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?

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In the last forty years federal courts have played a prominent role in reshaping our public institutions. From school desegregation to prisoners' rights, institutional reform in the shape of court judgments has become commonplace.[1] While some scholars question the efficacy of these structural injunctions, arguing that legislative prerogative should not be usurped by judicially mandated budgetary priorities,[2] the authority of federal courts to order such remedies is generally unquestioned. This authority arises out of the Supremacy Clause of the U.S. Constitution, which requires a state to do what is constitutionally commanded, despite any resulting violation of state law. As the Ninth Circuit Court of Appeals noted, "[t]hat compliance with a decree enforcing federal law will have an ancillary effect on the state treasury is the inevitable and permissible consequence of *Ex parte Young*–type suits."[3]

With this uncontroversial premise in mind, we now turn to an emerging and more controversial offshoot of judicially mandated structural reform—the use of settlement and consent decrees in bringing about such reform. A consent decree is a judicially approved settlement agreement that is based on an agreement between the parties, yet has the force and effect of a final judgment. Because of this dual nature, consent

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1. *See, e.g.*, Lewis v. Casey, 518 U.S. 343 (1996); Missouri v. Jenkins, 515 U.S. 70 (1995); Hutto v. Finney, 437 U.S. 678 (1978); Swann v. Charlotte Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

2. *See* Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J 1265, 1288-89 (1983) (arguing that in issuing structural injunctions, courts often mischaracterized the rights in question as constitutional deficiencies rather than as budgetary deficiencies. For example, a state may not choose to overcrowd prisons, but rather it could choose to spend money on other things which may add to the problem of prison overcrowding).

3. Washington v. Penwell, 700 F.2d 570, 574 (9th Cir. 1983).

decrees have elements of both contracts and judicial orders.[4] As the Supreme Court noted, a consent decree embodies the agreement of the parties and is enforceable as "a judicial decree that is subject to the rules generally applicable to other judgments and decrees."[5] A federal consent decree "must spring from, and serve to resolve, a dispute within the court's subject-matter jurisdiction; must come within the general scope of the case made by the pleadings; and must further the objectives of the law upon which the complaint was based."[6] Nothing controversial yet.

What is controversial, and the subject of this article, is whether state officials can agree to a remedy they would not have had the authority to order themselves; and if so, to what extent must an underlying constitutional violation be proved so as to justify the remedy. To understand the issue, let us look at an example. We'll begin with the imaginary U.S. state of Transylvania, and its attorney general, Count Dracula. Transylvanians, it turns out, are proponents of small government, and many years ago they enacted an amendment to their state constitution requiring that all spending increases in the state budget be approved by two-thirds of the Transylvania state assembly. Because of this spending cap, Transylvania has always had only one prison. As the years went on, the prison grew more and more crowded, until one day a group of prisoners brought suit in federal court alleging that the overcrowding was so bad that it resulted in a violation of their federal constitutionally guaranteed right to be free from cruel and unusual punishment. After a long and bitter legal battle, with both sides incurring hundreds of thousands of dollars in legal fees, the federal court agreed with the prisoners' allegations and ordered the state of Transylvania to build a new prison to resolve the overcrowding at a cost of twenty million dollars. Moreover, the court ordered the state of Transylvania to pay the plaintiffs' hundreds of thousands of dollars in legal fees, a not uncommon remedy in such suits.[7] Let us assume that the remedy was necessary to cure the overcrowding and that it met all the requirements of a federal injunction. Clearly then, the fact that the judgment would cause the state to spend its funds to build the new prison cannot void the federal judgment. Because of the Supremacy Clause of the U.S. Constitution, we know that a state law cannot prevent a federal court-ordered remedy that is necessary to cure a constitutional violation.[8]

Let us take this same example, except this time, Count Dracula, relying on his years of experience, realized that there was a good chance the state was going to lose the lawsuit. Therefore, Count Dracula, in his

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4. Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986).

5. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378 (1992).

6. Frew v. Hawkins, 540 U.S. 431, 437 (2004) (citing *Firefighters*, 478 U.S. at 525).

7. Under 42 U.S.C. § 1988, the court may order the defendant to pay the legal fees for a § 1983 plaintiff.

8. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954).

official capacity as the attorney general of Transylvania, began settlement negotiations with the prisoners instead of fighting the intense legal battle in the federal courts and risking an adverse judgment. After negotiations, the prisoners and Count Dracula entered into a settlement agreement stating that the state would build a new facility at a cost of ten million dollars that the prisoners agreed would alleviate the alleged constitutional violations. The parties submitted their agreement to the federal court, which approved the settlement as fair and entered it as a judgment. Furious at the spending increase that directly violated the Transylvania state constitution, Mr. and Mrs. Vampire sued the state in their capacity as taxpayers, arguing that Count Dracula did not have the authority to enter into such an agreement. They argued that only the state legislature, by a two-thirds vote, could increase state spending on prisons and that Count Dracula had no authority to circumvent the normal procedures. Moreover, their argument went, even if a federal court could order such a remedy upon a finding of a constitutional violation, there was no such finding in this case because the lawsuit settled prior to a finding on the underlying constitutional violation.

The result here is far from clear. Undeniably, without the pending lawsuit, Count Dracula could not have entered into a private contract with a group of prisoners to build a new prison in violation of the state's spending laws. The power to increase spending to build a new prison would have belonged to the state legislature alone. But a consent decree is more than a private contract, and federal courts are more than recorders of contracts, so surely the federal court stamp of approval must produce some additional rights.

Three views emerge from the reasoning underlying the cases regarding the authority of state actors to consent to settlements that result in structural reform consent decrees. First is the view that a state (or state actor) never has the authority to agree to a settlement that they would not have the power to bring about on their own. This view relies heavily on contract analysis and the notion that a contract is valid if and only if both parties had the authority to assent.[9] For example, a contract to pay a sum of money to take public office is not a valid contract because neither party has the power to put another in public office—that right belongs to the voters and the voters only. In much the same way, Count Dracula's contract to build a prison by spending ten million dollars would be invalid because the right to spend state funds does not belong to the Count but instead rests with a two-thirds majority of the state assembly. As the Seventh Circuit Court of Appeals has noted, "[w]hen the parties to a decree seek to *enlarge* their legal entitlements—to grant themselves rights and powers that they could not achieve outside

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9. *See, e.g.*, People Who Care v. Rockford Bd. of Educ., 961 F.2d 1335, 1338 (7th Cir. 1992).

of court—their agreement is not enough."[10] As it relates to public law remedies, another Seventh Circuit panel recently observed that although possibly inefficient, "'some rules of law are designed to limit the authority of public officeholders, to make them return to other branches of government or to the voters for permission to engage in certain acts. They may chafe at these restraints and seek to evade them,' but they may not do so by agreeing to do something state law forbids."[11]

A second view, based on the general policy of encouraging settlements, is that such an agreement is valid so long as the court had jurisdiction to order the relief and each party consented. The main importance of this view is that a court is not required to look into the merits of the claim upon which the consent decree is based. A district court in New Jersey recently upheld a consent decree as valid, while at the same time noting that, "[j]ursidiction existed if plaintiff's federal claims were colorable, and if the relief was fairly designed to cure the constitutional violations."[12] The Seventh Circuit Court of Appeals also echoed this sentiment, holding that "[t]he trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable, and appropriate under the particular facts and that there has been valid consent by the concerned parties."[13] First, settlements "contribute greatly to the efficient utilization of scarce . . . judicial resources."[14] Second, the policy of encouraging settlements is especially persuasive in structural reform cases where often "voluntary compliance by the parties over an extended period will contribute significantly toward ultimate achievement of statutory goals."[15] This view also focuses on the broad authority of the state attorney general, who, as the chief legal counsel of the state, possesses the power to direct the legal affairs of the state as the public interest requires.[16] Absent any state provision limiting the attorney general's authority, the power to settle must be one of the legal tools available to him. Moreover, a consent decree has no force until it is officially approved by the court and entered as a judgment. This process of court approval, which includes a hearing to determine the fairness of the proposed consent decree, provides an ample check on potential bad faith attempts to circumvent state law.

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10. *Id.* at 1337.

11. Perkins v. City of Chicago Heights, 47 F.3d 212, 216 (7th Cir. 1995) (quoting Dunn v. Carey, 808 F.2d 555, 560 (7th Cir. 1986)).

12. Mesalic v. Slayton, 689 F. Supp. 416, 420 (D. N.J. 1988).

13. Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 616 F.2d 1006, 1014 (7th Cir. 1980).

14. *Id.* at 1014 n.10 (citing Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977)).

15. *Id.* at 1014 (upholding a consent decree due in part to the fact that the objectives of the Fair Housing Act seemed better served and more easily met by voluntary compliance).

16. Lawyer v. Dep't of Justice, 521 U.S. 567, 577 n.4 (1997).

In between the first two views is a third view that allows a federal court to approve a consent decree that violates state law only upon properly supported findings that such a remedy is necessary to rectify a violation of federal law.[17] Under this view, a remedy that would violate state law "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."[18] Depending on how one defines "properly supported findings of a violation," this view begins to look much like either of the previous two views. If a properly supported finding means a formal federal court determination on the merits of the underlying violation, then this view looks very much like View I, where a state attorney general has no power to settle and instead must litigate all lawsuits aimed at obtaining a structural reform remedy. It makes little sense to argue that View I is wrong and that a state attorney general has the power to settle in a structural reform case, and yet suggest that the attorney general can only settle after having lost the lawsuit he couldn't settle until he had lost. On the other hand, if a properly supported finding consists of nothing more than a statement in the proposed decree that says something to the effect of "both parties agree there is a reasonable factual and legal basis to support plaintiff's allegations,"[19] then it is hard to see how this view differs from View II, which would give the state attorney general broad powers to settle lawsuits in the interest of the state so long as the underlying claim is not completely bogus.

It is my goal to demonstrate that View III is correct, and further, to suggest a workable standard for determining what constitutes a sufficient finding of a violation for consent decree purposes. Let us begin by analyzing the problems with View I, which, although appealing for its logical simplicity, cannot stand. Yet despite being explicitly rejected by the Supreme Court in 1997,[20] it continues to find support in the lower courts to this day.[21] In fact, the Ninth Circuit recently relied on the logic of View I to vacate a consent decree between Southern California Edison and the Commissioners of the California Public Utilities Commission that appeared to violate California state law.[22] As if almost quoting from

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17. *See* Perkins v. City of Chicago Heights, 47 F.3d 212, 216 (7th Cir. 1995).

18. *Id.* (emphasis added) (quoting Kasper v. Bd. of Election Comm'rs, 814 F.2d 332, 342 (7th Cir. 1987)).

19. *Lawyer*, 521 U.S. at 574. In *Lawyer*, the Supreme Court noted that the proposed settlement agreement included the statement that while defendants denied liability, all parties to the settlement concluded that "there is a reasonable factual and legal basis for plaintiffs' claim." *Id.* at 572. It is unclear how much weight the court gave to this statement, but the court did seem to take it into account when deciding if there was enough of a finding to support upholding the decree despite there being no formal finding of a constitutional violation.

20. *Id.* at 578.

21. *See* Southern Cal. Edison Co. v. Lynch, 307 F.3d 794, 812 (9th Cir. 2002).

22. *Id.* The Ninth Circuit did not actually void the settlement agreement, but rather held that the agreement appeared to violate state law and that if it did, the agreement would be void. The court then certified the question of whether the agreement actually violated state law to the Supreme Court of California.

View I, the Ninth Circuit noted that "as a matter of federal law, state officials cannot enter into a federally-sanctioned consent decree beyond their authority under state law."[23] To support this proposition, the court cited two previous Ninth Circuit cases as follows:

> *See Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997) (consent decree could not be interpreted to supplant California Outdoor Advertising Act because state agency would not have had authority to agree to such a decree); *Wash. v. Penwell*, 700 F.2d 570, 573 (9th Cir. 1983) (vacating a consent decree that required the state of Oregon to fund a prisoners' legal services program because the state Attorney General acted beyond his authority and therefore "the consent decree was void to the extent that it exceeded defendants' authority").[24]

However, neither case stands for these propositions. In *Keith v. Volpe*, the Ninth Circuit vacated a consent decree between an environmental group and the California Department of Transportation (Caltrans) that prohibited advertising displays along a state freeway because it conflicted with a state law regulating outdoor advertising.[25] However, the court did not void the consent decree because Caltrans lacked the authority to agree to such a decree, but rather because there was no violation of federal law to justify superseding state law. The court specifically noted that "[u]nder the Constitution, the district court could not supersede California's law unless it conflicts with any federal law," and the court approving the consent decree, "failed to identify a single federal law that would justify its overriding state law."[26] Looking closely at the holding of *Keith*, we can see that it does not support View I. *Keith* says nothing regarding the authority of state agencies to enter into a consent decree based on an alleged violation of federal law. Rather, *Keith* stands for the proposition that when a consent decree violates or supersedes state law, there must be a federal law justifying the intrusion. If that holding sounds familiar, it should, because it borrows directly from the logic of View III. View III, argued that such a consent decree must be based upon properly supported findings necessary to rectify a violation of federal law. *Keith* does not discuss what findings would be necessary to uphold the decree, noting only that in this case there were no such findings because there was no violation of federal law.

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23. *Id.*
24. *Id* at 809.
25. 118 F.3d 1386, 1392-93 (9th Cir. 1997).
26. *Keith*, 118 F.3d at 1393.

Washington v. Penwell is probably the case cited most often as supporting View I; yet this is far from the actual holding. In *Penwell*, a group of indigent Oregon prisoners sued state officials alleging that inadequate legal facilities denied their constitutional right of access to the courts.[27] The district court entered a consent decree requiring accessible prison law libraries and trained prisoner paralegals. A second consent decree clarified these programs and included certain funding requirements. A few years later, the state of Oregon sought to escape its obligations under the consent decree and therefore sued to have the decree vacated. The district court vacated the consent decree, holding that "defendants and their counsel, the Oregon Attorney General, lacked power to bind the state to this financial undertaking," because the "perpetual obligation to fund legal services violates state law."[28] Specifically, the decree violated Oregon's Constitution, which prohibits the state from incurring more than $50,000 in debt.[29] Moreover, "[e]xecutive officials such as defendants are forbidden to exercise legislative functions, including the making of appropriations, which are vested in the state assembly."[30]

While the Ninth Circuit affirmed the district court, it implicitly rejected much of the district court's reasoning. The Ninth Circuit vacated the consent decree because "defendants agreed to do more than constitutionally required."[31] The court noted that the "district court could not have entered an involuntary decree requiring state officials to do more than the minimum needed to conform with federal law."[32] Assuming the court is correct in stating that a federal court only has the power to require state officials to do the minimum necessary to conform with federal law,[33] it follows that the same state officials could not agree to do more through a consent decree. With this in mind, all *Penwell* holds is that state officials can't consent to an agreement that would do more to remedy the violation than the federal court could have ordered on its own. By focusing on the remedy the court could have ordered, *Penwell* implicitly recognizes the right of state officials to enter into a consent decree so long as such a remedy could have been ordered by the court. In fact, the court noted that "[i]f general legal services for prisoners were required by the Constitution, we might be able to enforce this provision, notwithstanding the state's protest. It would be a method

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27. Washington v. Penwell, 700 F.2d 570, 571 (9th Cir. 1983).

28. *Id.* at 573.

29. *Id.* (citing OR. CONST., art. XI, § 7).

30. *Id.* (citing OR. CONST., art. III, § 1; art. IV, § 1(1)).

31. *Id.* at 574.

32. *Penwell*, 700 F.2d at 574 (citing Spain v. Procunier, 600 F.2d 189, 194 (9th Cir. 1979) for the proposition that "[a]n equitable decree should not go further than necessary to eliminate the particular constitutional violation which prompted the judicial intervention in the first instance").

33. This assumption will be discussed in greater detail later in this paper. I will show that this assumption is unsound, but for the time being we should take this assumption as true because it is on this point that the court hung its argument.

of meeting constitutional standards, and one formulated by the officials charged with penal supervision."[34] Much as was the situation in *Keith*, the logic of *Penwell* sounds much like View III, which would uphold such a consent decree that violated state law only upon properly supported findings that such a decree is necessary to rectify a violation of federal law. In *Penwell*, the court vacated the decree because the remedy it produced was not necessary to rectify a violation of federal law, not because the state attorney general exceeded his authority by agreeing to a consent decree that violated the Oregon state constitution.[35]

In 1997, in *Lawyer v. Department of Justice,* the Supreme Court of the United States, in a 5-4 decision, upheld a consent decree that redrew Florida's legislative districts based on a lawsuit challenging the original districts as unconstitutional.[36] While we will discuss this case in greater detail when we discuss the sort of finding of a violation of federal law that justifies a consent decree violating state law, at this point it is worth noting that the court upheld the consent decree despite the fact it likely violated the Florida state constitution and despite the fact that the parties could not have agreed to the settlement outside of litigation.[37] Moreover, Justice Souter, writing for the majority, clearly rejected View I, noting that, "there is no reason to suppose that the State's attorney general lacked authority to propose a plan as an incident of his authority to represent the state in this litigation."[38]

Much like View I, View II is similarly incorrect. While it is true that a state law cannot prevent a remedy necessary to cure a federal constitutional or statutory violation, this does not mean that a state can always disregard a valid state law through a consent decree. The power to supersede valid state law arises from the Supremacy Clause, meaning that, "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."[39] While we will discuss whether a formal "violation" of federal law must be shown shortly, at this point it is clear that the power to disregard state law springs from this notion of a federal

34. *Penwell,* 700 F.2d at 574.

35. In *Duran v. Carruthers*, 678 F. Supp. 839, 852 n.23 (D. N.M. 1988), the court did not interpret *Washington v. Penwell* as holding the consent decree void because it did more than required to alleviate violations of federal law. Instead, the New Mexico District Court distinguished *Penwell,* saying "the *Penwell* holding must be stated as follows: Where a provision in a federal court order explicitly runs directly against the state treasury, and cannot be construed as a provision enforcing federal law which will have an ancillary effect on the state treasury (thereby bringing the injunction within the scope approved by *Edelman*), the provision is unenforceable." *Id.* While I find this reading of *Penwell* unpersuasive, such a possible distinction may prove useful for litigants who may be hesitant to argue that *Penwell* was decided incorrectly.

36. 521 U.S. 567 (1997).

37. *Id.* at 585 (Scalia, J., dissenting).

38. *Id.* at 577.

39. Perkins v. City of Chicago Heights, 47 F.3d 212, 216 (7th Cir. 1995) (emphasis added) (quoting Kasper v. Bd. Of Election Comm'rs, 814 F.2d 332, 342 (7th Cir. 1987).

violation. Without this power arising from the Supremacy Clause, a state actor is powerless to ignore binding state law.[40]

There are two cases which could be seen as supporting View II: *Metropolitan Housing Development Corporation v. Village of Arlington Heights*[41] and *Lawyer v. Department of Justice.*[42] Both of these cases uphold consent decrees that violated state law without a formal finding of a constitutional violation. However, the cases are more appropriately read as supporting View III, because although neither case contained a formal finding of a constitutional violation, both courts found at least a substantial evidentiary and legal basis for the plaintiffs' claims.

In *Village of Arlington Heights*, the Metropolitan Housing Development Corporation sued the Village of Arlington Heights arguing that its failure to rezone fifteen acres for multi-family use was racially discriminatory in violation of the Equal Protection Clause of the Constitution and the Fair Housing Act. After the trial, the district court held for the defendant-village.[43] The Seventh Circuit reversed, holding that the "ultimate effect" of the refusal to rezone was discriminatory and violated the Fourteenth Amendment of the Constitution.[44] The U.S. Supreme Court reversed the Seventh Circuit, holding that discriminatory intent must be shown to establish a Fourteenth Amendment violation and that no such intent could be inferred from the record.[45] The case was remanded to the Seventh Circuit to determine whether there was a violation of the Fair Housing Act.[46] On remand, the Seventh Circuit held that under the Fair Housing Act, the defendant-village had an obligation to refrain from exclusionary zoning and remanded the case to the district court with directions to require the village to identify a parcel of land within its boundaries that was properly zoned and suitable for low-income housing or be found in violation of the Fair Housing Act.[47] Shortly thereafter, the parties agreed to a settlement and provided the district court with a consent decree that indisputably circumvented normal statutory procedures in connection with the annexation of land. The district court allowed three different groups to intervene and after three days of hearings, approved the consent decree and entered it as judgment. The intervenors appealed, but the Seventh Circuit upheld the decree; and the Supreme Court refused to hear the matter.[48]

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40. U.S. CONST. art. VI, cl. 2.
41. Metro. Hous. Dev. Corp., v. Vill. of Arlington Heights, 616 F.2d 1006 (7th Cir. 1980).
42. *Lawyer*, 521 U.S. 567.
43. Metro. Hous. Dev. Corp., v. Vill. of Arlington Heights, 373 F. Supp. 208 (N.D. Ill. 1974).
44. Metro. Hous. Dev. Corp., v. Vill. of Arlington Heights, 517 F.2d 409, 413-15 (7th Cir. 1975).
45. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 (1977).
46. Metro. Hous. Dev. Corp., v. Vill. of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977).
47. *Id.* at 1285, 1295.
48. Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 616 F.2d 1006 (7th Cir. 1980), *cert. denied*, 434 U.S. 1025 (1978).

While the Seventh Circuit used broad language in upholding the decree, that language must be read in the context of the five-year litigation history of this lawsuit. On the one hand, the court stated that "[t]he trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy."[49] On the other hand, the court noted that the "trial judge fulfilled his responsibilities in determining that the settlement embodied in the consent decree was fair, adequate, reasonable and appropriate, and his opinion shows how carefully he analyzed the facts of the case in relation to the relevant principles of applicable law."[50] While there was no "formal" finding of a constitutional violation, the Seventh Circuit, on remand from the Supreme Court, held that the defendant-village "has a standing obligation under the Fair Housing Act to refrain from perpetuation of zoning policies that effectively foreclose construction of low-cost housing."[51] The court further instructed the district court that if the village could not identify a parcel of land within its boundaries which was both properly zoned and suitable for low cost housing, "the district court should conclude that the Village's refusal to rezone effectively precluded plaintiffs from constructing low-cost housing within Arlington Heights, and should grant plaintiffs the relief they seek."[52] While this may not constitute a "formal" finding of a federal statutory violation, it clearly is a *prima facie* finding of a violation as it serves to shift the burden to the defendants to prove that no violation of the Fair Housing Act had occurred.

In much the same way, the Supreme Court's decision in *Lawyer* is also better read as supporting View III rather than View II. In *Lawyer*, plaintiffs filed suit in federal district court against the state of Florida challenging the configuration of a Florida legislative district under the Equal Protection Clause.[53] After a failed mediation attempt, the parties (with the exception of one of the plaintiffs) filed a proposed settlement agreement with the district court that addressed the alleged unconstitutionality by redrawing the legislative districts. "The agreement noted that while the defendants and defendant-intervenors denied the plaintiffs' claims that District 21 was unconstitutional, all parties to the settlement concurred that there is a reasonable factual and legal basis for the plaintiffs' claim."[54]

After a fairness hearing, the district court entered the consent decree despite the fact that the remedy potentially violated the Florida Constitution, which seems to provide exclusive means through which

49. *Id.* at 1014.
50. *Id.* at 1015.
51. *Id.* at 1008.
52. *Id.*
53. *Lawyer*, 521 U.S. 567, 569.
54. *Id.*. at 572.

redistricting can take place.[55] The district court held that it was not obligated to find the existing District 21 unconstitutional in order to approve the consent decree. "While recognizing the need to 'guard against any disingenuous adventures' by litigants, the majority noted that a State should not be deprived of the opportunity to avoid 'an expensive and protracted contest and the possibility of an adverse and disruptive adjudication' by a rule insisting on 'a public *mea culpa'* as the sole condition for dispensing with 'a dispositive, specific determination of the controlling constitutional issue.'"[56] Before approving the settlement, the district court "required a showing of a substantial 'evidentiary and legal' basis for the plaintiffs' claim . . . and it held the standard satisfied."[57] Additionally, "[e]ach party either states unequivocally that existing District 21 is unconstitutionally configured, or concedes, for purposes of settlement, that the plaintiffs have established *prima facie* unconstitutionality."[58] One judge concurred, arguing that the consent decree could not be approved without a judicial determination that the original plan was unconstitutional, as he concluded it was.

The Supreme Court, in a 5-4 decision, affirmed the district court and explicitly rejected the appellants' argument that the district court erred in approving the consent decree without formally holding the original plan unconstitutional.[59] The Court noted that the State of Florida, through its attorney general, elected to enter into the settlement and that there were no reasons "to burden [the state's] exercise of choice by requiring a formal adjudication of unconstitutionality."[60] In a scathing dissent, Justice Scalia, joined by Justices O'Connor, Kennedy, and Thomas, wrote that "the District Court lacked the authority to mandate redistricting without first having found a constitutional violation."[61]

Rather than supporting View II, where the court upholds consent decrees without requiring a formal finding of a federal statutory or constitutional violation, both *Village of Arlington Heights* and *Lawyer* are more appropriately read as supporting View III because both cases

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55. In *Lawyer*, 521 U.S. at 578 n.4, the Supreme Court argued that allowing the state attorney general to redraw the legislative districts in response to this lawsuit might not have expressly violated the Florida State Constitution. Instead, the majority focused on the broad power of the attorney general to represent the state in litigation. The court cited *Ervin v. Collins*, 85 So. 2d 852, 854 (Fla. 1956), for the proposition that "under Florida law, the Attorney General as the chief law officer of the state and absent express legislative restriction to the contrary, may exercise his power and authority in the premises [the power to litigate] as the public interest may require." (internal quotations omitted). The dissent argued that Article III, § 16 of the Florida Constitution provides the exclusive means by which redistricting can take place. *Lawyer*, 521 U.S. at 585-86.

56. *Lawyer*, 521 U.S. at 574 (citing Scott v. Dep't. of Justice, 920 F. Supp. 1248, 1252 & n.2 (M.D. Fla.1996)).

57. *Id.* (quoting *Scott*, 920 F. Supp. at 1252).

58. *Id.* (quoting *Scott*, 920 F. Supp. at 1253, n.3).

59. *Id.* at 575-78.

60. *Id.* at 578.

61. *Lawyer*, 521 U.S. at 589 (Scalia, J.dissenting).

contain substantial findings of federal violations. The power to disregard state law springs from these findings of a federal violation. Both the majority and the dissent in *Lawyer* seem to advocate for View III; the only difference is that the dissenting Justices would narrowly define the necessary predicate violation to include only a formal finding of a federal violation.

If, as I have argued, View I (state actor can never enter into a consent decree that orders a remedy the state actor could not have brought about on his or her own) is incorrect, and View II (state actor has extremely broad powers to settle regardless of any federal statutory or constitutional violation) is likewise faulty, the correct view must lie somewhere in between. In other words, the power of a federal court to enter a consent decree must be dependent on some variable not considered in Views I and II. View III takes this middle road, making the power of a federal court to enter a consent decree that violates state law dependent upon a finding that the remedy decreed is necessary to rectify a violation of federal law. "[A]n 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."[62]

While the logic of View III is quite sound, it is of little practical assistance until we define the "finding" of a "violation" of federal law necessary to allow a federal court-ordered consent decree to trump state law. We know from the Supreme Court's decision in *Lawyer* and the Seventh Circuit's decision in *Arlington Heights* that a formal finding of a constitutional or statutory violation is not necessary to uphold the entry of a consent decree which supersedes state law; however, we also know that some finding of a violation is necessary because only from this notion of a federal violation does the Supremacy Clause allow the parties to disregard valid state laws.

In *People Who Care v. Rockford Board of Education* and *Perkins v. City of Chicago Heights*, the Seventh Circuit utilized the logic of View III to vacate two separate consent decrees because they lacked the necessary predicate finding of a constitutional violation.[63] In *Rockford,* a group of minority students sued the school board for intentional racial discrimination. The parties settled, and the district court approved a consent decree that, among other things, overrode much of the collective bargaining agreement between the school board and the teachers union. The teachers union intervened and the district court held what it called a "necessity hearing" to consider the union's objections. The district judge took evidence and concluded that "a sufficient factual predicate exists to support the [School] District's decision to enter into the consent

62. Perkins v. City of Chicago Heights, 47 F.3d 212, 216 (7th Cir. 1995) (emphasis added) (citing Kasper v. Bd. of Election Comm'rs , 814 F.2d 332, 342 (7th Cir. 1987)).

63. People Who Care v. Rockford Bd. of Educ., 961 F.2d 1335 (7th Cir. 1992); *Perkins*, 47 F.3d 212.

decree."[64] The district judge "found the decree necessary to curtail racial imbalance (and the alteration of seniority necessary to carry out the decree) but not that racial imbalance violates any rule of law."[65] In fact, as the Seventh Circuit noted, it is clear that "racial imbalance does not offend any federal norm."[66]

The Seventh Circuit vacated the consent decree, holding that a remedy "is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation."[67] Judge Easterbrook, writing for an unanimous panel, began his analysis by noting that "[r]emedies for violations of the Constitution may include altering statutory or contractual rules for assigning teachers to schools."[68] The question then became whether proof of a violation is "essential to the adoption of a remedy that affects third parties?".[69] In pure dicta, Judge Easterbrook discussed the practical implications of this question:

> Suppose that the violation were obvious—that Rockford had laws requiring segregation, or that its Board routinely drew school boundaries grouping pupils by race. Would it be necessary to adjudicate the obvious before adopting (or permitting the parties to agree on) a remedy that altered the assignment of teachers? It is not wholly satisfactory to say that if the violation is clear, the litigation will be swift and cheap; legal processes create opportunities for reluctant parties to postpone the day of reckoning. "Consent" that is no more than knuckling under to the inevitable is more like adjudication than a contract. . . . A "necessity" hearing then would be a cousin to a hearing leading to a preliminary injunction. The court would examine the evidence quickly, and if it found that victory for the plaintiffs was probable could approve a settlement reflecting the probable outcome of a contest. If a court may order preliminary relief without fully adjudicating the merits, may it not sometimes order relief on a combination of the parties' assent plus a review of the merits?[70]

The court did not answer these questions, however, holding that regardless of what sort of findings would be sufficient, in the present case "the district judge made no such finding."[71] Therefore, the court

64. *Rockford*, 961 F.2d at 1337 (internal quotations omitted).
65. *Id.* at 1338.
66. *Id.*(citing Freeman v. Pitts, 503 U.S. 467 (1992)).
67. *Id.*
68. *Id.*
69. *Rockford*, 961 F.2d at 1338.
70. *Rockford*, 961 F.2d at 1338 (citations omitted).
71. *Id.*

vacated the consent decree, holding that "before altering the contractual (or state-law) entitlements of third parties, the court must find the change necessary to an appropriate remedy for a legal wrong."[72] The court went on to note that "[e]ven if this finding may come on abbreviated proceedings (a subject we have not decided), there must be such a finding."[73]

Two years later, in *Perkins v. City of Chicago Heights*, the Seventh Circuit, and specifically Judge Easterbrook, had an opportunity to address the possible sufficiency of abbreviated findings discussed as dicta in *Rockford*. Instead, Judge Flaum, writing for a unanimous panel that included Judge Easterbrook, vacated the decree, holding only that the district judge's "generalized statements do not constitute sufficient findings of a violation of federal law and cannot adequately form the basis for the modifications of the Illinois statutory forms of government."[74] In *Perkins*, plaintiffs in a class action lawsuit alleged that Chicago Heights's at-large elections used to elect representatives to the Chicago Heights City Council violated Section 2 of the Voting Rights Act of 1965 by diluting the opportunity of African-American voters to elect representatives of their choice.[75] All parties moved for summary judgment, and while the district judge entered summary judgment for the class on certain issues, the court did not enter a finding of liability against the defendants, instead finding that genuine issues of material fact still existed precluding any finding of liability. The parties then agreed to a consent decree that included a new voting map that redrew the districts and changed the city's form of government from a managerial form of municipal government to a strong mayor form of municipal government.[76] The district judge approved the parties' consent agreement and entered findings of fact, conclusions of law, and a judgment order.

Two of the named plaintiffs objected to the settlement and moved to have the consent decree declared invalid. The district court dismissed the plaintiffs' claims, but on appeal, the Seventh Circuit vacated the consent decree because "the parties did not have the ability to consent to the modifications contained in the consent decree."[77] Consistent with View III, the court noted that "[o]nce a court has found a federal constitutional or statutory violation . . . a state law cannot prevent a necessary remedy. . . . 'To hold otherwise would fail to take account of the obligations of local governments, under the Supremacy Clause, to fulfill the requirements that the Constitution imposes on them.'"[78]

72. *Id.* at 1339.
73. *Id.*
74. *Perkins*, 47 F.3d at 217.
75. *Id.* at 214.
76. *Id.* at 215.
77. *Id.* at 216.
78. *Id.* (quoting Missouri v. Jenkins, 495 U.S. 33, 57-58 (1990)).

However, in the present case, the court held that there were no findings of a violation to justify overriding the Illinois Constitution, which contained exclusive provisions for changing a city's form of government.[79] Interestingly, Judge Easterbrook, who joined the unanimous majority, did not use this case to discuss upholding a consent decree based on abbreviated findings. Instead, the court held that there was not a sufficient finding of a violation, despite the fact that the district court found that the consent decree was "supported by a significant basis in evidence and law, and . . . narrowly tailored to achieve the necessary remedy."[80]

As a practical matter, litigants wary of future attacks on their consent decree should attempt to show *prima facie* unconstitutionality, or at least a substantial legal and evidentiary basis for the plaintiffs' claims, coupled with a concession by all parties of *prima facie* unconstitutionality. On the one hand, we have *Village of Arlington Heights*, which upheld a consent decree based upon a finding of a *prima facie* violation, and *Lawyer*, which upheld a consent decree after a showing of a "substantial evidentiary and legal basis" for plaintiffs' claims and a conceded *prima facie* unconstitutionality by the defendants. On the other hand, we have *Rockford*, where the court vacated the consent decree because there was no finding whatsoever of a violation, and *Perkins*, where the consent decree was vacated because the district court's findings were considered too generalized and therefore insufficient.[81] While uncertainty and lack of notice will likely cause structural reform cases to be over-litigated because the parties will be hesitant to risk having their settlement invalidated, litigants considering entering into a proposed consent decree should avoid the pitfalls of *Rockford* and *Perkins* and instead attempt to replicate findings such as those contained in *Lawyer*.

As a policy matter, the courts should adopt a formal procedure for approving a consent decree that trumps state law, which clearly defines the requisite "finding" of a federal violation. Judge Easterbrook, although disappointingly silent in *Perkins*, had it right when he suggested in *Rockford* that the trial court should "examine the evidence quickly, and if it found that victory for the plaintiffs was probable could approve a settlement reflecting the probable outcome of a contest."[82] This is consistent both with the logic of View III and with the Supreme Court's decision in *Lawyer*, where the district court's finding of a "substantial 'evidentiary and legal' basis for the plaintiffs' claim," was considered

79. *Perkins*, 47 F.3d at 216-17 (citing ILL. CONST. art. VII, § 6(f)) (stating that such modifications must be accomplished through referendum)).

80. *Id.* at 217.

81. The value of *Perkins* is likely limited to the extent its holding is inconsistent with *Lawyer*, where the Supreme Court upheld a consent decree based on the district court's finding of a "substantial 'evidentiary and legal' basis for the plaintiffs' claim." *Lawyer*, 521 U.S. at 574.

82. *Rockford*, 961 F.2d at 1338.

sufficient.[83] A formal adoption of Judge Easterbrook's preliminary injunction standard for approving a consent decree would greatly serve the public interest by reducing the uncertainty surrounding structural reform litigation. A reduction in uncertainty would serve to minimize the waste of valuable resources by reducing the number of over-litigated cases and, most importantly, would provide all parties and potential parties with notice of the threshold requirements for obtaining a structural consent decree.

A related issue facing litigants and courts is the sort of remedies that may be mandated through a consent decree. While a detailed examination of available remedies is beyond the scope of this article, a few notes here may provide some guidance. First, in formulating remedies to a consent decree, the parties must enjoy at least as broad discretion as the district court would have following trial. This discretion in formulating remedies includes the expansive remedial power of the federal courts to effectively cure constitutional violations and restore victims to their positions before the violations.[84]

The difficult question is whether the parties may agree to a remedy that the district court could not have ordered following an adjudication on the merits. In *Local Number 93, International Association of Firefighters v. City of Cleveland*, the Supreme Court answered with a resounding yes, noting that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial."[85] In *Firefighters*, the district court was clearly prohibited by § 706(g) of Title VII of the Civil Rights Act of 1964 from entering an "order" which mandated a race-conscious remedy, yet a race-conscious remedy is exactly what the parties agreed to and exactly what the district court entered in the consent decree.[86] Although the district court entered a consent decree that contained a remedy the court could not have ordered, the Supreme Court upheld the consent decree holding that consent decrees are not included among the "orders" referred to in § 706(g) because "the voluntary nature of a consent decree is its most fundamental characteristic."[87]

The Supreme Court echoed this sentiment in *Rufo v. Inmates of Suffolk County Jail*, noting, "we have no doubt that, to 'save themselves the time, expense, and inevitable risk of litigation,' petitioners could settle the dispute over the proper remedy for the constitutional violations that had been found by undertaking to do more than the Constitution itself requires (almost any affirmative decree beyond a directive to obey

83. *Lawyer*, 521 U.S. at 574.

84. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). *See also* Lewis v. Casey, 518 U.S. 343 (1996).

85. 478 U.S. 501, 525 (1996).

86. *Id.* at 511-12.

87. *Id.* at 521-22.

the Constitution necessarily does that), but also more than what a court would have ordered absent the settlement."[88]

Notwithstanding this broad power to approve consent decrees, federal courts should be wary of consent decrees that mandate a remedy the court itself could not have ordered. First, courts should be hesitant to infringe on state autonomy and should be loath to override otherwise valid state laws, except to the extent absolutely necessary to vindicate federal rights.[89] Second, the need to guard against disingenuous litigation is seemingly more acute where the defendants agree to do more than constitutionally mandated.

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88. 502 U.S. 367, 389 (1992) (quoting United States v. Armour & Co., 402 U.S. 673, 681 (1971)). In *Rufo*, the Supreme Court held that the "'grievous wrong' standard does not apply to requests to modify consent decrees stemming from institutional reform litigation." *Id.* at 393. The Court also noted that "[a] proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor." *Id.* at 391.

89. Some argue that comity is irrelevant (or waived) when the state itself has a hand in crafting the remedy. *See* Duran v. Carruthers, 678 F. Supp. 839, 852 (D. N.M. 1988) (stating that "[i]t would be a bizarre perversion of the principle of comity to suggest that a federal court is required, in order to preserve state autonomy, to override the decisions of state officials and substitute its own judgments").