity of the plaintiffs' allegations, based on considerations of "judicial economy, convenience, as well as fairness to the litigants"); Summit Twp. Taxpayers Ass'n v. Summit Twp. Bd. of Supervisors, 411 A.2d 1263, 1266 (Pa. Commw. 1980) (upholding a court-approved settlement of a zoning case that effectively resulted in a variance, even though the statutory procedures for granting a variance were not satisfied).

> ests of the state to save the expense of litigation by settling the controversy.[67]

Although its opinion is somewhat unclear, it appears that OLC's position on consent decrees is closest to this last approach. OLC begins by acknowledging that "Congress may place limits on the scope of the Attorney General's settlement power through the general laws that govern the conduct of the agencies on behalf of which the Attorney General purports to settle."[68] It nevertheless goes on to conclude that the "'Attorney General—in the exercise of his settlement responsibilities—is not bound by each and every statutory limitation and procedural requirement that Congress may have specifically imposed upon some other agency head in the administration of [the] agency's programs.'"[69] It further opines that a federal law which prohibits an executive official, such as the Secretary of the Treasury, from settling certain types of claims does not apply to the Attorney General when representing that official in litigation.[70] Thus, OLC believes that, at least in many circumstances, the Attorney General may enter into a consent decree on behalf of a government defendant requiring conduct that the defendant otherwise could not legally perform.

Despite the diversity of approaches to consent decrees that invalidate or circumvent statutes, courts generally do not take precautions against consent decrees in which agencies agree to interpret, apply, or enforce statutes or other legal provisions in particular ways; promulgate particular regulations; or take other such actions.[71]

Because a consent decree is a court order, the court has discretion to modify it based on "a significant change either in factual conditions or in law," even if one or more of the signatories objects.[72] The

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67 Midtown Hosp. v. Miller, 36 F. Supp. 2d 1360, 1369 (N.D. Ga. 1997).

68 OLC Consent Decree Opinion, *supra* note 25.

69 *Id.* (quoting Settlement Authority of the United States in Oil Shale Cases, 4B Op. O.L.C. 756, 758 (1980)).

70 *Id.* (citing Compromise of Claims Under Sections 3469 and 3229 of the Revised Statutes, 38 Op. Att'y Gen. 94 (1933)).

71 *See, e.g.*, Berger v. Heckler, 771 F.2d 1556, 1579 (2d Cir. 1985) (holding that, because the Secretary of Health and Human Services agreed to a consent decree which required "the promulgation of regulations, she cannot now object to th[ose] terms"); Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1120–21 (D.C. Cir. 1983) (affirming a consent decree requiring the EPA "to promulgate guidelines and limitations governing the discharge by 21 industries of 65 specified pollutants" and "mandat[ing] the use of certain scientific methodologies and decision-making criteria").

72 Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 384 (1992); *cf.* United States v. Swift & Co., 286 U.S. 106, 119 (1932) (holding that a district court may modify an antitrust consent decree only upon a "clear showing of grievous wrong evoked by new and unforeseen conditions"). In the wake of *Rufo*, commentators have split on how broadly *Rufo* should

Supreme Court has held, however, that a party may not seek to modify a consent decree simply because subsequent rulings have clarified the law upon which the plaintiffs' claims were based, or demonstrate those claims to be weaker than originally thought.[73] It explained that granting courts broad discretion to modify consent decrees based on subsequent legal developments "would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements."[74]

Even when subsequent developments make modification appropriate, the court must ensure that the change is "tailored to resolve the problems created by the change in circumstances," rather than "rewrit[ing] [the] consent decree so that it conforms to the constitutional floor."[75] When modifying a decree, a court may not review whether certain provisions "'could have been opposed with success if the defendants had offered opposition.'"[76] Thus, government defendants may not readily change consent decrees as new administrations, which may interpret the law differently, take office.

B. Other Means of Avoiding Adversarial Adjudication

Consent decrees are only one procedural vehicle through which litigants, including government defendants, may seek judicial rulings that affirm or alter their respective legal rights and obligations without having the court fully consider the merits of the underlying is-

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be interpreted, and whether its more liberal modification standard should be applied beyond the context of institutional consent decrees, particularly to antitrust decrees. *See, e.g.*, John D. Anderson, Note, *Modifications of Antitrust Consent Decrees: Over a Double Barrel*, 84 MICH. L. REV. 134, 153–54 (1985) (arguing that courts should apply a sliding scale to requested modifications of antitrust consent decrees, depending on which party is seeking the modification and whether it is opposed); Jed Goldfarb, Note, *Keeping* Rufo *in Its Cell: The Modification of Antitrust Consent Decrees After* Rufo v. Inmates of Suffolk County Jail, 72 N.Y.U. L. REV. 625, 629 (1997) (arguing that applying the flexible *Rufo* standard to antitrust consent decrees would "reduce settlement incentives for antitrust enforcement agencies"); David S. Konczal, Note, *Ruing* Rufo: *Ramifications of a Lenient Standard for Modifying Antitrust Consent Decrees*, 65 GEO. WASH. L. REV. 130, 134 (1996) (arguing that the standard for modifying antitrust consent decrees should be stricter than *Rufo* but offer more "flexibility" than *Swift*).

73 *Rufo*, 502 U.S. at 389–90; *see, e.g.*, Feeling v. Kelly, 152 F.R.D. 670, 672–73 (D.D.C. 1994) (declining to vacate a consent decree, despite a subsequent Supreme Court case that arguably weakened some of the plaintiffs' claims, due to "paramount issues of judicial economy, convenience, as well as fairness to the litigants").

74 *Rufo*, 502 U.S. at 389.

75 *Id.* at 391.

76 *Id.* at 391–92 (quoting *Swift*, 286 U.S. at 116–17).

sues.[77] Litigants also may use defaults, failure to oppose dispositive motions, stipulations of law, waivers and forfeitures, and confessions of error to attempt to obtain a substantive judgment while avoiding adversarial adjudication of a case, or particular issues within a case.[78] This Section demonstrates that, for a variety of doctrinal and practical reasons, consent decrees are more problematic than such other procedural vehicles, giving governmental defendants greater leeway to effectively change the law, entrench their policy preferences, and restrict their successors' discretion based on potentially faulty legal premises that courts do not review in-depth.

Most basically, a defendant implicitly may accede to a plaintiff's claims by failing to file a responsive pleading to a complaint. A court typically will treat such a failure as a default[79] and deem the complaint's well-pleaded factual allegations admitted.[80] Even in such cases, however, the court is required to assess the validity of the complaint's allegations of law[81] and determine whether the plaintiff has stated valid causes of action.[82] Likewise, if the plaintiff seeks an injunction, then the court must exercise its equitable discretion and decide for itself whether the requested relief is appropriate.[83]

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77 For a more detailed discussion of the various ways in which litigants can attempt to obtain substantive court rulings while avoiding adversarial adjudication of cases, or particular issues within cases, see Michael T. Morley, *Avoiding Adversarial Adjudication and the Limits of Article III*, 41 FLA. ST. U. L. REV. ___ (forthcoming 2014).

78 Settlement agreements are not included in this list because, as discussed at greater length later, *see infra* Section IV.A, they are private contracts. Generally, a court's only responsibility when parties enter into a settlement agreement is to dismiss the case, which the Supreme Court has recognized is a purely administrative housekeeping matter. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 21–22 (1994).

79 FED. R. CIV. P. 55(a).

80 *Id.* R. 8(b)(6); *see also* City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 137 (2d Cir. 2011) ("It is an 'ancient common law axiom' that a defendant who defaults thereby admits all 'well-pleaded' factual allegations contained in the complaint." (citation omitted)); *cf.* Angelo Iafrate Constr., LLC v. Potashnick Constr., Inc., 370 F.3d 715, 722 (8th Cir. 2004) ("A default judgment entered by the court binds the party facing the default as having admitted all of the well pleaded allegations in the plaintiff's complaint.").

81 Nishimatsu Constr. Co. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975) ("[A] defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law." (emphasis omitted)).

82 Finkel v. Romanowicz, 577 F.3d 79, 84 (2d Cir. 2009) (holding that, even if a defendant is in default, a court is "required to determine whether the [plaintiff's] allegations establish [the defendant's] liability as a matter of law"); DirecTV, Inc. v. Hoa Huynh, 503 F.3d 847, 855 (9th Cir. 2007) (affirming the district court's "refus[al] to grant default judgment" because the "complaints failed to state violations" of federal law).

83 13 MOORE'S FEDERAL PRACTICE § 65.03 (3d ed. 1997) ("[A] plaintiff is not entitled to a permanent injunction simply because a default judgment has been entered; the court must engage in an 'inquiry' to determine whether the plaintiff has demonstrated that injunctive relief is appropriate."); *see also* Thomson v. Wooster, 114 U.S. 104, 113 (1885)

When a federal agency or official defaults, the burdens on the plaintiff are even higher. Federal Rule of Civil Procedure 55(d) provides, "A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court."[84] Although "the quantum and quality of evidence that might satisfy a court can be less than that normally required,"[85] the plaintiff still must make an evidentiary showing, in addition to establishing the legal validity of its claims and sufficiency of its allegations. Courts apply Rule 55(d) vigorously; a court will not enter a default judgment against the Government unless it believes that the plaintiff is entitled to relief on the merits.[86]

Alternatively, a defendant may attempt to implicitly agree to a plaintiff's claims by failing to oppose a motion for summary judgment. Typically, when a litigant does not oppose a motion, the court deems the matter conceded.[87] Summary judgment, however, "cannot be granted by default even if there is a complete failure to respond to the motion."[88] Rather, the court must confirm that the moving party's legal arguments are valid and that the record contains no disputes of material fact.[89] Thus, courts apply stricter standards when awarding relief as a result of a default or failure to oppose a dispositive motion than when considering a proposed consent decree.

("[A] decree pro confesso is not a decree as of course according to the prayer of the bill . . . [but] is made (or should be made) by the court, according to what is proper to be decreed upon the statements of the bill assumed to be true.").

84 FED. R. CIV. P. 55(d).

85 Alameda v. Sec'y of Health, Educ. & Welfare, 622 F.2d 1044, 1048 (1st Cir. 1980).

86 *See, e.g.*, Harvey v. United States, 685 F.3d 939, 946 (10th Cir. 2012) (holding that, because the plaintiff "did not provide satisfactory expert evidence to establish his claims, he is not entitled to default judgment"); Camacho-Rodriguez v. Potter, 136 F. App'x 378, 379 (1st Cir. 2005) (per curiam) (affirming judgment for the United States Postmaster General, despite his default, because the plaintiffs failed to establish an Americans with Disabilities Act violation); Marziliano v. Heckler, 728 F.2d 151, 158 (2d Cir. 1984) (affirming the entry of default against the Secretary of Health and Human Services after confirming that "there was an adequate factual basis for [the plaintiff's] claim").

87 *See, e.g.*, Hershey v. United States, No. 89-15262, 1991 U.S. App. LEXIS 10366, at *6 (9th Cir. May 16, 1991) ("[F]ailure to file an opposition [i]s required to be treated as . . . consent to the granting of the motion.").

88 FED. R. CIV. P. 56 Adv. Comm. Note (2010 Amend.); *see, e.g.,* United States v. One Piece of Real Prop. Located at 5800 SW 74th Ave., 363 F.3d 1099, 1101–02 (11th Cir. 2004) ("[T]he district court cannot base the entry of summary judgment on the mere fact that the motion was unopposed but, rather, must consider the merits of the motion.").

89 *See* FED. R. CIV. P. 56(e)(3) (providing that, if a party "fails to properly address another party's assertion of fact" in response to a summary judgment motion, the court may "grant summary judgment *if* the motion and supporting materials . . . show that the movant is entitled to it" (emphasis added)).

Litigants also may use stipulations of law to attempt to resolve issues in a case without having the court pass on their merits. The Supreme Court has declined to address whether courts have a "duty" to consider the merits of stipulations of law before accepting them, and has instead held only that courts have discretion to do so.[90] It is unclear how courts are to apply this standard.

Typically, a court "abuses its discretion when it makes an error of law."[91] If this meant that accepting an erroneous stipulation of law constituted an abuse of discretion, then a court would have to review and assess the validity of all such stipulations, and there would be little, if any, room for any actual exercise of discretion. Because the Supreme Court expressly declined to require courts to review stipulations of law, however,[92] it is unclear whether or when a court must identify and reject invalid stipulations.

Although stipulations of law warrant further academic consideration,[93] they are less concerning than consent decrees for two reasons. First, as a practical matter, government litigants are far more likely to attempt to resolve major or dispositive legal issues through consent decrees (or settlement agreements) rather than stipulations, in order to avoid potentially unpredictable or undesirable remedial consequences. A government litigant has a strong incentive to offer major stipulations only in the context of an overall resolution of a case, to be able to influence the nature and scope of the resulting relief.

Second, whereas courts are extremely limited in the degree of scrutiny they may apply to proposed consent decrees,[94] they (at a minimum) have complete discretion to delve into the merits of a proposed stipulation of law.[95] Thus, current doctrine gives courts greater flexibility to refuse erroneous stipulations of law than consent decrees based on incorrect legal premises.

Rather than offering an express stipulation of law, litigants may attempt to preclude comprehension and accurate judicial consideration of the underlying issues in a case by forfeiting or waiving issues or arguments. A forfeiture occurs when a party "fail[s] to make time-

90 U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., 508 U.S. 439, 448 (1993).

91 Koon v. United States, 518 U.S. 81, 100 (1996).

92 *Indep. Ins. Agents*, 508 U.S. at 448 ("We need not decide whether the Court of Appeals had, as it concluded, a 'duty' to address" the validity of litigants' stipulations of law).

93 *See, e.g.*, Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1218–24 (2011) (explaining how competing conceptions of the judiciary's main function have different implications for how courts should consider stipulations of law); Morley, *supra* note 77.

94 Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) (establishing a liberal four-prong test for approving consent decrees); *see supra* Part I.

95 *Indep. Ins. Agents*, 508 U.S. at 448.

ly assertion of [a] right" before the court,[96] while a waiver occurs when a litigant "intentional[ly] relinquish[es] or abandon[s]" a claim, argument, or right.[97]

A waiver or forfeiture is akin to an implicit or unintentional stipulation of law. As with stipulations of law, courts are not required to reach the merits of waived or forfeited arguments or issues, but have discretion to do so. Sometimes, this authority is described as completely discretionary,[98] while other cases hold that courts may adjudicate such issues only when "necessary to avoid a manifest injustice."[99] A government defendant seeking to concede a plaintiff's claims without judicial consideration of them is likely to rely on a consent decree, rather than just waiving or forfeiting a potentially meritorious argument, because a consent decree allows greater control over the ultimate outcome of the case and the relief the court awards.

Finally, litigants may use a confession of error to attempt to induce a court to base a ruling on their undisputed conception of the law. A confession of error acknowledges that an appellate court should reverse or vacate a lower court's opinion due to a defect or error and typically remand for further proceedings.[100] In *Lawrence v. Chater*,[101] the Court explained that it does not "determin[e] the[] merits" of a confession of error, but rather considers only whether the confession is "plausible."[102] Under this extremely liberal standard, when the Solicitor General confesses error, the Court almost invariably "GVRs" the case: grants certiorari, vacates the lower court ruling,

96 Yakus v. United States, 321 U.S. 414, 444 (2009).

97 United States v. Olano, 507 U.S. 725, 733 (1993).

98 Singleton v. Wulff, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."); Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 249 (3d Cir. 2013) ("[I]t is within our discretion to consider an issue that the parties did not raise below.").

99 *In re* Nortel Networks Corp. Sec. Litig., 539 F.3d 129, 133 (2d Cir. 2008).

100 Solicitor General Drew S. Days, III, *The Solicitor General and the American Legal Ideal*, 49 SMU L. REV. 73, 78 (1995) ("Solicitors General have 'confessed error' in cases where the government has won in the lower courts but the Solicitor General concluded that a 'fundamental error' had led to that result.").

101 516 U.S. 163, 170–71 (1996).

102 *Id.*; *see also* Nunez v. United States, 554 U.S. 911, 912 (2008) (Scalia, J., dissenting) (discussing the Court's "dubious yet well-entrenched habit of entering a GVR order *without an independent examination of the merits* when the Government, as respondent, confesses error in the judgment below" (alteration in original)); Mariscal v. United States, 449 U.S. 405, 407 (1981) (Rehnquist, J., dissenting) ("But I harbor serious doubt that our adversary system of justice is well served by this Court's practice of routinely vacating judgments which the Solicitor General questions without any independent examination of the merits on our own.").

and remands for reconsideration in light of the Government's new position.[103]

The Court's current approach of almost reflexively approving them exacerbates the potential problems.[104] Because confessions of error are made at the appellate level, after a government litigant already has obtained a favorable judgment below, however, they tend to be quite rare. Moreover, as with stipulations of law, government litigants have a strong incentive to try to settle a case outright through a consent decree or settlement agreement, rather than conceding an important or dispositive issue without trying to contain the resulting fallout.

Thus, for both doctrinal and practical reasons, consent decrees are a particularly problematic method through which government defendants may obtain substantive court orders without merits-based rulings on the underlying legal issues,[105] thereby potentially circumventing the traditional legislative and regulatory processes. Nevertheless, to the extent that concerns about consent decrees also apply to other procedural vehicles such as stipulations of law; waivers and forfeitures; and confessions of error, some of the reforms suggested in Part IV may be extended to them, as well.

II. CONSENT DECREES, ADVERSENESS, AND JUSTICIABILITY

An unavoidable, yet typically overlooked, threshold issue regarding consent decrees is whether a court has Article III jurisdiction to enter them.[106] When litigants reach an understanding and are ready

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103 *See Nunez*, 554 U.S. at 912 (Scalia, J., dissenting); *Mariscal*, 449 U.S. at 407 (Rehnquist, J., dissenting).

104 As explained at greater length in Morley, *supra* note 77, the Court has not always held such a permissive attitude toward confessions of error. From 1942 through the 1970s, the Court "examine[d] independently the errors confessed" rather than leaving the development of the law "to the stipulation of the parties." Young v. United States, 315 U.S. 257, 258–59 (1942).

105 One additional unofficial alternative is that the Executive could purport to defend a case, but deliberately do a poor job. *See* Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 119–20 (2000); *see also* Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1207–08 (2012) (recognizing that, when "the purported proponent of [a] statute does not actually believe that it is constitutional," it may be "unwilling to make the strongest arguments in support of its constitutionality", it undermines that system and the benefits it is supposed to promote."). Professor Daniel J. Meltzer downplays this risk based on "the traditions of the career lawyers in the Department [of Justice]." Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1225 (2011).

106 One issue beyond the scope of this Article is the extent to which this analysis differs with regard to Article I courts.

to terminate a case on mutually agreeable terms, it is questionable whether a live "case or controversy" continues to exist or that the parties' posture remains sufficiently adversarial for the dispute to be deemed justiciable. Litigants who submit a proposed consent decree to a court are signaling that they no longer want or need the court to adjudicate any disputed questions of facts or law and that they are in accord regarding their respective legal rights and obligations. This is most apparent in the extreme case, where a plaintiff files a complaint and a proposed consent decree simultaneously.[107]

Article III's case-or-controversy requirement[108] allows federal courts to exercise jurisdiction over only "actual" disputes "arising between adverse litigants."[109] In theory, federal courts "refus[e] to entertain cases" which do not involve "a collision of actively asserted and differing claims"[110] or "the honest and actual antagonistic assertion of rights."[111] The Court has explained, "[T]he adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity."[112]

A case which begins as a justiciable dispute later may become nonjusticiable if the parties are no longer adversarial or antagonistic toward each other[113] or their dispute is otherwise mooted.[114]

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107 This objection applies to all consent decrees, not just those in government-defendant cases, but it has particular salience to the latter. Private litigants usually can memorialize the terms of a consent decree in a settlement agreement instead, and even may agree to have the court in which the underlying case was filed adjudicate any alleged violations of the agreement. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381–82 (1994). The main difference between a settlement agreement and a consent decree in such cases is the availability of the contempt remedy. Government defendants, in contrast, often cannot achieve the same substantive outcomes in a settlement agreement as they could in a consent decree. Thus, the practical ramifications of allowing courts to enter consent decrees in government-defendant cases are far greater than in other types of disputes. *See infra* Part III.

108 U.S. Const. art. III, § 2, cl. 1 (specifying that the federal "judicial power shall extend" to various types of "cases" and "controversies"); Raines v. Byrd, 521 U.S. 811, 818 (1997).

109 Muskrat v. United States, 219 U.S. 346, 361 (1911).

110 Poe v. Ullman, 367 U.S. 497, 505 (1961).

111 United States v. Johnson, 319 U.S. 302, 305 (1943); *accord* Chi. & Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 344–45 (1892).

112 *Poe*, 367 U.S. at 503. In the extreme case, Article III's adverseness requirement bars federal courts from entertaining lawsuits where the real party in interest is the same on both sides. S. Spring Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U.S. 300, 301 (1892); Wood-Paper Co. v. Heft, 75 U.S. 333, 336 (1869). It likewise bars jurisdiction where the parties falsely stipulate to, or avoid litigating the existence of, key facts in order to generate a test case so that a legal or constitutional issue may be resolved. Bartemeyer v. Iowa, 85 U.S. 129, 135 (1873).

113 *See, e.g.*, *S. Spring Gold Mining Co.*, 145 U.S. at 301 (holding that the case had become nonjusticiable because, while it was pending, the same people came to control the corpora-

The majority opinion in *United States v. Windsor*, in which the Court invalidated § 3 of the Defense of Marriage Act ("DOMA"),[115] largely treated Article III's adverseness requirement as a prudential, rather than jurisdictional, limitation.[116] The plaintiff in *Windsor* sued to obtain a tax refund that the Internal Revenue Service ("IRS") had denied her because § 3 prevented the Court from recognizing her same-sex marriage.[117] Although the Obama Administration required federal agencies to enforce § 3's definition of marriage as a union between one man and one woman,[118] it prohibited DOJ from defending the provision's constitutionality in court.[119]

The Supreme Court commented that the DOJ's failure to contest the plaintiff's constitutional arguments raised "prudential" concerns because the litigants' agreement on the main issue in the case could lead to a "friendly, non-adversary proceeding."[120] The Court held that those concerns were overcome, however, because the U.S. House of Representative's Bipartisan Legal Advisory Group had intervened to defend § 3's constitutionality.[121] It also expressed concern that declining to hear the case would lead to a substantial amount of unnecessary litigation in the lower courts.[122] Justice Antonin Scalia, joined by Chief Justice John Roberts and Justice Clarence Thomas, vigorously dissented, arguing that Article III's adverseness requirement was jurisdictional.[123]

Notwithstanding *Windsor*, it is likely that Article III's adverseness requirement remains at least partly jurisdictional. The majority opinion held that a justiciable case existed, despite the Government's

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tions on both sides); *Wood-Paper Co.*, 75 U.S. at 336 (holding that the case had become non-justiciable because, while it was pending, the plaintiffs purchased the patents at issue and therefore "own[ed] both sides of the subject-matter of [the] litigation").

114 *See, e.g.*, Singer Mfg. Co. v. Wright, 141 U.S. 696, 700 (1891) ("The taxes being paid, the further prosecution of this suit to enjoin their collection would present only a moot question, upon which we have neither the right nor the inclination to express an opinion."); San Mateo Cnty. v. S. Pac. R.R. Co., 116 U.S. 138, 141 (1885) (deeming the case moot because "the debt for which the suit was brought has been unconditionally paid and satisfied").

115 Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (1996)), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

116 *Windsor*, 133 S. Ct. at 2683–89.

117 *Id.* at 2683.

118 1 U.S.C. § 7.

119 *Windsor*, 133 S. Ct. at 2683–84.

120 *Id.* at 2687 (internal quotation omitted).

121 *Id.* at 2687–88.

122 *Id.*

123 *Id.* at 2701 (Scalia, J., dissenting) ("Article III requires not just a plaintiff (or appellant) who has standing to complain but an opposing party who denies the validity of the complaint." (emphasis omitted)); *see also id.* at 2711–12 (Alito, J., dissenting).

agreement with the plaintiff's constitutional arguments, because the IRS refused to "give . . . effect" to those arguments through its continued refusal to provide the tax refund that the plaintiff claimed.[124] Thus, even though the majority opinion frames the jurisdictional issue in terms of standing, it seems to suggest that the parties must be at least minimally adverse to each other—even if only with regard to the plaintiff's ultimate relief—for a federal court to be able to exercise jurisdiction over a matter.[125]

It also is noteworthy that *Windsor* did not purport to overrule any of the precedents discussed in this Part that more squarely frame Article III's adverseness requirement as a jurisdictional issue,[126] suggesting the continued validity of those holdings. Finally, the majority opinion itself stressed the "unusual and urgent" nature of the case.[127] Especially given the politically charged nature of the dispute, the fundamental rights at stake, and the tremendous public pressure and attention it generated, the case might not offer the best view of the Court's attitude toward the adverseness issue. Even if adverseness ultimately is viewed as a prudential limitation rather than an absolute jurisdictional requirement, however, it remains rooted in Article III, and federal courts generally must decline to entertain cases where the parties are not adverse to each other.[128]

Consent decrees raise—or, perhaps more accurately, *should* raise—justiciability concerns because a justiciable case cannot exist where both sides come to "desire the same result."[129] Section A delves into the serious challenges that consent decrees present under Article III's adverseness requirement. Section B explains why the functional considerations underlying that requirement do not support the issuance of consent decrees, either. Section C shows that the Supreme Court's attempts to reconcile consent decrees with Article III are unpersuasive. Section D distinguishes other judicial practices in which the participants also lack adverseness that commonly are said to provide a basis for allowing courts to enter consent decrees. Final-

124 *Id.* at 2685.

125 *Id.*

126 *See supra* notes 108–13; *infra* note 159.

127 *Id.* at 2688.

128 *Id.* at 2687 ("Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" (quoting Baker v. Carr, 369 U.S. 186, 204 (1962))).

129 Moore v. Charlotte-Mecklenburg Bd. of Educ. 402 U.S. 47, 48 (1971) (per curiam) (dismissing an appeal because both parties were seeking the same declaratory judgment).

ly, Section E briefly examines other arguments commentators have offered to defend the use of consent decrees by Article III courts.

A. *Consent Decrees and Article III Precedent*

Although the Supreme Court consistently has held that Article III permits federal courts to issue consent decrees,[130] several of its precedents suggest that they raise serious justiciability concerns. In *Lord v. Veazie*, for example, the Court dismissed the appeal because there was "no real dispute" between the litigants and their interests "were not adverse."[131] It explained, "It is the office of courts of justice to decide the rights of persons and of property, *when the persons interested cannot adjust them by agreement between themselves*—and to do this upon the full hearing of both parties."[132] It concluded that a ruling entered in the absence of adverseness between the parties "in the eye of the law is no judgment of the court. It is a nullity . . . ."[133] When litigants have reached the point where they are able to seek a consent decree, by definition, they can determine their rights "by agreement between themselves,"[134] and one of the key conditions of justiciability identified in *Lord* is lacking.

Likewise, in *Moore v. Charlotte-Mecklenburg Board of Education*, the Court reiterated that a case is not justiciable when both sides seek the same relief.[135] The district court there had held that a provision of North Carolina's anti-busing law was unconstitutional and enjoined its enforcement. On appeal to the U.S. Supreme Court, both parties argued that the lower court had erred and that the statute was constitutional. The Court observed, "We are thus confronted with the anomaly that both litigants desire precisely the same result, namely a holding that the anti-busing statute is constitutional. There is, therefore, no case or controversy within the meaning of Article III of the Constitution."[136] These holdings raise serious questions about the permissibility of entering a judgment when both sides argue in favor of it.

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130 *See infra* Section II.C.

131 49 U.S. 251, 254 (1850).

132 *Id.* at 255 (emphasis added).

133 *Id.* at 256.

134 *Id.* at 255.

135 402 U.S. 47, 47 (1971).

136 *Id.* at 47–48; *see also* Chi. & Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 346 (1892) (holding that a court should not "declare legislative acts unconstitutional upon agreed and general statements" from the parties).

The Court also alluded to justiciability concerns regarding consent decrees in *Vermont v. New York*, an original jurisdiction case arising from an interstate water dispute.[137] After litigating for over two months about a polluted sludge bed in Lake Champlain and Ticonderoga Creek, the State litigants agreed to resolve the case by entering into a consent decree.[138] The proposed decree stated that "no findings" would be made, and it "shall not constitute an adjudication on any issue of fact or law, or evidence, or [an] admission by any party with respect to any such issue."[139] It called for immediate action to remediate the pollution, as well as the appointment of a special "South Lake Master" to adjudicate any future disputes that arose concerning it.[140]

The Court decided "not to approve the Proposed Decree."[141] It observed, "In the instant case no findings of fact have been made; nor has any ruling been resolved concerning either equitable apportionment of the water involved or the questions relative to whether New York . . . [is] responsible for the creation of a public nuisance as alleged by Vermont."[142] The Court further held, "Article III speaks of the 'judicial power' of this Court, which embraces application of principles of law or equity to facts, distilled by hearings or by stipulations. Nothing in the Proposed Decree . . . speaks in terms of 'judicial power.'"[143] The Court went on to suggest that it would be more appropriate for the parties to settle the dispute through either an interstate compact or a traditional settlement agreement.[144]

Three Justices came closest to questioning the validity of consent decrees in *Maryland v. United States*, in which several States intervened in an antitrust enforcement action to challenge a consent decree between AT&T and DOJ.[145] The States argued that the decree improperly preempted their laws regulating the telephone industry.[146] The Court summarily affirmed the decree, but then-Justice William Rehnquist, dissenting along with Chief Justice Warren Berger and

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137 417 U.S. 270 (1974).

138 *Id.* at 270–71.

139 *Id.* at 271.

140 *Id.*

141 *Id.* at 274.

142 *Id.* at 276. The Court also expressed concern that, in reviewing the recommendations of the Special Master and "supervising the execution of the Consent Decree," it "would be acting more in an arbitral rather than a judicial manner." *Id.* at 277.

143 *Id.* at 277.

144 *Id.* at 277–78.

145 460 U.S. 1001, 1002 (1983) (Rehnquist, J., dissenting).

146 *Id.* at 1102 (Rehnquist, J., dissenting).

Justice Byron White, wrote, "I am troubled by the notion that a district court, by entering what is in essence a private agreement between parties to a lawsuit, invokes the Supremacy Clause powers of the Federal Government to pre-empt state regulatory laws."[147] Such concerns over the invalidation of state laws based solely on a consent decree logically would extend to invalidation, or even definitive interpretation, of federal laws and regulations pursuant to the Government's agreement with a private party, as well.

Professors Martin Redish and Andrianna Kastanek raised similar justiciability-related objections to settlement class actions in the *University of Chicago Law Review* a few years ago:

> [B]ecause by its nature [a settlement class action suit] does not involve any live dispute between the parties that a federal court is being asked to resolve through litigation, and because from the outset of the proceeding the parties are in full accord as to how the claims should be disposed of, there is missing the adverseness between the parties that is a central element of Article III's case-or-controversy requirement.[148]

Thus, Article III's adverseness requirement presents a serious and largely under-appreciated challenge to federal court approval of consent decrees.[149] Unlike a mere stipulation of law[150] or confession of error,[151] a consent decree purports to formally dispose of an entire case. If parties wish to voluntarily terminate litigation on mutually agreeable terms, then they may do so through a settlement agreement accompanied by voluntary dismissal, rather than a consent decree.

A settlement agreement does not raise Article III concerns because it is a private contract, and an unadorned dismissal is an ap-

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147 *Id.* (Rehnquist, J., dissenting).

148 Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 547 (2006); *see also* Owen M. Fiss, *The History of an Idea*, 78 FORDHAM L. REV. 1273, 1278 (2009) (arguing that a court's review of a proposed class action settlement "is often made without the benefit of a truly adversarial process—the parties who control the litigation have already reached agreement").

149 *Cf.* Fiss, *supra* note 148, at 1278 (stating briefly that it is "impermissible for judges to approve settlements and lend their authority to them as when a consent decree is entered" because the court would be ruling "without the benefit of a truly adversarial process"); Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of the Federal Courts*, 69 NOTRE DAME L. REV. 447, 526 (1994) (stating in passing that there is "no live controversy between adverse parties" when they seek a consent decree); William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 413 (2001) (arguing that "judicial activity fits oddly into the adversarial framework" when "[t]he parties are no longer adverse to one other, but rather in accord on the settlement terms").

150 U.S. Nat'l Bank v. Indep. Ins. Agents, Inc., 508 U.S. 439, 448 (1993).

151 Lawrence v. Chater, 516 U.S. 163, 170–71 (1996).

propriate means of terminating a case that no longer presents a justiciable controversy.[152] As discussed later,[153] because settlement agreements are simply contracts, government officials and agencies cannot use them to circumvent constitutional or statutory limits on their authority or restrict their successors' discretion in interpreting laws, promulgating regulations, or enforcing legal requirements.[154] Thus, while settlement agreements always are more appropriate than consent decrees from an Article III perspective, the distinction is especially important in government-defendant cases.[155]

B. Functional Analysis of Adverseness

Consent decrees also are problematic when considered in light of the functional considerations underlying Article III's adverseness requirement. First, requiring adverseness between the parties improves the quality of judicial decision-making.[156] Litigants with competing interests and goals typically offer different perspectives on a case and have a strong incentive to provide the court with all pertinent facts and law. Courts are more likely to reach the correct answer when parties actively identify the flaws or omissions in each other's arguments. Conversely, when all litigants desire the same result, they have little incentive to highlight defects in their arguments or present adverse considerations persuasively, beyond the bare minimum required by the rules of ethics.[157]

Adverseness also promotes judicial economy, by ensuring that courts' limited resources are dedicated to parties that actually require judicial intervention to resolve their disputes and determine their respective rights and obligations. Litigants that have reached an understanding are free to memorialize it in a settlement agreement and need not call upon a court to issue a consent decree. Although plaintiffs might prefer a consent decree so that they can enforce their

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152 U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 21–22 (1994).

153 *See infra* Section IV.A.

154 *See* United States v. Winstar, 518 U.S. 839, 888–89, 896 (1996) (plurality opinion) (reaffirming the continued validity of the reserved powers doctrine and sovereign acts doctrine as limits on the ability of government entities to enter into contracts limiting the exercise of their sovereign authority); Stone v. Mississippi, 101 U.S. 814, 820 (1879) ("[A]gencies can govern according to their discretion . . . while in power; but they cannot give away nor sell the discretion of those that are to come after them . . . .").

155 *See also infra* Part III.

156 *See* Poe v. Ullman, 367 U.S. 497, 503 (1961) ("[T]he adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed . . . .").

157 Giradeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 650 (1983).

rights through summary contempt proceedings rather than being relegated to a breach of contract claim, that difference in remedy does not render a settlement agreement an inadequate alternative.[158]

A third justification for Article III's adverseness requirement is to help ensure that courts do not stray beyond their constitutional role by performing functions entrusted to the legislative or executive branches.[159] Many consent decrees in non-institutional public law cases require courts to invalidate or adopt a definitive interpretation of a legal provision, potentially without even considering the merits of the matter.[160] Alternatively, they can require executive branch officials to apply or enforce legal provisions in a certain manner, thereby restricting the future exercise of their discretion, even if the court or successor administrations would have interpreted those provisions differently.[161] While courts may nullify the actions or restrict the discretion of governmental entities when necessary to ensure compliance with constitutional or statutory requirements,[162] doing so based purely on the litigants' consent is unwarranted judicial interference with those entities' institutional prerogatives.

Finally, adverseness reduces the likelihood that litigants will use the judicial system to obtain a ruling that will prejudice third parties.[163] This is most evident in the context of government-defendant cases. When government defendants use consent decrees to override laws or regulations, or bind the discretion of successor administrations and officials, those decrees prejudice not only the government defendants' successors, but also the voters who directly or indirectly

158 As discussed in Section IV.A, the use of settlement agreements rather than consent decrees would have the biggest impact in government-defendant cases. Contracts in which an agency or official purports to limit or waive its statutory authority to promulgate or enforce regulations generally are unenforceable, particularly through specific performance. The fact that settlement agreements are more limited than consent decrees in that respect is not a deficiency, however, but rather a substantial reason for favoring them. *See infra* Part IV.

159 *See* Flast v. Cohen, 392 U.S. 83, 95 (1968) (noting that Article III "limit[s] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process").

160 *See* Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) (establishing a four-factor test for approving consent decrees); Cleveland Cnty. Ass'n for Gov't By the People v. Cleveland Cnty. Bd. of Comm'rs, 142 F.3d 468, 477 (D.C. Cir. 1998) (holding that a consent decree may override a state law to rectify either "an admitted or adjudged violation" of federal law); DEG, LLC v. Twp. of Fairfield, 966 A.2d 1036, 1045–46 (N.J. 2009) (holding that a state Attorney General may settle a case involving a constitutional challenge to a state law to avoid an adjudication on the merits).

161 *See, e.g.*, Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1120 (D.C. Cir. 1983).

162 *See* Milliken v. Bradley, 418 U.S. 717, 744–45 (1974); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15–16 (1971).

163 Redish & Kastanek, *supra* note 148, at 549.

put them in office, many of whom may not have legal standing to challenge the decree. Thus, consent decrees—particularly in government-defendant cases—are inconsistent with the purposes underlying Article III's adverseness requirement.

C. Judicial Attempts to Reconcile Consent Decrees with Article III

Although a few district courts occasionally have refused to enter consent decrees due to lack of adverseness,[164] the Supreme Court consistently has approved their use, without persuasively explaining their constitutional foundation. Most commentators cite *Swift & Co. v. United States*[165] or *Pope v. United States*[166] to establish that it has "long been settled" that "a consent decree, in which a public administrative agency presents for judicial approval a prenegotiated settlement . . . in order to provide prospective relief . . . constitutes a 'case or controversy' sufficient to confer subject matter jurisdiction under Article III."[167] Neither of these cases, however, resolves the justiciability issue.

In *Swift*, meatpacking companies that had agreed to an antitrust consent decree several years earlier asked the Court to vacate it.[168] They argued that the district court had lacked jurisdiction under Article III to enter the decree in the first instance because the fact that all parties to the suit had sought such relief indicated that the "controversy had ceased."[169] The Court rejected the claim, holding that a party to a consent decree may not later collaterally attack it based on lack of jurisdiction.[170] The Court explained that, if the district court

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164 *See, e.g.*, Idaho Bus. Holdings, LLC v. City of Tempe, No. CV-06-2137-PHX-FJM, 2007 U.S. Dist. LEXIS 62352, at *2 (D. Ariz. Aug. 22, 2007) (holding that, where "the parties purport to have settled their case and thus there is no longer a case within the meaning of Article III," it would not "be appropriate" to enter a consent decree "adjudicat[ing] a constitutional question"); Hazel B. v. Otis, Civ. Action File No. 6820, 1974 U.S. Dist. LEXIS 12024, at *6 (D. Vt. Mar. 2, 1974) (declining to issue a consent decree because "[t]he courts are without judicial power to dispose of constitutional issues where proceedings are not clearly adversary or in which there is no actual antagonistic assertion of rights, even if undertaken in good faith"); Macklin v. Kaiser Co., 69 F. Supp. 137, 141 (D. Or. 1946) ("As a result of [the] absence of controversy, the stipulation of settlement renders the case moot. The court is not then bound to enter judgment to enforce the stipulation of settlement made by the parties.").

165 276 U.S. 311, 313–15 (1928).

166 323 U.S. 1, 3–5 (1944).

167 *E.g.*, Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 928 n.115 (1996); Randolph D. Moss, Note, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 YALE L.J. 1811, 1819 n.47 (1986).

168 276 U.S. 311, 321 (1928).

169 *Id.* at 326.

170 *Id.* at 311–12.

that issued the decree had "erred in deciding that there was a case or controversy, the error is one which could have been corrected only by an appeal."[171]

Thus, the *Swift* Court dodged the issue of whether the pendency of a proposed consent decree causes a case to lose its adversarial nature. Nevertheless, *Swift* customarily is cited as recognizing that consent decrees are consistent with Article III[172] because the Court also stated, in somewhat cryptic dicta, that the defendants' argument "ignores the fact that a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction may issue to prevent future wrong, although no right has yet been violated."[173] Although these observations are accurate, they do not address whether parties seeking a consent decree stand in a sufficiently adversarial relationship to allow a court to entertain and grant their request for injunctive relief.

In *Pope*—which did not even involve a consent decree—Congress had passed a special law allowing a particular contractor to sue in the Court of Claims to be reimbursed for expenses he had incurred while building a tunnel for the District of Columbia's water system.[174] The Court of Claims held that the law was unconstitutional, because it effectively gave the plaintiff a right to judgment and "decid[ed] all questions of fact except certain simple computations."[175] The Supreme Court reversed, holding among other things, "When a plaintiff brings suit to enforce a legal obligation[,] it is not any the less a case or controversy upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff's claim is uncontested or incontestable."[176] The Court declared, "It is a judicial function and an exercise of the judicial power to render judgment on consent. A judgment upon consent is a 'judicial act.'"[177]

The Court's holding may not be as broad as it initially appears. The Court cited *Swift* which, as discussed above, addressed the justiciability of consent decree requests only briefly in dicta, as well as other cases that enforced consent decrees without reaching the jurisdictional issue.[178] The *Pope* Court went on to explain that a case is justiciable if the court is required to "determine[] that the unchallenged

171 *Id.* at 326.
172 *See, e.g.*, Effron, *supra* note 16, at 1811; Moss, *supra* note 167, at 1819 n.47.
173 *Swift*, 276 U.S. at 326.
174 Pope v. United States, 323 U.S. 1, 4 (1944).
175 *Id.* at 8.
176 *Id.* at 11.
177 *Id.* at 12.
178 *Id.*

facts shown of record establish a legally binding obligation" and "adjudicate[] the plaintiff's right of recovery and the extent of it."[179] A consent decree in which the parties agree to both liability and relief, and the court is not required to make any independent legal or factual determinations, does not appear to fall within this holding. Thus, even the seminal Supreme Court cases on the issue fail to establish that consent decrees are consistent with Article III.

D. Article III's Adverseness Requirement and Other Judicial Practices

Some authorities—including Charles Alan Wright and Arthur R. Miller's *Federal Practice and Procedure* treatise[180]—argue that consent decrees do not raise justiciability concerns because federal courts act in numerous other types of uncontested proceedings, by issuing certificates of naturalization, entering default judgments, granting uncontested bankruptcies, accepting confessions of error, and receiving guilty pleas.[181] These examples present interesting challenges to Article III's adverseness requirement but, upon close examination, do not suggest that a "case or controversy" may exist when all parties ask the court to enter the same judgment in a civil case.[182]

1. Naturalization Proceedings

Federal district courts throughout the country regularly naturalize new citizens, despite the fact that such proceedings, at least in the modern era, are typically uncontested. Under current law, the judiciary's involvement in uncontested naturalizations is both ministerial and ceremonial, limited to issuing the oath of allegiance[183] and "address[ing] the newly naturalized citizen[s] upon the form and genius of our Government."[184] This role is a largely historical appurte-

179 *Id.*

180 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3530 (3d ed. 2013).

181 *See* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1373–74 (1973) (noting that "it is difficult to assert that 'real' adversaries are necessary to the existence of a case or controversy"); Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 903 (stating that courts often issue orders in "a variety of non-adversarial contexts").

182 *Cf.* Muskrat v. United States, 219 U.S. 346, 361 (1911) ("[The] judicial power . . . is the right to determine actual controversies arising between adverse litigants . . . .").

183 8 U.S.C. §§ 1421(b)(1)(A), 1448(a) (2012).

184 *Id.* § 1448a.

nance[185] to a federal court's main function and reveals little about Article III.

In *Tutun v. United States*,[186] the Supreme Court held that a federal appellate court had statutory jurisdiction to review a district court's denial of a naturalization petition. The opinion noted in passing that naturalization proceedings were "cases" under Article III, because "[t]he United States is always a possible adverse party," but did not delve further into the question of adverseness.[187]

This approach seems inconsistent with the Court's core adverseness jurisprudence.[188] It is difficult to understand how a particular uncontested proceeding may be deemed sufficiently "adverse" to satisfy Article III, based solely on the hypothetical possibility that the Government (or some other litigant) might contest some other matter that some other party brings under the same statute in the future. The fact that the Government is "always a possible adverse party" in certain types of suits, such as naturalization proceedings,[189] does not establish that it actually is an adverse party in a particular case where it neither contests a person's claims nor opposes their requested relief.

Tutun's brief and incidental treatment of adverseness, which was not even the question at issue in the case, perhaps may be viewed as either an insufficiently considered assertion or an ad hoc exception to the Court's core adverseness jurisprudence. The Court's reasoning also may have been driven by the role that state and federal courts have played in naturalization proceedings since the Founding Era,[190] rather than more broadly applicable justiciability principles.

It also may be pertinent that *Tutun* was issued before the rise of the administrative state. The role that *Tutun* endorses for the judiciary—reviewing and adjudicating the substance of uncontested applications for citizenship[191]—is one that likely would be seen today as the proper role of an administrative agency rather than a federal court.

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185 Congress has granted state and federal courts power to naturalize citizens who satisfy statutory requirements since the Naturalization Act of 1790, § 1, 1 Stat. 103, 103 (Mar. 26, 1790).

186 270 U.S. 568, 580 (1926).

187 *Id.* at 577. The situation in *Tutun* was somewhat more complicated than the Court's cursory treatment of the adverseness issue may suggest because, at least by the appellate stage, the Government was arguing against the Petitioner's position. *See* 1925 J. SUP. CT. U.S. 179, 199.

188 *See supra* Section II.A.

189 *Tutun*, 270 U.S. at 577.

190 *See supra* note 188.

191 *Tutun*, 270 U.S. at 576–77.

Thus, the case may no longer present an accurate conception of the judicial power.

Even if one accepts the validity of *Tutun*'s holdings, however, it could be argued that a distinction exists between a naturalization petition that the Government declines to oppose, or on which it takes no position, and a consent decree where the government affirmatively consents to and joins in the plaintiff's request for relief. Indeed, the rules of civil procedure treat a failure to oppose a plaintiff's claims very differently from an express stipulation or affirmative consent.[192] Thus, while naturalization proceedings—like the other examples discussed in this Section—may offer some support for the judicial practice of issuing consent decrees, they do not foreclose justiciability concerns about them.

2. Default Judgments

A default judgment differs substantially from a consent decree for Article III purposes. When a plaintiff moves for default, the defendant has not agreed that the plaintiff has a right to relief. Rather, by failing to file a responsive pleading, the defendant implicitly admits only the well-pled factual allegations of the complaint.[193] Despite its lack of participation, the defendant is not deemed to implicitly have assented to the validity of the plaintiff's legal claims, the specific remedies the plaintiff seeks, or entry of judgment against it. As discussed earlier, courts retain an independent obligation to ensure the legal sufficiency of the plaintiff's claims and the propriety of the requested relief, especially in government-defendant cases.[194] Thus, despite a defendant's lack of active opposition, the defendant in a default judgment case remains implicitly or formally opposed to the plaintiff—a presumption that is impossible to retain when the defendant expressly requests the same relief as the plaintiff through a proposed consent decree.

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192 *See supra* Section I.B (discussing the different standards that courts apply when confronting the various procedural vehicles through which litigants can seek substantive rulings or judgments without having the court fully consider the merits of either the case or a particular issue within the case); *see also* Morley, *supra* note 77.

193 FED. R. CIV. P. 8(b)(6) ("An allegation . . . is admitted if a responsive pleading is required and the allegation is not denied."); City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 137 (2d Cir. 2011) ("It is an 'ancient common law axiom' that a defendant who defaults thereby admits all 'well-pleaded' factual allegations contained in the complaint.").

194 *See supra* notes 81–86 and accompanying text.

3. Uncontested Bankruptcies

Uncontested bankruptcies raise some of the same issues as both naturalization petitions and default judgments. A creditor, of course, may unilaterally forgive a debtor's obligations to it. Indeed, all of a debtor's creditors could agree to forgive her debts, either completely or with particular repayment terms, without judicial proceedings or bankruptcy.

A debtor must seek a discharge through bankruptcy only if one or more creditors refuse to release her from her obligations. The fact that the debtor and creditors cannot voluntarily resolve their conflicts among themselves establishes that they are adverse. As with a default judgment, this underlying adverseness is not eliminated by the fact that a creditor might not find it economically worthwhile to contest a bankruptcy proceeding or have any colorable claims or defenses to raise.[195] Moreover, when a petitioner files an uncontested bankruptcy, a creditor who fails to contest it is simply taking no position on the issue. Like an uncontested naturalization petition or default judgment, this is distinguishable from a consent decree in which the defendant both joins in the plaintiff's request and affirmatively agrees to the requested relief.

4. Confessions of Error

Confessions of error also do not attenuate Article III's adverseness requirements. Adverseness has never been understood to mean that litigants must contest every possible issue of fact and law in a case; to the contrary, the pretrial process is geared largely toward narrowing the scope of contested issues that the court must resolve.[196] Most confessions of error, even on substantial points of law, are not wholly dispositive of the case and require remand for further adversarial proceedings, on remedy if nothing else. Thus, a court's decision to accept a confession of error does not suggest a complete lack of adverseness in the underlying case.

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195 If debtors and creditors collectively settle upon a repayment plan and present it to a court, then that would be the substantive equivalent of a consent decree that the court (according to this Article) lacks jurisdiction to enter. Such an agreement should be embodied in a private contract, rather than a court order or consent decree.

196 Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1746 (1992) (noting that pretrial informational disclosures give parties opportunities to narrow issues and eliminate meritless claims).

5. Guilty Pleas

Guilty pleas present the closest analogue to consent decrees, particularly when they involve an agreement between the government and defendant as to both guilt and sentence.[197] It could be argued that the longstanding and widely accepted practice of accepting guilty pleas establishes the justiciability of consent decrees. Although federal courts ultimately derive their authority in both civil and criminal matters from the same language in Article III, it may be that the constitutional requirements for a criminal "case or controversy" differ from those of a civil "case or controversy."[198]

The civil and criminal justice systems serve fundamentally different purposes from each other in numerous ways. Moreover, the practice of accepting guilty pleas may be justified by compelling considerations that do not apply to consent decrees in civil cases. Conceivably, the government and criminal defendants could settle criminal cases through private contracts requiring the defendant to serve a specified prison sentence, pay a fine, and agree to be designated a "felon." It generally would be regarded as intolerable for courts to be excluded from the criminal justice process in that manner, however, especially given the prevalence of plea bargaining.[199] Having courts accept guilty pleas and enter judgments of conviction protects the constitutional rights of the defendant; ensures that waivers of those rights are knowing, intelligent, and voluntary;[200] allows courts to maintain at least a degree of oversight over the executive branch's prosecutorial power; and places a judicial imprimatur on convictions.

No such compelling considerations apply to the civil justice system. Civil litigants commonly resolve their differences through private settlement agreements. Courts are neither expected nor required to play a role in most civil settlements, except in unusual circumstances such as class-action cases,[201] because waivers of rights in civil cases are not subject to the same safeguards that apply in crimi-

197 A guilty plea that leaves a degree of sentencing discretion with the court is comparable to a stipulation of liability, which is insufficient in itself to defeat adverseness.

198 Some scholars have offered a slightly different take, arguing that the term "cases" in Article III includes both civil and criminal matters, while the term "controversies" is limited solely to civil matters. William E. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 265–67 (1990); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1575 (1990).

199 *See* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) (arguing that plea bargaining "has swept across the penal landscape").

200 United States v. Ruiz, 536 U.S. 622, 629 (2002).

201 FED. R. CIV. P. 23(e).

nal prosecutions.[202] The need to maintain a degree of oversight over the executive branch is absent in most civil cases, as is the possibility that a person will be completely deprived of her freedom. Thus, the constitutional and practical considerations that warrant interpreting Article III as permitting the acceptance of guilty pleas in criminal cases do not apply in the civil context. While it is tempting to analogize between guilty pleas and civil consent decrees, the differences between the civil and criminal justice systems preclude guilty pleas from serving as a basis for jettisoning Article III's adverseness requirement from the civil realm.

E. Other Arguments for the Justiciability of Consent Decrees

Most defenses of the justiciability of consent decrees are based on either *Swift*[203] and *Pope*,[204] or analogies to other types of proceedings before federal courts that do not involve adverse parties; all of these arguments have been addressed in the Sections above. Professor Judith Resnik contends that the very fact that a plaintiff seeks a consent decree "suggest[s] that, despite parties' agreement to discontinue litigation, a 'case' or 'controversy' exists, enabling courts to have the authority to enter judgment."[205] The fact that one or more putative parties to a contract (such as a settlement agreement) might wish to embody that agreement in a court order, however, does not give rise to Article III adverseness or a justiciable controversy. One can imagine any number of agreements for which a risk-averse or distrustful signatory might wish to be able to invoke a court's summary contempt power; such a desire does not give rise to a justiciable controversy.

Professors Martin H. Redish and Adrianna D. Kastanek argue instead that the Supreme Court's holding in *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*[206] grants courts authority to enter consent decrees.[207] *Bancorp* holds that, when a case becomes moot, a court may issue any orders that are "'reasonably ancillary to [its] pri-

202 *See, e.g.*, FED. R. CRIM. P. 11 (establishing a detailed procedure that courts must follow before accepting guilty pleas).

203 Swift & Co. v. United States, 276 U.S. 311, 326 (1928).

204 Pope v. United States, 323 U.S. 1, 11–12 (1944).

205 Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1514 (1994).

206 513 U.S. 18 (1994).

207 Redish & Kastanek, *supra* note 148, at 590.

mary, dispute-deciding function,'"[208] in order to "'make such disposition of the whole case as justice may require.'"[209] Professors Redish and Kastanek argue that a "court's ability to enter a consent decree that resolves previously adversarial litigation is appropriately viewed as ancillary to the adjudicatory process."[210]

This reading of *Bancorp* is too ambitious. *Bancorp* recognizes that federal courts have the quintessentially housekeeping power to dispose of cases that no longer present justiciable controversies; it does not authorize affirmative grants of substantive relief. Imposing legal obligations on one or more parties is not "ancillary" to a court's dispute-deciding function, but rather a direct and substantial result of it. *Bancorp* does not allow courts to go beyond the administrative steps, such as dismissal[211] and vacatur of lower-court opinions, necessary to dispose of a case that should no longer be pending.

Perhaps the most compelling argument upon which supporters of consent decrees can rely is the judiciary's largely unbroken historical practice of issuing them.[212] Although longstanding practices going back to the nation's Founding typically carry great weight in constitutional interpretation,[213] particularly in separation-of-powers controversies,[214] judicial practices concerning justiciability are not especially persuasive because the Court did not develop and begin enforcing many aspects of Article III's case-or-controversy requirement until relatively late in the nation's history.[215] Historical practice, therefore,

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208 *Bancorp*, 513 U.S. at 22 (quoting Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 111 (1970) (Harlan, J., concurring in denial of writ of certiorari)).

209 *Id.* at 21 (quoting Walling v. James v. Reuter, Inc., 321 U.S. 671, 677 (1944)).

210 Redish & Kastanek, *supra* note 148, at 590.

211 *See Bancorp*, 513 U.S. at 29 ("The case is dismissed as moot.").

212 *See* Swift & Co. v. United States, 276 U.S. 311, 323–24 (1928) (discussing pre-Revolutionary English practice concerning consent decrees).

213 Eldred v. Ashcroft, 537 U.S. 186, 213 (2003) ("[C]onsistent congressional practice is entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of [over two] centur[ies], it is almost conclusive." (quotation marks omitted)); *see also* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 678 (1970) (holding that an "unbroken practice" in constitutional interpretation "is not something to be lightly cast aside").

214 *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 826 (1997) (relying on "historical practice" in determining the scope of legislative standing under Article III).

215 Joshua L. Sohn, *The Case for Prudential Standing*, 39 U. MEMPHIS L. REV. 727, 735 (2009) ("American Framing-era courts commonly entertained cases that would flunk the Supreme Court's modern standing requirements."); Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 66–67 (2008) ("[T]he Supreme Court's opinions over the nation's first 150 years [show] that direct injury was not a necessary element of a 'case' or 'controversy.'"); *see generally* Pushaw, *supra* note 149 (arguing that the original understanding of the terms

is not an especially informative guide to Article III's applicability to consent decrees.

Consent decrees, therefore, raise strong Article III adverseness concerns—whether jurisdictional or merely prudential— that should make the judiciary reluctant to issue them. Courts should require litigants to enter into settlement agreements to terminate litigation, rather than approving consent decrees. In most cases, the main impact of such a switch would be requiring litigants to invoke breach-of-contract remedies, rather than summary contempt proceedings, if the agreement is violated. As Part III explains, however, limiting government defendants to settlement agreements rather than consent decrees would preclude many of the separation-of-powers concerns that such decrees can create in public law cases.

III. CONSENT DECREES AND SEPARATION OF POWERS

Justiciability concerns aside, consent decrees in government-defendant cases raise serious separation-of-powers problems because they allow executive officials and agencies to improperly entrench their preferred policies, interpretations of the law, and enforcement priorities against changes by subsequent administrations, without having a court decide whether such restrictions are legally or constitutionally required.[216] The leading critiques of government-defendant consent decrees contend that they therefore violate Article II.[217] This Part offers a somewhat different view.

Section A explains that Article II, as well as the Veto Clause of Article I,[218] bar consent decrees that purport to limit power or discretion that the Constitution directly and specifically confers on the President, but such decrees tend to be rare. Section B shows that similar Article II objections do not apply to consent decrees that limit power or discretion that statutes and regulations confer on the President or other executive branch officials—the category into which most consent decrees in government-defendant cases fall. Rather, such decrees are improper because Congress has not delegated authority to either the Attorney General or executive officials to permanently en-

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"cases" and "controversies" as used in Article III allowed federal courts to hear certain types of matters that current justiciability doctrine prohibits).

216 As explained in Part I, the standard for approving consent decrees is very lax and generally does not require the court to consider the legal merits of the parties' legal theories or even whether the plaintiff is entitled to relief. *See supra* Section I.A.

217 McConnell, *supra* note 16, at 300–01, 321; Rabkin & Devins, *supra* note 16, at 237, 276.

218 U.S. CONST. art. I, § 7.

trench restrictions on agencies' discretion concerning regulations, policies, legal interpretations, or enforcement.

A. Consent Decrees and Executive Powers Conferred by the Constitution

As several commentators and OLC correctly conclude, Article II prohibits consent decrees that restrict powers and discretion that the Constitution directly and specifically confers on the President without the need for statutory mediation.[219] Most of these constitutional grants of authority, such as the powers to recommend legislation or grant pardons, are set forth in Article II,[220] although Article I confers the President's veto power.[221] Under this standard, the consent decree in *United States v. Board of Education of Chicago*, which required the Government to "make every good faith effort to find and provide every available form of financial resources adequate for the implementation of [a school] desegregation plan" for Chicago,[222] would be invalid under the Recommendations Clause,[223] insofar as it required the President to seek appropriations from Congress or prohibited him from seeking to reduce financial aid to Chicago schools.[224]

A consent decree that attempts to limit or control the President's exercise of a constitutionally conferred power would conflict with, and effectively amend, the constitutional provision granting that authority. A sub-constitutional authority, such as a consent decree, cannot trump an express constitutional provision.[225] Of course, a court may restrict of exercise of executive authority when necessary to enforce constitutional rights or other limits on governmental power, but courts do not make such merits-related determinations when issuing consent decrees, and nothing in the Constitution suggests that a

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219 McConnell, *supra* note 16, at 319–20; OLC Consent Decree Opinion, *supra* note 25; *see also* Rabkin & Devins, *supra* note 16, at 232–34.

220 *See* U.S. CONST. art. II. § 2, cl. 1; *id.* art. II § 3, cl. 1.

221 *Id.* art. I, § 7.

222 588 F. Supp. 132, 139 (N.D. Ill. 1984), *vacated* 744 F.2d 1300 (7th Cir. 1984).

223 U.S. CONST. art. II, § 3, cl. 1.

224 *See Bd. of Educ. of Chicago*, 588 F. Supp. at 237–39, 242 (identifying acts "taken by the Executive Branch in connection with Congressional consideration" of school funding legislation that purportedly violated the consent decree, and holding that the decree required the Executive Branch to engage in "lobbying activities" and "seek . . . reappropriation or new legislation when other sources of available funds prove inadequate"). The Seventh Circuit interpreted the consent decree narrowly to avoid imposing such obligations on the President, but held that the executive branch's interactions with Congress "contravene[d] the spirit of the Decree" and did "not befit a signatory of the stature of the United States Department of Justice." *Bd. of Educ. of Chicago*, 744 F.2d at 1308.

225 OLC Consent Decree Opinion, *supra* note 25; McConnell, *supra* note 16, at 320.

President may impose his view or interpretation of the document on his successors.

Professor Peter Shane rejects this approach, arguing that the President may agree to a consent decree that limits his constitutionally conferred authority so long as the either does not "prevent the executive from accomplishing its constitutionally assigned functions" or "is justified by an overriding need."[226] He relies on *Nixon v. Administrator of General Services*, in which the Supreme Court held that separation-of-powers problems arise only when one branch "'prevents'" another "'from accomplishing its constitutionally assigned functions.'"[227]

This approach appears unavoidably subjective and ad hoc,[228] and would dangerously permit de jure executive entrenchment of an incumbent's preferred policies or legal interpretations. While the *Nixon* Court holding that Professor Shane embraces may be a reasonable way of addressing potential interbranch usurpations, it offers no protection against a President's attempted entrenchment of restrictions on the office's constitutional authority. Thus, Article II should be read as precluding consent decrees that limit powers that the Constitution expressly confers on the President.

B. Consent Decrees and Executive Powers Conferred by Statute or Regulation

Some opponents of consent decrees go even further, arguing that Article II prevents executive agencies and officials from entering into many types of consent decrees that limit or control the exercise of their *statutorily* conferred powers and discretion,[229] such as by requiring them to interpret, apply, or enforce legal provisions in certain ways; promulgate certain regulations; or utilize certain tests or methodologies when developing regulations. One variant of this argument is based on the premise that the Article II Vesting Clause,[230] Take Care Clause,[231] and/or general tripartite structure of the federal government guarantee the Executive the power to interpret statutes, decide what regulations to promulgate, and determine enforcement priorities.[232]

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226 Shane, *supra* note 16, at 258.

227 *Id.* at 257–58 (quoting Nixon v. Admin. of Gov't Servs., 433 U.S. 425, 443 (1977)).

228 *Cf.* McConnell, *supra* note 16, at 318–19 (arguing that Professor Shane's proposed standard is "weak" and provides "no real protection at all").

229 McConnell, *supra* note 16, at 300–01, 321; Rabkin & Devins, *supra* note 16, at 237, 276.

230 U.S. CONST. art. II, § 1, cl. 1 ("The executive power shall be vested in a President of the United States of America.").

231 *Id.* art. II, § 3 ("[The President] shall take care that the laws be faithfully executed.").

232 *See* McConnell, *supra* note 16, at 298, 300–01, 321; Rabkin & Devins, *supra* note 16, at 230.

A closely related claim is that such decrees are inconsistent with the President's four-year term, because they allow earlier administrations to "preclud[e] subsequent Presidents from changing [their] policies."[233] Professor Michael W. McConnell argues, "If changes in policy have already been ruled out by binding and irrevocable agreements with private parties, then there is no point in holding [elections]."[234]

These arguments read too much into Article II. Article II does not require Congress to delegate authority to the executive branch to promulgate regulations, interpret statutes, or exercise discretion over how to enforce them. At the extreme, Congress may specify all pertinent statutory details in painstaking and minute detail, deny agencies the ability to promulgate regulations,[235] and either mandate or prohibit enforcement of certain laws under various circumstances (perhaps even creating a private right of action in case the executive fails to comply).[236]

Likewise, the Constitution likely allows Congress to grant an agency the temporary ability, for only a specified period of time, to promulgate regulations, develop policies, and determine enforcement priorities under a particular statute. Congress may specify that the agency's determinations as of the end of that period will be prospectively binding on the agency into the indefinite future, unless and until Congress chooses to override them (or otherwise amend the law). Nothing in either the Constitution or Supreme Court precedent suggests that a congressional delegation of authority to the Executive Branch must be perpetual. The end result on an agency (and successor administrations) once a temporally limited delegation expires would be the same as if Congress itself had codified all of the interpretations and decisions that the agency made while the delegation remained in effect. Such measures would not violate Article II.

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233 McConnell, *supra* note 16, at 298, 300 (arguing that "[a]ny attempt by a President to assert legal control over the powers of his successors, unless specifically authorized, is a violation" of the constitutional provision "provid[ing] that Presidents shall serve four-year terms of office").

234 *Id.* at 300.

235 Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

236 *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 833 (1985) ("Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue.").

From the perspective of executive power, the key issue with consent decrees thus appears to be a question of statutory interpretation—whether Congress expressly or implicitly authorized government defendants to agree to them.[237] If an agency's organic statute or the Attorney General's general litigation authority[238] allowed a government defendant to agree to consent decrees, that authorization would not improperly limit the constitutional powers of future administrations that would be bound by such decrees. Executive officials generally have no Article II basis for demanding that Congress guarantee them a certain range of discretion. Conversely, if federal laws cannot fairly be read as authorizing an agency to enter into consent decrees (particularly consent decrees that impose legal restrictions or requirements on the agency beyond those required by federal law), then a consent decree involving that agency would be a statutory, rather than constitutional, violation. Either way, there is no constitutional problem.

Substantial arguments may be raised on both sides of the statutory issue of whether Congress has authorized federal agencies and officials to enter into consent decrees. On the one hand, agencies' organic statutes may be treated as implicitly authorizing consent decrees, based on congressional acquiescence in the longstanding practice of government defendants entering into them. This argument is bolstered by the fact that Congress has enacted laws that regulate consent decrees in particular areas, such as antitrust.[239]

OLC further suggests that at least part of the basis for government defendants' ability to agree to consent decrees is the Attorney General's statutory authority to represent the United States in litigation.[240] According to this argument, the power to litigate on behalf of federal agencies and officials necessarily includes the ability to settle such lawsuits on such terms as the Attorney General, in the exercise of his professional judgment, deems reasonable, including entering into consent decrees.

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237 Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 621 (1983) ("A contemporaneous and consistent construction of a statute by those charged with its enforcement combined with congressional acquiescence creates a presumption in favor of the administrative interpretation, to which we should give great weight . . . ." (quotation marks omitted)).

238 28 U.S.C. § 516 (2006) ("[T]he conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."); *id.* § 519 ("[T]he Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party . . . .").

239 *See* Tunney Act, 15 U.S.C. § 16 (2006).

240 OLC Consent Decree Opinion, *supra* note 25 (citing 28 U.S.C. §§ 516, 519).

On the other hand, statutory delegations of authority to an agency generally are not interpreted as allowing the agency or its officials to limit their successors' statutorily conferred discretion. As the Supreme Court explained in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, an agency's discretionary decisions are considered matters of policy that the agency may revise "on a continuing basis" and are not "carved in stone."[241] It seems unlikely that Congress would bar agencies from entrenching limits on successors' discretion through traditional policymaking procedures, including formal rulemaking and adjudicatory processes, yet implicitly permit them to do so through consent decrees, which neither are subject to a detailed merits review nor involve public participation. Indeed, it would be odd to allow federal agencies to entrench particular legal interpretations, policies, or enforcement schemes—particularly without a judicial determination that they are constitutionally or legally valid or required—simply to settle litigation, when agencies generally are regarded as lacking authority to engage in such entrenchment to pursue other equally or even more important goals.[242]

Similarly, it is far from clear that DOJ's statutory right and power to represent federal agencies and officials in litigation implies the ability to agree to bind agencies to restrictions on their discretion or authority, beyond those that the agencies themselves otherwise would have the statutory authority to approve. While an attorney representing a client may agree to settlements on the client's behalf, an attorney-client relationship cannot give the attorney authority to agree to arrangements to which the client would lack the independent legal authority to consent directly.

Because consent decrees are subject to a serious risk of manipulation, allow for circumvention of the traditional legislative and regulatory processes, and can lead to entrenchment of incumbents' policy preferences, courts should be reluctant to infer congressional authorization for them absent a specific, clear statement to that effect.[243] Congress's general grants of litigation authority to DOJ, therefore, should be seen as insufficient to authorize the use of consent decrees

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241 467 U.S. 837, 863, 865 (1984).

242 *See generally* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002) (arguing that the government can use entrenchment to achieve goals that otherwise would be difficult or impossible).

243 *Cf.* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (arguing that clear statement requirements in statutory interpretation are a form of "quasi-constitutional law" that can provide "structural constitutional protections . . . [for] underenforced constitutional norms").

in government-defendant cases. Thus, under current law, consent decrees raise separation-of-powers problems primarily because federal defendants lack statutory authority to enter into them.[244]

Although this critique of consent decrees is not constitutionally based, it is broader than other leading criticisms of them. Professor McConnell, for example, argues that a consent decree is appropriate in a government-defendant case if the court could have issued such an order following a trial on the merits.[245] He explains, "If government lawyers, in an exercise of professional discretion, decide to compromise [by entering into a consent decree], this poses no more constitutional problem than would a similar litigated decree."[246] In Professor McConnell's view, consent decrees raise entrenchment-related concerns only when they "contain[] elements that differ from or go beyond what a court could order in a litigated judgment."[247]

Professor McConnell contends, in essence, that government defendants should be permitted to concede liability and enter into consent decrees, so long as the remedy is appropriately tailored and does not extend beyond what is necessary to correct the alleged legal violation.[248] A government entity's imposition of a permanent de jure limitation on a successor's discretion is statutorily improper, however, unless the law actually requires it. Because courts do not adjudicate the merits of the plaintiffs' claims when reviewing proposed consent decrees, the process provides no assurance that there is a sufficient constitutional or statutory basis for constraining future administrations' interpretive, regulatory, or enforcement authority.

Professors Jeremy A. Rabkin and Neal E. Devins also have cautioned against consent decrees in government-defendant cases, but only ones that (i) require the President to make or withhold "legislative and budgetary recommendations to Congress"; (ii) interfere with the executive's "spending priorities"; or (iii) "unduly constrain" ex-

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244 If Congress were expressly to authorize an agency to execute consent decrees, then the law would be subject to review primarily on delegation-related grounds, but the non-delegation doctrine is virtually moribund. *See* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2100 (2004) (noting "courts' unwillingness to enforce" a non-delegation norm).

245 McConnell, *supra* note 16, at 302.

246 *Id.*

247 *Id.*

248 *Id.*; c*f.* Alfred M. Mamlet, *Reconsideration of Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits*, 33 EMORY L.J. 685, 686–87 (1984) (arguing that courts should afford government officials the broadest possible discretion in remedying constitutional violations in institutional or structural cases, rather than imposing detailed requirements).

ecutive discretion in "setting broad enforcement priorities."[249] Again, these points are valid but, like Professor McConnell's argument, focus solely on the impropriety of certain remedies, rather than the existence of a consent decree itself or the concession of liability. Moreover, Professors Rabkin and Devins do not demonstrate that we should be any less concerned about limitations on other areas of traditional executive discretion, such as the promulgation of regulations, interpretation of statutes, or limitations on other agency policies. Thus, while existing critiques of consent decrees raise valid concerns, they do not go far enough in identifying the actual basis and full scope of the problem. While all consent decrees raise justiciability problems, those involving government defendants allow those entities to exceed their statutory authority, improperly entrench their policy preferences, and circumvent traditional legislative and regulatory processes.

IV. NEW APPROACHES TO CONSENT DECREES IN GOVERNMENT-DEFENDANT CASES

This Part recommends reforms to judicial doctrines concerning consent decrees. Section A proposes the most far-ranging solution, urging courts to avoid the justiciability problems of consent decrees by refusing to issue them and requiring litigants—especially government defendants—to execute private settlement agreements instead. In case courts are not willing to implement such a major change, Section B offers a new framework for determining whether to approve consent decrees in government-defendant cases. Most notably, this Section encourages courts to confirm that the plaintiffs have stated valid claims, ensure that the relief is adequately tailored to redressing the challenged harm, and facilitate intervention by third parties to help ensure that these other requirements are satisfied.

A. Settlement Agreements as a Replacement for Consent Decrees

Because consent decrees raise serious justiciability concerns under Article III,[250] courts should decline to issue them and instead require litigants that wish to end litigation voluntarily, on negotiated terms, to execute a settlement agreement. A settlement agreement is a private contract among some or all of the parties to a case that requires termination of the settling plaintiffs' claims. The defendants often

249 Rabkin & Devins, *supra* note 16, at 276–77.

250 *See supra* Part II.

agree to some concession, such as paying the plaintiffs, taking or refraining from certain acts, dismissing counterclaims, or waiving or disclaiming certain alleged rights of their own.

The settlement agreement itself, rather than a court order, specifies the parties' obligations toward each other and, in most cases, the court is not required to review or approve it.[251] As litigants may stipulate to dismiss a case without the court's approval, a court has little or no opportunity to reject most settlements.[252] Indeed, the court may not even see the settlement agreement; many settlement agreements contain confidentiality clauses that prohibit public disclosure of their terms.[253] A settlement agreement is enforceable in the same manner as any other contract: through a breach-of-contract suit for compensatory damages or, if the requirements for equitable relief are satisfied, specific performance.[254]

In general, a claim for breach of a settlement agreement must be brought in state court unless there is an independent basis for federal jurisdiction.[255] The Supreme Court has held, however, that parties to a settlement agreement arising from a federal lawsuit may stipulate that the federal court in which that lawsuit was filed may exercise jurisdiction over disputes concerning the agreement.[256]

Settlement agreements, as a type of contract, do not raise Article III justiciability concerns, because the court is not issuing a substantive order that affirms or alters the parties' legal rights and obligations. Rather, the court simply dismisses the case, which is the procedurally appropriate response when a live controversy no longer exists.[257]

In cases between private parties, the main effect of requiring litigants to use settlement agreements rather than consent decrees is that, when one party fails to satisfy its obligations, the other side must file a breach of contract suit, rather than pursue summary contempt

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251 As discussed below, *see infra* notes 297–98 and accompanying text, courts must approve settlement agreements in class action cases and certain types of federal statutory actions.

252 *See* FED. R. CIV. P. 41(a)(1)(A)(ii).

253 *See* Erik S. Knutsen, *Keeping Settlements Secret*, 37 FLA. ST. U. L. REV. 945, 945–46 (2010).

254 Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 382 (1994).

255 *Id.*

256 *Id.* at 381. At least one circuit has questioned this strategy's efficacy, holding that "jurisdictional retention provisions, even when contained in court orders, will not enable parties to return to federal court to litigate settlement disputes" unless some other basis exists for invoking the court's subject-matter jurisdiction. Anthony DiSarro, *Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation*, 60 AM. U. L. REV. 275, 305 (2010) (citing Lynch v. Samatamason, Inc., 279 F.3d 487, 489 (7th Cir. 2002)).

257 U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 21 (1994).

proceedings.[258] Using settlement agreements instead of consent decrees would have the biggest impact in government-defendant cases, because settlement agreements allow agencies and officials to voluntarily resolve lawsuits without raising concerns about justiciability, separation of powers, or the defendants' underlying statutory authority. In the event that the government enters into a settlement agreement that declares a legal provision invalid and bars the government from enforcing it, requires the government to apply or enforce a provision in certain ways, or mandates that an agency promulgate particular regulations, a court likely would refuse to enforce the agreement against unwilling officials under the "reserved powers" doctrine.

The reserved powers doctrine provides that a contract in which a governmental entity purports to refrain from enacting particular laws, or from enforcing or interpreting them in particular ways, generally is unenforceable.[259] The doctrine recognizes that "the power of governing is a trust committed by the people to the government, no part of which can be granted away."[260]

> [Government] agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances."[261]

The reserved powers doctrine originally was formulated under the Contracts Clause[262] and applied to the States, but later rulings recognize that it extends to the federal Government, as well.[263] It is a necessary implication of the Constitution itself. Article I, § 8 begins with the phrase, "Congress *shall* have power," and then confers eighteen different powers on it.[264] Allowing the Government to enter into a

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258 For an in-depth discussion of the differences between settlement agreements and consent decrees, see DiSarro, *supra* note 256.

259 Stone v. Mississippi, 101 U.S. 814, 821 (1879).

260 *Id.* at 820.

261 *Id.*; *see also* U.S. Trust Co. v. New Jersey, 431 U.S. 1, 23–24 (1977) (holding that the reserved powers doctrine prevents states from entering into contracts that require them to surrender an attribute of their sovereignty, but not financial agreements); *cf.* V.F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment, 86 A.2d 127, 131 (N.J. 1952) (explaining that the prohibition on "contract zoning" arises from a municipality's inability to contract away part of its police power).

262 U.S. CONST. art. I, § 10.

263 *See* United States v. Winstar, 518 U.S. 839, 888–89 (1996) (plurality opinion); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982). *But see* Alan R. Burch, *Purchasing the Right to Govern:* Winstar *and the Need to Reconceptualize the Law of Regulatory Agreements*, 88 KY. L.J. 245, 264 (1999) ("The reserved powers doctrine is essentially an artifact of legal history.").

264 U.S. CONST. art. I, § 8.

contract limiting or restricting the use of one of those powers effectively would limit or modify that express grant of authority. Just as a statute cannot bar Congress from exercising a constitutionally conferred power,[265] neither may an alternate sub-constitutional instrument, such as a contract.[266]

The reserved powers doctrine is a more generalized version of the "contract zoning" doctrine in land-use law, which many states have adopted. The contract zoning doctrine generally prohibits municipalities and zoning officials from entering into contracts, including settlement agreements, in which they agree to grant variances, rezone parcels of land, or amend master land-use plans.[267] One of the main justifications for this prohibition is that "[z]oning is an exercise of the police power to serve the common good and general welfare. It is elementary that the legislative function may not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts."[268] The reserved powers doctrine arises from the same considerations.

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265 Marbury v. Madison 5 U.S. (5 Cranch) 137, 178 (1803) ("[I]f both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law . . . the constitution . . . must . . . govern[] the case . . . .").

266 Depending on one's view of the nature of contract, it can be argued that a contract does not absolutely require an obligated party to perform or refrain from the specified acts, but rather gives the obligated party the choice of either satisfying its specified contractual obligations or paying damages to its counterparty. *See, e.g.*, United States v. Blankenship, 382 F.3d 1110, 1133 (11th Cir. 2004) ("[A] contract gives a party two equally viable options (perform or pay compensation), between which it is generally at liberty to choose."). Even under that view of contracts, however, a government defendant may avoid performing the acts specified in a settlement agreement simply by compensating the plaintiffs for the resulting damages, if any. Under a consent decree, in contrast, the court can issue orders and use the coercive powers of civil and criminal contempt to force a government entity into compliance. *See, e.g.*, Spallone v. United States, 487 U.S. 1251 (1988) (upholding a daily fine of $1 million against a municipality until it complied with a court order). Whether the reserved powers doctrine should bar plaintiffs from recovering compensatory damages from a government defendant that breaches a settlement agreement is a separate issue beyond the scope of this Article.

267 *See, e.g.*, Dacy v. Ruidoso, 845 P.2d 793, 797 (N.M. 1992) ("[C]ontract zoning is illegal whenever it arises from a promise by a municipality to zone property in a certain manner . . . ." (emphasis omitted)); Hartnett v. Austin, 93 So. 2d 86, 89–90 (Fla. 1956).

268 V.F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment, 86 A.2d 127, 131 (N.J. 1952); *accord Dacy*, 845 P.2d at 797; *see also* Ford Leasing Dev. Co. v. Bd. of Cnty. Comm'rs of Jefferson, 528 P.2d 237, 240 (Colo. 1974); Haas v. Mobile, 265 So. 2d 564, 566 (Ala. 1972). Other cases explain that contract zoning is illegal because, by promising to "zone property in a specified manner . . . a municipality preempts the power of the zoning authority to zone the property according to prescribed legislative procedures." *Dacy*, 845 P.2d at 797; *see also* Prock v. Town of Danville, 655 N.E.2d 553, 559–60 (Ind. App. 1995).

The "sovereign acts" doctrine is an alternate possible basis upon which a court may refuse to enforce certain settlement agreements or other contracts with government defendants, although its applicability is far less likely following the Supreme Court's ruling in *United States v. Winstar Corp.*[269] The sovereign acts doctrine provides that "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign."[270] Under this principle, "'Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to . . . violate the particular contracts into which it enters with private persons.'"[271] Whereas the reserved powers doctrine focuses on the validity and enforceability of the original agreement, the sovereign acts doctrine imposes some limits on the types of subsequent official actions that may be considered breaches of a generally enforceable agreement.

The sovereign acts doctrine ensures that, if the government enters the marketplace in a "nonregulatory capacity," by executing a contract in the same capacity as a private entity, it does not thereby implicitly limit its ability to act in its sovereign "regulatory capacity."[272] The Court held that the doctrine was inapplicable in *Winstar* because the Government had entered into the contracts at issue there in a "fused" combination of "'regulatory' and 'nonregulatory' capacities."[273] The doctrine likely would be similarly inapplicable to an agreement settling a case challenging the validity, interpretation, or enforcement of a legal provision, because the government would enter any such agreement in "fused" regulatory and nonregulatory capacities, if not exclusively in its regulatory capacity.

A second obstacle to applying the sovereign acts doctrine in this context is that it prevents only "public and general" acts of the government from constituting a breach of a government contract.[274] *Winstar* held that a government act is not public and general "if it has the substantial effect of releasing the Government from its contractual obligations."[275] Although the exact scope of this ruling is not well

269 518 U.S. 839, 891–910 (1996) (plurality opinion).
270 Horowitz v. United States, 267 U.S. 458, 461 (1925).
271 *Id.* (quoting Jones v. United States, 1 Ct. Cl. 383, 384 (1865)).
272 *Winstar*, 518 U.S. at 892–94.
273 *Id.*
274 *Id.* at 895–96 (citing *Jones*, 1 Ct. Cl. at 385).
275 *Id.* at 899.

defined,[276] it is reasonably arguable that, if the Government agrees to refrain from enforcing a legal provision, to interpret or enforce a provision in a particular manner, or to promulgate certain regulations, then any contrary actions would have the "substantial effect" of violating the agreement.

Even if a court rejected all of these doctrines and held that a settlement agreement invalidating, definitively construing, or requiring enforcement of a legal provision were valid, the court would be unlikely to grant specific performance. "[E]ven where courts have found that a legislature is bound by the contractual promises of a former legislature, the remedy is simply damages, not enforcement of a legislative scheme that the future body does not favor."[277] A court also has the further alternative of treating the settlement agreement as rescinded, rejuvenating the original legal challenge. Thus, unlike consent decrees, executive officials cannot use settlement agreements to circumvent statutory limitations on their authority or entrench their preferred constitutional and policy preferences in a legally enforceable manner.[278]

Allowing government defendants to enter into settlement agreements, but not consent decrees, would best balance the competing interests at stake in a public law case. If a government agency or official agrees with a litigant concerning the proper interpretation, application, or enforcement of a legal provision, it is free to voluntarily adopt that approach as an exercise of its executive or prosecutorial discretion,[279] and embody that agreement in a settlement.

Of course, from a plaintiff's perspective, settlement agreements are less desirable than consent decrees because they cannot be enforced through summary contempt proceedings, and future admin-

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276 *See* Connor Bros. Constr. Co. v. Geren, 550 F.3d 1368, 1374–76 (Fed. Cir. 2008) (examining several factors in determining whether the Army's challenged actions were "public and general").

277 John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1781 (2003).

278 To the extent that settlement agreements do pose such a threat, it might be worthwhile to consider whether some or all of this Article's procedural recommendations concerning consent decrees should apply to them. *See infra* Section IV.B. Because litigants have virtually unlimited discretion to dismiss pending litigation by stipulation, FED. R. CIV. P. 41(a)(1)(A)(ii), and courts generally have no opportunity to review, and are not required to approve, settlement agreements, extending this Article's recommendations to such agreements would require more substantial changes to existing rules and procedures.

279 *See* Chevron U.S.A., Inc. v. Natural Res. Defense Council, 467 U.S. 837 (1984); Skidmore v. Swift & Co., 323 U.S. 134 (1944). The fact that the agency performs certain acts or omissions pursuant to a settlement agreement does not change their substantive legality, which may be challenged by adversely affected third parties.

istrations that have different views of the law may choose to abrogate them. As discussed above, the reserved powers doctrine, restrictions on specific performance, and potentially even the sovereign acts doctrine likely would prevent plaintiffs from enforcing agreements against unwilling successors. At most, an aggrieved plaintiff may be able to seek damages or have its agreement vacated and the underlying lawsuit reinstated. These limitations, however, are the unavoidable consequences of agencies' general lack of statutory authority to entrench particular policies or interpretations of the law and irrevocably impose them on their successors.

Despite their limitations, settlement agreements can play a valuable role in allowing plaintiffs to negotiate agreeable resolutions to cases against government defendants. Institutional inertia may contribute to the "stickiness" of settlement agreements, regardless of their legal enforceability. Moreover, if a plaintiff's legal theory is sound and a court likely would rule in its favor, then subsequent administrations would be unlikely to nullify a negotiated settlement.[280] Successor administrations are most likely to abrogate settlement agreements where the plaintiffs' underlying claims are weak or the legal issues are unsettled, but these are precisely the types of cases for which we would not want an incumbent administration to irrevocably bind its successors without a court ruling on the merits, and for which judicial resolution of the issues is desirable. Thus, using settlements instead of consent decrees not only prevents Article III justiciability problems but also, in the context of government-defendant cases, helps prevent government officials and agencies from entrenching their policy preferences and making permanent commitments to which they lack the legal authority to agree.

B. Procedural Safeguards for Consent Decrees in Government-Defendant Cases

If courts are unwilling to abandon the use of consent decrees altogether, then they should implement additional safeguards in gov-

280 *Cf.* Easterbrook, *supra* note 16, at 22–24 (explaining how the likelihood of favorable or adverse court rulings affects parties' incentives); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979) (arguing that "the outcome that the law will impose" if a case is litigated affects the behavior and bargaining of the potential litigants); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984) (arguing that the likelihood that a particular dispute will result in litigation depends on the "expected costs to parties of favorable or adverse decisions, the information that parties possess about the likelihood of success at trial, and the direct costs of litigation and settlement").

ernment-defendant cases to alleviate separation-of-powers concerns, ensure that agencies do not agree to decrees that exceed their statutory authority, and minimize improper entrenchment. Individual courts could implement many of the reforms suggested in this Section as exercises of their equitable discretion when considering proposed consent decrees. The Supreme Court similarly might be able to impose most of them through its inherent power over judicial administration.[281] Alternatively, these reforms could be implemented through amendments to either the Federal Rules of Civil Procedure or Title 28.

Subsection 1 discusses the substantive standards courts should employ in reviewing proposed consent decrees in government-defendant cases, and procedural requirements that would aid in such review. Subsection 2 explains the steps courts should take to facilitate intervention in such cases, which could substantially improve their review of proposed decrees under the heightened standards this Article proposes.

1. Standards for Approval

A court should not issue a consent decree in a government-defendant case unless, in addition to the factors set forth in *Local No. 93* being satisfied,[282] the court determines that (i) the plaintiff has stated valid claims and (ii) the relief is closely tailored to remedy the legal violations at issue. Requiring courts to review the legal sufficiency of plaintiffs' claims would go a long way toward remedying one of the main problems with consent decrees in government-defendant cases—that the court lacks a legally valid basis for issuing them.

Because a consent decree is a hybrid between a contract and a court order, its validity depends on either the parties' consent or the court's authority to remedy legal violations. As discussed earlier, agencies generally do not have statutory authority to limit their successors' exercise of their statutorily delegated policy-making, interpretive, or enforcement authority. Thus, a court order validly may impose such restrictions only if they are appropriately tailored responses to actual constitutional or statutory violations.

Courts are well-positioned to engage in these merits-related inquiries. Many government-defendant cases in which a plaintiff seeks injunctive relief (other than a structural or institutional injunction)

281 Hanna v. Plumer, 380 U.S. 460, 472–73 (1965).

282 Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986).

can be resolved largely as a matter of law. They involve challenges to the constitutionality of legal provisions; the substantive validity of agency regulations, policies, or procedures; the sufficiency of the process underlying an agency issuance; an agency's decision to enforce or not enforce a particular legal provision; and the like. The pertinent evidence tends to be "legislative"-type facts contained within the administrative record, which is subject to judicial notice and may be considered in determining whether a complaint states a valid claim.[283]

The Supreme Court adopted a comparable approach toward confessions of error in *Young v. United States*.[284] The *Young* Court held that agreement between the Government and its opponent on a legal principle "does not relieve th[e] Court of the performance of the judicial function."[285] The Court recognized that it has a "judicial obligation[] . . . to examine independently the errors confessed."[286] Although the Court abandoned that approach several decades later,[287] the *Young* Doctrine is well-suited for both confessions of error and proposed consent decrees; it allows courts to ensure that the judicial power is exercised in response only to actual statutory or constitutional violations.

After ascertaining that a plaintiff properly has alleged an actual legal violation, the court also should ensure the propriety of the requested relief. Although government officials and agencies may choose to enact policies and procedures that go beyond the constitutionally or statutorily required minimum, they generally may not bind their successors to those decisions.[288] Because government entities lack statutory power to entrench their policy preferences and limit their successors' discretion, a court should not impose such restrictions through a consent decree unless they are a closely tailored means of remedying a constitutional or statutory violation.

The Prison Litigation Reform Act ("PLRA") already applies a strict variation of this standard to "[p]rospective relief" in litigation con-

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283 *See* Marshall Cnty. Health Care Auth. v. Shalala, 988 F.2d 1221, 1222 (D.C. Cir. 1993) (holding that a district court may examine matters of public record in ruling on a Rule 12(b)(6) motion).

284 315 U.S. 257 (1942).

285 *Id.* at 258.

286 *Id.* at 258–59.

287 Lawrence v. Chater, 516 U.S. 163, 171 (1996) (holding that the Court will accept any "plausible" confession of error without further considering the merits of the underlying issue).

288 *See generally supra* Part III.

cerning "prison conditions."[289] It provides that such relief "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs."[290] The PLRA adds, "The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."[291]

The Supreme Court has applied a comparable standard in fully litigated constitutional cases. In *Dayton Board of Education v. Brinkman*, the Court held that a desegregation remedy may cover only the "incremental segregative effect [that constitutional] violations had on the racial distribution of the . . . school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations."[292] Similarly, in *Califano v. Yamasaki*, the Court reiterated that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief for the plaintiffs," based on the nature of their claims.[293] Imposing such requirements on the scope of relief in consent decrees ensures that government defendants cannot use them as a way of improperly enhancing their authority by gratuitously entrenching their policy preferences and discretionary determinations into law.

The lack of adverseness between the parties seeking a consent decree can hinder a court's ability to accurately determine the legal sufficiency of the plaintiff's claims and the propriety of the requested relief. The next Subsection discusses various steps that courts should take to facilitate intervention by third parties to provide helpful analysis and authorities. Especially because intervenors may not be available to oppose a consent decree, however, the court also should require a government defendant seeking a consent decree to file an *Anders*-type brief, identifying and responding to potential legal argu-

289 18 U.S.C. § 3626(a)(1)(A)(2006).

290 *Id.*

291 *Id.*; *see also id.* § 3626(a)(1)(B)(i)–(iii) ("The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law . . . unless—(i) federal law requires such relief . . . ; (ii) the relief is necessary to correct the violation of a Federal right; and (iii) no other relief will correct the violation of the Federal right.").

292 433 U.S. 406, 420 (1977); *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) (requiring that any race-conscious relief to remedy the effects of past discrimination be "narrowly tailored").

293 442 U.S. 682, 702 (1979).

ments that reasonably could be raised against the plaintiffs' claims or requested relief.

In *Anders v. California*, the Supreme Court established a special briefing requirement for a court-appointed attorney who wishes to withdraw from representing a criminal defendant in a statutorily guaranteed appeal on the grounds that there are no potentially colorable issues to litigate.[294] The Court held that the attorney must file a "brief referring to anything in the record that might arguably support the appeal. . . . [T]he court—not counsel—then proceeds, after full examination of all the proceedings, to decide whether the case is wholly frivolous."[295] These requirements would be somewhat modified in the context of a consent decree, requiring the government defendant to demonstrate that the proposed consent decree satisfies the standards proposed above and respond to a reasonable range of potential counterarguments. If litigants wish a court to memorialize a settlement with a government defendant in an order that binds subsequent administrations—entrenchment of a type to which the government defendant could not consent on its own—it is reasonable to require that the moving parties demonstrate that such relief is legally appropriate.

Courts also generally should be required to hold hearings on proposed consent decrees, at which intervenors can present contrary arguments and the court can question the parties about the sufficiency of the government defendant's *Anders*-type brief. These requirements undoubtedly will increase the time it takes for litigants in government-defendant cases to obtain consent decrees, but such delays almost always accompany the incorporation of additional procedural protections into an administrative or judicial process. Courts already must hold hearings or otherwise engage in substantial reviews of settlements in numerous contexts, such as class actions[296] and antitrust cases,[297] so these requirements should be feasible.

2. Facilitating Intervention

When government defendants seek to enter into consent decrees, the court also should facilitate intervention by third parties to ensure

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294 386 U.S. 738, 744 (1967).

295 *Id.*

296 FED. R. CIV. P. 23(e)(2) (providing that a court may approve a settlement in a class action case "only after a hearing and on finding that it is fair, reasonable, and adequate").

297 15 U.S.C. § 16(e)–(g) (2006) (requiring a court to determine that an antitrust consent decree is in the public interest before approving it).

that the pertinent legal issues are adequately and accurately presented, and that the proposed decree is appropriate. Intervenors' participation can help ensure the accuracy of the court's conclusion by offering a more adversarial presentation of the issues and identify the weaknesses, oversights, and omissions in the settling parties' arguments.

As an initial matter, courts should require government defendants seeking a consent decree to file a public notice and a copy of their *Anders*-type brief in the *Federal Register*. Such notice already is required in antitrust[298] and environmental cases,[299] among others. This notice will alert third parties that intervention may be necessary to defend the legal provision, policy, or governmental act at issue.

Courts also should apply Rule 24's standards for intervention liberally in this context.[300] Third parties seeking to intervene to defend legal provisions or administrative actions that government defendants no longer wish to uphold often face a variety of obstacles. First, some courts have held that, when litigants seek to settle weeks, months, or years after a case was filed, a motion to intervene to attempt to block the proposed settlement is untimely.[301] Timeliness under these circumstances should be measured from the date the motion for a consent decree is filed, not from the outset of the case. The public is entitled to assume that government defendants will vigorously defend against challenges to legal provisions and administrative determinations. They should not be given an incentive to file protective intervention motions at the outset of cases, before a substantial need to intervene has arisen.

Second, some courts also bar litigants from intervening in government-defendant cases on the grounds that defending legal provisions and other governmental acts is the responsibility of the Attorney General, who is presumed to adequately represent putative intervenors' interests.[302] When the Attorney General seeks a consent

298 *Id.* § 16(b).

299 42 U.S.C. § 9622(i)(1) (2006).

300 FED. R. CIV. P. 24.

301 *See, e.g.*, Cnty. of Orange v. Air Cal., 799 F.2d 535, 538 (9th Cir. 1986) ("[T]he fact that [the putative intervenor] waited until after all the parties had come to an agreement after five years of litigation should . . . weigh heavily against [it]."); *see also* Choike v. Slippery Rock Univ., 297 F. App'x 138, 141 (3d Cir. 2008) (holding that intervention was untimely in part because it threatened to "'derail' the settlement").

302 *See, e.g.*, Curry v. Regents of the Univ. of Minn., 167 F.3d 420, 423 (8th Cir. 1999) ("[W]hen a government entity is a party and the case concerns a matter of sovereign interest, the government is presumed adequately to represent the interests of the public."); Edwards v. City of Houston, 78 F.3d 983, 1005 (5th Cir. 1996) ("[W]hen the putative rep-

decree, however, and the adverseness in the underlying case evaporates, an intervenor can help the court confirm that the requirements proposed above for granting a consent decree have been satisfied.[303] Furthermore, if the Attorney General wishes to concede the validity of the plaintiff's claims, then she cannot be adequately representing the interests of private parties that would oppose them.

Third, courts have denied requests for permissive intervention to oppose consent decrees on the grounds that they would prolong the proceedings.[304] As discussed above, however, prolonging proceedings regarding consent decrees is, to some extent, desirable to prevent them from being abused.

Finally, courts should allow intervenors to rely on "piggyback" standing to join cases, rather than requiring them to demonstrate Article III standing in their own right. In general, intervenors are not required to establish their own Article III standing to join a case, but rather may "piggyback" on the standing of the existing parties.[305] Courts typically hold that this piggyback standing evaporates when the district court enters a consent decree. To remain in the case and appeal the decree, an intervenor must establish independent Article III standing, which they often are unable to do.[306]

As discussed in Part II, when litigants reach a consensus and seek judicial approval of a consent decree, a justiciable controversy no longer exists between them, and the court should dismiss the lawsuit rather than enter a substantive order that declares or modifies the parties' rights and obligations. If a court rejects that approach, however, and concludes that it has jurisdiction to enter a consent decree, then the decree should not terminate the existence of the controversy between the litigants until it is finalized through the exhaustion

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resentative is a governmental body or officer charged by law with representing the interests of the absentee, a presumption of adequate representation arises . . . .").

303 *See supra* Subsection IV.B.1.

304 *See, e.g.*, Bloomington v. Westinghouse Elec. Corp., 824 F.2d 531, 536–37 (7th Cir. 1987) (holding that intervention would prejudice the litigants because of the time they had invested in negotiating a settlement).

305 Dillard v. Chilton Cnty. Comm'n, 495 F.3d 1324, 1330 (11th Cir. 2007) ("[I]ntervenors in this circuit may in some cases be permitted to 'piggyback' upon the standing of original parties to satisfy the standing requirement."); *see also* Diamond v. Charles, 476 U.S. 54, 64 (1986) ("[T]his ability to ride 'piggyback' on the State's undoubted standing exists only if the State is in fact an appellant before the Court . . . .").

306 *Dillard*, 495 F.3d at 1336 (holding that intervenors failed to allege a particularized injury-in-fact sufficient to confer Article III standing independent of the original parties); *Diamond*, 476 U.S. at 55 ("[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art[icle] III. ").

of—or expiration of the period for—appellate review. This approach would allow putative intervenors to invoke piggyback standing to appeal the propriety of the decree, particularly if the court adopts the standards that this Article recommends.

CONCLUSION

A consent decree is a potent mechanism through which government agencies and officials can impose legal obligations on their successors, entrench their policy preferences, and limit the discretion of future administrations. They are much more pernicious than settlement agreements because critical limitations, such as the reserved powers doctrine and the general prohibition on specific performance of government contracts, do not apply to them.

Consent decrees exceed the bounds of courts' Article III powers. When litigants reach agreement on their respective rights and seek a consent decree from the court, neither adverseness nor a justiciable controversy continues to exist between them. The proper course is for the court to direct the parties to embody their understanding in a settlement agreement and dismiss the case, rather than issuing a substantive order that declares, establishes, or modifies the parties' legal obligations without adversarial testing or argument.

In most cases, the use of a consent decree rather than a settlement agreement affects only the remedies available to the litigants for alleged breaches. Settlement agreements may be enforced only through breach-of-contract claims, while consent decrees may be enforced through summary contempt proceedings. In government-defendant cases, however, the limitations that apply to government contracts ensure that government agencies and officials cannot use settlement agreements to exceed their statutory authority by entrenching their policy preferences and limiting their successors' statutorily conferred discretion. Because courts generally do not apply such limitations to consent decrees and subject them to only a minimal level of scrutiny,[307] government entities can use them to elevate discretionary legal interpretations and policy determinations into legally binding mandates and restrictions on their successors. If courts continue to issue consent decrees despite the Article III adverseness concerns, then they should limit the potential for abuse by requiring a government defendant seeking one to demonstrate that the plain-

307 *See supra* Part I.

tiff has stated valid claims and that the relief is an appropriate remedy for the violations at issue.