Mandatory Consent: Binding Unrepresented Third Parties Through Consent Decrees

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MANDATORY CONSENT: BINDING UNREPRESENTED THIRD PARTIES THROUGH CONSENT DECREES

I. INTRODUCTION

Settlement is the most common and efficient way to resolve employment discrimination suits. One manner in which such settlements are made is through consent decrees. A consent decree is an agreement between the parties to a lawsuit to settle on mutually acceptable terms, which the judge agrees to enforce as a judgment. Initially, settlement by consent decree occurred primarily in the area of antitrust law. Recently, however, the use of consent decrees has expanded into other public law areas, particularly in the employment discrimination context. One cause for concern has been that public law litigation tends to affect the rights of individuals and groups that are not parties to the litigation.

Whether consent decrees are subject to challenge by those who are adversely affected by their provisions depends upon several factors. The most significant factor is the nature of the rights of third parties that are affected. Some consent decrees result in dispreferred nonminorities losing promotional or seniority rights, while other decrees, or some provisions of the same decree, may result in only the loss of prospective employment opportunities.

This Comment will analyze the problems inherent in the use of consent decrees and attempt to provide solutions to these problems. Part II will discuss the nature of consent decrees. Part III will introduce the collateral attack bar, which precludes those adversely affected from challenging a decree after it has been approved by the court. Part IV contains a discussion of Martin v. Wilks, in which the Supreme Court rejected the collateral attack bar. The Martin Court held that a person could not be deprived of rights in a proceeding to which he or she was not a party. Congress’s response to Martin, which legislatively overturned the Court’s decision, is discussed in Part V. Part VI contains a discussion of the rights of incumbent employees and how those rights

3. Id. at 321.
4. Id.
6. Id. at 759.
may be affected by consent decrees. The interests of future job applicants that may be affected by consent decrees are analyzed in Part VII. Part VIII examines some of the problems inherent in the use of consent decrees and offers suggestions for resolving or reducing these problems. In conclusion, this Comment argues that the failure to recognize the rights of all those affected by consent decrees will not alleviate the effects of past discrimination. Rather, it will serve to perpetuate the racial tensions that exist in the workforce, the implications of which are felt throughout society.

II. CONSENT DECREES

There has been disagreement as to whether consent decrees are actually contracts or judgments. At times the courts have treated them as private contracts between the parties, while at other times they have been treated as judgments. However, the more prevalent analysis treats a consent decree as a combination of both contract and judgment. Although a consent decree is generally interpreted like a contract, the Supreme Court has declined to apply contract analysis when one party

7. See, e.g., United States v. Armour & Co., 402 U.S. 673, 681-82 (1971). "Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." Id. at 682. "[A] consent decree is a form of contract, and, as such, the rules of contract interpretation are applicable." South v. Rowe, 759 F.2d 610, 613 (7th Cir. 1985).

8. See, e.g., System Fed. No. 91, Railway Employees' Dept. v. Wright, 364 U.S. 642, 650-52 (1961). "We reject the argument... that a decree entered upon consent is to be treated as a contract and not as a judicial act." Id. at 651 (quoting United States v. Swift & Co., 286 U.S. 106, 114-15 (1932)).

9. See, e.g., Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986). "[C]onsent decrees bear some of the earmarks of judgments entered after litigation. At the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts." This "dual character... has resulted in different treatment for different purposes." Id. See also United States v. ITT Continental Banking Co., 420 U.S. 223, 236-37 n.10 (1975). "When the facts of a given case do not lend themselves to easy resolution by viewing the decree as akin to a contract, courts have turned to the quasi-judicial nature of consent decrees and have resorted to equitable considerations." United States v. American Cyanimid Co., 719 F.2d 558, 564 (2nd Cir. 1983), cert. denied, 465 U.S. 1101 (1984).

10. See, e.g., South, 759 F.2d at 613. "[I]f the intent of the parties is not unambiguously expressed by the language of the decree, the district court may review extrinsic evidence..." Id. Brown v. Neeb, 644 F.2d 551, 557 (6th Cir. 1981) (beginning with the premise that consent decrees should be construed like contracts because they have many of the attributes of contracts). This is a logical approach because a consent decree is simply the embodiment of the agreement of the parties. See Kramer, supra note 2, at 329. Thus, the contract principle of furthering the expectations of the parties is fully applicable.
seeks to modify a consent decree, characterizing the decree as a "judicial act." 11

The use of consent decrees as a means of settling employment discrimination suits has become increasingly common. 12 In many cases, an employer who is sued by a plaintiff on behalf of a large group of minorities will find it less costly and less time consuming to avoid protracted litigation by entering into a consent decree. 13 Such decrees typically consist of commitments by the employer to implement certain affirmative action practices. Because the remedies sought are generally preferential hiring or promotional policies to redress past discrimination, the results necessarily affect the interests of nonminorities who are not represented by either of the negotiating parties. 14

A consent decree differs from the typical agreement that marks the early settlement of a lawsuit. In the usual settlement situation, if the plaintiff and the defendant are able to agree on an acceptable figure to resolve the dispute, they will enter into an agreement and the suit will be voluntarily dismissed. 15 Should any problems of non-compliance with the terms of the settlement arise, the party seeking enforcement may initiate a new action for breach of the settlement contract, which, like any other contract, may be enforced or set aside by the court. 16

In some cases, the parties request that the court enter the settlement as a decree. 17 In this situation, if either party fails to fulfill its obligations under the agreement, the other party may obtain contempt sanctions, rather than having to file a new lawsuit for breach of the settlement contract. 18 This provides a more expedient and less expensive method of enforcing the agreement. If the settlement is entered as a decree, the court may provide additional assistance, such as appointing a monitor to ensure that the terms of the decree are properly followed. 19 The court may also assist by selecting an expert to develop new testing procedures.

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13. Id. at 321-22; Douglas Laycock, Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 103 U. CHI. LEGAL F. 103, 113 (1987); see also infra Part VIII.C.
15. Kramer, supra note 2, at 325.
16. Id.
17. Id.
18. Id.
19. Id. at 325-26.
if the parties to the decree are unable to agree upon an expert themselves.  

Another difference between a private settlement contract and a consent decree is that in the case of an affirmative action plan resulting from a private contract, the court can only declare the contract unenforceable, in which case it will have no effect. If the plan is part of a consent decree, however, the court has the ability to modify the decree.

Regardless of how consent decrees are characterized, problems arise when they affect the rights of those who were not involved in their formulation and thus did not consent to their terms. Although the property rights of incumbent employees to continued employment or promotional opportunities have been afforded some degree of protection by the courts, there has been a reluctance to modify the terms of consent decrees that restrict the employment opportunities of nonminority job applicants, who have no such claim of entitlement to the positions they seek.

III. COLLATERAL ATTACK DOCTRINE

The propriety of allowing those who are disfavored by a consent decree to bring a suit challenging that decree remains uncertain. The collateral attack doctrine prevented an individual from bringing an action challenging a consent decree unless that challenge was raised in the decree suit itself. This doctrine led to a line of cases in which most of the circuit courts of appeals held that once a decree was approved by the court, no further challenge to its terms would be permitted.

The collateral attack doctrine is controversial because it involves the need to balance the rights of third parties challenging consent decrees that impair their own rights against the need for decrees to offer some

22. Id. at 357.
24. Grover, supra note 1, at 44.
25. See, e.g., Striff v. Mason, 849 F.2d 240, 245 (6th Cir. 1988) (“It is well settled that legal actions which constitute collateral attacks on consent decrees entered in civil rights cases are not permitted.”); Marino v. Ortiz, 806 F.2d 1144, 1146-47 (2d Cir. 1986), aff'd by an equally divided Court, 484 U.S. 301 (1988); Deveraux v. Geary, 765 F.2d 268 (1st Cir. 1985), cert. denied, 478 U.S. 1021 (1986); Thaggard v. City of Jackson, 687 F.2d 66, 68-69 (5th Cir. 1982), cert. denied, 464 U.S. 900 (1983); Dennison v. City of Los Angeles Dep't of Water & Power, 658 F.2d 694, 696 (9th Cir. 1981); Goins v. Bethlehem Steel Corp., 657 F.2d 62, 64 (4th Cir. 1981), cert. denied, 455 U.S. 940 (1982); Society Hill Civic Ass'n v. Harris, 632 F.2d 1045, 1052 (3d Cir. 1980).
degree of finality and certainty to the parties who use them as a means of settlement.\textsuperscript{26} The potential for collateral attacks directly reduces the incentive for parties to settle discrimination claims through the use of consent decrees.\textsuperscript{27}

The collateral attack doctrine has been applied differently by various courts. Some courts prohibited any lawsuit that sought to challenge action taken pursuant to a consent decree;\textsuperscript{28} others imposed such a prohibition only if the party seeking to challenge the decree had the chance to intervene in the original suit.\textsuperscript{29} While the collateral attack bar did not completely eliminate the ability of majority employees to protect their interests,\textsuperscript{30} it did restrict the manner in which such challenges could be made.\textsuperscript{31}

\section*{IV. \textit{Martin v. Wilks}}

The Supreme Court's decision in \textit{Martin v. Wilks}\textsuperscript{32} rejected the collateral attack doctrine. The \textit{Martin} Court refused to preclude the plaintiffs, who were white firefighters adversely affected by consent decrees entered into during the settlement of prior litigation, from challenging the decrees.\textsuperscript{33} The Court held that to do so would "contravene[] the

\begin{itemize}
\item \textsuperscript{26} Grover, \textit{supra} note 1, at 45.
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} \textit{E.g.,} Thaggard, 687 F.2d at 69; Hefner v. New Orleans Public Serv., Inc., 605 F.2d 893, 898 (5th Cir. 1979), \textit{cert. denied}, 445 U.S. 955 (1980). The "consent decree was reached after careful consideration by the parties involved; they do not wish, and should not be forced, to defend the decree in lawsuits brought long after the decree was signed." \textit{Hefner}, 605 F.2d at 898.
\item \textsuperscript{29} \textit{Martin v. Wilks}, 490 U.S. 755, 762-69 (1989); \textit{Marino}, 806 F.2d at 1146 (suggesting that appellants' proper course of action would have been to intervene in the lawsuit in which the consent decree was entered); \textit{Dennison}, 658 F.2d at 696 (barring any challenge where union "had sufficient opportunity to intervene . . . prior to the entry of the consent decree").
\item \textsuperscript{30} Grover, \textit{supra} note 1, at 48. The bar prohibited anyone from challenging the decree in a separate suit. Majority employees remained free to intervene in the original suit and to raise their objections at that time. \textit{Id.}
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} 490 U.S. 755 (1989).
\item \textsuperscript{33} The decrees to which the plaintiffs objected were entered into to resolve litigation between a group of black firefighters, the City of Birmingham, and the Jefferson County Personnel Board. \textit{Id.} at 758-59. The decrees were provisionally approved, and notice of the fairness hearings was published in local newspapers. \textit{Id.} at 759. The Birmingham Firefighters Association (BFA) appeared at the hearings and filed objections as \textit{amicus curiae}. \textit{Id.} After the hearing, but before final approval of the decrees, the BFA and two of its members moved to intervene on the grounds that their rights would be adversely affected by the decree. \textit{Id.} The district court denied the motions as untimely, and the decrees were approved. \textit{Id.} A group of seven white firefighters then sought an injunction to prevent enforcement of the decrees, which was denied by the district court. \textit{Id.} A second group of white firefighters then
general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party." In explaining its decision, the Court noted that "[u]nless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." The Court explained that Rule 19 of the Federal Rules of Civil Procedure contemplates just this type of situation, where the outcome of an action is likely to affect the interests of numerous people. The petitioners in Martin proposed that rather than requiring the parties to an action to join those who might potentially be affected by the outcome of the case, those individuals should be required to intervene. The Court rejected this argument, noting that it would not eliminate the problems associated with determining who should be included in a lawsuit, but rather that it "merely shifts that responsibility to less able shoulders." The Court concluded that employers subject to conflicting decrees would be best able to bear the burden of determining who might be adversely affected by the outcome of the case. Therefore, the Court affirmed the decision of the Eleventh Circuit Court of Appeals. The case was remanded for reconsideration of the plaintiffs' reverse discrimination claims in light of the Court's holding that those claims were not barred to the extent that they were inconsistent with the consent decree. Mar- tin thus provided a more accessible remedy for majority plaintiffs who were discriminated against pursuant to the terms of consent decrees.

sued the City and the Board, alleging that they were being denied promotions in favor of less qualified blacks in violation of federal law. Id. at 760. The defendants moved to dismiss on the grounds that the suit constituted an impermissible collateral attack on the consent decrees. Id. The motion was denied by the district court, which held that while the decrees would provide a defense to claims of discrimination for actions that were required by the decrees, it remained to be determined whether the promotions at issue were in fact required by the decrees. Id. After trial, the district court granted the motion to dismiss. Id. The Eleventh Circuit reversed, holding that because the plaintiffs had not been parties to the consent decrees their claims were not precluded. Id. at 761. The court remanded for trial of the discrimination claims, suggesting that the law governing voluntary affirmative action plans should be applied in judging the decrees. Id. The Supreme Court affirmed the Eleventh Circuit's judgment. Id.

34. Id. at 759.
35. Id. at 763 (quoting Chase National Bank v. Norwalk, 291 U.S. 431, 441 (1934)).
36. Id. at 767.
37. Id. at 766-67.
38. Id. at 767.
39. Id.
40. Id. at 769.
the same time, the decision was perceived as eliminating any chance for finality in the settlement of civil rights cases.\textsuperscript{41}

V. LEGISLATIVE RESPONSE TO \textit{MARTIN v. WILKS}

Congress responded to the Court's decision in \textit{Martin} by enacting section 108 of the Civil Rights Act of 1991.\textsuperscript{42} The Act was an attempt to legislatively overturn the Court's rejection of the collateral attack bar and to restore the prohibitions against third-party attacks on consent decrees such as that in \textit{Martin}.

As the legislative history of the Civil Rights Act of 1990\textsuperscript{43} indicates, it was feared that "[t]he purpose and effect of such decrees in remedying employment discrimination will be frustrated absent such a statutory scheme."\textsuperscript{44} The House Committee on Education and Labor believed that \textit{Martin} would result in the entry of fewer consent decrees resolving employment discrimination claims, and that "[w]ithout remedial legislation, Congress' intent in adopting Title VII of 'encouraging voluntary settlement of employment discrimination claims' [would] be frustrated."\textsuperscript{45} The goal was to strike a middle ground between the strict rule barring collateral attacks and the approach taken by the Supreme Court in \textit{Martin}.\textsuperscript{46}

There are two situations in which section 108 of the Civil Rights Act of 1991 precludes challenges to affirmative action plans arising out of employment discrimination.\textsuperscript{47} The first bars challenge to a decree by anyone who had "actual notice ... sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person."\textsuperscript{48} If the consent decree is likely to impact the rights of incumbent employees, this notice will require more than publication.\textsuperscript{49} The second category denies the opportunity to challenge a de-

\begin{itemize}
\item \textsuperscript{41} S. REP. NO. 315, 101st Cong., 2d Sess. 49 (1990).
\item \textsuperscript{42} 42 U.S.C. § 2000e-2(n) (Supp. 1993).
\item \textsuperscript{43} The relevant provisions of the Civil Rights Act of 1990 were similar to those enacted as part of the Civil Rights Act of 1991. See S. 2104, 101st Cong., 2d Sess. § 6 (1989); H.R. 4000, 101st Cong., 2d Sess. § 6 (1989).
\item \textsuperscript{44} H.R. REP. No. 644, 101st Cong., 2d Sess. 35 (1990).
\item \textsuperscript{45} Id. at 36 (citing Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981)).
\item \textsuperscript{46} Id.
\item \textsuperscript{48} Id. § 2000e-2(n)(1)(B)(i).
\item \textsuperscript{49} Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798-800 (1983) (holding that unless the individual "is not reasonably identifiable, constructive notice [by publication]" is insufficient). In such a situation, involving current employees, notice could be enclosed with the employees' paychecks or sent to their homes by letter. See Issacharoff, supra note 14, at 227-28.
\end{itemize}
cree to anyone "whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation." 50

Regardless of the motivation behind section 108, its effect has been to reduce the availability of a forum to challenge consent decrees for non-parties who are adversely affected by their terms. The inequities of such a result are clear. It is the employer who has engaged in past discrimination. When confronted with the claims of those who have been harmed by this discrimination and are rightfully demanding compensation, the employer will often take the quicker and easier way out. 51 Rather than face the prospect of protracted litigation, the employer may enter into a consent decree, which in effect puts the burden of its concessions on third parties, who can be either current or future employees.

VI. THE RIGHTS OF INCUMBENT EMPLOYEES

In the case of nonminorities working for an employer at the time the consent decree is implemented, the potential conflicts are apparent. A consent decree that covers promotional activities will have a direct effect on the rights of all employees who are or may become candidates for promotion. 52 Otherwise, the decree would be ineffective. 53 However, because incumbent employees can often claim a property right in their position and seniority status, the courts have afforded them some protection from the harsh consequences that could otherwise result from consent decrees. 54

For example, in Board of Regents v. Roth, 55 the Supreme Court held that employees have an affirmative right to continued employment, which constitutes a property interest, when they have "a legitimate claim of entitlement" based on "more than a unilateral expectation" of continued employment. 56 In determining which terms of employment rise to the level of a property interest, the Court looked to the terms on which the employer had offered the job. 57 The Court noted that such a prop-

52. Issacharoff, supra note 14, at 200.
53. Id.
54. See, e.g., Board of Regents v. Roth, 408 U.S. 564, 578 (1972) (holding that Roth's property interest in employment was created and defined by the terms of his appointment).
55. 408 U.S. 564 (1972).
56. Id. at 577-78. The purpose of these safeguards is "to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." Id. at 577.
57. Id. at 577.
Property interest is not created by the Constitution, but rather it is created, and its dimensions are defined, "by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 58

Consent decrees inevitably result in third parties absorbing the cost of the employer's discriminatory conduct. 59 By guaranteeing racial preferences in future hiring and promotional decisions, an employer may avoid back pay liability completely, or at least minimize the amount it has to pay. 60 While this may be considered a desirable outcome, it has also been criticized for allowing employers to shift too much of the burden for redressing past discrimination onto current employees. 61 The hiring of less qualified workers is the only manner in which an employer might suffer in this regard. However, weighed against the alternative of actually paying the victims of past discrimination, an agreement to implement hiring or promotional quotas is an enormous bargain for the employer. 62

Although the property interest of certain incumbent employees in continued employment and promotional opportunities has been recognized, 63 it has received only limited protection. When these property rights are considered to have been obtained as the result of unlawful discrimination, the legitimate expectations of incumbent employees may be defeated. 64 The analysis used in allocating burdens in redressing past discriminatory practices invariably involves the assumption that because whites have benefitted from past discrimination, it is not unreasonable to

58. Id.
59. See infra Part VIII.C.
60. Laycock, supra note 13, at 114. If a case is fully litigated and the employer is found to have violated Title VII, the employer may be held liable for significant amounts of back pay. Id. In making preferential hiring concessions to reach settlement, the employer in effect buys its way out of potential back pay liability by giving away promotional and hiring opportunities that should be available to all individuals.
61. Id. at 114-16.
62. Id. at 114.
63. See supra Part VI.
64. See Franks v. Bowman Transp. Co., 424 U.S. 747, 774 (1976) (finding no basis to deny retroactive seniority merely because it would diminish the expectations of "arguably" innocent employees); MICHEL ROSENFIELD, AFFIRMATIVE ACTION AND JUSTICE 192-94 (1991) (discussing the Supreme Court's reasoning in Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986), that although the non-minority firefighters who were adversely affected by the preferential hiring policies were not themselves guilty of any wrongdoing, because they had benefitted from the effects of past discrimination, it was not unjust to make them bear part of the burden of the remedy). For a discussion of how seniority claims of majority incumbents may be defeated, see Issacharoff, supra note 14, at 232-34 nn.214-18.
discriminate against them now. However, such an assessment is an oversimplification.

Although society as a whole, and a specific defendant in a given case, may owe compensation to those it has discriminated against, it does not necessarily follow that each individual employed by the defendant is absolutely liable for that defendant's discriminatory conduct. Nor does it follow that because specific individuals did not engage in the discriminatory conduct, they should not bear any of the burden of providing compensation. The question is therefore one of degree. To what extent may individuals be required to bear the burden for their employer's past discrimination? In answering this query, it must be determined to what extent an employer should be permitted to escape the consequences of its own discriminatory conduct by shifting the burdens of compensation to its current employees and future job applicants.

As noted earlier, an employer is often eager to settle, in order to avoid the expense of litigation. In so doing, the employer may also succeed in shifting more of the burden to employees and future applicants by entering into a consent decree. By agreeing to affirmative action in hiring and promotion, an employer is often able to escape its greatest potential financial exposure—an award of backpay. However, such a resolution is not justified simply to facilitate settlement if those who are affected by the decree are not the proper cost-bearers.

The inequity of allowing an employer to force third parties to bear much of the cost of settlement is especially apparent where the defendant is a municipality. When the city itself has engaged in past discrimination, making it "the culpable party, in both a moral and legal sense, for the unlawful discrimination giving rise to the litigation," the city should

65. See, e.g., Robert K. Fullinwider, The Reverse Discrimination Controversy 37 (1980); Issacharoff, supra note 14, at 233; see also Franks, 424 U.S. at 774 (holding that to deny seniority relief to identifiable victims of race discrimination, solely because to do so would diminish the expectations of other, arguably innocent employees, would frustrate the "make whole" objective of Title VII). The Court went on to note that there was nothing in Title VII or its legislative history to show that Congress intended to bar retroactive seniority relief to victims of illegal discrimination. Franks, 424 U.S. at 774.
66. Fullinwider, supra note 65, at 33-42.
67. Id.
68. See supra note 11 and accompanying text.
69. Issacharoff, supra note 14, at 244-45.
70. Id. In the hiring context, no settled expectations are affected, and as long as rigid quotas are not employed, the terms are likely to be accepted by the court. See United Steel-workers v. Weber, 443 U.S. 193, 208-09 (1979).
71. Issacharoff, supra note 14, at 245.
72. Id.
not be allowed to pass on the brunt of the cost of settlement to its employees.\textsuperscript{73} The unfairness of such a result is clear, as the city has a broad tax base over which the costs of settlement may be spread.\textsuperscript{74}

VII. RIGHTS OF INDIVIDUALS IN THE HIRING CONTEXT

In most discussions of the appropriateness of affirmative action remedies, consideration is given to the relative burdens that must be borne by those who have previously suffered discrimination and those whose interests will be impaired by the remedies that are implemented.\textsuperscript{75} The interests of nonminorities that are considered generally are those involving a property interest in employment opportunities.\textsuperscript{76} Unable to offer any such claim, applicants for initial employment are frequently left with no basis on which to challenge a decree that might seriously affect their rights to a position.\textsuperscript{77}

The Supreme Court has given little consideration to the impact consent decrees have on potential employees, stating that “[i]n cases involving valid hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally.”\textsuperscript{78} It should not be overlooked, however, that “[t]his denial of opportunity is a very real cost for those who lose out on account of affirmative action, considering especially that these individuals are innocent of discriminatory conduct.”\textsuperscript{79}

The problem faced by nonminorities in the hiring context is made all the more difficult because at the time the consent decree was entered into, not only were these individuals unidentifiable for purposes of join-der, they themselves may have been unaware that they would be seeking employment with a given employer. Therefore, they had no basis for seeking to intervene in the original suit.

\textsuperscript{73} Id. at 246.
\textsuperscript{74} Id.
\textsuperscript{77} Issacharoff, \textit{supra} note 14, at 238. Professor Issacharoff’s analysis suggests that “neither the due process nor the affirmative action case law would be an obstacle to liberal, entry-level affirmative action.” \textit{Id}.
The court could notify those individuals with pending job applications of the lawsuit, but their status as interested applicants is likely to be short-lived, making it unlikely that any of them could effectively represent the class of future applicants. If these individuals are to be bound by the terms of the consent decree, the court must appoint a guardian ad litem to represent their interests. Problems arise in this situation as well, as there may be no one willing to pay a guardian ad litem, or there may be difficulty ensuring the guardian's independence, particularly if he or she is paid by the employer.

The lack of representation afforded to the interests of nonminorities in the hiring context was illustrated in the case of Hammon v. Barry. The Settlement Agreement in Hammon was divided into two parts, one relating to hiring and one relating to promotions. The portion relating to promotions needed approval of both the minority and majority groups, as well as the City. The portion relating to hiring, on the other hand, was submitted for approval only to the minority plaintiffs and the defendant City.

When nonminority individuals apply for a position with that employer at a later date, they will be subject to the affirmative action plan implemented through the consent decree although their interests, like those of all future applicants, were not represented during the negotiation of the decree.

One argument used to minimize the impact of consent decrees in the hiring context is that majority applicants have no right to the jobs for which they apply; refusing to consider them simply means they will have

80. Laycock, supra note 13, at 148-49.
81. Id. at 149. See, e.g., In re Century Brass Products, Inc., 795 F.2d 265, 275 (2d Cir.), cert. denied, 479 U.S. 949 (1986) (requiring that a representative for the retired employees of the debtor be appointed after finding as a matter of law that a conflict would exist if the union were to represent both active and retired workers). In re Amatex Corp., 755 F.2d 1034, 1043 (3d Cir. 1985) (finding in the context of a bankruptcy proceeding that because of the adverse interests of the other parties, future asbestos claimants required their own representative to protect their interests). The conflicts in the case of a consent decree covering preferential hiring policies are even more apparent. Once the employer has decided to settle, its interests are clearly adverse to those of its current employees. The employer seeks to limit its liability for back pay, while the employees and future job applicants are interested in protecting their rights to jobs and promotions.
82. See generally Laycock, supra note 13, at 149.
84. Id. at 1090. Although the interests of the majority group of plaintiffs were not aligned with those of future applicants, their input and approval would offer at least some minimal level of protection for those individuals whose identity could not be known at the time of settlement because they are not yet associated with the employer. Id.
to take a job elsewhere. The social inequities of this rationale are manifest. Even adopting the view that those who benefitted by past discrimination may rightfully be required to endure discrimination themselves, it is uncertain how many applicants actually fall within that group. The problem with this rationale is that the burden of preferential hiring policies is felt most strongly by younger, white job-seekers who are generally the least responsible for the discrimination sought to be redressed.

VIII. DIFFICULTIES WITH CONSENT DECREES

The primary advantage of consent decrees is that they provide an alternative to unwieldy, expensive, and time-consuming litigation. Despite the benefits of expedited disposition of suits, there are certain problems inherent in the use of consent decrees. The first is that decrees are often approved on the basis of limited factfinding. The second problem is that in implementing a decree, the parties often act far in excess of the terms of the decree. The third and most controversial aspect of consent decrees is that they usually involve a highly inequitable allocation of the costs of remedying past discrimination.

A. Insufficient Factfinding

One problem with the use of consent decrees is that they are not always supported by sufficient factfinding. Although this is true of most cases that settle, the implications become troublesome when a consent decree affects the rights not only of those who are party to the lawsuit, but of others as well. "Generally, the remedies in employment discrimination consent decrees are intended to eliminate present and future discrimination in employment and sometimes to redress the imbalance caused by past discrimination." It is this latter objective that may be inaccurately assessed without the benefit of traditional trial procedures such as discovery, presentation of evidence, and findings of fact.

85. See generally Issacharoff, supra note 14, at 208-09.
86. Fullinwider, supra note 65, at 54.
87. See, e.g., United Black Firefighters Ass'n v. City of Akron, 976 F.2d 999, 1011 (6th Cir. 1992) (holding that the district court erred in entering the consent decree without proof of past discrimination).
88. United States v. City of Miami, 2 F.3d 1497, 1505 (11th Cir. 1993).
89. The Supreme Court requires that any type of race-conscious relief be justified by a "compelling state interest," which would be clearly established where the race-conscious employment practices remedy "past and present discrimination by a state actor." United States v. Paradise, 480 U.S. 149, 167 (1987) (plurality opinion). See also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (plurality opinion). Some degree of factfinding is necessary to establish both of these factors justifying remedial employment practices.
If consent decrees are entered early in the course of litigation when no direct evidence of past discrimination has been produced to support the terms of the decree, affirmative action policies are more likely to be perceived as unjust and over-inclusive.

"Ascertaining the proportion of qualified applicants from each favored group would seem necessary before determining whether affirmative action should continue with respect to both initial hires as well as promotions, since the base may be skewed because of a lack of interest by a particular favored group."90 Applying this same reasoning to the initial implementation of a decree provides another example of a determination that should be made before any remedial measures are undertaken.

It is well established that states violate the Equal Protection Clause of the Fourteenth Amendment if they show preference to any person on the basis of race, whatever that race may be.91 There is an exception to this general rule, however, which arises where "discrimination against whites is necessary to rectify previous discrimination in their favor committed by the state agency that is seeking to practice remedial discrimination."92 Thus, an essential element required for the implementation of remedial measures is a finding that the particular branch of a governmental defendant did in fact engage in past discriminatory practices. Far from providing such information, some consent decrees contain explicit statements to the contrary, with the governmental unit agreeing to implement affirmative action practices while expressly stating that it is not acknowledging having engaged in any past discrimination.93

Frequently, initial discrimination claims are brought based upon the fact that the percentage of minorities in a given occupation does not mirror the percentage of minorities in the labor force.94 However, such data does not automatically justify remedial discrimination. Even if some re-

90. City of Miami, 2 F.3d at 1507.
92. Billish, 989 F.2d at 893 (emphasis added) (citing Croson, 488 U.S. at 509).
93. E.g., Wygant, 476 U.S. at 278. Through years of litigation and three separate lawsuits, the Board continually denied the existence of prior discriminatory hiring practices. Id. Language contained within the consent decree stated that "[b]y entering into this Consent Decree, the defendants do not thereby admit any violations of law, rule or regulation." Hammon, 752 F. Supp. at 1114.
94. E.g., City of Miami, 2 F.3d at 1499; Stuart v. Roache, 951 F.2d 446, 450 (1st Cir. 1991), cert. denied, 112 S. Ct. 1948 (1992); Davis v. City and County of San Francisco, 890 F.2d 1438, 1446-47 (9th Cir. 1989).
medial measures are warranted, the extent of those policies needs to be ascertained to a reasonable degree of certainty. It is unclear to what degree a certain racial or ethnic group should be represented in a given occupation, and the idea that minority representation should be proportional has been met with criticism from the field of social science.95 "There is no iron law of human behavior that every racial or ethnic group will perform equally well on nonbiased examinations in all fields of human endeavor."96 Thus, disparities in representation may be attributable to factors other than discrimination, including education, geographical distribution of races, and specific areas of occupational specialization.97

Unbiased testing procedures are one method that can be used to eliminate much of the uncertainty as to possible causes for disproportional representation of a given class. One factor in the initiation of many discrimination suits is the employer's use of what are alleged to be discriminatory employment tests.98 The result is often the inclusion in consent decrees of a requirement that new tests be developed and implemented which are validated for race and gender neutrality.99

The development and use of objective criteria in hiring and promotion is perhaps the most positive result of consent decrees. The development of such tests can often be an involved process, as a thorough job analysis must be conducted to ensure that the exam tests only for knowledge and skills that are truly job-related.100 While the task of objectively quantifying the abilities necessary for job performance becomes more difficult with more complex jobs, every attempt to do so should be made when possible. The use of new testing procedures designed to evaluate, hire, and promote based upon merit is likely to result in far less resent-

95. Eastland, supra note 79, at 36.
96. Billish, 989 F.2d at 896 (quoting United States v. City of Chicago, 870 F.2d 1256, 1261 (7th Cir. 1989)).
98. See, e.g., Billish, 989 F.2d at 894 (including in consent decree a requirement that the city develop new promotional tests that were to be validated as race-neutral); United Black Firefighters Ass'n v. City of Akron, 976 F.2d 999, 1003 (6th Cir. 1992) (plaintiffs alleging that promotional test was discriminatory because 89.3% of whites passed, while only 76.3% of blacks passed); Davis, 890 F.2d at 1443 (basing claim of discrimination on significant disparity between the passing rates of black and white applicants).
99. E.g., Billish, 989 F.2d at 894 (involving consent decree which mandated the compilation of a new eligibility list based on a new examination which the city was to develop); United Black Firefighters Ass'n, 976 F.2d at 1004 (involving consent decree that established a procedure for choosing an expert to develop new exercises for future promotional exams).
100. BARBARA LINDEMAN SCHLEIG & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 153-54 (1983).
ment and criticism of consent decrees and affirmative action than most other remedial policies. Indeed, many of those opposed to affirmative action cite the need for a merit-based system. The use of objective, job-related criteria provides the most easily accessible step in that direction. While the use of new exams will not redress all of the harm caused by past discrimination, its prospective effects can be significant. Thus, this method should be implemented to the fullest extent possible in the development and approval of consent decrees.

B. *Exceeding the Scope of the Decree*

Another problem with consent decrees is that, as implemented, they often exceed their scope and the discrimination they purport to remedy.\(^{101}\) This type of overreaching undermines the legitimacy of consent decrees. The judicial process of conducting fairness hearings prior to entering consent decrees is intended to give all those interested in the subject matter of the decree the opportunity to present their views to the court.\(^{102}\)

Subsequent disregard of the terms of the decree by the parties destroys the legitimacy originally provided by having it entered by the court. Although court approval of a consent decree does not necessarily engender widespread acceptance of the terms of that decree, as long as those terms are followed one can at least operate from the premise that the employer is acting properly.

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101. *See, e.g.*, *Billish*, 989 F.2d at 890. The consent decree contained a provision requiring the development and implementation of promotional examinations that were validated for racial neutrality. Rather than waiting for the results of this exam, it appeared that the commissioner appointed, out of rank order, two minorities to the position of lieutenant who had not scored above the cut-off point on the exam. *Id.* at 894. The court noted that such action "would not bespeak the kind of sensitivity to the importance of avoiding racial criteria in making employment decisions, whenever it is possible to do so, that Croson requires." *Id.* In addition, the court noted that because the test scores had been adjusted to improve the results for nonwhites by race-norming, the departures from rank order could not be justified on the ground that the order had been based on a discriminatory test. *Id.* at 895. In *United States v. City of Miami*, 2 F.3d 1497 (11th Cir. 1993), the city and the union had entered into a consent decree with a goal of hiring 56% minorities and women. The city subsequently enacted its own affirmative action program, with a goal of hiring 80% minorities and women, far in excess of the goal contained in the judicially approved consent decree. *Id.* at 1501.

102. A fairness hearing gives third parties and *amici* the opportunity to voice their comments regarding the proposed decree. Kramer, *supra* note 2, at 358. After hearing the objections of third parties, the court may refuse to enter the decree unless the parties revise it to address the concerns raised. *Id.* This of course raises the concern that the greater the changes demanded by the court before approving the decree, the more likely it is that the parties will forego settlement and proceed to trial. *Id.*
Obviously there is no method to ensure that parties will always act within the guidelines of a consent decree, just as there is no way to ensure that parties to an ordinary contract will not breach at a later date. The courts have the authority to impose sanctions when any party to a decree fails to live up to its terms.\textsuperscript{103} This same power should be expanded and utilized to provide for contempt sanctions when a party exceeds the terms of a consent decree. Clearly, sanctions would be inappropriate when remedial policies result in the hiring or promotion of a percentage of minorities marginally higher than that contained as a goal in the consent decree. However, in the cases where an employer has clearly overstepped the bounds of the decree,\textsuperscript{104} sanctions should be imposed with the objective of deterring such misconduct in the future.

**C. Inequitable Allocation of Costs of Settlement**

The greater the potential backpay liability to which an employer is exposed, the greater the likelihood that the employer will be willing to implement preferential hiring and promotional policies in exchange for the plaintiffs' waiver of their backpay claims.\textsuperscript{105} One commentator has observed that "[t]he only way to shift the cost back to the employer is through a judgment, award, or settlement that compensates losses caused by the quota."\textsuperscript{106}

The Supreme Court's decision in Franks v. Bowman Transportation Co., \textit{Inc.}\textsuperscript{107} indicates that a dispreferred employee is not entitled to the promotion that he was denied pursuant to the terms of a consent decree because to do so "might well perpetuate and prolong the effects of the discrimination that the [decree] was designed to eliminate."\textsuperscript{108} The Franks Court did refer to the possibility of compensating employees who are adversely affected by their employer's remedial action with damages.\textsuperscript{109} The Court also stated that courts should attempt to protect innocent employees by placing the burdens of compensation on the wrongdoing employer whenever possible.\textsuperscript{110}

The protection from liability, which acting pursuant to a consent order generally provides, "does not exist where the judicial order was ne-

\textsuperscript{103} Kramer, \textit{supra} note 2, at 325.
\textsuperscript{104} See \textit{supra} note 101 and accompanying text.
\textsuperscript{105} Issacharoff, \textit{supra} note 14, at 243; Laycock, \textit{supra} note 13, at 114.
\textsuperscript{106} Laycock, \textit{supra} note 13, at 115.
\textsuperscript{107} 424 U.S. 747 (1976).
\textsuperscript{109} \textit{Franks}, 424 U.S. at 777.
\textsuperscript{110} Id. at 776-777.
cessitated by the wrongful conduct of the party sought to be held liable.” The court in *McAleer v. American Telephone & Telegraph Co.* held that because it was undisputed that the plaintiff would have been promoted but for the affirmative action plan, he was entitled to summary judgment on the issue of the employer’s liability to him. Noting that “it may well be impossible through a monetary award for economic losses to compensate plaintiff fully,” the court nonetheless held that “since McAleer had no responsibility for [the employer’s] past sex discrimination, it is [the employer] rather than McAleer who should bear the principal burden of rectifying the company’s previous failure to comply with the Civil Rights Act of 1964.”

Hiring issues are generally beyond the scope of a union’s jurisdiction. Because neither the union nor its members would have substantially contributed to the employer’s discriminatory hiring policies, the company should more properly bear the burden of correcting that discrimination. While it is beyond the scope of this Comment to consider the methods for computing the damages suffered by those dispreferred by preferential employment policies, such an undertaking would help immeasurably in more equitably distributing the costs of remedying past discrimination.

IX. Conclusion

The problems associated with consent decrees are as complex and divisive as the issue of affirmative action itself. The Supreme Court has observed that it may be necessary to take race into account in order to remedy the effects of prior discrimination, and that innocent people may be called upon to bear part of the burden of redressing that discrimination. However, another court has also noted that “[w]hile the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome.”

112. *Id.*
113. *Id.* at 440.
114. *Id.*
117. *Id.*
Because of their effectiveness in promoting settlement, it is imperative that adjustments be made in the use of consent decrees to reduce the inequities and conflicts they cause. It must be remembered, however, that "[s]ettlement is not the ultimate end of the legal process; the ultimate end is the just disposition of parties' claims."\textsuperscript{119} Furthermore, "it would be an obvious distortion of the legal process to say that the claims of some parties should be forfeited in order to make it easier for other parties to settle."\textsuperscript{120} It is therefore vital that some protection be afforded to the rights of majority employees and job applicants without unduly obstructing the possibilities for settlement of initial discrimination claims.

As discussed above, one possible method for achieving this goal is to increase the development and use of objective criteria as much as possible. Objective criteria would eliminate the likelihood of discrimination against members of any group. Another step that would increase the effectiveness and acceptance of consent decrees is strictly holding the parties to a decree to its terms. A consent decree should not be interpreted as a court-approved license to discriminate in any manner perceived to be related to the objectives of the decree. Those who blatantly exceed the scope of a consent decree should be subject to sanctions by the court. Finally, in the interests of justice and fairness, the courts should require employers who have actually engaged in the past unlawful discrimination to compensate the dispreferred minorities onto whom they have shifted much of the burden of redressing their own wrongs.

The courts should therefore establish guidelines based upon criteria such as that mentioned above. This would aid parties in developing consent decrees that could both further the goal of settlement and minimize the likelihood that the results would be any more burdensome to the rights of third parties than is absolutely necessary.

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\textsuperscript{119} Kramer, \textit{supra} note 2, at 333.
\textsuperscript{120} \textit{Id.}