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EPA Settlements of Administrative Litigation

Bob Rosin*

Observers have criticized federal administrative decisionmaking as unwieldy,¹ prone to delay,² and costly.³ Recent proposals for relieving these problems include greater procedural informality,⁴ decreased judicial scrutiny of agency decisions,⁵ negotiation as an alternative to current rulemaking practices,⁶ and deregulation.⁷ This Comment explores the use of settlements of administrative litigation as an additional means for easing these difficulties.

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2. For example, in 1981 the Environmental Protection Agency was more than fifteen months behind schedule in promulgating standards for maximum contamination levels of certain toxic chemicals. Environmental Protection Agency: Private Meetings and Water Protection Programs: Hearings before the Subcomm. on the Environment, Energy, and Natural Resources of the House Comm. on Government Operations, 97th Cong., 1st Sess. 434 (1981) (statement of Rep. Toby Moffett). The FDA peanut butter hearings provide the classic illustration of delay. A dispute concerning whether peanut butter should contain 87% or 90% peanuts lasted over 12 years. Neustadt, supra note 1, at 154. Delay also can be seen as an economic cost to parties and to society. See infra note 3.

3. Costs include actual expenses of participating in or conducting decisionmaking and the costs of related litigation. CURRENT ISSUES IN U.S. ENVIRONMENTAL POLICY 26 (P. Portney ed. 1978) (costs of litigation). Delay in decisionmaking exacerbates the costs incurred by both parties and society. Neustadt, supra note 1, at 154. Delay creates uncertainty as to standards of conduct and, from an economic standpoint, increases the risk of the venture subject to delay. Increased risk in turn can discourage investment, economic growth, and innovation. Stewart, Regulation, Innovation, and Administrative Law: A Conceptual Framework, 69 CALIF. L. REV. 1256 (1981). In addition, delay represents a foregone opportunity to have solved the problem earlier. Resources spent on administrative decisionmaking and subsequent litigation might have been used elsewhere to greater advantage had the same decision been reached at a lower cost. See generally Alchian, Cost, 3 INT'L ENCYCLOPEDIA OF THE SOC. SCI. 404, 404 (1968).


5. Id.


Settlements of administrative litigation may help remedy some of the problems of administrative decisionmaking by reducing delay and costs associated with litigation and by facilitating the implementation of more workable regulations. Administrative settlements, however, raise legal and policy questions not found in the typical settlement between private parties. Agency conduct during settlement negotiations and agency activities dictated by the settlement terms must comply with administrative law and procedure as well as constitutional standards designed to maintain separation of powers and guarantee due process. In addition, policies furthered by private settlement, such as efficiency and flexibility, take on different significance in the context of agency settlements.

This Comment focuses on settlements of suits that challenge policies of the Environmental Protection Agency (EPA). EPA has settled not only enforcement actions, but also suits contesting its administrative rules, interpretations, and policies. In these latter types of settlements, litigants typically surrender their claims in exchange for a promise by the agency to take a particular action such as the promulgation or proposal of new regulations. The agency's obligation may concern either procedure or substance. For example, EPA has settled several suits challenging its failure to issue regulations alleged to have been required by statutes; in these cases, EPA has bound itself to follow a set timetable in promulgating rules that satisfy general criteria specified by the settlement instrument. EPA also has moved to settle challenges to existing regulations, by agreeing to propose particular, detailed regulations worked out in negotiations.

Part I of this Comment evaluates the advantages and
disadvantages of policy-oriented administrative settlements. Part II discusses the availability of judicial review of such settlements and reviews possible legal grounds for attacking settlement provisions.

I

BENEFITS AND DRAWBACKS

In recent years, administrative rulemaking, especially in the environmental field, has become increasingly formal and adversarial. Judicial, congressional, and executive supervision of the administrative process has led to the imposition of extensive procedural requirements. Not surprisingly, most proposed reforms have sought to reintroduce greater discretion, informality, and cooperation into administrative decisionmaking. Negotiation of settlements in administrative litigation


14. Id.; see also id. at 16-69.

15. See proposals listed supra text accompanying notes 4-7. Greater procedural informality and deregulation necessarily increase informality. Lessened judicial scrutiny increases the discretion of administrators. Negotiation introduces elements of cooperation (through bargaining) and, depending on the negotiation process, may increase discretion and informality. These reforms may be viewed as attempts to discover the mix of elements that best suits particular types of agency decisionmaking.
may be one way to do so. This section analyzes the potential benefits and drawbacks of administrative settlements as an alternative to litigation.

A. Efficiency Gains

The clearest advantage of settlements is that they end lawsuits and thereby reduce delay and costs. Settlements can, however, also create new opportunities and incentives for delay and litigation. For example, in the seven years following the settlement of Natural Resources Defense Council v. Train,\textsuperscript{17} EPA and other parties appealed twice to the court of appeals, and the district court that entered the decree heard a stream of motions for vacation, modification, and intervention.\textsuperscript{18} Delays may arise as outside parties sue or intervene to protect their interests in possible settlements.\textsuperscript{19} In addition, parties to the settlement may use intentional delay to buy time or as another weapon in the war of attrition. Judicial hostility to “unjustified obstructionism” may curb some abuse,\textsuperscript{20} but given the chance, some lawyers and clients will probably seize on settlement negotiations as another opportunity to use delay to their advantage.

Good faith negotiation of settlements may more often lead to mutually beneficial outcomes than does litigation. Commentators and social psychologists often point to the ability to produce “nonzero sum” or “pareto optimal” solutions as an important attribute of negotiation.\textsuperscript{21} In negotiation, bargaining parties can explore alternatives together rather than insisting that their view is the only correct answer.\textsuperscript{22} Face-to-face bargaining also lowers the transaction costs of discovering areas of agreement.\textsuperscript{23} Settlements thus may produce workable measures that achieve regulatory goals while accommodating the needs of the parties represented in the settlement negotiations.\textsuperscript{24}

\textsuperscript{16} For a discussion of the costs of litigation and delay, see supra note 3.
\textsuperscript{19} Non-parties may intervene under FED. R. CIV. P. 24. See infra notes 45-46 and accompanying text.
\textsuperscript{20} See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 553 (1978). The Court used the phrase in referring to participants in rulemaking who plant obscure suggestions in their comments in order to sandbag the agency by contesting the agency’s failure to consider those comments. Id.
\textsuperscript{22} Shuck, supra note 21, at 31.
\textsuperscript{23} Id.
\textsuperscript{24} See Cohen, supra note 21, at 881.
B. Improved Exchange of Information

Settlement negotiations may provide agencies with more and better information than does litigation. The Court of Appeals for the District of Columbia has noted that informal exchange of information between agencies and the public is fundamental to administration, and that "the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated." In the short run, the closed forum of settlement negotiations frees participants from having to posture for their constituencies. The bargaining process encourages participants to be truthful and to moderate their positions since excessive posturing usually damages a negotiator's bargaining power. In addition, face-to-face discussions speed transmission of information. Negotiations also may allow the agency to draw on otherwise inaccessible information developed by the other parties for trial. In the long run, negotiations may help establish working relationships that lead to increased cooperation and better understanding between regulator and regulated. Through negotiation, participants in settlements may become more willing to work with the settling agency and to share more and better information.

The short term informational benefits outlined above will occur only if participants bargain in good faith—that is, if they sincerely want to reach a settlement and are willing to forsake gross misrepresentation. This often may not be the case given the incentives for delay in settlement negotiations. As for the long term benefits, it is unlikely that cooperative working relationships will develop in certain cases. For example, such a relationship is unlikely to develop from negotiations between the litigation counsel hired by an industry association and the Department of Justice attorneys assigned to represent an agency. Negotiations, however, may foster some accommodation between agencies and regulated industries, even if grudging.

28. To the extent that bargaining power determines outcomes, and power depends on the subjective perceptions of the participants, anything that damages credibility damages bargaining power. S. Bacharach & E. Lawler, supra note 21, at 48-52. See also J. Rubin & B. Brown, supra note 27, at 15.
29. See Cohen, supra note 21, at 881.
30. This assumes that the parties have adequate information on which to base their strategies and decisions. In the absence of adequate information, negotiation may not produce the results that many bargaining theories predict. See Young, Introduction, in Bargaining: Formal Theories of Negotiation 23-27 (O. Young ed. 1975).
C. Increased Compliance

Parties who help fashion a regulation may be more willing to abide by it. This may mean only that an agency can avoid pettifogging from settlement participants during promulgation of a compromise measure. In addition, though, if the members of a regulated industry perceive a measure to be fair and workable, in part because their representatives helped to design it, they may comply more readily. Of course, if the reformed measure is in fact more equitable and effective as a result of negotiations, that alone should encourage compliance. Finally, to the extent that the settlement in question resembles a consent decree between a few firms and an enforcement agency, the parties participating in the settlement might feel obligated to honor what amounts to a treaty with the government.

Increased compliance will occur only if participants in an administrative settlement bargain in good faith and adequately represent their respective parties. Even if the participants bargain in good faith, those who do not directly participate and who are dissatisfied with a measure still may decide not to comply. For example, a hazardous waste handler in Oregon may be unaware that a law firm in Washington, D.C. negotiated a settlement on behalf of the industry. Even if the handler were aware of the settlement, that knowledge may not create any special sense of obligation to obey the measure.

D. Increased Administrative and Judicial Discretion

Settlements increase the discretion accorded both courts and agencies. Discretion is indispensable to allow agency decisionmakers flexibility, for in some situations, firm rules are unworkable and ad hoc decisionmaking is necessary.

Discretion, however, invites arbitrariness and abuse of power. For example, if an agency decides to settle in one case and to proceed to litigation in a similar case, it treats parties to the two suits differently. If the agency lacks principled justifications for settling or not settling, it acts arbitrarily. The absence of standards also may expose agency decisionmakers to undue influence and pressures from private parties which may lead to abuse of power. For example, an agency may prefer to settle a minor case rather than sacrifice good relations with a major firm with which it must deal on a daily basis. Although accommodation in policymaking is not unusual, and perhaps should not be, without standards or institutional constraints, such accommodation can lead to agency ineffectiveness, "capture," or even corruption.

31. See supra note 30 and accompanying text.
33. See P. Quirk, Industry Influence in Federal Regulatory Agencies 12
The question, then, is whether or not the amount and type of discretion conferred by settlements is desirable. The answer involves a calculus of the benefits of discretion and the possibilities of abuse and arbitrariness.

Within statutory and institutional boundaries, the formulation of agency policy is perhaps inevitably discretionary. The settlement process may simply increase the visibility of agency discretion in the decision-making process. Ironically, this increased visibility also may make policy formulation more susceptible to checks on arbitrary discretion through agency guidelines and judicial supervision.\textsuperscript{34}

The settlement process, however, differs in kind from traditional agency policymaking. In ordinary policymaking, institutional barriers, such as agency practices and bans on ex parte contacts,\textsuperscript{35} help to shield decisionmakers from improper influence and prevent abuse of discretion. Settlements weaken these barriers and give opposing negotiators a chance to practice personal persuasion. In addition, settlements also may provide new opportunities for abuse of discretion in administrative procedures. In August 1983, for example, an attorney for the Justice Department denounced EPA for holding settlement negotiations with industry counsel that excluded counsel for the Environmental Defense Fund.\textsuperscript{36}

A traditional method for controlling discretion in decisionmaking is to impose rules or procedures on the agency, especially requirements of specific findings, reasoned justification, and consistency.\textsuperscript{37} Current procedural requirements narrow the discretion conferred by the power to settle. For example, when EPA proposes rules in accordance with a settlement it must publish the proposal in the Federal Register and entertain public comment.\textsuperscript{38} If EPA fails to do so, or disregards pertinent objections, it risks reversal in court.\textsuperscript{39} If current procedural requirements do not sufficiently check excessive discretion, agencies themselves or Congress can create guidelines for settlements. Such attempts to curb excessive discretion should reflect the varied circumstances in which settlements arise.\textsuperscript{40}

\textsuperscript{34} Wilson, \textit{The Politics of Regulation}, in \textit{The Politics of Regulation} 357, 360 (J. Wilson ed. 1980).
\textsuperscript{35} \textit{See infra} note 40 and accompanying text.
\textsuperscript{36} \textit{See infra} notes 199-208 and accompanying text.
\textsuperscript{39} 5 U.S.C. \textsection 553(b) (1982).
\textsuperscript{40} The most appropriate means of constructing settlement guidelines appears to be through notice and comment rules proposed by the agencies themselves. Agency rulemaking
Judicial review also provides a check on abuse of agency discretion. Settlements, however, confer discretionary authority on courts as well as agencies. A court's decision to enter a consent decree or to modify an existing decree generally can be reviewed in appellate courts only for abuse of discretion. This standard of appellate review gives the court supervising the settlement great freedom to channel and control implementation of new policy through settlements. The most immediate check on agency discretion conferred by settlements is itself exercised with great discretion.

E. Adequacy of Representation and Quality of Decisionmaking

Settlements alter the process of policymaking and change the roles of participants in that process. Settlements therefore create new problems in ensuring the fairness of the decisionmaking process and the quality of decisions reached.

Fairness and quality of decisionmaking depend in large part on the adequacy of representation of persons whose interests are affected by the decision. Settlement adds elements of private negotiation to the present system of decisionmaking. If interests are left unrepresented or bargaining power is distributed disproportionately, private negotiation produces results that are unfair to those affected and are less than optimal solutions to the problem resolved. Courts and Congress have tried to improve representation under the present system of administrative decisionmaking. The administrative settlement process gives a small group of private persons strong influence over decisionmaking, accentuating the need for such efforts.

Ordinary devices of civil procedure give federal courts considerable control over representation in settlement negotiations. Under Rule 24 of the Federal Rules of Civil Procedure, federal courts may permit interven-
tion by interested parties. If the applicants seeking to intervene in ongoing negotiations have interests that are redundant or irrelevant to the matter to be settled, the court may deny the request. Further, a court can decline to enter an order for any settlement it finds unfair or inappropriate.

Notwithstanding the power of supervising courts to police settlement negotiations, problems of assuring adequate representation in settlements persist. Intervention speaks only to the inclusion of parties in negotiations. It does not address representation of interests of persons who are unaware of their right to intervene or who are otherwise unable to apply for intervention. Nor does intervention remedy conflicts of interests between group representatives and the persons whose interests they purport to represent unless those whose interests are prejudiced are aware of the conflict and apply to intervene.

Difficulties in assuring adequate representation are not unique to settlements of administrative litigation. Federal courts handle similar problems of representation in class action litigation and in other areas of the law. Settlements nonetheless burden courts with determinations of what weight to give varying interests and how to safeguard weak or unrepresented interests.

Quality of decisionmaking also may suffer in settlement because settlements may frame issues incorrectly or awkwardly. The legal issues that determine bargaining strength may be only tenuously related to the issues of policy at stake. For example, if the litigants contest a regulation on the basis of procedural errors made by the agency in enacting the

45. FED. R. CIV. P. 24(b).
46. See id. "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."
47. See Citizens for a Better Env't v. Gorsuch, 718 F.2d at 1014. For example, in the settlement in Natural Resources Defense Council v. Train, Judge Flannery of the District Court for the District of Columbia both permitted extensive intervention and required the parties to modify their agreement before he entered a decree. 8 Env't Rep. Cas. (BNA) at 2120-21.
49. See id.
50. See id.
51. See id.
53. Often substantive law may give guidance. For example, the Nonattainment Program of the Clean Air Act has a primary purpose of protecting public health and a secondary purpose of according states flexibility to meet air quality standards while permitting reasonable economic growth. See Note, New Source Netting in Nonattainment Areas under the Clean Air Act, 11 ECOLOGY L.Q. 343, 369 (1984). If settlement negotiations unduly favor economic interests and EPA does not take the part of the public, the supervising court can require the parties to modify their agreement to reflect the priorities of the Act. See supra note 47 and accompanying text.
54. Of course, this criticism is true of litigation of administrative actions in general.
regulation, the relative bargaining strength of the parties depends more on the likelihood of proving agency error than on the substantive soundness of the regulation. Decisions made in settlement hence can skew policy results.55

Agencies and supervising courts can avoid skewed policy results to some extent by exercising their effective veto over any settlement. Agencies can decline to settle or, where a complaint alleges only procedural error, they often can moot procedural errors by holding new rounds of decisionmaking.36 Similarly, supervising courts can refuse to accept settlement agreements that unjustifiably favor one set of bargaining parties. Thus, the strong bargaining position of agencies and the ability of supervising courts to block any settlement lessen the risks to balanced policy results posed by skewed bargaining power or awkwardly framed issues.

F. Other Considerations

Settlements may place participants in inappropriate roles. Settlements can expose agency personnel to persistent professional pressure in circumstances that may offer less institutional protection than usual. The confidentiality needed in most negotiations creates a conflict of interest for public interest groups. Lawyers for these groups often see part of their role as informing the public about important issues;57 ongoing negotiations may muzzle these lawyers by preventing them from disclosing information on matters related to the settlement.

Settlements also may push courts into long term supervision of a coequal federal branch. Even if settlements do not violate the separation of powers principle, the continued jurisdiction created by a settlement decree can lead to friction between the branches. Judges, however, may find themselves in this position regardless of whether the case is settled or tried. For example, if a court finds that an agency failed to issue regulations mandated by Congress, the remedies available to the court are as intrusive as typical provisions in settlements of such suits.58

Finally, settlements may make it difficult for the public, Congress,
and the Executive to monitor and legitimately influence agency con-
duct. Agencies need not publish a notice of settlement negotia-
tions. To keep informed of such negotiations, interested persons therefore must check the dockets of every federal court. In addition, the requirement that an agency receive judicial consent before modifying policies elabo-
rated in a settlement decree may inhibit changes in policy, weakening the interplay between the public, Congress, the Executive, and federal agencies. To the extent that settlements may reduce this interaction, they reduce agency accountability and may subvert control of agency bureaucracies by citizens and their elected representatives.

In summary, settling administrative litigation may increase effi-
ciency of decisionmaking, lead to better information exchange and in-
creased compliance, and give agencies needed flexibility to deal with the intricacies of regulation. At the same time, however, settlement negotia-
tions may open new opportunities for delay, improper influence in deci-
sionmaking, and abuse of agency discretion. Although some admin-
istrative and judicial mechanisms exist within the settlement pro-
cess to protect against such abuses, they may not always be adequate. Persons whose interests were unrepresented in negotiations or who were left unprotected by the final settlement may remain dissatisfied with the settlement results. The next section analyzes when and how such parties may challenge a final settlement decree. Part A analyzes when a party may challenge judicial and agency actions related to settlements. Part B discusses possible substantive grounds for such challenge.

II
LEGAL CHALLENGES TO SETTLEMENTS

A. Review of Judicial and Agency Actions Related to Settlements

An individual or group that wishes to challenge a settlement can contest either the judicial or the agency actions involved. Parties to the settled suit can appeal the judicial decree incorporating the settlement, as well as rulings by the supervising court on any subsequent motion to modify or dissolve the decree. Persons or groups not party to the suit who are dissatisfied with particular settlement provisions perhaps can

60. See id. at 1136 (Wilkey, J., dissenting).
61. If an agency disobeys a settlement decree in order to change policy, it can be held in contempt regardless of whether or not the supervising court would have sanctioned the change in a motion to modify. See infra note 72.
64. See, e.g., Citizens for a Better Env’t v. Gorsuch, 718 F.2d at 1120.
contest the actual decision to settle and probably can attack most agency actions taken in accordance with the settlement, provided they can establish standing. The choice of whether to pursue review of judicial or of agency action depends on a number of factors, including the availability and timing of review, the applicable standards of review, whether the contemplated challenge seeks to overturn the entire settlement or only certain provisions, and whether or not the challenge will present issues in a favorable light.

1. Review of Judicial Actions

Appellate review of trial court decisions connected with agency settlements is limited. Only parties to a settlement decree may appeal the decree or decisions on subsequent motions to modify or dissolve the decree. In general, an appellate court may strike down a settlement decree or may reverse rulings on motions to dissolve or amend only for an abuse of discretion. In some cases, other grounds for reversal may be available. For example, because courts construe settlement agreements in many respects as contracts, an appellate court may reverse lower court rulings on contractual grounds, such as vagueness. In addition, if

65. See infra text accompanying notes 74-78.
66. See infra text accompanying notes 74-95.
68. Res judicata and collateral estoppel may prevent relitigation of some issues in some cases. It nonetheless may be possible to pursue more than one avenue of review at one time. For example, it may be possible to pursue concurrently an appeal of the judicial settlement decree and a petition for review of an agency action taken pursuant to the decree.
70. Officers for Justice v. Civil Serv. Comm’n of San Francisco, 688 F.2d at 625-26 (abuse of discretion standard in appeal of settlement decree); see also Citizens for a Better Env’t v. Gorsuch, 718 F.2d at 1126 (decrees must be consistent with federal law).
71. Citizens for a Better Env’t v. Gorsuch, 718 F.2d at 1125.
72. See Comment, The Consent Decree as an Instrument of Compromise and Settlement, 72 Harv. L. Rev. 1314, 1333-34 (1959); see, e.g., Cook v. Birmingham News, 618 F.2d 1149, 1152 (5th Cir. 1980) (void for vagueness). Cf. Restatement (Second) of Contracts § 178 (1979) (public policy defense against enforcement of contract). However, a party charged with contempt for violation of a settlement decree probably cannot collaterally challenge the validity of settlement provisions on contractual grounds.

If a person to whom a court directs an order believes that the order is incorrect the remedy is to appeal, but absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.
the supervising court entered the settlement decree after erroneously denying a petition to intervene, any provision that prejudices relevant interests of the persons denied intervention must be set aside unless the absent parties consent to the decree. 73

Because of this limited right of appeal and the deferential standard of review on appeal, persons dissatisfied with a settlement may prefer to attack instead agency actions related to the decree.

2. Review of Agency Actions

Not all agency actions are reviewable, and some, although reviewable, cannot be challenged immediately. Courts cannot review administrative actions committed to agency discretion by Congress. Even actions not committed to agency discretion must become both final and ripe before a challenger can obtain review.

The Administrative Procedures Act (APA) exempts from judicial review all agency actions “committed to agency discretion” by Congress. 74 Although a litigant defending the legality of a settlement might argue that the decision by the agency to settle is committed to agency discretion and exempt from judicial review, this argument probably will fail. The Supreme Court has interpreted the agency discretion exemption narrowly. In *Citizens to Preserve Overton Park v. Volpe*, 75 the Court held that the legislative history of the APA limits the exemption to “those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’ ” 76 For example, the decision of an agency to end an investigation ordinarily is nonreviewable because, like the decision of a prosecutor dropping charges against a defendant, it is a discretionary act not governed by law. 77 Unlike the decision of a prosecutor to drop charges, however, the decision of an agency to settle administrative litigation entails more than the allocation of legal resources or the mapping of an overall enforcement strategy. A settlement usually comprises substantive judgments by the agency such as whether to regulate in a particular area and whether to develop specific regulations spelled out in the settlement instrument. The procedural and substantive provisions of the APA 78 reach many analogous substantive decisions, such as the withdrawal of a notice of rulemaking. Thus, a decision to

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76. *Id.* at 410 (quoting S. REP. No. 752, 79th Cong., 1st Sess. 26 (1945)).
77. See *Kixmiller v. SEC*, 492 F.2d 641, 645 (D.C. Cir. 1974).
78. See *infra* text accompanying notes 96-103.
settle probably is governed by law, and the "committed to agency discretion" exemption should not preclude judicial review.

The doctrines of ripeness and finality pose greater obstacles to obtaining judicial review of settlements. *Abbott Laboratories v. Gardner* and its companion cases⁷⁹ spell out a two-step inquiry for determining whether or not an agency action is ripe for judicial review. The task is "first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied at that stage."⁸⁰ Thus, if the issue tendered is legal, as opposed to factual, judicial review often will be appropriate because no further facts from a developed record are needed.⁸¹ Similarly, if the agency action creates a dilemma between costly compliance and the risk of serious penalties or criminal prosecution, review probably will be timely to avoid hardship to the petitioning party.⁸²

Finality is closely related to ripeness.⁸³ The APA authorizes review only of "final" agency actions, unless another statute grants a right of review.⁸⁴ Courts use the finality doctrine flexibly and pragmatically to grant or deny review in appropriate cases. Relevant factors for determining whether or not an administrative action is final include the intent of the agency, the authority of the acting officer, and the nature of the decision.⁸⁵

Requirements of ripeness and finality probably block review of most agency decisions to settle. In some cases, decisions to settle may raise predominantly legal issues, such as whether interpretive rules stipulated by the settlement conflict with the statute they interpret. In such cases, a court may find the case ripe for review. Nevertheless, the existence of the settlement does not change the status quo. Until the agency carries out settlement provisions, the settlement affects no one.⁸⁶ Hence, at the time of the settlement agreement, no concrete controversy exists and the case usually is unripe for review. A decision to settle also is not a final action under the APA because the agency can always seek a modification of the

⁸². See, e.g., id. at 153 (dilemma between expensive compliance with FDA labeling statute and civil sanctions and criminal penalties for noncompliance and consequent negative publicity for pharmaceutical business).
⁸³. See *Abbott Laboratories v. Gardner*, 387 U.S. at 149-52 (using finality of an agency action under the APA as factor in determining appropriateness of judicial review).
⁸⁶. In the absence of any injury, persons dissatisfied with the settlement lack standing to contest the action of the agency. See 5 U.S.C. §§ 702, 704 (1982).
settlement decree, moot any controversy to be litigated.\footnote{87} Notwithstanding that the decision of an agency to settle thus probably cannot be reviewed, most agency actions taken pursuant to a settlement can be reviewed at some point. For example, if the agency promulgates or withdraws a rule pursuant to a settlement, its actions usually are ripe for review and final.\footnote{88} It is unclear, however, whether certain informal agency actions can be reviewed directly or whether review must wait until the agency takes formal action. In \textit{FCC v. WNCN Listeners Guild},\footnote{89} the Supreme Court examined the validity of a policy statement issued by the Federal Communications Commission but not yet applied to any set of facts. The Court's decision to hear the case assumed that the unapplied policy statement was a final agency action ripe for review. In light of the special nature of FCC cases,\footnote{90} however, \textit{WNCN Listeners Guild} perhaps is not a general statement of the law.

Informal agency actions such as the adoption of general policies usually can be challenged when the settling agency relies on them in taking a final, ripe action, even if they cannot be reviewed directly. For example, if in issuing a permit EPA relied on a policy stipulated to in a settlement, persons who claim to be injured probably can challenge the approval, the policy, and indirectly, the settlement.

The decision of the District Court of the District of Columbia in \textit{Natural Resources Defense Council v. Train}\footnote{91} confirms the conclusion that an agency decision to settle usually can be reviewed only indirectly, through ripe, final actions taken pursuant to the settlement. In \textit{Train}, the district court, over the objections of several intervenors, approved a settlement of four suits that challenged the failure by EPA to promulgate regulations required by section 307 of the Federal Water Pollution Control Act.\footnote{92} The settlement bound EPA to issue certain categories of regulations according to a set timetable.\footnote{93} The district court dismissed the intervenors' immediate challenge of the settlement, holding that no concrete controversy existed.\footnote{94} The court nevertheless affirmed the right of

\footnote{89} 450 U.S. 582 (1981).
\footnote{90} \textit{See generally, e.g., Columbia Broadcasting Sys. v. United States, 316 U.S. 407 (1942), where the Court found an FCC policy governing television station contracts ripe for review even though the agency had not yet denied or revoked a license on the basis of the policy. Courts may be be willing to review relatively unripe actions by the FCC because of the large stakes involved with broadcasting licenses, and consequent risk to licensees.}
\footnote{91} 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976).
\footnote{92} \textit{Id.} at 2120-21
\footnote{93} \textit{Id.} at 2123, 2125-26.
\footnote{94} \textit{Id.} at 2121.
the objecting participants to bring suit whenever they could satisfy requirements of ripeness and finality. Thus, persons dissatisfied with a settlement probably must postpone any legal challenges against an agency until there is some ripe, final action that "partakes" of the settlement.

B. Legal Grounds for Challenging Settlements

If judicial review is available, significant substantive grounds for attacking the legality of a settlement or of specific settlement provisions include the Administrative Procedures Act and other statutes, the nondelegation doctrine, the scope of federal equitable power and infringement of agency discretion, and the ex parte contacts doctrine and due process.

I. The Administrative Procedures Act

The APA regulates agency rulemaking. Action taken pursuant to a settlement that bypasses any of the numerous procedural requirements elaborated from the APA may be challenged. Most agency actions are reviewable under section 10(c) of the APA, and under section 10(e), courts can invalidate any administrative actions that violate the Act.

Section 10(e) permits the reviewing court to decide relevant questions of law and to interpret constitutional and statutory provisions. The court is to "hold unlawful and set aside" agency actions, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," unconstitutional, in excess of the agency's statutory authority, enacted in violation of procedures required by law, or, if the agency action was subject to the requirements of formal rulemaking, unsupported by "substantial evidence."

95. Id. The court added: "As noted in the memorandum accompanying the order denying intervention, approval of the agreement creates no precedent on the legality of the specific regulation which may emerge." Id.
96. 5 U.S.C. § 704 (1982). This section permits review of federal agency actions "made reviewable by statute," and of "final agency actions for which there is no other adequate remedy in a court." Id. (emphasis added).
97. Id. § 706.
98. Id.
99. Id. § 706(2)(A).
100. Id. § 706(2)(B).
101. Id. § 706(2)(C).
102. Id. § 706(2)(D).
103. Id. § 706(2)(E). "Substantial evidence" means substantial evidence taken from the record as a whole. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). The Supreme Court has introduced an additional standard that allows courts to overturn agency action that is a "clear error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). Professor Davis notes that the clear error standard has not changed perceptibly what courts do in fact. K. DAVIS, supra note 67, at 533. Further, the arbitrary and capricious and
The scope of review in administrative law cases is a reflection of the relation between the federal courts and agencies. Judge Leventhal of the Court of Appeals for the District of Columbia has characterized this relation as a "partnership' in furtherance of the public interest." Consistent with this view, Judge Leventhal described a supervisory role for the court that

calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making. If the agency has not shirked this fundamental task, however, the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards.

Thus the scope of review in particular cases is more difficult to ascertain than the statutory scheme of the APA suggests.

Certain actions taken pursuant to a settlement clearly violate the APA. For example, if a rule promulgated pursuant to a settlement effects an unconstitutional taking, it will be struck down if challenged. In most cases, however, it will not be clear that an agency action is unlawful. Because each type of agency action taken pursuant to a settlement presents different types of legal issues, the following section discusses separately legal challenges to interpretative rules, legislative rules and other informal agency actions.

a. Review of Interpretive Rules

Interpretive rules interpret existing law, while legislative rules create new law through the exercise of authority delegated to the agency. The authority and intent of the agency issuing a rule generally determine whether a rule is legislative or interpretive. Nevertheless, the line be-

substantial evidence standards often are more of a judgment about the reasonableness of agency action than of the weight of evidence supporting an agency's decision. Id. at 520-33 (Supp. 1982); B. SCHWARTZ, ADMINISTRATIVE LAW 595-96, 606 (1976).

Courts have elaborated new procedural requirements, not always obvious from statutory language, from the standards imposed by the APA and other statutes. See OFFICE OF THE CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, A GUIDE TO FEDERAL AGENCY RULEMAKING 229-31 (1983). Failure to comply with these requirements is grounds for judicial reversal of agency actions. See id.

105. Id.
106. B. SCHWARTZ, supra note 103, at 153-54.
tween the two types of rules often blurs. 108

Courts may substitute their judgment for that of an agency when reviewing an interpretive rule, 109 but they usually give some measure of deference to an agency's interpretation of a statute for which it has enforcement responsibility. 110 The deference shown an agency's interpretation "in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 111

Interpretive rules introduced or altered in accordance with a settlement therefore may be overturned if the reviewing court disagrees with the agency interpretations. In most cases, stipulated interpretations should not evoke great judicial deference. First, in most cases the stipulation will change or reverse previous interpretations; otherwise the parties and the agency would not have bothered to stipulate the interpretation in settlement. Of course, there is no reason why an agency might not agree to return to an earlier, longstanding position. If the agency has not done so, however, stipulated interpretive rules will be neither consistent with previous pronouncements nor longstanding. Moreover, because the litigants and the agency bargained for the proposal and the enactment of the interpretative rule, there is reason to suspect that practical considerations influenced the agency decision. During negotiations the agency probably will have considered its chances of success in the litigation, as well as the merits of any rule proposed by the opposing party. In enacting the rule, the agency will have relied on more than its expertise. The inclusion of stipulated interpretive rules or proposals for such rules in a settlement thus undercuts claims to deference, and reviewing courts should overturn interpretations they find unreasonable.

b. Review of Legislative Rules

The promulgation of a legislative rule entails more than interpretation of existing law. Promulgation of a legislative rule creates new law. In general, legislative rules adopted through formal hearings must be supported by substantial evidence, 112 while legislative rules adopted through informal notice and comment procedures may be struck down if arbitrary and capricious or a clear error of judgment. 113

108. See General Motors Corp. v. Ruckelshaus, 742 F.2d at 1565.
110. See K. DAVIS, supra note 67, at 563.
113. See id. § 706(2)(A); Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 416. For simplicity, this Comment generally focuses on informal rules; the standards of review for
i. Stipulated Promulgation of Legislative Rules. If a settlement requires an agency to adopt a specific legislative rule, the rule probably can be challenged on that ground alone. A formal notice and comment rule stipulated by a settlement would lack any record of substantial evidence of support. The settlement itself demonstrates that the agency was willing to disregard the record because the agency bound itself to issue the rule even if the record did not justify doing so. Similarly, an informal notice and comment rule would appear to be arbitrary and capricious because by binding itself in settlement the agency consciously chose not to exercise the lawmaking discretion delegated to it, and instead agreed to issue the rule regardless of credible adverse public comment.

Application of the procedural requirements derived by courts from the APA confirms this conclusion. For example, during the notice and comment period of formal rulemaking, an agency must reveal the data and methodology on which it intends to rely. Yet an agency truthfully can reveal no data or methodology on which it intends to base its decision if it intends or is willing to disregard those data or analyses in order to honor its settlement obligations. Similarly, in informal rulemaking, the concise statement of basis and purpose required by the APA must demonstrate that major issues posed by comments have been ventilated and considered. When an agency agrees in settlement to promulgate a rule, the concise statement of facts cannot demonstrate that major issues posed by public comments have been considered if the agency in fact made its decision prior to the comment period, agreeing, in effect, to ignore comments that militate against adopting the stipulated regulation.

ii. Stipulated Proposals of Legislative Rules. Settlements uncovered in research for this Comment have required only that the agency propose, not adopt, a particular rule. An agreement to propose a rule does not differ greatly from an acceptance of a private petition for rulemaking, a permissible means of initiating rulemaking. Arguably, courts therefore should not differentiate between rules adopted from proposals made pursuant to settlements and those adopted from private petitions, but instead should disregard the origins of the proposed rule.

In Mobil Oil Corp. v. Federal Power Commission, the United States Supreme Court used analogous reasoning in reviewing a ratesetting adjudication involving a settlement proposal. The Federal Power Commission had instituted proceedings to establish a rate structure for

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formal rules are at least as strict as those for informal rules. See generally 5 U.S.C. § 706 (1982) and sources cited supra note 103.

117. See supra notes 11-12.
sale of natural gas in Southern Louisiana and several parties to the proceeding had proposed a settlement. Although the settlement was never ratified by all parties to the adjudication, the Commission adopted many of the settlement provisions in its rate setting order. The Court held that because the Commission itself could have originally proposed the terms of the final order, the Commission did not exceed its authority by adopting some of those terms from a proposed settlement among the parties to the adjudication. The Court upheld the order on the grounds that the Commission had complied with all relevant administrative procedures, and that the order was supported by the record. The Court thus disregarded that many terms of the order originated in a proposed settlement.

Yet to disregard that a proposal for a rule originated in a settlement is to ignore that the parties and the agency have bargained for the proposal. The parties presumably would not have entered into the agreement if they expected the agency merely to publish a notice in the Federal Register and never to take further action. Most likely, the parties to such a settlement assume that the agency will comply with the spirit of the settlement, even if the agency cannot bind itself to issue a particular rule.

Adoption of a rule from a proposal stipulated in a settlement may be per se arbitrary and capricious because in honoring its settlement obligations the agency may consider improper or irrelevant factors and may fail to consider relevant factors. For example, if an agency adopts a rule primarily to satisfy its settlement obligations, or worse, to placate a legal opponent, it will base its decision on factors unrelated to those on which Congress intended the agency to rely. The stipulation of a proposal may itself be a danger signal that the agency will not taken a “hard look” at the relevant issues. Courts will sometimes inquire into the mental processes of agency decisionmakers to determine whether improper considerations influenced agency actions or whether the agency neglected relevant factors. Even, if the adoption of the rule from a

119. Id. at 292, 296-97.
120. Id. at 297-98, 312-14.
121. Id. at 313-14.
122. Id.
124. See supra text accompanying notes 104-05. A number of cases warn that “when Congress creates a procedure that gives the public a role in deciding questions of public policy, that procedure may not lightly be sidestepped by administrators.” Action for Children’s Television v. FCC, 564 F.2d 458, 472 (D.C. Cir. 1977) (citing Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 594 (D.C. Cir. 1971)). By merely going through the motions of rulemaking, without truly considering public comment, the agency effectively sidesteps procedures for public participation.
125. In Citizens to Preserve Overton Park v. Volpe, the Supreme Court stated:
stipulated proposal is not per se invalid, courts may strike the rule down if it is irrational or unreasonable. 126

iii. Withdrawal of Legislative Rules. In most cases, withdrawal of a legislative rule entails broad discretion in setting policy and interpreting congressional legislation. 127 Withdrawal usually constitutes promulgation of a new rule—one pronouncing that there no longer will be a rule where one previously existed. An agency rescinding a rule must comply with appropriate rulemaking procedures 128 and "is obligated to supply a reasoned analysis for the change." 129 Because withdrawal of a legislative rule usually is equivalent to promulgation, the discussion above regarding stipulated promulgation or proposal of rules applies by analogy. 130

c. Review of General and Internal Policies

If reviewable, other kinds of informal agency actions taken pursuant to a settlement must satisfy the arbitrary and capricious and clear error standards. 131 For example, a settlement might specify the method by which EPA will notify facilities to be inspected. Arguably, actions taken pursuant to such settlement are arbitrary and capricious because in adopting the policy from the settlement, the agency abdicated discretion

The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into mental processes of administrative decisionmakers is usually to be avoided. United States v. Morgan, 313 U.S. 409, 422 (1941). And where there are administrative findings that were made at the same time as the decision, as was the case in Morgan, there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves. See Shaughnessy v. Accardi, 349 U.S. 280 (1955).

401 U.S. at 420; accord, Hercules, Inc. v. EPA, 598 F.2d 91, 123 (D.C. Cir. 1978).

In some cases, the adoption of rules from a stipulated proposal may constitute sufficient bad faith to warrant further inquiry, especially in conjunction with other evidence, such as internal memoranda, that the agency intended to disregard public comment. But cf. Hercules, Inc. v. EPA, 598 F.2d at 91 ("mere fact" that the final decision of an agency hearing officer closely resembled the position held by nonimpartial agency staff found insufficient to justify inquiry into officer's mental processes).

126. See supra note 103.


129. Id. at 2866.

130. See supra text accompanying notes 112-26.

to private parties or may have relied on improper factors. Even if the action is not per se arbitrary and capricious, the existence of a settlement should affect the amount of deference to be shown the agency. In either case, a reviewing court retains significant power to supervise informal action taken pursuant to a settlement and to guard against unfair or unethical conduct.

2. Review Under Other Statutes

Settlements also must comply with procedures imposed by statutes other than the APA. Substantive environmental statutes or internal agency rules often prescribe administrative procedures. For example, the Resource Conservation and Recovery Act requires the EPA Administrator, in cooperation with the states, to "develop and publish minimum guidelines for public participation" in administrative processes. The current guidelines require that public hearings and meetings be held in certain instances, and that a "Responsiveness Summary" be prepared in certain cases, including the promulgation of a new rule. The summaries are to describe the "public participation activity," the matters on which the public was consulted, the views and comments received, and the agency's response to those views. Insufficient compliance with such procedural requirements would provide a separate ground under the APA for overturning rules issued pursuant to settlements.

3. The Nondelegation Doctrine

In its simplest form, the nondelegation doctrine requires only that Congress make discernible the boundaries of agency authority and that

132. See supra note 123 and accompanying text, applying the per se argument to stipulated proposals of rules.

133. Courts usually defer to an agency's internal policies. See National Ass'n of Postal Supervisors v. United States Postal Serv., 602 F.2d 420, 432 (D.C. Cir. 1975). The arbitrary and capricious and clear error standards themselves are judgments about the deference due administrative agencies, but courts often defer to an agency position in light of factors such as the amount of expertise required and actually employed by the agency taking the action. See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins., 103 S. Ct. at 2869 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 167 (1962)); see also K. DAVIS, supra note 67, at 542-43; B. SCHWARTZ, supra note 103, at 580-81. Both Schwartz and Davis note the flexibility of scope of review standards.

134. In addition to specifying internal administrative procedures, these statutes in some instances also specify procedures for judicial review of agency action. For example, substantive environmental statutes often specify the court and time limits in which actions must be brought. B. SCHWARTZ, supra note 103, at 432-33. See, e.g., 42 U.S.C. § 7607(b) (1982) (requiring that a challenge to a nationally applicable Clean Air Act rule be brought in the District of Columbia Circuit within 60 days of the rule becoming final).


137. Id. § 25.8.

138. Id.

agencies act within those boundaries. The basis for the doctrine lies in American democratic principles, which hold that the state's authority to govern arises from the consent of the governed. The Congress and the President are elected by the citizens and are directly accountable to them. In contrast, administrative agencies derive their power indirectly through the authority of Congress and the Executive. This delegation of power circumscribes the authority of the agency.

At first glance, the nondelegation doctrine does not appear to affect the validity of settlements. The power to make rules implies a power to defend those rules when they are challenged in court; the power to settle follows from the power to defend. Therefore, if an agency possesses authority to undertake the challenged rulemaking, settlement of the suit challenging the rule also should fall within the scope of its authority.

Settlements, however, involve more than the conduct of an agency's legal affairs. Settlements may delegate to private individuals the power to shape regulations. That delegation further shifts decisionmaking authority from elected officials and, like the initial delegation to the agency, is subject to the nondelegation doctrine. In deciding whether or not to uphold a delegation to private parties, however, courts look less to political theory than to the possibility of abuse of discretion by the private groups.

Thus courts probably would hold a delegation of rulemaking power to a nonrepresentative private group invalid even if attempted by Congress. An attempt by an administrative agency to do so also probably would be invalid as an ultra vires act.

In several cases, the courts have intervened to ensure that neither Congress nor agencies confer quasi-legislative authority on nonrepresentative private groups. For example, in Carter v. Carter Coal Co., the Supreme Court struck down a depression era trade code as an improper delegation of public power to private individuals. The code gave the power to fix wages and hours jointly to producers of more than two-thirds of a district's coal and to a majority of the district's miners. The Court held:

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an
official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.148

Courts have been more receptive to the delegation of rulemaking powers to private groups that represent the interests of those they will govern.149 For example, courts have upheld trade codes that have been ratified by an overwhelming majority of affected parties.150

If a settlement unduly benefits some interests to the detriment of others, or if the settlement negotiation unfairly excludes certain interests, the nondelegation doctrine may provide a successful avenue of attack. The key issue is whether the settlement negotiations amount to decision-making by an unrepresentative group. An unfair result is some indication of improper delegation. An agency that participates in unfair negotiations or agrees to an unfair result abdicates its responsibility to the public. In addition, a lower court that accepts such an unfair settlement agreement probably abuses its authority.151 Thus, even in a challenge based on abuse of discretion by the trial court or on violations of the APA, the nondelegation doctrine, with its focus on fairness and adequacy of representation, may be an appropriate way to analyze the validity of the settlement.

4. Scope of Equitable Remedial Powers and Infringement of Agency Discretion

Limitations on the scope of remedial powers available to federal courts together with the prohibition against a court’s infringement of agency discretion also serve to prevent settlements from impermissibly reallocating power delegated to an agency. These two restrictions concern the arrogation of power by the courts rather than by private citizens. The first restriction prevents a court from requiring an agency to comply with a settlement that fails to further the objectives of the agency’s enabling statute. The second restriction bars a court from encroaching on statutorily authorized agency discretion.

The Court of Appeals for the District of Columbia recently discussed the two restrictions in Citizens for a Better Environment v. Gorsuch.152 The Natural Resources Defense Council (NRDC) moved to have the EPA Administrator held in contempt153 following EPA’s failure to comply with the timetable for promulgating regulations set by the set-

148. Id. at 311.
149. Liebmann, supra note 143, at 709. See also 1 K. Davis, supra note 32, at 193-98.
150. Liebmann, supra note 143, at 709 n.284.
151. See infra note 170 and accompanying text.
152. 718 F.2d 1117 (D.C. Cir. 1983).
153. Id. at 1121.
tlemet decree in Natural Resources Defense Council v. Train. EPA and NRDC then requested permission to modify the original settlement, and the district court granted the motion. Some of the parties to the settlement appealed. The court of appeals rejected the appellants’ challenge to the modification, but remanded the case to determine whether or not the original settlement impermissibly infringed on the discretion committed to EPA. On remand, the district court held that the settlement did not impermissibly infringe upon EPA discretion. The district court also denied an EPA motion to delete from the settlement certain provisions that required EPA to perform allegedly discretionary acts.

In Citizens for a Better Environment, the Court of Appeals for the District of Columbia reviewed both district court rulings and affirmed. The appellants argued, first, that the district court lacked power to approve provisions of the settlement that “direct EPA to take actions not required to remedy specific violations” of the Clean Water Act and, second, that such provisions impermissibly infringed on the discretion delegated to EPA by Congress.

a. The Scope of Federal Equitable Powers

In support of their first argument, the appellants relied on language from System Federation No. 91, Railway Employees’ Department, AFL-CIO v. Wright. The Supreme Court in Wright remarked that a district court’s “authority to adopt a consent decree comes only from the statute which the decree is intended to enforce.” The appellants interpreted this to mean that each provision in a settlement must remedy a specific violation of the relevant statute.

The majority in Citizens for a Better Environment rejected this view of the scope of the district court’s powers as “unduly narrow.”

154. For a description of the settlement, see supra text accompanying notes 91-93.
161. Id. at 1122.
162. Id.
163. Id. at 1125 (citing Wright, 364 U.S. 642 (1961)).
165. 718 F.2d at 1125.
166. Id.
majority began by asserting that the appellants misread *Wright*. The quoted passage, the majority stated, "means only that the focus of the court's attention in assessing the agreement should be the purposes which the statute is intended to serve, rather than the interests of each party to the settlement." The majority also found that the appellants' reading conflicted with the longstanding rule that courts may order a consent decree without first determining that there has been a statutory violation. Indeed, courts need only find that a settlement is "fair, adequate, reasonable, and appropriate under the particular facts and that there has been valid consent by the concerned parties." The majority thus concluded that the district court had the power to approve any decree consistent with the statute alleged to have been violated.

The majority correctly interpreted the general scope of remedial powers of district courts. Because the decision to enter an equitable decree is discretionary, case law does not offer a systematic analysis of the scope of judicial power to order a settlement. *Wright* may give some guidance, however, if read in light of its holding. In *Wright*, a labor union sought to modify a consent decree because of a change in law. The Supreme Court held that the district court should have ordered a modification because the decree no longer furthered the purposes of the consent decree. The majority recognized that even if a decree is consistent with the controlling statute, a settlement may be ordered only if it is "fair, adequate, reasonable, and appropriate under the particular facts." The *Train* consent decree may have been inappropriate because EPA bound itself to private parties to do what otherwise would be discretionary acts.


167. Id.
168. Id. The appellants misread the passage, but the majority's explanation of *Wright* is awkward. For a description of the meaning of the passage in light of the holding of *Wright*, see infra text accompanying notes 174-76.
170. 718 F.2d at 1126 (citing Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1014 (7th Cir. 1980)).
171. 718 F.2d at 1126-27.
172. The court, however, could have been more demanding in its review of the *Natural Resources Defense Council v. Train* settlement. The majority recognized that even if a decree is consistent with the controlling statute, a settlement may be ordered only if it is "fair, adequate, reasonable, and appropriate under the particular facts." 718 F.2d at 1126. The *Train* consent decree may have been inappropriate because EPA bound itself to private parties to do what otherwise would be discretionary acts.

174. 364 U.S. at 644-46.
statute, now amended, which the union originally had been charged with violating. By analogy, an original settlement decree should be valid only if it furthers the objectives of the statute under which the decree is entered.

b. Infringement of Agency Discretion

The majority in Citizens for a Better Environment also rejected the argument that the decree encroached on the discretion granted EPA under the Clean Water Act. Disposing of the appellants’ assertion that the decree violated the prohibition enunciated in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, against judicial imposition of administrative procedures in excess of those required by statute, the majority emphasized that the decree “was largely the work of EPA and other parties to these suits, not the district court.” Further, the majority interpreted prior infringement of discretion cases as prohibiting judicial interference with administrative results, but not with administrative processes. Finally, the majority observed that Congress, by not voicing its disapproval of the settlement agreement during legislative debates over the 1977 Amendments to the Clean Water Act, had “implicitly sanctioned the limited infringement . . . which the Decree entails.”

Judge Wilkey vigorously dissented. He contended that the district court was powerless to enter the decree because the decree tread on the agency’s discretion and hence violated constitutional separation of powers requirements. He criticized the majority’s distinction between results and process as unworkable and without basis. Finally, he denounced “government by consent decree” as inviting abuse, discouraging public monitoring of agencies, impeding agencies’ ability to respond to legislative and executive initiatives, and ultimately undercutting the foundations of democracy.

Although the majority and dissent cited prior infringement cases to defend their respective positions, both failed to analyze infringement critically in light of the underlying concern of those cases—the constitutional separation of powers doctrine. The separation of powers doc
trine, though elusive, helps to explain the divergent cases on infringement. Professor Nagel has outlined an explanation of separation of powers cases that is especially helpful. Nagel argues that when the Supreme Court hears separation of powers cases, it attempts to find the "least restrictive means of reconciling the powers" of the branches in conflict "by comparing the relative degrees of intrusions into the classically defined functions" of those branches. He suggests that two functional comparisons may assist this inquiry: comparison of the depth of the intrusions and comparison of the breadth of the intrusions. Depth refers to "how directly and pervasively each claimed power was related to the classically or textually defined purposes of that branch of the government." Breadth embraces "a more practical inquiry into the actual operational impact of the claims on the competing branch."

Nagel's approach reconciles divergent infringement of discretion cases. While civil rights decisions often thrust courts into the daily affairs of state and federal institutions, appellate courts have rebutted attempts by lower courts to intrude on agency discretion in general administrative matters. Under Nagel's theory, the traditional commitment asserted that the settlement violated the separation of powers doctrine because it infringed on the Administrator's discretion, see supra text accompanying note 181, but did not fully analyze the constitutional issue.

186. Nagel, supra note 172, at 697-701.
187. Id. at 698.
188. Id. at 699.
189. Id. The quotation refers to depth as it may have been applied by the Supreme Court in United States v. Nixon, 418 U.S. 683 (1974). Nagel defines depth as "a more abstract inquiry into the quality of the governmental purpose inherent in each competing claim." Nagel, supra note 172, at 699. His explanation of the term as applied seems more felicitous.
190. Nagel supra note 172, at 699. Nagel's theory is consistent with recent separation of powers cases such as Chada v. Immigration and Naturalization Serv., 103 S. Ct. 2764 (1983).
ment of the protection of civil rights to the courts\(^{194}\) justifies judicial intrusion into the functions of other branches. In contrast, in most administrative law cases there is no such traditional or compelling commitment of issues to the judiciary. Furthermore, far-reaching judicial remedies in administrative cases interfere “deeply” because Congress has expressly delegated the decisionmaking authority to the agency, not the courts, and “broadly” because such remedies disturb the daily operations of the agency. Thus the different results in civil rights and administrative law cases can be seen as a result of the separation of powers doctrine.

Applying Nagel’s analysis, the majority’s holding in \textit{Citizens for a Better Environment} appears largely correct. The majority’s bright line rule that settlement provisions may prescribe only processes but not results minimizes “deep” judicial intrusion into matters that Congress intended to leave to agency discretion. Indeed, when litigation centers on failure by the agency to issue regulations required by statute, the decree does no more than require the agency to obey its congressional mandate.\(^{195}\) “Process” settlement decrees also limit the “breadth” of judicial intrusion because such decrees require only periodic monitoring of agency compliance with procedural rules, not agency compliance with substantive provisions.

While the majority’s reliance on congressional intent to condone the settlement was justified,\(^{196}\) the argument that EPA consented to the infringement of its discretion\(^{197}\) is more problematic. At first glance, agency consent indicates that any judicial intrusion resulting from a settlement decree is neither deep nor broad. Yet a regulatory agency is not the appropriate institution to evaluate the constitutional balance of powers. That task belongs to the courts.\(^{198}\)

The better approach, in light of separation of powers analysis, is to interpret the process/result distinction in \textit{Citizens for a Better Environment} as a rule of thumb. If not applied mechanically, the distinction gives guidance to district courts and flexibility to the courts of appeals to remedy settlements that in fact do intrude on agency discretion. By recognizing that constitutional separation of powers problems underlie infringement of discretion cases, courts can accord proper weight to factors not to intrude on an agency choice of action under NEPA); Federal Power Comm’n v. Transcontinental Gas Pipeline Corp., 423 U.S. 326, 331-34 (1976) (vacating court order requiring agency to undertake investigation). \textit{Citizens for a Better Environment}, 718 F.2d at 1131 n.10 (Wilkey, J., dissenting), cites both cases and others.


\(^{195}\) See Natural Resources Defense Council v. Train, 8 Env’t Rep. Cas. (BNA) at 2121-22.

\(^{196}\) \textit{Citizens for a Better Environment}, 718 F.2d at 1129-30; see supra text accompanying note 180.

\(^{197}\) Id. at 1127-28.

\(^{198}\) Cooper v. Aaron, 358 U.S. 1 (1958); Marbury v. Madison, 1 Cranch 137 (1803).
such as congressional intent and agency consent. Finally, interpreting the distinction as a rule of thumb lessens characterization difficulties that may result from a bright line rule.

The separation of powers doctrine imposes at least two important limitations on agency settlement practices. A court must not exceed its equitable remedial powers and must not improperly infringe on agency discretion. If particular provisions of the settlement violate either limitation, they are unconstitutional and should be held invalid. If a proposed settlement creates significant, though not constitutionally disabling separation of powers difficulties, the supervising court should require the parties to reformulate their agreement. To adopt such an agreement without modification may constitute an abuse of discretion and grounds for reversal.

5. Violation of Due Process and the Ex Parte Contacts Doctrine

Due process and the ex parte contacts doctrine constitute the final significant objections to agency settlements. An ex parte contact is an unpublicized exchange of information between a government official and a person or organization outside the official's agency.199 Certain ex parte contacts may violate an absent party's constitutional or statutory rights and thus are prohibited.

Settlements often entail ex parte contacts because negotiations usually involve unannounced, if not secret, meetings. Only in a closed forum of private negotiation can the agency and other litigants define their positions, exchange sensitive information, and yield to compromise.200 A more open forum may discourage candidness by parties who fear the release of damaging or embarrassing information such as trade secrets or admissions of wrongdoing. An open forum also can lead to public posturing by the bargaining parties, sending false signals to other participants.201 Finally, a closed forum limits dialogue to those parties intimately associated with the outcome of the dispute, and helps to assure a manageable and efficient settlement process.202

Although settlements result from extensive ex parte contacts, the ex parte contacts doctrine does not apply to most settlements. Limitations on ex parte contacts in informal agency decisionmaking, which stem primarily from the decision of the Court of Appeals for the District of Columbia in Home Box Office v. FCC203 and its progeny, focus on contacts in the context of quasi-adjudicatory hearings and disputes over claims to

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200. See generally supra notes 27-28 and accompanying text.
201. See generally id.
202. See generally id.
a valuable privilege. Courts have restricted ex parte contacts in these settings to assure due process, protect meaningful participation in rulemaking, and preserve the integrity of the rulemaking process.\(^{204}\) If contacts preceding a settlement do not threaten these policies, the ex parte contacts doctrine should not prevent implementation of settlement provisions.

Courts have long recognized the inconsistency of secret ex parte contacts with the principles of fairness implicit in due process.\(^{205}\) This notion of fairness underlies the right of citizens to participate meaningfully in an agency decision that affects them.\(^{206}\) As the court observed in *Home Box Office*, if an agency disregards the public record and instead relies on private discussions, "public . . . discussion has been reduced to a sham."\(^{207}\) Judge Skelly Wright reiterated this view in *United States Lines v. Federal Maritime Commission*:

> The public right to participate in a hearing . . . is effectively nullified when the agency decision is based not on the submissions and information known and available to all, but rather on the private conversations and secret points and arguments to which the public and the participating parties have no access.\(^ {208}\)

Due process values invoked in ex parte contacts cases also raise concerns about abuse of unchannelled agency discretion. Professors Robinson and Gellhorn have observed that in this area of the law, "procedural limits appear to be less an outgrowth of traditional due process concerns" than "a negative reaction to the independent use of legislative power by agencies."\(^ {209}\) Language in *Home Box Office* bears out this observation. The opinion reflects suspicion that "the final shaping of rules we are reviewing here may have been by compromise among the contending industry forces, rather than by exercise of the independent discretion in the public interest."\(^ {210}\) In controlling this abuse of discretion, due process and the ex parte contacts doctrine mirror the nondelegation doctrine, focusing on unfairness to those whose efforts to petition the government are disregarded rather than on the illegitimacy of private individuals arrogating public power.

The *Home Box Office* case also justifies ex parte contacts restrictions as vital to ensuring the integrity of rulemaking, the adequacy of judicial review, and the full adversarial discussion of issues. In *Home Box Office*,

\(^{204}\) See United States Lines v. Federal Maritime Comm'n, 584 F.2d 519, 539-42 (D.C. Cir. 1978); *Home Box Office*, 567 F.2d at 54-57.

\(^{205}\) See United States Lines v. Federal Maritime Comm'n, 584 F.2d at 539.

\(^{206}\) Id. at 539-40.

\(^{207}\) *Home Box Office*, 567 F.2d at 54.

\(^{208}\) United States Lines v. Federal Maritime Comm'n, 584 F.2d at 539.


\(^{210}\) *Home Box Office*, 567 F.2d at 53.
the court of appeals interpreted *Citizens to Preserve Overton Park v. Volpe* as requiring
that the public record . . . reflect what representations were made to an agency so that relevant information . . . may be brought to the attention of the reviewing courts by persons participating in agency proceedings. This course is obviously foreclosed if communications are made to the agency in secret and the agency itself does not disclose the information presented.\textsuperscript{211}

The opinion observed that ex parte contacts deny agencies and reviewing courts "the benefit of an adversarial discussion."\textsuperscript{212} Adversarial discussion is crucial as it illuminates facts or expert opinion which may be "biased, inaccurate, or incomplete."\textsuperscript{213}

Under certain circumstances, courts have curtailed ex parte contacts to safeguard congressional purposes implicit in statutes. For example, in *Sierra Club v. Costle*, a special statute required the EPA to put all written communications related to rulemaking in a docket for public viewing and comment.\textsuperscript{214} The court held that "a fair inference could be drawn" that some oral ex parte contacts should be summarized and docketed "in order to give practical effect" to the statute.\textsuperscript{215} Otherwise, the docketing requirement could be circumvented "by communicating . . . by voice rather than by pen."\textsuperscript{216}

An ex parte contact is improper only if it "materially influences" the action ultimately taken by the agency.\textsuperscript{217} Whether or not a court will find a contact improper depends to a great extent "on the relative significance of various communications" in influencing the agency action\textsuperscript{218} and on the court's characterization of the contacts as unsavory or salutary.\textsuperscript{219} An ex parte contact may fail to rise to the level of a prejudicial influence.\textsuperscript{220} Alternatively, the desirability of certain ex parte contacts may outweigh what otherwise might be prejudicial influence. For example, in *Sierra Club v. Costle* the Court of Appeals for the District of Columbia held that an undisclosed meeting between agency officials and the President and White House staff did not justify invalidating an agency

\textsuperscript{211} Id. at 54.
\textsuperscript{212} Id. at 55.
\textsuperscript{213} Id.
\textsuperscript{215} 657 F.2d at 402.
\textsuperscript{216} Id.
\textsuperscript{217} Action for Children's Television v. FCC, 564 F.2d 458, 476 (D.C. Cir. 1977).
\textsuperscript{218} See *Sierra Club v. Costle*, 657 F.2d 298, 403 (D.C. Cir. 1981).
\textsuperscript{219} See id. at 405-06.
\textsuperscript{220} See, e.g., Viacom Int'l v. FCC, 672 F.2d 1034, 1043-44 (2d Cir. 1982) (nothing in the record to suggest that ex parte contacts "materially influenced" FCC); *Sierra Club v. Costle*, 657 F.2d 298, 404 (D.C. Cir. 1981) (failure to docket Senate briefing an inadvertent oversight); Raz Inland Navigation Co. v. ICC, 625 F.2d 258 (9th Cir. 1980) (contact no more than a status report).
action. The court reasoned that broad policy required that the President be able to confer with agency officials. Such ex parte meetings are beneficial because they increase the integration of the Executive Branch, lessen isolation of agency policymakers, foster accountability of agencies, and encourage consistent national policy. Similarly, Home Box Office itself recognized that "informal contacts between agencies and the public are the 'bread and butter' of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness."

The validity of judicially created ex parte restrictions and their applicability to the settlement of rulemaking challenges is unclear. First, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council purports to deny courts the authority to fashion new procedural requirements. Courts nevertheless have continued to rely on the ex parte restrictions formulated prior to Vermont Yankee. These courts either ignore the decision in Vermont Yankee or, as in Sierra Club v. Costle, cast their holdings as based on the Constitution or on statutes.

Second, cases subsequent to Home Box Office have read the ex parte contacts doctrine as confined to instances that involve "conflicting private claims to a valuable privilege" or quasi-adjudicatory hearings. These limitations appear to represent a judgment as to which cases are likely to possess valid due process claims. A due process claim seeks redress for an injury to a constitutionally protected interest. Loss of a valuable privilege to a competitor because of improper government action clearly satisfies the requirement of injury. The presence of improper influence in a quasi-adjudicatory setting likewise satisfies the requirement, because it denies a right to a fair hearing.

Sierra Club v. Costle and Action for Children's Television v.

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221. Sierra Club v. Costle, 657 F.2d at 408.
222. Id. at 405-06.
223. Id. The court of appeals added that there may be instances where due process requires ex parte contacts between agencies and the White House to be made part of the record. Id. at 406-07.
226. Id. at 543-48.
227. See, e.g., Sierra Club v. Costle, 657 F.2d at 400.
228. See Sierra Club v. Costle, 657 F.2d at 400-03; see, e.g., United Steelworkers of Am., AFL-CIO v. Marshall, 647 F.2d 1189, 1215-16 (D.C. Cir. 1980).
229. See Sierra Club v. Costle, 657 F.2d at 400. The conflicting claims language originated in Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959). Judge MacKinnon's concurrence in Home Box Office articulated a similar limitation on the ex parte contacts doctrine. 567 F.2d at 62. Later cases have followed Judge MacKinnon's concurrence and have quoted the Sangamon formula. See, e.g., United Steelworkers of Am., AFL-CIO v. Marshall, 647 F.2d 1215.
FCC\textsuperscript{231} suggest an additional basis for the limitations on the ex parte contacts doctrine applied in the cases following \textit{Home Box Office}. When Congress enacted the Government in the Sunshine Act, it amended section 557 of Title V (section 8 of the APA) to prohibit ex parte contacts during adjudications.\textsuperscript{232} The court in \textit{Action for Children's Television} reasoned that "[i]f Congress wanted to forbid or limit \textit{ex parte} contacts in every case of informal rulemaking, it certainly had a perfect opportunity of doing so" when it amended section 557.\textsuperscript{233}

That it did not extend the \textit{ex parte} contact provisions of the amended section 557 [concerning agency actions that require public hearings] to section 553 [concerning all agency rule making]—even though such an extension was urged upon it during the hearings—is a sound indication that Congress still does not favor a per se prohibition or even a "logging" requirement in all such proceedings.\textsuperscript{234}

\textit{Sierra Club v. Costle} pursued this argument one step further than \textit{Action for Children's Television} by juxtaposing the passage above with a statement that the Court of Appeals for the District of Columbia has "declined to apply \textit{Home Box Office} to informal rulemaking of the general policymaking sort."\textsuperscript{235} While the court in \textit{Action for Children's Television} used the "opportunity to legislate" argument to support its refusal to infer from the APA a ban on ex parte contacts,\textsuperscript{236} the court in \textit{Sierra Club v. Costle} suggested that the failure to legislate demonstrates a general congressional hostility to ex parte contact restrictions, and that courts should defer to this implied intent unless the situation demands intervention.\textsuperscript{237}

The ex parte contacts doctrine presently will not block many settlements. Most settlements in environmental regulation involve "general policymaking" not quasi-adjudications of conflicting claims to valuable privileges.\textsuperscript{238} Even if the doctrine applies, ex parte contacts must have materially influenced settlement provisions before, a court will strike down the settlement.\textsuperscript{239} Disclosing the contents of the settlement agreement and providing subsequent opportunities to comment probably will purge any taint of impropriety.\textsuperscript{240} Moreover, a reviewing court's attitude toward ex parte contacts is likely to be lenient where parties receive gui-

\begin{footnotesize}
\textsuperscript{231} 564 F.2d 458 (D.C. Cir. 1977).
\textsuperscript{233} See \textit{Sierra Club v. Costle}, 657 F.2d at 402-03.
\textsuperscript{234} 564 F.2d at 474-75 & n.28; see also \textit{Sierra Club v. Costle}, 657 F.2d at 402 (quoting \textit{Action for Children's Television}).
\textsuperscript{235} \textit{Action for Children's Television}, 564 F.2d at 475 n.28.
\textsuperscript{236} \textit{Sierra Club v. Costle}, 657 F.2d at 402.
\textsuperscript{237} See 564 F.2d at 474-75 & n.28.
\textsuperscript{238} See 657 F.2d at 402 n.507.
\textsuperscript{239} See generally settlements described \textit{supra} notes 9-12 and accompanying text.
\textsuperscript{240} See \textit{supra} notes 217-20 and accompanying text.
\textsuperscript{241} See \textit{supra} notes 211-13 and accompanying text.
\end{footnotesize}
dance and assistance in negotiation from the original supervising court. 241

Even if a settlement does not violate the ex parte contacts doctrine, due process alone may afford general grounds for intervention if a court suspects undue influence or unfairness. For example, the Court of Appeals for the District of Columbia has clearly enunciated its distrust of agency regulations reached by compromise among industry members. 242 This concern for agency propriety is not far removed from basic notions of due process. As Justice Black stated in a somewhat different context:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness . . . . [T]o perform its high function in the best way "justice must satisfy the appearance of justice." 243

As in a challenge based on the ex parte contacts doctrine, a person challenging a settlement on general due process grounds must show that the settlement prejudices some constitutionally protected interest. An individual interest in effective participation in administrative decisionmaking, even if implied from procedural statutes, however, probably would be insufficient. 244 Some greater showing of injury will be required.

CONCLUSION

In summary, individuals and groups who wish to challenge settlement provisions currently have several means of doing so. Parties can move the supervising court for modification or reversal of the settlement decree, and can appeal decisions on such motions as well as the original decree incorporating the settlement provision. Non-parties and parties alike can contest agency actions taken pursuant to settlement provisions if not the agency decision to settle. Salient grounds for contesting settlement include violation of the APA and other laws and procedural requirements, the nondelegation doctrine, limitations on the equitable powers of federal courts and the constitutional doctrine of separation of powers, and the ex parte contacts doctrine and due process.

Settlements of environmental administrative litigation may prove to be a valuable adjunct to current administrative procedures, but also may exacerbate lack of bureaucratic accountability and the risk of the abuse

241. This was an important, if tacit factor in Citizens for a Better Environment. The court of appeals seemed frustrated by what appeared to be pettifogging by losing parties that had enjoyed adequate opportunities to make their voices heard. See Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1124-27 (D.C. Cir. 1983).

242. Home Box Office, 567 F.2d at 53.


of power. Current administrative law, such as notice and comment rulemaking requirements, may help avoid some of these problems. In addition, private challenges to administrative settlements may provide a check against abuses. Courts, agencies, and Congress should establish further guidelines for managing settlements and ensuring that abuses do not occur. With proper safeguards, and as participants gain experience, settlements of administrative litigation can become a useful technique in administering and implementing the nation's environmental laws and regulations.