

# THE YALE LAW JOURNAL

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## The Attorney General's Settlement Authority and the Separation of Powers

**ABSTRACT.** This Note presents a novel defense of the Attorney General's authority to settle litigation against the United States and, in the process, make policy commitments. After canvassing the existing law and critiques of the settlement authority, the Note argues that the constitutional separation of powers does not forbid entering into policymaking settlements. The Note then proposes (1) new doctrine to make these settlements more consistent with administrative law norms, and (2) institutional norms and statutory changes that would improve the administration of settlement agreements.

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## INTRODUCTION

In 2018, protests erupted against the Trump Administration because of a new family-separation policy.<sup>1</sup> The Administration (erroneously) blamed the Clinton-era *Flores* settlement agreement, publicly highlighting the obscure world of these agreements in federal policymaking.<sup>2</sup> In fact, the *Flores* settlement emerged from a lawsuit in which the Department of Justice (DOJ) agreed to settle claims regarding the treatment of noncitizen children detained by immigration authorities.<sup>3</sup> It “establishes a ‘nationwide policy for the detention, release, and treatment of minors’ in immigration custody,” which “binds the parties until the federal government promulgates final regulations implementing the agreement.”<sup>4</sup> This settlement—like many others between DOJ and private parties—prescribes the policies to which the U.S. government *must* adhere, regardless of changing circumstances or political judgments.

The Trump Administration promulgated a *Flores*-settlement rulemaking that purports to “implement” the settlement and return control over this aspect of immigration policy to the executive branch.<sup>5</sup> The rulemaking is of only dubious consistency with the underlying agreement,<sup>6</sup> and the Trump Administration likely intended to overturn, in effect, the settlement agreement. The Ninth Circuit now may need to decide the critical question: whether preexisting settlement agreements can prevent agencies from promulgating new, otherwise-legal regulations.<sup>7</sup>

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1. Alexandra Yoon-Hendricks & Zoe Greenberg, *Protests Across U.S. Call for End to Migrant Family Separations*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/trump-protests-family-separation.html> [<https://perma.cc/F3VP-E2BL>].
  2. See, e.g., Dara Lind & Dylan Scott, *Flores Agreement: Trump's Executive Order to End Family Separation Might Run Afoul of a 1997 Court Ruling*, VOX (June 21, 2018, 10:42 AM EDT), <https://www.vox.com/2018/6/20/17484546/executive-order-family-separation-flores-settlement-agreement-immigration> [<https://perma.cc/C4VM-VN5B>].
  3. SARAH HERMAN PECK & BEN HARRINGTON, CONG. RESEARCH SERV., R45297, THE “FLORES SETTLEMENT” AND ALIEN FAMILIES APPREHENDED AT THE U.S. BORDER: FREQUENTLY ASKED QUESTIONS 6-7 (2018).
  4. *Id.* at 7; see Stipulation and Order, *Flores v. Reno*, No. 85-cv-04544 (C.D. Cal. Dec. 12, 2001).
  5. Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44392 (Aug. 23, 2019) (to be codified at 8 C.F.R. pts. 212, 236 and 45 C.F.R. pt. 410).
  6. See *Flores v. Barr*, 407 F. Supp. 3d 909, 931 (C.D. Cal. 2019) (denying motion to terminate the settlement and enjoining enforcement of the final rule).
  7. Defendant-Appellants’ Opening Brief at 53-54, *Flores v. Barr*, No. 19-56326 (9th Cir. Dec. 20, 2019), ECF No. 10 (arguing “the district court lacked authority—under the All Writs Act

The *Flores* settlement highlights the importance of understanding the settlement power. By settling either constitutional or statutory claims against the government, DOJ can make policy for both current and future administrations. For example, in settling a case about whether a statute is constitutional, the United States might agree to refrain from enforcing certain aspects of the statute. Doing so effectively overturns part of the law without congressional action. Alternatively, the government might commit to implementing or to interpreting the law in particular ways. Such a commitment could take the form of a mandatory rulemaking or the forbidding of certain kinds of enforcement action. In effect, the administration could make policy without any of the traditional trappings of administrative law.

The settlement power raises fundamental questions about the policymaking relationship between the judiciary and the executive branch: To what extent can an administration bind itself and its successors to particular policies or actions that would otherwise remain discretionary? How can long-term judicial oversight of federal policy be consistent with the executive branch's duty to faithfully execute the law? Do policymaking settlements unduly transfer federal power to private plaintiffs, who can "collude" with friendly administrations to enshrine favorable approaches to huge swaths of policy entrusted to the executive branch?

Opposing views have developed on this topic. Under one theory, the unbridled power of the executive branch to settle litigation and constrain future exercises of discretion abrogates the prerogatives of future executives and potentially undermines democracy itself.<sup>8</sup> On another theory, Congress has imposed few external constraints on the Attorney General's control of litigation, including the settlement power.<sup>9</sup> As a result, the Attorney General retains broad discretion to settle litigation on terms she deems appropriate, including limits on future executive-branch action. Potentially implicit in this understanding are countervailing separation-of-powers concerns that imposing limits on the settlement authority would infringe the executive's authority to execute the law.<sup>10</sup> Neither account is complete, necessitating a new separation-of-powers perspective on this timely topic.

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or any other source of authority—to invalidate the regulations in their entirety” on the basis of the settlement agreement).

8. See, e.g., Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 318.
9. See Settlement Auth. of the U.S. in Oil Shale Cases, 4B Op. O.L.C. 756, 756-57 (1980) (claiming “inherent” and statutory authority to settle cases).
10. See *infra* Part II.

After demonstrating the insufficiency of prior separation-of-powers accounts of the settlement power, I present a novel argument for how policymaking settlements can be reconciled with both the constitutional separation-of-powers and traditional administrative law principles. The constitutional separation of powers clearly permits the executive branch to execute its vision of the law, including its view of the illegality of current practices and policies, by settling lawsuits. The judiciary should avoid *ex ante* review of these settlements because approval decisions hinge on quintessentially executive judgments about litigation strategy and the government's position. The judiciary should, however, continue to enforce settlements. And Congress can always override policymaking settlements through its legislative authority. But unilateral executive decisionmaking can and should be checked through traditional administrative law mechanisms of judicial review. Whenever DOJ consents to relief in a way that makes policy, the resulting policy should be subject to the same judicial scrutiny as though it were formulated outside the shadow of the settlement. Moving judicial review to the *ex post* position ensures that private parties and the government retain the principal benefits of settlements without sacrificing transparent, reasoned decisionmaking.

This Note analyzes policymaking settlements in which the executive branch surrenders a legal right to pursue certain policies or actions specified by an agreement to resolve litigation.<sup>11</sup> By limiting the breadth of future decisionmaking capacity, the executive branch can effectively constrain the range of permissible future policies even in the absence of new legislation or a judicial decision. For example, the *Flores* settlement thwarted both the Obama Administration's and the Trump Administration's efforts to impose certain policies related to detaining immigrants.<sup>12</sup> But unlike traditional forms of executive-

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11. Related work, including the seminal Office of Legal Counsel (OLC) opinion on settlements, discusses them in terms of their potential to limit the future exercise of executive-branch discretion. See *Auth. of the U.S. to Enter Settlements Limiting the Future Exercise of Exec. Branch Discretion*, 23 *Op. O.L.C.* 126, 126-30 (1999). While the terms "policymaking" and "discretion-limiting" are similar, they are not synonymous. A settlement that committed the President, in perpetuity, to make certain recommendations to Congress under the Recommendations Clause would be "discretion-limiting" but not "policymaking," because it does not carry legal force. "Policymaking settlements" more accurately captures the dimension of interest: that these settlements might be used as mechanisms to create and entrench preferred policies.

12. See Order Denying Defendants' "Ex Parte Application for Limited Relief from Settlement Agreement," *Flores v. Sessions*, No. 85-cv-4544, 2018 WL 4945000, at \*2 (C.D. Cal. July 9, 2018) (denying the Trump Administration's request to, in effect, "hold minors in *indefinite* detention in unlicensed facilities"); *Flores v. Johnson*, 212 F. Supp. 3d 864, 869 (C.D. Cal. 2015) (rejecting the Obama Administration's attempt to implement a "blanket policy to detain all female-headed families, including children, in secure, unlicensed facilities for the du-

branch policymaking, such as notice-and-comment regulation, few process safeguards exist for settlement agreements.<sup>13</sup> As a result, these types of settlements might be conceptualized as an undertheorized form of “unorthodox policymaking,”<sup>14</sup> where the executive branch binds itself and others (including future administrations) through litigation.

As in the *Flores* case, these settlements are most likely to arise in litigation against federal agencies by private parties seeking some kind of policy development or implementation. These might be statutory or constitutional challenges, and may arise under the Administrative Procedure Act’s (APA) waiver of sovereign immunity.<sup>15</sup> Empirical evaluation of the quantity, type, and partisan valence of settlements is nearly impossible without a catalogue of policymaking settlements from DOJ, which has proven challenging to obtain.<sup>16</sup> This Note therefore focuses on the legal concerns raised by these settlements.

The argument proceeds in five parts. Part I describes existing doctrine and DOJ policy with respect to settlements. Part II analyzes shortcomings in prior critiques of the settlement power and reframes the separation-of-powers debate in terms of executive control over litigation strategy. Part III explains how *ex post* judicial review of settlements can recognize the legitimacy of executive control over litigation while preserving the values of transparency, reasoned decisionmaking, and judicial review. Part IV offers other, constitutional alternatives for Congress to exercise its authority to limit or direct the settlement authority. Finally, Part V offers a good-governance perspective on the limits of DOJ’s institutional role and competencies. In light of these governance critiques, the Note concludes with guiding principles for use of the settlement authority.

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ration of the proceedings that determine whether they are entitled to remain in the United States” as inconsistent with the settlement agreement, and denying the administration’s request to modify the settlement).

13. See *infra* Section I.C.

14. See *infra* note 51 and accompanying text; cf. Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1789-90 (2015) (discussing forms of lawmaking and policymaking that deviate from the idealized governing procedures).

15. 5 U.S.C. § 702 (2018).

16. See *infra* Section V.A.

## I. THE ATTORNEY GENERAL'S LITIGATION AUTHORITY AND THE POWER TO SETTLE CASES

This Part describes the legal foundations of the Attorney General's settlement authority, as well as the government's standards for modifying or revoking previous settlement agreements. Problematically, settlement agreements are effective vehicles for constraining future policy choices, both because (1) there is a lack of upfront process and substantive standards for initial agreement to a settlement; and (2) there are demanding requirements for subsequent modification. Nonetheless, the available remedies for violation present a set of interesting, and largely overlooked, doctrinal considerations, as discussed in Section I.D.

### A. *Typology of Settlement Agreements*

Two settlement mechanisms are available to DOJ to end litigation: contract settlements and consent decrees. Though they formally differ in effect, the relevant regulations and Office of Legal Counsel (OLC) opinions treat them equivalently.<sup>17</sup>

#### 1. *Contract Settlements*

Outside the federal government, most settlement agreements take the form of contracts. Surrendering "doubtful" legal claims provides valid consideration<sup>18</sup> and the parties agree to dismiss the case with prejudice.<sup>19</sup> In general, contract settlements do not require court approval unless the relevant rules of procedure or substantive law require it.<sup>20</sup>

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17. See generally 28 C.F.R. §§ 0.160(d), 0.161 (2019) (making no distinction); U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 1-14.000(A) (2018) (same); Auth. of the U.S. to Enter Settlements Limiting the Future Exercise of Exec. Branch Discretion, 23 Op. O.L.C. 126, 126-30 (1999) (same).

18. See RESTATEMENT (SECOND) OF CONTRACTS § 74 (AM. LAW INST. 1981).

19. See FED. R. CIV. P. 41.

20. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 13.14 (2018). The common law may also require approval where settlement "affects the rights of nonparties or nonsettling parties, or where the settlement is executed by a party acting in a representative capacity." *Id.* These exceptions have not been applied to settlement agreements limiting executive-branch discretion, so the Department of Justice (DOJ) can enter contract settlements without court approval.



Contract settlements have received less critical treatment in the literature than consent decrees, which are presumed to be plaintiffs' favored instrument for institutional-reform litigation or policymaking.<sup>21</sup> This is because consent decrees exert more coercive effect as they are enforceable with courts' contempt powers.<sup>22</sup> Contract settlements may also be more difficult to study because they do not appear on the public docket, unlike a consent decree.<sup>23</sup> From this perspective, they would appear to present even less accountability for political actors seeking to evade traditional policymaking processes. But, as discussed below, contract settlements have historically been treated as less problematic by separation-of-powers scholars because they appear on their face to be less enforceable.<sup>24</sup>

## 2. *Consent Decrees*

Consent decrees are settlements entered as orders of the court by the consent of the litigants. They "have attributes both of contracts and of judicial decrees . . . . Because of this dual character, consent decrees are treated as contracts for some purposes but not for others."<sup>25</sup> As court orders, they are enforceable by contempt,<sup>26</sup> although available evidence suggests that contempt findings against federal defendants are exceedingly rare.<sup>27</sup>

Consent decrees require court approval before taking effect. While the consent decree can provide "broader relief than the court could have awarded after a trial," the court must decline to enter consent decrees where the settlement terms "conflict[] with or violate[] the statute upon which the complaint was based."<sup>28</sup> The crucial question for consent decrees binding the government, however, is who or what can provide authoritative consent.<sup>29</sup>

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21. For an argument that consent decrees have been treated too much like contracts, see Ross Sandler & David Schoenbrod, *From Status to Contract and Back Again: Consent Decrees in Institutional Reform Litigation*, 27 REV. LITIG. 115 (2007).

22. See *infra* Section I.D.

23. See FED. R. CIV. P. 41.

24. See *infra* note 64 and accompanying text.

25. *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236 n.10 (1975).

26. See *infra* notes 61-62 and accompanying text.

27. See *infra* note 67 and accompanying text.

28. *Local 93 v. City of Cleveland*, 478 U.S. 501, 525-26 (1986).

29. See *infra* Part II.

The leading case on consent decrees and federal-agency policymaking decisions is *Citizens for a Better Environment v. Gorsuch*.<sup>30</sup> Policymakers and critics alike have treated the case as canon since the Supreme Court cited it approvingly.<sup>31</sup> In *Citizens for a Better Environment*, the D.C. Circuit upheld the district court's power to enforce a consent decree on the basis that (1) the settlement was voluntary;<sup>32</sup> and (2) it did not "prescrib[e] any substantive outcome, merely set[ting] forth procedures designed to remedy the Agency's prior allegedly unlawful actions."<sup>33</sup> In sharp contrast to the dissent, the majority argued that approving the consent decree was judicial minimalism: "[T]he practical effect [of rejecting the consent decree] would have been to limit EPA's discretion to move forward with its preferred . . . regulation program, which the Decree promoted and protected. We believe the court's role should be more restrained."<sup>34</sup> Judge Wilkey, dissenting, vigorously contested these conclusions. He viewed the approval of the consent decree as an impermissible assertion of the judicial power, infringing on both the executive and legislative branches' control over policy.<sup>35</sup> As a result, the "weakening of democratic control over agency policy" posed serious prudential and constitutional problems.<sup>36</sup> The debate between the majority and dissenting opinions in *Citizens for a Better Environment* has never been resolved. Federal courts have followed the majority opinion, while scholarly commentary has largely rallied around the dissent's reasoning.

This Note aims to provide a new answer in this long-running debate by returning to first principles about the separation of powers and the legal authority for settlements.

### B. Legal Authority for Settlements

Except as otherwise authorized by law, the Attorney General litigates on behalf of the United States. The authority to litigate derives from the common

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30. 718 F.2d 1117 (D.C. Cir. 1983).

31. See *Local 93*, 478 U.S. at 525-26.

32. *Citizens for a Better Environment*, 718 F.2d at 1128-29. The majority presumes such consent can be authoritative and binding upon agency successors. See *id.* at 1134 (Wilkey, J., dissenting).

33. *Id.* at 1127 (majority opinion).

34. *Id.*

35. *Id.* at 1136 (Wilkey, J., dissenting).

36. *Id.*

law tradition,<sup>37</sup> as well as from modern statutes that expressly grant authority to DOJ.<sup>38</sup>

No statute explicitly authorizes DOJ to enter into settlements that make policy or otherwise constrain the future exercise of executive-branch discretion or policymaking.<sup>39</sup> These settlements fall into the “zone of twilight” where the “distribution [of power] is uncertain.”<sup>40</sup>

DOJ contends that the settlement power—including the power to bind the executive branch’s future discretionary choices—is both “inherent” and authorized by statute.<sup>41</sup> OLC memoranda staking out this position are not explicit about whether and how this “inherent” authority is constitutionally justified, although they reference the Take Care Clause as a possible constraint.<sup>42</sup> The case law on enforcement authority, however, provides a possible argument. In *Morrison v. Olson*, the Supreme Court made clear that a statute that “sufficiently deprives the President of control over the independent counsel,” and therefore the conduct of prosecutorial litigation, would violate the separation of powers because it would “interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.”<sup>43</sup> And in *Heckler v. Chaney*, the Court extended the enforcement logic to the civil context. Although *Heckler* was resolved on statutory grounds, it referenced the constitutional stakes by comparing an agency’s failure to begin civil enforcement proceedings with prosecutorial discretion, “which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Consti-

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37. The Att’y Gen.’s Role as Chief Litigator for the U.S., 6 Op. O.L.C. 47, 48-49 (1982) (citing Confiscation Cases, 74 U.S. (7 Wall.) 454, 458-59 (1868); *The Gray Jacket*, 72 U.S. (5 Wall.) 370 (1866)).
  38. 28 U.S.C. §§ 516, 519 (2018) (empowering DOJ and the Attorney General to conduct litigation on behalf of the United States).
  39. By contrast, Congress explicitly authorizes the Attorney General to pay monetary “settlements . . . for defense of imminent litigation or suits against the United States.” 28 U.S.C. § 2414 (2018); see also 31 U.S.C. § 1304(a) (2018) (appropriating funds to pay for monetary settlements from the Judgment Fund); 31 C.F.R. § 256.1 (2019) (explaining when settlements may be paid from the Judgment Fund). Congress also explicitly authorizes payment of settlements in federal tort cases “after the commencement of an action.” 28 U.S.C. § 2677 (2018).
  40. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).
  41. See *Settlement Auth. of the U.S. in Oil Shale Cases*, 4B Op. O.L.C. 756, 756 (1980) (“This power is in part inherent, appertaining to the Office, and in part derived from various statutes and decisions.” (quoting 38 Op. Att’y Gen. 98, 99 (1934))).
  42. *Id.* at 757-58; see also *Auth. of the U.S. to Enter Settlements Limiting the Future Exercise of Exec. Branch Discretion*, 23 Op. O.L.C. 126, 138 (1999).
  43. 487 U.S. 654, 693 (1988).

tution to ‘take Care that the Laws be faithfully executed.’”<sup>44</sup> The Take Care power therefore appears to provide a possible constitutional hook for the Attorney General’s legal authority to direct the conduct of litigation—and by extension, to settle litigation—as well as a limitation.

The Take Care function does not just operate in the realm of enforcement actions. The conduct of other civil litigation on the government’s behalf also implicates the constitutional separation of powers. Court decisions on the constitutionality of qui tam actions underscores this point.<sup>45</sup> Parties defending against False Claims Act suits have challenged the statute, arguing that permitting private parties to litigate on behalf of the United States violates the separation of powers and the Take Care Clause.<sup>46</sup> The courts of appeals that have considered the issue, however, have uniformly rejected these separation-of-powers challenges.<sup>47</sup> The circuits’ reasoning turns on the fact that the government retains sufficient control over the litigation,<sup>48</sup> indicating that the executive branch does have some constitutional claim to control the conduct of litigation. Although its scope has not been fully defined, that authority appears to

44. 470 U.S. 821, 832 (1985) (quoting U.S. CONST. art. II, § 3).

45. Under certain circumstances, qui tam actions allow private parties to litigate in the name of the United States in order to recover fraudulent claims. See 31 U.S.C. §§ 3729, 3730(b)-(c) (2018). In essence, if DOJ declines to pursue the lawsuit on the government’s behalf, a private party—the “relator”—is empowered to conduct the litigation for the government. The government remains the primary beneficiary of any recovery, but the relator is awarded a percentage of the recovery as an incentive payment. *Id.* § 3730(d).

46. See Robin Kundis Craig, *Will Separation of Powers Challenges “Take Care” of Environmental Citizen Suits? Article II, Injury-in-Fact, Private “Enforcers,” and Lessons from Qui Tam Litigation*, 72 U. COLO. L. REV. 93, 148-56 (2001) (describing separation-of-powers challenges to qui tam suits); see also Ara Lovitt, Note, *Fight for Your Right to Litigate: Qui Tam, Article II, and the President*, 49 STAN. L. REV. 853, 868-76 (1997) (arguing that qui tam suits violate the separation of powers by infringing on the executive branch’s litigation authority under the Take Care Clause).

47. See *United States ex rel. Stone v. Rockwell Int’l Corp.*, 282 F.3d 787, 806-07 (10th Cir. 2002) (citing *Riley v. St. Luke’s Episcopal Hosp.*, 252 F.3d 749, 753-57 (5th Cir. 2001); *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994); and *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 755 (9th Cir. 1993)).

48. See *Stone*, 282 F.3d at 806 (concluding that the presence of a qui tam relator did not “so hinder[] the Government’s prosecutorial discretion as to deprive the Government of its ability to perform its constitutionally assigned responsibilities,” citing the Take Care Clause as the source of those responsibilities); *Taxpayers Against Fraud*, 41 F.3d at 1041 (“[T]he Executive Branch retains sufficient control over the relator’s [litigation] conduct to ensure that the President is able to perform his constitutionally assigned duty to take Care that the Laws be faithfully executed.” (internal quotation marks and citations omitted)); *Kelly*, 9 F.3d at 752 (holding that the qui tam statute “permits a degree of executive control sufficient to satisfy the *Morrison* standard”).

include not just decisions about what legal strategies or arguments to advance, but also whether and on what terms to settle initiated or imminent litigation. Building off this insight, I develop the separation-of-powers case for the executive branch's litigation conduct authority below.<sup>49</sup>

### C. Internal Procedures and Practices

In general, Congress has not prescribed procedural requirements for DOJ to follow when negotiating or accepting settlements. Moreover, substantive statutes that would bind agencies in the exercise of their discretion do not mechanically impose the same limits on efforts to resolve litigation. OLC has opined that “the Attorney General—in the exercise of his settlement responsibilities—is not bound by each and every statutory limitation and procedural requirement that Congress may have specifically imposed upon some other agency head in the administration of that agency’s programs.”<sup>50</sup> Nevertheless, statutory procedural requirements may impact the relief that can be offered to counterparties through the settlement process. For example, “when the Administrative Procedure Act . . . governs the means by which a rule may be adopted, proposed, or considered, the Attorney General may not resolve litigation, in the absence of an express congressional authorization, by committing an agency to follow a contrary rulemaking process.”<sup>51</sup> The understanding of the separation of powers I present helps resolve the apparent tension between these two statements. This Note clarifies the extent to which the statutory substantive and procedural requirements, including the APA, should bind the Attorney General’s settlement authority.<sup>52</sup>

DOJ has also not codified its internal criteria for accepting or rejecting settlements into regulations, but it has designated the officials authorized to accept settlements. In general, Assistant Attorneys General may accept settlement offers within their jurisdiction.<sup>53</sup> Only the Deputy Attorney General (DAG) or Associate Attorney General (AAG), however, may authorize policymaking set-

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49. See *infra* Section III.A.

50. Settlement Auth. of the U.S. in Oil Shale Cases, 4B Op. O.L.C. 756, 758 (1980).

51. Auth. of the U.S. to Enter Settlements Limiting the Future Exercise of Exec. Branch Discretion, 23 Op. O.L.C. 126, 163 (1999).

52. By engaging in ex post review of agency action rather than ex ante review of settlement agreements, courts can respect both the relatively unbounded nature of the Attorney General’s authority *and* the statutory constraints on agency heads. See *infra* Part III.

53. 28 C.F.R. § 0.160(a)-(c) (2019).

tlements.<sup>54</sup> The regulations also contemplate situations in which the DAG or AAG may approve a settlement, despite opposition from a client agency.<sup>55</sup> In other words, those settlements with the greatest separation-of-powers implications must receive the personal attention and approval of either the DAG or AAG, who are fully empowered to exercise the entire settlement authority of the Attorney General.<sup>56</sup>

#### D. Remedies and Compliance

When a federal party violates a settlement agreement, what remedies are available to the nonfederal party? For contract settlements, the typical remedy is resumption of the suit.<sup>57</sup> The literature has assumed contract settlements are less offensive than consent decrees because specific performance is presumed unavailable.<sup>58</sup> As a result, a future administration could renege on a prior administration's commitments made via a contract settlement, and plaintiffs would simply have to restart their suit and prove entitlement to relief on the merits. Damages remedies, to the extent they would be available at all, likely do not have the same coercive effect as injunctions because they can be paid out of the general-purpose Judgment Fund.<sup>59</sup>

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54. *Id.* §§ 0.160(d), 0.161 (reserving authority where “the proposed settlement converts into a mandatory duty the otherwise discretionary authority of a department or agency to promulgate, revise, or rescind regulations,” or “the proposed settlement otherwise limits the discretion of a department or agency to make policy or managerial decisions committed to the department or agency by Congress or by the Constitution”); accord DEP’T OF JUSTICE, JUSTICE MANUAL § 1-14.000(A) (2018).

55. 28 C.F.R. § 0.160(d)(2).

56. *Id.* § 0.161(b).

57. See Memorandum from Edwin Meese III, Att’y Gen., to All Assistant Att’y Gen. & All U.S. Att’y 4 (Mar. 13, 1986), <https://www.archives.gov/files/news/samuel-alito/accession-060-89-1/Acco60-89-1-box9-memoAyer-LSWG-1986.pdf> [<https://perma.cc/CH76-FCAN>] (requiring that the only remedy for governmental breach be resumption of the suit).

58. E.g., Robert R. Detlefsen, *Government Consent Decrees and the Paradox of “Consent”: A Critical Case Study*, 18 JUST. SYS. J. 13, 15 (1995) (describing how a consent decree “goes further” than “an ordinary negotiated settlement”); Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 37.

59. See Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 737 (2018) (noting the lack of incentive effects for agencies when the penalties for noncompliance are made from the Judgment Fund).

Because contract remedies provide little incentive for agency compliance under the traditional view,<sup>60</sup> consent decrees are assumed to be the preferred method of settling disputes involving discretionary action. For violations of consent decrees, courts have the power to issue criminal or civil contempt sanctions.<sup>61</sup> These sanctions may be coercive (in other words, applied until compliance is achieved), remedial, or compensatory (compensating the compliant party for losses arising from noncompliance).<sup>62</sup> Previous commentators appear to have assumed without question that the threat of such sanctions effectively induces compliance.<sup>63</sup> From the standpoint of the prevailing conception of the separation of powers, consent decrees are particularly problematic because they guarantee that the court exercises ongoing supervisory power over the federal party. In other words, responsibility for administration of the programs transfers from the executive branch to the judiciary—potentially in perpetuity because consent decrees do not automatically terminate.

The literature's assumptions—that contract settlements are never coercive and consent decrees always are—are not well founded. With respect to contract settlements, the availability of specific performance as a doctrinal matter is not entirely clear. The conventional view is that the statutes providing the remedies for breach of contract by the government only waive sovereign immunity for monetary damages.<sup>64</sup> However, later cases suggest specific performance may be available, at least in some subset of cases.<sup>65</sup> Ultimately, the exact role the con-

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60. See *Auth. of the U.S. to Enter Settlements Limiting the Future Exercise of Exec. Branch Discretion*, 23 Op. O.L.C. 126, 131 (1999) (noting that if “revival of the suit” is the sole remedy, the settlement “impose[s] no legally meaningful constraint on executive branch discretion”).
61. See generally 1 DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* § 2.8(2)-(3) (2d ed. 1993) (describing remedies for breach of court orders).
62. *Id.* § 2.8(2).
63. See, e.g., Henry N. Butler & Nathaniel J. Harris, *Sue, Settle, and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism*, 37 HARV. J.L. & PUB. POL’Y 579, 599 (2014) (“[T]he agency is bound to act to avoid contempt charges. The agency reallocates resources, making the terms of the consent decree its priority.”). *But see* Peter M. Shane, *Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241, 266 n.98 (noting the reluctance of courts to hold the Attorney General in contempt).
64. See *Sharp v. Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986) (“The waiver of sovereign immunity in the Administrative Procedure Act does not run to actions seeking declaratory relief or specific performance in contract cases, because that waiver is by its terms inapplicable if ‘any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought,’ and the Tucker Act and Little Tucker Act impliedly forbid such relief.” (citation omitted)).
65. See *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 610 (D.C. Cir. 1992) (“*Sharp* tells us that a federal district court may accept jurisdiction over a statutory or

tract would play in the dispute is not clear; it seems likely the plaintiff would have to show some entitlement under the statute to the relief sought, but the remedy might turn on the prior contract with the government.<sup>66</sup> In any event, the literature has too casually dismissed the possibility that contract settlements are a meaningful mechanism for the government to bind itself, albeit one ultimately less powerful than consent decrees.

And with respect to consent decrees, courts are remarkably unwilling to impose fines or credibly threaten to imprison federal officials for contempt.<sup>67</sup> As a result, the literature has likely overstated the coercive power one administration can levy against successor administrations via consent decrees. Rather, “norms and shaming” appear to be the primary mechanism by which court orders induce agency compliance.<sup>68</sup> It remains an untested hypothesis whether those professional norms operate equally effectively where only a contract settlement resolves the dispute.

#### *E. Modifying, Revoking, or Dissolving Settlement Agreements*

Because consent decrees are judicial orders, the executive branch does not have the same degree of discretion in their implementation that it would have if they were regulations or statutes. Instead, consent decrees may be modified under Federal Rule of Civil Procedure 60(b).<sup>69</sup> The standard is a significant change in law or fact, which is likely not met merely by changes in the political fortunes of the officials who agreed to a consent decree.<sup>70</sup> Nonetheless, in the context of a consent decree against a *state* government, the Supreme Court has indicated its expectation that modification or dissolution in due course would

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constitutional claim for injunctive relief even where the relief sought is . . . specific performance.”), *overruled on other grounds by* Perry Capital LLC v. Mnuchin, 864 F.3d 591, 620 (D.C. Cir. 2017).

66. While federal law governs the question, *see* Jeffrey A. Parness & Matthew R. Walker, *Enforcing Settlements in Federal Civil Actions*, 36 *IND. L. REV.* 33, 47-48 (2003), it is not clear *what* federal law requires.
67. Parrillo, *supra* note 59, at 697-98, 704, 739.
68. *Id.* at 775-77.
69. *See* Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 378 (1992). The Court reemphasized that while a consent decree “in some respects is contractual in nature . . . it is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.” *Id.*
70. The standard has been muddled as the Court has emphasized that public officials bring “new policy insights,” which might contribute to “reexamination of the original judgment.” *Horne v. Flores*, 557 U.S. 433, 448 (2009).



be appropriate to return policy responsibilities to elected officials.<sup>71</sup> Despite the Court's statements, the academic literature does not appear to address whether the standard for consent decrees for *federal* defendants has changed.<sup>72</sup> The fact that settlements, and in particular consent decrees, have demanding standards for modification forms the basis for critiques of settlements as creating asymmetries between Presidents over time.

Unlike nonfederal parties subject to a settlement, however, federal defendants have an additional tool at their disposal: the power to interpret contract settlements and receive judicial deference to those interpretations.<sup>73</sup> Of course, the power to interpret is not the power to rewrite unilaterally. Nonetheless, subsequent administrations may find their discretion substantially less limited than previous commentators have assumed because of this backdoor to modification.

## II. POLICYMAKING SETTLEMENT AGREEMENTS AND THE CONSTITUTIONAL SEPARATION OF POWERS

Given the potentially coercive power of settlements, the problem is securing genuinely "authoritative consent"<sup>74</sup> — a particularly troublesome problem in the context of settlement by governmental agencies.<sup>75</sup> Conventional defenses of discretion-limiting settlements depend in large part on the assumption that the governmental parties negotiated and consented to them.<sup>76</sup> But as described in this Part, scholars have raised a number of potential separation-of-powers concerns with the executive branch's authority to provide authoritative consent

71. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 442 (2004).

72. Perhaps the literature understands *Frew* principally as a case about federalism and institutional-reform litigation. See, e.g., Catherine Y. Kim, *Changed Circumstances: The Federal Rules of Civil Procedure and the Future of Institutional Reform Litigation After Horne v. Flores*, 46 U.C. DAVIS L. REV. 1435 (2013); Mark Kelley, Note, *Saving 60(b)(5): The Future of Institutional Reform Litigation*, 125 YALE L.J. 272 (2015); see also *Horne*, 557 U.S. at 448 ("[I]nstitutional reform injunctions often raise sensitive federalism concerns."); *Frew*, 540 U.S. at 442 ("[P]rinciples of federalism . . . require the [district] court to give significant weight' to the views of government officials." (quoting *Rufo*, 502 U.S. at 392 n.14) (second alteration in original)).

73. See *infra* notes 223-225 and accompanying text.

74. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1078-79 (1984).

75. See Detlefsen, *supra* note 58, at 14 (arguing government settlements do not have authoritative consent); Easterbrook, *supra* note 58, at 35 ("To take seriously the proposition that the decree depends on consent is to require a court to ask whether the consent was authoritative.").

76. See *supra* note 32 and accompanying text.

over settlements, from unaccountable collusion with private parties to impermissibly binding an administration's successors in office. None of these separation-of-powers concerns, however, suffice to justify stripping DOJ of its current legal authority. This Part demonstrates the insufficiency of the critiques offered to date of the settlement authority. It first examines accusations that the federal government collusively settles litigation to achieve its policy goals. It then addresses constitutional critiques of the settlement authority, explaining why those critiques fall short. Part III will then develop a new understanding that demonstrates how the settlement authority coheres with the separation of powers.

#### A. Collusive "Sue-and-Settle" Agreements?

During the Obama Administration, conservative critics decried so-called "sue-and-settle" tactics, where the government settled litigation on terms unduly favorable to ideologically compatible plaintiffs.<sup>77</sup> Specifically, these critics alleged that the Obama Administration was colluding with pro-environment groups to settle "sham" litigation in ways that would bind future administrations.<sup>78</sup> For example, critics pointed to a settlement requiring the Environmental Protection Agency (EPA) to promulgate rules setting emissions standards for fossil-fuel-burning power plants.<sup>79</sup> Because the plaintiffs negotiated the settlement with the EPA behind closed doors, the critics argue that "billions of dollars in compliance costs are now imposed upon businesses [that] were never afforded an opportunity to participate."<sup>80</sup> Of course, concern about coordination with nongovernmental litigants is not new.<sup>81</sup> But the Chamber of Commerce's concerted effort to increase the political salience of governmental litigation tactics as a partisan issue<sup>82</sup> ultimately garnered traction in the Trump

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77. See, e.g., Andrew M. Grossman, *Regulation Through Sham Litigation: The Sue and Settle Phenomenon*, HERITAGE FOUND. 10 (Feb. 25, 2014), [http://thf\\_media.s3.amazonaws.com/2014/pdf/LM110.pdf](http://thf_media.s3.amazonaws.com/2014/pdf/LM110.pdf) [<https://perma.cc/LZ3L-LR2W>].

78. See *id.*

79. See Kelli Hayes, Comment, *Sue and Settle: Forcing Government Regulation Through Litigation*, 40 U. DAYTON L. REV. 105, 112, 120-22 (2015).

80. *Id.* (emphasis omitted).

81. See, e.g., Detlefsen, *supra* note 58, at 15; see also *Horne v. Flores*, 557 U.S. 433, 449 (2009) (citing *Nw. Env't Advocates v. EPA*, 340 F.3d 853, 855 (9th Cir. 2003) (Kleinfeld, J., dissenting); and *Ragsdale v. Turnock*, 941 F.2d 501, 517 (7th Cir. 1991) (Flaum, J., concurring in part and dissenting in part)).

82. See Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 SEATTLE U. L. REV. 891, 892 (2014).

Administration: in 2017, the EPA issued a new policy designed to limit settlement agreements.<sup>83</sup>

The “sue-and-settle” account has numerous problems, starting with whether “collusion” is even descriptively accurate. Critics agree that “[i]t is not a sham for the Executive Branch to consent to relief when existing practices are illegal or unconstitutional.”<sup>84</sup> This necessarily involves the exercise of judgment about the legality of existing practices by the executive branch. Settlement agreements, by definition, resolve uncertain legal claims.<sup>85</sup> The executive must therefore make some independent determination about what the law requires as to the existing practices. If the government agrees with the plaintiff that the law requires a change from existing practices, a good-faith settlement is in the interest of all parties: the plaintiffs receive the relief they sought; the government faithfully executes its vision of the law;<sup>86</sup> and the public saves the expense of litigation.

It is not inherently “collusive” for the executive branch to agree with a set of plaintiffs, even if similar ideological goals motivate the agreement. “Sue-and-settle” critics offer no way to distinguish between “genuine” and “sham” settlements other than by reference to their *own* views. But unlike legal scholars, an administration has both constitutional authority and democratic legitimacy underpinning its view of the law.<sup>87</sup> Given that *someone* other than a judge<sup>88</sup> must make an assessment about the legality of existing practices, the executive branch is best positioned to determine the appropriateness of settlement.

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83. E. SCOTT PRUITT, DIRECTIVE PROMOTING TRANSPARENCY AND PUBLIC PARTICIPATION IN CONSENT DECREES AND SETTLEMENT AGREEMENTS (Oct. 16, 2017), [https://archive.epa.gov/epa/sites/production/files/2017-10/documents/signed\\_consent\\_decree\\_and\\_settlement\\_agreement\\_directiveoct162017.pdf](https://archive.epa.gov/epa/sites/production/files/2017-10/documents/signed_consent_decree_and_settlement_agreement_directiveoct162017.pdf) [<https://perma.cc/3UPB-FAEL>].

84. Easterbrook, *supra* note 58, at 34.

85. Fundamental principles of contract law underscore this point: to provide valid consideration, the claim surrendered must be “doubtful because of uncertainty as to the facts or the law.” RESTATEMENT (SECOND) OF CONTRACTS §§ 73, 74 (AM. LAW INST. 2019). If existing executive-branch practices unequivocally violate the law, a settlement abandoning their defense would not provide valid consideration for a settlement.

86. This understanding aligns with the view that “the Constitution’s text and structure . . . both . . . speak to the President’s responsibility to preserve, protect, and defend the Constitution as he understands it.” Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 509-10 (2012).

87. See *infra* Section III.A.

88. Definitionally, it must be someone other than a judicial entity, since expansive judicial review defeats the purpose of a settlement. See *infra* note 142 and accompanying text.

But even for ideologically motivated settlements, negotiations need not occur in smoke-filled rooms and involve only the administration's preferred interest groups.<sup>89</sup> Indeed, involving outside groups in policy-settlement negotiations may help both: (1) to design better policies in the first instance by adding expertise; and (2) to insulate policies against ex post challenges that delay implementation.

Further, even assuming that "sue-and-settle" agreements could be accurately described as "collusive," the legal arguments against them remain obscure. Administrations may enact their policies through procedurally appropriate channels. Settlements, including consent decrees, may provide broader relief than would be available if a case were litigated to final judgment.<sup>90</sup> For plaintiffs challenging agency inaction, this has become particularly important since the Supreme Court limited the availability of injunctions compelling agency action and thereby removed an alternate avenue to force policy change.<sup>91</sup> Nothing in the case law calls into question the legality of "collusive" consent decrees.<sup>92</sup>

The normative arguments offered by the academic literature ultimately prove unsatisfying. Some scholars argue that consent decrees require limitations in order to avoid "unacceptable forms of delegation" of governmental authority to nongovernmental parties.<sup>93</sup> Neither contract settlements nor consent decrees, however, delegate any authority to nongovernmental parties. Each requires the consent of the government to become effective. At the time of negotiation, the Executive—as a party to the negotiation—maintains an absolute veto over the exercise of any governmental authority. Delegation problems might arise if the executive branch truly loses its veto—for instance, if it could be bound not by the courts, but merely by private parties' *ipse dixit*.<sup>94</sup> But that is

89. See Elizabeth Fisher & Patrick Schmidt, *Seeing the "Blind Spots" in Administrative Law: Theory, Practice, and Rule-Making Settlements in the United States*, 30 COMMON L. WORLD REV. 272, 282-83 (2001) (describing rulemaking settlement-negotiations involving adverse parties).

90. See *Local 93 v. City of Cleveland*, 478 U.S. 501, 525-26 (1986).

91. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004).

92. Even *Horne v. Flores*, which contains dicta about the "risk[s] of collusion between advocacy groups and executive officials," did not announce any rule of law that prevents such "collusion." 557 U.S. 433, 449 (2009) (quoting *Nw. Env't Advocates v. EPA*, 340 F.3d 853, 855 (9th Cir. 2003) (Kleinfeld, J., dissenting)). It only addressed the proper standard for relief from an earlier settlement under Federal Rule of Civil Procedure 60(b)(5). *Id.* at 447-50.

93. Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203, 227 (1987).

94. See *The Constitutional Separation of Powers Between the President and Cong.*, 20 Op. O.L.C. 124, 176-77 (1996).

not the case: settlement agreements require authoritative federal consent. Instead, the problem must be that future executive-branch officials are bound by the decisions of past officials with whom they disagree, which are enforced by private parties who can seek contempt sanctions — an entirely different framing.

*B. The Temporal Separation of Powers: Can the Executive Bind Itself?*

More persuasive critiques argue that settlement agreements impermissibly bind the executive branch to its past decisions. During the 1980s, academics and judges began to criticize the use of discretion-limiting settlements as anti-democratic. One representative critique argued that the separation of powers is violated when “present executive department or administrative agency leaders did not agree to, and do not wish to follow, the restrictions the courts are imposing on the executive branch through . . . consent decrees [signed by prior administrations].”<sup>95</sup> The binding effect of consent decrees on future administrations flows doctrinally from the judicial position that, for purposes of res judicata, successors in office constitute the same legal “person” and are therefore bound by judgments against their predecessors.<sup>96</sup>

However, arguments that discretion-limiting settlements are unconstitutional are often flawed. Michael McConnell, for example, argues that “attempt[s] by a President to exert legal control over the powers of his successors” through consent decrees violates the constitutional provisions limiting the terms of Presidents.<sup>97</sup> This cannot be right.<sup>98</sup> Many decisions made by Presi-

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95. Paul D. Windsor, *Separation of Powers and the Reagan Administration's Policy on Consent Decrees: Have the Courts Overstepped the Limits of Judicial Powers?*, 1989 U. ILL. L. REV. 541, 549.

96. See, e.g., *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940) (holding that federal officers are in privity, and therefore a judgment against one binds others); *City of New Orleans v. Citizens' Bank of La.*, 167 U.S. 371, 388-89 (1897) (holding that “[t]he mere fact that there has been a change in the person holding the office does not destroy the effect of” res judicata). The federal courts’ rules of procedure now automatically substitute public officials’ successors in office. SUP. CT. R. 35(3); FED. R. APP. P. 43(c)(2); FED. R. CIV. P. 25(d).

97. McConnell, *supra* note 8, at 300.

98. Eric Posner and Adrian Vermeule correctly describe the analogous claim about Congress — that the fixed-terms provisions forbid entrenchment — as “baffling.” Nothing about the term of an office suggests that policies created during that term cannot outlast the term. See Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1683 (2002); see also, e.g., Easterbrook, *supra* note 58, at 36 (listing examples).

dents and their administrations have legal effects that outlast their terms in office, from appointments<sup>99</sup> to policies that engender reliance interests.

A more nuanced argument might suggest that the asymmetry between the (lack of a) standard for entering into a settlement and the high bar for subsequent modification creates an impermissible temporal asymmetry. This version would rely on an intuitive formal-symmetry principle: what one administration can do, the next can undo through analogous procedures.<sup>100</sup> Administrative law generally contains precisely such a principle,<sup>101</sup> which forbids more searching judicial review merely because a policy reverses an earlier one.<sup>102</sup> But that principle is not perfectly generalizable. Policies “engender[ing] serious reliance interests” demand “a more detailed justification than what would suffice for a new policy created on a blank slate.”<sup>103</sup> In any event, no one presents an account of why this principle derives from *constitutional* law rather than the APA, which typically maintains procedural neutrality between differing policy positions.<sup>104</sup>

Moreover, some executive decisions and policies may be irreversible altogether: for example, uses of the constitutional pardon power create policy.<sup>105</sup>

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99. See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 790 n.112 (2013) (listing statutes that define the appointed officers' terms, including many that exceed the President's four-year term).

100. Through this symmetry principle, the law—whether constitutional or statutory—guards against undue political entrenchment. Cf. Posner & Vermeule, *supra* note 98, at 1667 (defining legislative entrenchment as “statutes or internal legislative rules that are binding against subsequent legislative action in the same form”).

101. *E.g.*, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 92 (2015) (holding that a new administration can overturn an old interpretative rule without resorting to a more burdensome legislative rule).

102. See *FCC v. Fox Television Studios, Inc.*, 556 U.S. 502, 514 (2009).

103. *Id.* at 515. Even beyond the formalities of judicial review, policies with serious reliance interests may be difficult to reverse in practice because the benefiting constituencies have strong incentives to mobilize support, making those policies costly for political actors to abandon. See, *e.g.*, Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 402–04 (2015) (providing examples of informal entrenchment that are as effective as formal entrenchment mechanisms).

104. *Mortg. Bankers*, 575 U.S. at 101 (explaining that the APA “mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance”).

105. For example, some Democrats wrote a letter urging President Obama to use the pardon power effectively to enshrine his Deferred Action for Childhood Arrivals policy. See Seung Min Kim, *House Dems Push Obama to Pardon Dreamers*, POLITICO (Dec. 7, 2016, 9:47 AM EST), <https://www.politico.com/story/2016/12/house-dems-immigration-pardon-232283> [<https://perma.cc/9QNQ-AM9N>]. The letter demonstrates the political attraction of using

Similarly, Presidents may use prosecutorial powers strategically to create irreversible outcomes. Due process prevents an administration from unilaterally rescinding a nonprosecution agreement agreed to by a previous administration.<sup>106</sup> An administration that issues an unconditional nonprosecution agreement creates an irreversible obstacle for a successor administration, even if that later administration would otherwise have the power to prosecute (because the statute of limitations had not expired). And even if the agreement contains conditions, it can only be voided for those reasons the prior administration found relevant, not any later-arising policy or prudential concerns identified by a successor administration.

Even on a statutory level, Congress may have created mechanisms for discretionary policy choice that function as one-way ratchets, preventing one administration from undoing a prior administration's decisions as a formal matter. For example, every President can designate national monuments, but only Congress can abolish them.<sup>107</sup> While doubtless incomplete, these examples undermine the superficially attractive proposition that one President can never bind her successors as a formal matter.

Further, the legal source of the equality principle is unclear. Article II offers little help, as Eric Posner and Adrian Vermeule explain in the analogous context of Article I legislative entrenchment.<sup>108</sup> The Vesting Clause provides that “[t]he executive power shall be vested in a President of the United States of America.”<sup>109</sup> That Clause offers no insight into when prior exercises of the executive power are irreversible. The pardon power is a “quintessential and non-delegable”<sup>110</sup> executive power,<sup>111</sup> and yet it is irreversible. The “executive power” sometimes includes the power to make irreversible decisions; the question is simply how far it expands. And as explained earlier, the term-of-office provi-

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constitutional powers to make irreversible decisions. And if immigration offenses were generally criminal rather than civil, the gambit might have succeeded since the pardons would have been clearly valid and effective.

106. See, e.g., *United States v. Castaneda*, 162 F.3d 832, 835-36 (5th Cir. 1998) (holding that due process prevents the government from unilaterally nullifying a nonprosecution agreement).

107. See Mark Squillace, Eric Biber, Nicholas S. Bryner & Sean B. Hecht, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55, 55 (2017).

108. Cf. Posner & Vermeule, *supra* note 98, at 1674-83 (explaining textual and historical problems with arguments relying on the Vesting and Electoral Cycles Clauses as arguments against legislative entrenchment).

109. U.S. CONST. art. II, § 1, cl. 1.

110. *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1119 (D.C. Cir. 2004).

111. U.S. CONST. art. II, § 2.

sion simply provides no answer either.<sup>112</sup> Nothing in the text of Article II provides any support for a categorical rule that constitutionally forbids one President from binding her successors.

Instead of the strong symmetry principle advanced by some scholars, it may be better to view symmetry as a much more modest claim. It is certainly true that there is a *weak* constitutional-symmetry principle: each administration has equal authority to enter policymaking settlements during its term in office, and in that sense to entrench its policies against its successors. Some scholars may decry this symmetry principle as “a weak and idiosyncratic understanding of equality.”<sup>113</sup> But it is the only way to protect each administration's authority against future administrations that could take any number of possible positions on any issue. Not only would the contrary position be undemocratic, depriving current voters of the ability to enact their preferred policy, but it would necessarily also be speculative, since no one can predict which politicians or policies will prevail in the future. Further, this weak symmetry principle recognizes some sense of equality between Presidents: each has an equal democratic mandate, and therefore each should stand on equal footing with his or her predecessors.

In fact, in certain situations, entrenchment may be an inherent feature of the system—and the only means of protecting the authority of future executives. The national monuments example neatly illustrates why this makes sense. Suppose administrations *A* and *C* support the designation of certain land as a national monument to preserve it. Intervening administration *B* opposes that designation. Instead, *B* would like to put the land to some use that would permanently degrade it. Facially, allowing *B* to reverse *A*'s designation would promote equality between the two. But it creates inequality between *B* and *C*. Administration *B* has the option to preserve or reverse *A*'s decision, but *C* loses out on the choice to maintain *A*'s position (and its preferred outcome). *B*'s position becomes entrenched as a result of a formal rule of reversibility. Law cannot escape inequality in entrenchment in this scenario. Decisionmaking over time often has inherent inequalities that advantage first movers.

Inequality is particularly salient in the litigation context, and for good reason. Intragovernmental equality is not the only public law value; finality also plays an important role, particularly in the context of judgments. The finality value means that choice of litigation strategy is often not subject to revision be-

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112. See *supra* notes 97–99 and accompanying text.

113. John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 415 n.108 (2003).



tween administrations, either because of estoppel,<sup>114</sup> waiver,<sup>115</sup> or entry of final judgment.<sup>116</sup> Even when possible, a change in litigation position “is a really big deal.”<sup>117</sup> To the extent that settlements are understood as outgrowths of litigation positions rather than freestanding exercises of authority, the idea that they are not subject to revision appears perfectly consistent with the ordinary operation of legal adjudication. Administrations constantly bind their successors when they decide which positions to take in litigation, depending on how successfully they argue them.

### C. *The Take Care Clause’s Ambivalence*

The Take Care Clause<sup>118</sup> both imposes a duty on the President and confers a source of power to see that duty fulfilled.<sup>119</sup> As a result, the Clause offers only an ambivalent answer to the question of whether the Constitution constrains or empowers the Executive’s (exclusive) decisionmaking power over the conduct of litigation—including the decision of whether and on what terms to settle.<sup>120</sup>

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114. See *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 169 (1984) (holding that the government is subject to estoppel under certain circumstances).
115. See *United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001) (declining to address the government’s argument because it was not raised below).
116. *Plaut v. Spendthrift Farm*, 514 U.S. 211, 218-19 (1995) (holding that other branches cannot command federal courts to reopen final judgments).
117. Andrew Hamm, *Justice Kagan and Paul Clement Share SG Stories at American Law Institute Annual Meeting*, SCOTUSBLOG (May 22, 2018, 1:16 PM), <http://www.scotusblog.com/2018/05/justice-kagan-and-paul-clement-share-sg-stories-with-american-law-institute> [<https://perma.cc/3LJW-2XVR>] (quoting Justice Kagan).
118. U.S. CONST. art. II, § 3.
119. Settlement Auth. of the U.S. in Oil Shale Cases, 4B Op. O.L.C. 756, 757-58 (1980) (“[T]he Attorney General is bound . . . to ‘take care that the laws be faithfully executed,’ and . . . consequently there may be some forms of settlement that would be foreclosed. . . .”); see also Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1854 (2016) (“A well-known—and commonsensical—canon of textual interpretation instructs that the imposition of a duty necessarily implies a grant of power sufficient to see the duty fulfilled.”). The Supreme Court has never interpreted the word “faithfully,” exacerbating confusion about the Clause’s meaning and effect. *Id.* at 1858.
120. OLC has also analyzed the inverse question: whether the Constitution permits Congress to authorize the President to settle on terms that limit future executive-branch discretion. Auth. of the U.S. to Enter Settlements Limiting the Future Exercise of Exec. Branch Discretion, 23 Op. O.L.C. 126, 141-42 (1999). I would frame the question as to what extent the Take Care Clause constrains or empowers the executive branch to execute its interpretation of the law through settlement.

On one view, the Constitution commands the executive to follow the substantive law established by Congress, including in the settlement context. As a result, courts have on occasion asserted the power to review – and possibly vitiate – settlements that, in the court's view, contravene substantive law.<sup>121</sup> On this view, a settlement agreement cannot authorize the executive to take actions that would otherwise violate the law. To the extent that legislation has entrusted discretionary decisionmaking power in executive officers, preventing them from exercising that discretion through binding settlement agreements violates the underlying purposes of the statute. Each President must follow the constitutional command to “take care” with respect to the execution of the laws. One President may not prevent her successors from implementing their own, conflicting visions of what it means to faithfully execute laws that entrust them with discretionary decisions.

On another view, the Constitution implicitly recognizes the unique prerogative of the executive branch to litigate. A plausible reading of the Court's case law on prosecutorial and enforcement discretion supports this perspective.<sup>122</sup> The government, no less than other parties, is entitled to settle cases on unfavorable terms,<sup>123</sup> which may result in litigation by other parties. And to the extent that settlement agreements compel the government to take action that would harm nonparties to the lawsuit, those nonparties should have recourse under the APA to challenge the action.<sup>124</sup>

Moreover, part of the executive's job is taking a position on the law and litigating appropriately. This goes beyond just applications of prosecutorial dis-

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121. See, e.g., *United States v. Carpenter*, 526 F.3d 1237, 1241-42 (9th Cir. 2008) (holding that settlements are reviewable under certain circumstances, but not explicitly discussing the constitutional question); *Exec. Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 762 (4th Cir. 1993) (“The Attorney General's authority to settle litigation for its government clients stops at the walls of illegality.”).

122. See *Constitutional Limitations on Fed. Gov't Participation in Binding Arbitration*, 19 Op. O.L.C. 208, 226 (1995) (“[T]he general separation of powers principle would stand as a bar to [Congress] vesting an arbitration panel with unreviewable authority to direct . . . federal litigation by the executive branch's attorneys.”); *supra* notes 42-47 and accompanying text; see also *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2242 (2020) (Kagan, J., dissenting) (“Presidential control, as noted earlier, can operate through many means . . . [including] centralized review of rulemaking or litigating positions . . .”).

123. See *Swift & Co. v. United States*, 276 U.S. 311, 331-32 (1928) (finding that the settlement authority “includes the power to make erroneous decisions”).

124. See *infra* Section III.B (arguing that courts should apply typical APA review to agency action compelled by settlement).

cretion. DOJ declines to defend laws that it determines are unconstitutional,<sup>125</sup> and occasionally even judgments that it retrospectively decides were unjust.<sup>126</sup> Similarly, “[i]t is not a sham for the Executive Branch to consent to relief when existing practices are illegal or unconstitutional,”<sup>127</sup> since “illegality presumably requires remedial action of some sort.”<sup>128</sup> Because the Executive can permissibly set litigation strategy or policy based on its interpretation of a statute or the Constitution, any attempt to constrain executive discretion over settlement agreements presupposes that the government—and courts<sup>129</sup>—can accurately distinguish between settlements in which action is truly discretionary and settlements in which action is compelled by statute or the Constitution. Those questions, of course, give rise to profound differences of opinion. Forbidding the current executive from entering into binding settlements on the theory that a later Executive might review a legal requirement as “permissive” rather than “mandatory” prevents the current Executive from taking care to execute the law. The Constitution does not require that later executives’ views take precedence. In other words, at a minimum the intertemporal separation-of-powers concerns cut in both directions.

Because the Take Care Clause only offers at best an ambivalent answer about what constraints, if any, exist on the settlement authority from inside Article II, I now turn to the judiciary and Congress.

#### D. *The Role of the Judiciary*

Another argument says that requiring judicial approval of consent decrees violates the separation of powers by vesting too much authority in courts. For example, the D.C. Circuit confronted this argument in a recent *qui tam* case.<sup>130</sup>

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125. Congress recognized this practice in 28 U.S.C. § 530D (2018), which requires DOJ to notify Congress whenever it declines to defend a law because it determines the law is unconstitutional.

126. See Neal Kumar Katyal, *The Solicitor General and Confession of Error*, 81 *FORDHAM L. REV.* 3027, 3030 (2013).

127. Easterbrook, *supra* note 58, at 34.

128. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1908 (2020).

129. At first glance, courts seem well positioned to answer exactly these kinds of interpretative questions. But that misunderstands the nature of settlements, which are outgrowths of litigating positions. See *infra* Part III. Courts are empowered to adjudicate cases or controversies, but not to establish the executive branch’s litigating position. If the executive branch reaches an interpretation of the Constitution or a statute consistent with an adverse party’s understanding, the settlement is, in a meaningful sense, genuine.

130. *United States ex rel. Schweizer v. Océ N.V.*, 677 F.3d 1228, 1235–36 (D.C. Cir. 2012).

The defendant argued that because the Constitution entrusts the President with the “take care” power, decisions to dismiss cases based on settlements, like decisions not to prosecute,<sup>131</sup> are constitutionally immune from judicial intervention. The D.C. Circuit rejected this argument, but the court’s reasoning fails to persuade.

First, according to the court, “judicial scrutiny of settlement agreements and similar devices is fairly common.”<sup>132</sup> True enough, but this observation is nonresponsive to the separation-of-powers question. Judicial scrutiny of settlement agreements where both parties are nongovernmental obviously poses no separation-of-powers concerns, and in the criminal context, the Due Process Clause provides a constitutional hook for more exacting judicial supervision of the government’s treatment of defendants. But in the context of civil litigation in which the government is a party, the court must provide more robust justification for its review of the executive branch’s decisions. The D.C. Circuit’s first justification simply does not address the separation-of-powers argument.

Second, the D.C. Circuit says, where “the government invoke[s] the court’s supervisory powers” to enforce a settlement agreement, “a court cannot become a partner in enforcement without first examining the reasonableness of the request.”<sup>133</sup> Even if there is a separation-of-powers argument in favor of executive-branch management of its own cases, the court says that the judiciary must retain control over the exercise of the *judicial power*.

This second argument is simply inapposite in the context of policymaking contract settlements. In administrative law, a discretionary decision by the government can later be enforced against the government, even if the underlying decision had no judicial imprimatur.<sup>134</sup> Analogously, once the government has voluntarily committed to a contract settlement, concerns about judicial involvement in enforcement appear misplaced. This claim holds even if the judiciary never agreed to become a partner in enforcement in the first instance—the

131. See *supra* notes 42-47 and accompanying text; cf. *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003) (describing this argument).

132. *Schweizer*, 677 F.3d at 1236.

133. *Id.*

134. Under the *Accardi* doctrine, courts invalidate agency actions contrary to rules the agency promulgated, even if there was no obligation to promulgate the rule. *Lopez v. Fed. Aviation Admin.*, 318 F.3d 242, 246 (D.C. Cir. 2003) (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)); see also *INS v. Yang*, 519 U.S. 26, 32 (1996) (holding that even if an “agency’s discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned” (citation omitted)).

private law of the contract motivates the coercion, which must be enforced except in the most extreme cases. Because contract settlements and consent decrees are fundamentally similar, I would instead accept the argument that *in either case* the government's freely given consent provides sufficient basis for judicial enforcement, even absent judicial imprimatur. The D.C. Circuit's unpersuasive reasoning demonstrates the need for a more robust understanding of the separation-of-powers implications of the settlement authority.

Another related argument is that judicial *enforcement* of discretion-limiting settlement agreements violates the separation of powers by vesting too much authority in courts.<sup>135</sup> In his *Citizens for a Better Environment v. Gorsuch* dissent, Judge Wilkey argued that judicial enforcements of consent decrees constraining the exercise of executive-branch discretion violate Article III because they exceed courts' jurisdiction by ordering relief not authorized by statute.<sup>136</sup> This argument was subsequently rejected by the Supreme Court.<sup>137</sup> But Judge Wilkey also made a separation-of-powers argument—because the consent decree requires particular discretionary actions, “[t]he court here acts as an Administrator . . . without any statutory or constitutional mandate.”<sup>138</sup> Congress has not authorized courts to review these types of discretionary actions under the APA.<sup>139</sup> As a result, Judge Wilkey argued, the court impermissibly exercised executive rather than judicial power. But executive-branch agencies can create law for courts to apply through their voluntary actions.<sup>140</sup> Where the courts simply apply preexisting law, they do not improperly usurp the executive power. Policymaking settlements cohere with the separation of powers between the executive and judiciary.

### III. RECONCILING SETTLEMENT AUTHORITY, THE SEPARATION OF POWERS, AND ADMINISTRATIVE LAW

Rather than treating consent decrees as antagonistic to other forms of executive-branch policymaking, I consider them as part of the legal ecosystem of

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135. The literature appears especially critical of enforcement of consent decrees. See, e.g., Windsor, *supra* note 95, at 549.

136. *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1131 (D.C. Cir. 1983) (Wilkey, J., dissenting) (“[C]ommanding the Executive Branch to exercise its administrative discretion in a particular way [] exceeds the reach of the federal court.”).

137. *Local 93 v. City of Cleveland*, 478 U.S. 501, 522-23 (1986).

138. *Citizens*, 718 F.2d at 1135 (Wilkey, J., dissenting).

139. 5 U.S.C. § 701(a)(2) (2018).

140. See *supra* note 134 and accompanying text.

administrative law: neither a substitute nor workaround for more traditional mechanisms, but part and parcel of the Executive's authority. I therefore present an account that takes seriously the concerns that an administration might try to evade any judicial scrutiny of its preferred policy outcomes. Rather than supporting *ex ante* review of settlements, however, I show how *ex post* review best accomplishes the twin aims of preserving executive-branch powers while promoting administrative law values of accountability and transparency in policymaking.<sup>141</sup>

### A. A Robust Understanding of the Executive's Litigation Authority

Prior scholarship has suffered from a shallow understanding of the executive's litigation authority. In part, previous scholars have jumped straight to an unexplored assumption of bad faith, or at best gamesmanship, as the reason executives seek to implement policymaking settlements. Without a clearer theoretical account of why the executive branch might settle a case, scholars have no way to understand the costs of limiting policymaking settlements.

#### 1. Remembering the "Easy" Cases

The Executive is entrusted with the initial task of sorting meritorious claims against the United States from those where a defense can be justified. This phenomenon manifests both in constitutional understanding, through the prosecutorial-discretion function and the pardon power, as well as in executive-branch practice, such as the refusal to defend unconstitutional statutes or confession of error where judgments have been unjustly won. Settlements merely provide one more mechanism of sorting between cases in which plaintiffs are entitled to relief and those in which they are not. This executive function is not amenable to judicial review or oversight because "it is precisely the desire to avoid a protracted examination of the parties' legal rights which underlies consent decrees."<sup>142</sup> We entrust the executive branch to make the first determination about whether a valid legal claim exists. And because "address[ing] . . . finding[s] of illegality . . . can involve important policy choices,"<sup>143</sup> the executive branch is well positioned to enter into settlements

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141. Other scholars have also made explicit connections between constitutional law values and administrative law values. See, e.g., Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 487-512 (2010).

142. *Citizens*, 718 F.2d at 1126.

143. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910 (2020).

that correct clear legal errors by setting new, prospective administrative policies.

Admittedly, this view does not answer the harder questions about arguably opportunistic, “collusive” settlements. But even in the context of defending statutes, not all scholars agree that the Executive must make every colorable argument to save the statute.<sup>144</sup> Where the executive branch’s own policymaking authority is at issue, the judgment of the executive weighs even more heavily. And even if it were permissible to impose limits on that judgment, the countervailing costs must also factor into the calculus. Settlements are not just mechanisms of entrenchment or political gamesmanship.<sup>145</sup> Rules that delimit the Executive’s discretion are unlikely to be perfectly tailored to opportunistic cases. Rather, they are likely to delay or prevent settlement in the easy cases in which plaintiffs clearly deserve relief. Careful consideration must be given before establishing bright-line rules that would inadvertently limit the ability of the government to do justice in the “easy” cases.

## 2. *Discretion in Litigation Strategy*

With respect to the more difficult cases: controlling the conduct of litigation is an implied executive-branch power incidental to the authority to enforce and defend federal law.<sup>146</sup> Even where scholars have suggested a greater role for Congress in federal-government litigation, the constitutional delegation to the executive embodied in the Take Care Clause looms large.<sup>147</sup>

Importantly, the Executive enjoys unbounded discretion in litigation-strategy choices. We can subdivide discretionary executive actions into two categories: bounded and unbounded discretion. Where discretion is bounded, the executive branch may choose among a set of permissible options, but it must select based on criteria prescribed by law. By contrast, unbounded discretion permits a selection without reference to any particular criterion. Government attorneys selecting litigation strategy are free to choose without reference to any prescribed criteria.<sup>148</sup>

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144. See Devins & Prakash, *supra* note 86.

145. See *supra* note 84 and accompanying text.

146. *Supra* Part II.

147. See, e.g., Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 963 (2012) (explaining the view that “litigation is appropriately a part of the executive’s ‘take care’ function”).

148. See *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1480 (D.C. Cir. 1995) (noting that “[i]n both civil and criminal cases, courts have long acknowledged that the Attorney General’s authority to control the course of the federal government’s litigation is presumptively immune from judicial review” because there is no law to apply). There are outer limits, such

Because choice of litigation strategy is unbounded, administrations can use litigation to pursue their objectives without regard to any other actor's objectives. Administrations, for example, might pursue cases or arguments that are less likely to prevail because they want to shape the law; such decisions are, and should be, completely unreviewable. The choice to pursue a settlement, as a subset of litigation strategy, is therefore similarly unbounded. Review of the choice to settle would involve a complex determination about how to balance the litigation risks against the administration's objectives.

Instead, judicial review should focus on the underlying objects of the settlement—the agency action compelled or forbidden as a result of DOJ approval. For example, if a settlement agreement requires rulemaking, the rule itself could be challenged in an APA suit. If the settlement requires a certain enforcement regime, enforcement actions could be challenged on their merits. This approach moves from an *ex ante* review regime to an *ex post* one.

### B. Settlements, Administrative Law, and Politics

The fundamental administrative law question for settlements is if and when judicial review is available. “In terms of timing, courts may evaluate settlements *ex ante*—at the time of the initial settlement—or *ex post*—in reviewing final agency action implementing a settlement.”<sup>149</sup> In contrast to the existing case law, I support *ex post* review rather than *ex ante* review as the principal means by which courts evaluate settlement agreements. *Ex post* review allows the normal mechanisms of judicial review of agency action under the APA to function as intended,<sup>150</sup> preventing litigants from circumventing those safeguards, while simultaneously permitting meaningful relief through settlement agreements.

First, *ex post* review solves the problem of distinguishing between politics and law in settlement agreements. The Supreme Court's interpretation of the APA is conventionally understood to foreclose “politics” as a justification for

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as a prohibition on making decisions based on protected characteristics or making sanctionable arguments. But those limits do not provide any affirmative requirements as to what arguments DOJ must make. *Id.* at 1481.

149. Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1044 (2001).

150. This approach necessarily repudiates *Ass'n of National Advertisers v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), which prohibits an agency from having an “unalterably closed mind” in the rulemaking process. *Id.* at 1154. But *National Advertisers* is all but a dead letter. See Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except When They're Not*, 59 ADMIN. L. REV. 79, 93 (2007) (observing that no court has ever required recusal because of prejudice in a rulemaking).



policy changes, at least in policy development,<sup>151</sup> though the doctrine has been challenged.<sup>152</sup> In this Note, I express no view on this debate. Instead, I suggest that ex post review of settlement agreements accords with either understanding of the appropriateness of politics as justification in administrative law. For those who believe that politics does have a role, settlement agreements provide an outlet for politically appointed DOJ officials to incorporate “the philosophy of the administration” into the policymaking process.<sup>153</sup> Requiring searching ex ante approval of settlement decrees undermines that role for politics.

Admittedly, this victory comes at the price of a concession to the antipolitics school. Requiring typical judicial review of the agency action ex post ensures that—no matter what the settlement agreement gives away—the client agency must justify that course of action under the normal standards of review, which forbid bare-knuckle politics as a justification. As usual, the final agency action must be justified in terms of reasoned, expert justifications.

*Second*, ex post review resolves the need for an administrative record to determine whether the proposed course of agency action is justified. Unlike anti-trust law, where procedures for taking and evaluating evidence have been established by the Tunney Act,<sup>154</sup> courts reviewing settlements have to rely on their equitable powers to determine whether to approve them based on a bare record. But because settlements indicate that the parties are no longer adversarial, the court needs to rely upon intervenors or other third parties to provide countervailing information. And in some cases, the legality of a proposed course of action may not be clear until a factual record can be developed, revealing, for instance, whether a proposed policy is arbitrary and capricious.

Simultaneously, ex post review levels the playing field between contract settlements and consent decrees. Contract settlements do not require court approval, unlike consent decrees. But there are good reasons to think these two mechanisms should closely mirror one another, both substantively and procedurally. Given federal courts’ evident reluctance to use the contempt power against federal defendants, consent decrees likely are much less coercive than previously assumed. Without that coercive judicial power underlying them, consent decrees are essentially mere agreements that happen to be entered on a

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151. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983); see also Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2, 5 & n.4 (2009) (discussing the conventional understanding of *State Farm*).

152. *State Farm*, 463 U.S. at 59 (Rehnquist, J., dissenting in part); Watts, *supra* note 151.

153. *State Farm*, 463 U.S. at 59 (Rehnquist, J., dissenting in part).

154. See *infra* Section IV.C.

court's docket. Approval mechanisms should reflect the reality that these two types of agreements are, in practice, nearly identical.

*Third*, this approach solves the problem of arbitrary distinctions between procedure and substance by working around it altogether. Under the seminal *Citizens* framework for approval of consent decrees, courts may approve consent decrees that prescribe procedures for proposing regulations so long as they avoid “prescrib[ing] the content of the regulations that [the agency] must promulgate.”<sup>155</sup> This reifies a type of substance/procedure distinction that is ultimately illusory, as Judge Wilkey suggested in his *Citizens* dissent.<sup>156</sup> Clever litigants can use consent decrees to “establish regulatory ‘processes’ which guarantee the bare minimum of regulation or which enable regulated industries to evade prosecution.”<sup>157</sup> Because the line between substance and procedure is impossible to police effectively *ex ante*, Judge Wilkey would have refused to enter even a nominally procedural consent decree; rather, he would have modified the decree to ensure the executive branch’s policymaking discretion remained unconstrained by judicial order.<sup>158</sup>

My approach solves the arbitrariness of the substance/procedure distinction by allowing agencies to commit not only to procedural guarantees, but also to substantive outcomes—with the proviso that those outcomes are subject to judicial review. An agency could commit to a good-faith effort to promulgate a rule with a particular set of policies specified in the consent decree. To offer a specific example, perhaps the EPA would agree to set an air-pollution standard at no more than *X* parts per million and commit to at least three enforcement actions per year on the new standard. But the agency may not rely on that consent decree to prove to a reviewing court that the rule it promulgated complied with the APA.<sup>159</sup> Rather, the agency action would stand or fall on its own merits in *ex post* judicial review *exactly* as if it were not compelled by the consent decree. Rather than asking courts to scrutinize consent decrees to see whether they step across the line from procedure to substance before any agency action has actually been taken, I would shift judicial review back to its ordinary, *ex*

<sup>155</sup>. *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1129 (D.C. Cir. 1983).

<sup>156</sup>. *Id.* at 1133-34 (Wilkey, J., dissenting).

<sup>157</sup>. *Id.* at 1135-36.

<sup>158</sup>. *Id.* at 1130.

<sup>159</sup>. One former DOJ official noted the theoretical possibility that an agency would want to enter into a consent decree to provide the “patina of judicial approval” to agency action on the edge of its authority. The former official described this possibility as “very unusual,” though, and could not identify any examples. Telephone Interview with Former Senior DOJ Official (Mar. 26, 2020).

post position, which provides the benefits of a fully developed record and familiar standards.

*Fourth*, an ex post evaluation levels the playing field between self-terminating and non-self-terminating settlement agreements. For example, the *Flores* litigation consent decree contains a self-termination provision that depends upon the promulgation of rules “implementing” the agreement.<sup>160</sup> This appears as close to an outcomes-based consent decree as litigants can achieve. The countervailing cost is that self-terminating consent decrees ultimately return control to the agency—once the regulation is finalized, judicial supervision ends. However, this raises additional questions: Who interprets whether the regulation actually “implements” the consent decree? Would a regulation that fails to do so be arbitrary and capricious, or otherwise unlawful?<sup>161</sup> Replacing this two-track system with ex post judicial review of the final agency action solves this dilemma.

*Fifth*, even while achieving public accountability, an ex post approach avoids sacrificing the principal advantages of policymaking settlement for private litigants. If an agency agrees to undertake discretionary action but then reneges, parties could still call upon courts to enforce the agreement and compel the desired agency action. Although agencies and nonfederal parties could stipulate to promulgate a rule or other policy with a particular outcome,<sup>162</sup> they could not guarantee that it would survive back-end judicial review. Even in the absence of such a guarantee, policymaking settlement remains valuable to litigants because it provides significant agenda-setting power when agencies and litigants agree that reform is needed. This is particularly important where an agency’s decision not to engage in any action at all would be effectively immune from judicial review.<sup>163</sup> Ex post review strikes the balance between ensuring settlements offer meaningful benefits and mitigating the costs to courts of approving and overseeing settlements.

Under my proposed system, agencies would not be able to rely on the mere existence of a settlement or consent decree to prove that their (in)action complies with the APA.<sup>164</sup> Instead, the agency would have to demonstrate the fac-

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160. See Stipulation and Order, *Flores v. Meese*, No. 85-cv-04544 (C.D. Cal. Dec. 12, 2001) (requiring regulations to “implement” the agreement to terminate the consent decree).

161. See *Flores v. Barr*, 407 F. Supp. 3d 909, 930-31 (C.D. Cal. 2019) (enjoining the enforcement of the “implementing” regulation as inconsistent with the settlement).

162. Due process might forbid a guarantee to reach a particular outcome in an adjudication but not a commitment to investigate or prosecute a certain *type* of enforcement action.

163. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 832, 837-38 (1985).

164. Because of the limits on judicial review of agency inaction, *Norton v. S. Utah Wilderness All. (SUWA)*, 542 U.S. 55, 61-63 (2004), settlements guaranteeing agency inaction would

tual and legal sufficiency as though it were writing on a blank slate. The major difference would be that the settlement would prevent agency backsliding through the court's powers to enforce the settlement conditions, at least until a sister court adjudicated the lawfulness of the final agency action contemplated.

### C. Example Application to Rulemaking Settlements

To see how this approach contrasts with current doctrine, consider example cases where parties offer courts settlements that seek—either explicitly or implicitly—to avoid procedural requirements on agency action. In this example, the proposed consent decree would vacate the product of notice-and-comment rulemaking. Of course, under ordinary administrative law, agencies can only “undo” notice-and-comment rulemaking with analogous notice-and-comment procedures, even if the agency believes the original rulemaking was defective.<sup>165</sup> But courts do not need to follow notice-and-comment procedures before vacating a rule by judicial order.<sup>166</sup> And since consent decrees are judicial orders, not agency action,<sup>167</sup> they are not bound by the APA's notice-and-comment requirement. As a result, consent decrees can be an attractive vehicle for plaintiffs and agencies that want to vacate a rule but also seek to avoid the strictures of notice-and-comment procedure. Are policymaking settlements fundamentally inconsistent with the APA, or do they offer a free workaround for clever agencies?

The Ninth Circuit has attempted to solve this dilemma by drawing a fine line. On the one hand, settlements do not obligate agencies to follow the same

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likely face less overall scrutiny than settlements guaranteeing affirmative agency action. To the extent this is a problem, the *SUWA* interpretation of the APA is the cause. But the public accountability measures I propose, *see infra* Section V.B, would at least allow public and congressional scrutiny of settlements foreclosing agency action. And, of course, an agency could not rely on the mere fact of a settlement agreement to justify its inaction.

165. *See, e.g.,* *Consumer Energy Council v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 447 n.79 (D.C. Cir. 1982) (“The Commission’s argument that notice and comment requirements do not apply to ‘defectively promulgated regulations’ is untenable because it would permit an agency to circumvent the requirements of § 553 merely by confessing that the regulations were defective in some respect and asserting that modification or repeal without notice and comment was necessary to correct the situation.”). But in litigation, agencies are free to accomplish this same goal—either through settlements or a more common procedural device, a motion for voluntary remand. For an excellent discussion of voluntary remands, including their strategic uses by agencies, *see generally* Joshua Revesz, *Voluntary Remands: A Critical Reassessment*, 70 ADMIN. L. REV. 361 (2018).

166. 5 U.S.C. § 551(1)(B) (2018) (exempting “courts” from requirements for agencies under the APA).

167. *Id.* § 551(13).

rulemaking procedure as they would have been obligated to follow in the absence of the agreement.<sup>168</sup> But simultaneously, consent decrees may not “promulgate a new substantive rule” or “permanently and substantially amend . . . an agency rule that would have otherwise been subject to statutory rulemaking procedures.”<sup>169</sup> This line makes intuitive sense: the Ninth Circuit views the acceptable purpose of consent decrees as “merely temporarily restor[ing] the *status quo ante* pending new agency action.”<sup>170</sup>

This approach contrasts with the view expressed by the D.C. district court. In another forestry case, the district court acknowledged that “[t]he proposed consent decree would . . . allow [the defendant agency] and [the plaintiff organization] to accomplish something through an act of this [c]ourt that they could not do on their own” by circumventing the statutory notice-and-comment process.<sup>171</sup> Nonetheless, “this fact does not preclude the [c]ourt from entering the proposed consent decree.”<sup>172</sup> Unlike the Ninth Circuit, the D.C. court placed great weight on the fact that the consent decree comes in the form of a “judicial act” exempt from statutory notice-and-comment procedures.<sup>173</sup> But the court noted that although it had the power to enter such a decree, prudential considerations might counsel against doing so: “If every lawsuit challenging agency action ended in a consent decree giving a private interest group plaintiff the relief it was seeking, the procedural safeguards of the APA would be eviscerated.”<sup>174</sup> As a result, the court concluded that “assessing the consent

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168. *Turtle Island Restoration Network v. U.S. Dep’t of Commerce*, 672 F.3d 1160, 1167 (9th Cir. 2012) (“[I]f the [intervenor’s] position is carried to its logical conclusion, then any attempt by federal agencies to settle litigation involving a regulation would entail a return to the same rulemaking process by which the regulation was created—a proposition that contradicts the Supreme Court’s policy determination in another context.”).

169. *Conservation Nw. v. Sherman*, 715 F.3d 1181, 1186-87 (9th Cir. 2013).

170. *Id.* (quoting *Turtle Island Restoration*, 672 F.3d at 1167).

171. *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 26-27 (D.D.C. 2013).

172. *Id.*

173. *Compare Conservation Nw.*, 715 F.3d at 1187 (“[T]he decree may run afoul of statutory rulemaking procedures even though it is in form a ‘judicial act.’”), with *Am. Forest*, 946 F. Supp. 2d at 26 (noting that a consent decree vacating agency action is a “judicial act” that does not require notice and comment). The D.C. district court also noted the agency could request a voluntary vacatur and remand without violating notice-and-comment procedures, a litigation tactic repeatedly blessed by the D.C. Circuit. See *Am. Forest*, 946 F. Supp. 2d at 26; see also *Revesz*, *supra* note 165, at 366-68 (describing the acceptance of voluntary remands).

174. *Am. Forest*, 946 F. Supp. 2d at 27; see also *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015) (noting, in a different context, “[t]he risk . . . that an agency could circumvent the rulemaking process through litigation concessions, thereby denying interested parties the opportunity to oppose or otherwise comment on significant changes in regulatory policy”).

decree's fairness, reasonableness, and consistency with the public interest requires some consideration of the merits" of the underlying suit challenging the agency action.<sup>175</sup>

Both approaches are problematic. The Ninth Circuit's approach is not only atextual—as the D.C. court explained, the APA explicitly exempts courts from its notice-and-comment requirements, and consent decrees are judicial acts—but it also reifies a status quo bias. The point of many settlements is not to preserve temporarily the status quo, as a preliminary injunction might. Rather, the point is to resolve the legal claims at issue in the manner that a final judgment might. Limiting settlements to the restoration of the status quo ante pending new agency action fails to address the real problem at issue. By contrast, the D.C. court's approach involves a quasi-merits determination by the court, problematically expanding the role of settlement. The court's concern about preserving APA safeguards is legitimate but mistimed.

These problems can be solved by moving review to the ex post position. Suppose again the government agrees that a rulemaking was flawed and that the resulting rule should be repealed. The government can (1) settle the claim, (2) consent to repeal the rule, and (3) follow through on its commitment with a notice-and-comment procedure. Parties with standing to challenge the final agency action (the repeal) can then bring a typical APA challenge. The settlement agreement affords relief to the plaintiffs, while the government cannot evade judicial review on the merits of the contemplated action.

The ex post approach is also doctrinally simple. The court should not enter a vacatur order itself—that is, the consent decree should not, of its own force, vacate the rule. Rather, the settlement (by contract or consent decree) should obligate the agency to repeal the rule. The agency would then have to justify the new (repeal) rule, and it could not rely on the existence of the settlement agreement as a legal justification for the repeal. None of this requires new congressional authorization or new judicial review procedures. All it requires is that courts permit the government to consent to substantive outcomes in settlements, *provided that* the government can justify its new position in ex post review.

And unlike the Ninth Circuit's *Conservation Northwest* approach, this procedure works equally well in the opposite direction. The government could consent to a new rulemaking that changes the status quo. It would just need to justify the new rule if and when the rule is challenged under the APA.

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175. *Am. Forest*, 946 F. Supp. 2d at 27.

*D. The Internal Separation-of-Powers Problem*

Legal scholarship has increasingly focused on the internal (or intraexecutive branch, as opposed to constitutional) separation of powers.<sup>176</sup> Though no previous scholarship has applied this concept to settlement agreements, these agreements pose significant problems for the internal separation of powers. DOJ claims the authority to settle lawsuits despite client agencies' express opposition to the settlement.<sup>177</sup> This power to override agency preferences in the course of litigation is not merely speculative: the Department of Health and Human Services opposed<sup>178</sup> DOJ's position in the recent Fifth Circuit litigation about the constitutionality of the Affordable Care Act (ACA).<sup>179</sup> While litigating decisions about the constitutionality of a statute differ somewhat from pure policymaking, this example demonstrates the potential for DOJ domination of administrative priorities through litigation strategy. Indeed, other academics have raised similar issues about DOJ domination in its representation of client agencies at the Supreme Court.<sup>180</sup>

Although Congress entrusted DOJ with litigation authority, client agencies (should) make policy and execute substantive statutes.<sup>181</sup> Indeed, there is

176. *E.g.*, Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 378, 386-404 (2019); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2319-22 (2006); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 426-36 (2009).
177. See 28 C.F.R. § 0.160(d)(2) (2019) (contemplating approval despite client-agency "opposition").
178. Eliana Johnson & Burgess Everett, *White House Obamacare Reversal Made over Cabinet Objections*, POLITICO (Mar. 26, 2019, 9:33 PM EDT), <https://www.politico.com/story/2019/03/26/trump-obamacare-reversal-cabinet-1238359> [<https://perma.cc/Z6D4-EKXF>].
179. See Brief for Federal Defendants, *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019) (No. 19-10011) (arguing the ACA is unconstitutional and not severable).
180. See, *e.g.*, Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 595-96 (2003) (arguing that "DOJ should only make decisions about litigation strategy, not substantive policy"); Margaret H. Lemos, *The Solicitor General as Mediator Between Court and Agency*, 2009 MICH. ST. L. REV. 185, 197 (arguing that the Solicitor General's control over litigation "in cases involving agency interpretations of statutory law threatens to undermine core justifications for the administrative state, and to stifle the growth of an agency- rather than court-centered mode of statutory interpretation").
181. *E.g.*, Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1061 (1978) ("The Solicitor General's Office recognizes that control over the Government's litigation is not intended to transform the Department of Justice into a superagency sitting in judgment on the policy decisions of other departments or agencies.").

nothing in the Constitution that requires control over litigation strategy to vest with DOJ. The Attorney General is, of course, not a constitutional officer; even if the Constitution requires the executive branch to have control over the litigation strategy of the United States, nothing requires that authority to reside in DOJ.<sup>182</sup> The reverse is also true: nothing constitutionally requires policy decisionmaking to occur in particular agencies with separate substantive mandates.

But does DOJ's settlement authority violate separation-of-powers values *within* the executive branch? Should agency interpretations of statutes receive *Chevron* deference if they are dictated by settlement agreements? Suppose, for example, that a settlement agreement requires an agency to promulgate an ordinary legislative rule interpreting a statute.<sup>183</sup> By assumption, the rule would be upheld as a reasonable interpretation entitled to *Chevron* deference if it were promulgated without any settlement agreement.

Colorable arguments could be made in either direction: in one direction, the government might argue the policy should be viewed more leniently than if the agency were writing on a blank slate because the agency had a legal obligation to comply with the settlement. In the other direction, a challenger might argue the court should be less deferential because the resulting policy may reflect factors other than the agency's expertise.<sup>184</sup> On balance, neither is particularly persuasive. Deviating from the ordinary course of judicial review creates distortionary incentives. If the standard changes in either direction, litigants will be unduly biased either toward or against settlement agreements.

The ex post review regime clarifies the answer: a reviewing court should treat the rule exactly as if the agency had promulgated it without the settlement. This view protects the internal separation of powers between DOJ and its client agencies. It maintains DOJ's full authority over the conduct of litigation. Simultaneously, it ensures client agencies are responsible for their statutory duties. It also clarifies the distinction in the OLC memoranda between statu-

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182. As a result, Congress has granted some agencies independent litigating authority. See Datla & Revesz, *supra* note 99, at 801-02. *But see* Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1465 (2017) ("Even if agencies possess litigation authority independent from DOJ, it is not obvious that such authority is constitutional under Article II or Article III.").

183. Such a settlement agreement would violate *Citizens*, but the procedure/substance distinction underpinning that decision is illusory. See *supra* notes 155-158 and accompanying text.

184. Cf. Lemos, *supra* note 180, at 208-10 (explaining that DOJ lawyers lack subject-matter expertise, which is the rationale for deference). "[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference." *Pension Benefit Guarantee Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990) (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 865 (1984)).



tory restrictions on agency heads and the Attorney General.<sup>185</sup> By bifurcating the settlement process into the agreement itself and the underlying agency action, courts can easily apply statutory commands to the appropriate actors. Where the statute does not bind the Attorney General, DOJ remains free to settle the case—even where the statutory command to the client agency might factor in *ex post* review. This distinction matters particularly where there are prescribed processes to reach a policy outcome (e.g., notice and comment). The agency head could follow the statutory process, even though the Attorney General obviously could not while negotiating the settlement agreement.

Under this doctrinal approach, DOJ would be able to exercise its settlement authority consistently with the constitutional separation of powers and core administrative law principles. By incorporating policymaking settlements into the broader picture of administrative law, this proposal avoids the separation-of-powers difficulties described in Part II. Policymaking settlements are consistent with the executive branch's role in formulating policy under the modern APA regime. And back-end judicial review ensures the executive branch remains legally accountable for its policy decisions.

Whether DOJ *ought* to enter into policymaking settlements at all is a more difficult question.<sup>186</sup> Before answering that question, though, I first analyze other methods Congress retains to control DOJ's settlement authority that do not offend the constitutional separation of powers.

#### IV. POLICYMAKING SETTLEMENTS AND CONGRESSIONAL POWER

As a formal matter, settlement agreements pose few separation-of-powers problems *vis-à-vis* Congress: the legislature can always supersede whatever choice the executive makes via legislation. Because consent decrees are equitable court orders, Congress can always modify their prospective effects through substantive legislation.<sup>187</sup> As a result, policy decisions made by the executive are not binding on a present or future Congress, regardless of whether they take the form of settlement agreements or traditional executive-branch policy. Of course, Congress may face collective-action problems or a veto threat. But formally, Congress retains the power to reverse the executive's decision.

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185. See *supra* text accompanying notes 50-51.

186. See *infra* Part V.

187. See *Plaut v. Spendthrift Farm*, 514 U.S. 211, 232 (1995) (reiterating that Congress can alter the prospective effect of injunctions).

Contracts, though not generally subject to the same abrogation,<sup>188</sup> may also be amenable to congressional revision to the extent that the only remedy for breach is resumption of the lawsuit.<sup>189</sup> To succeed in that lawsuit, the nonfederal party would have to show that it was entitled by statute to whatever relief it sought, not merely that the government violated the contract settlement. And Congress, of course, retains the ability to modify the substantive law providing the rule of decision. As a result, Congress always retains the formal power to revise the executive branch's settlement decisions.

To the extent that the principal separation-of-powers concern is the inability of Congress prospectively to overturn settlement agreements as a practical rather than a formal matter, a number of possibilities emerge, including exercise of the appropriations power, legislation requiring notice-and-comment procedures analogous to the APA, and fast-track legislative overrides.

#### A. *Exercising the Spending Power*

Congress can limit or constrain the executive's litigation and settlement authority through the spending power.<sup>190</sup> Congress can prevent the Executive from expending funds on particular civil suits, at least where: (1) Congress has the power to waive the underlying claims that the government would assert; and (2) the suit is in the "pre-trial state."<sup>191</sup> Relatedly, the Ninth Circuit has held enforceable an appropriations rider precluding DOJ from spending money on certain marijuana prosecutions.<sup>192</sup> The reasoning implicitly upholds Congress's power to direct the litigation, at least insofar as Congress can control *which* actions DOJ prosecutes, if not *how* DOJ prosecutes them. But by extension, Congress might be able to require DOJ to litigate certain actions by requiring the expenditure of funds; conversely, it might force DOJ to settle other litigation by prohibiting the expenditure of funds to litigate the case. It is not entirely clear whether the decision to settle should be characterized as a choice about which litigation to undertake or how to undertake litigation. If the former, Congress seems to have primacy through the spending power; if the lat-

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188. Congress might be able to make performance-of-contract settlement legally impossible under the sovereign acts doctrine. See *United States v. Winstar Corp.*, 518 U.S. 839, 891-910 (1996) (plurality opinion) (explaining the application and the limitations of the doctrine).

189. See *supra* notes 57-58 and accompanying text.

190. See *Att'y Gen.'s Role as Chief Litigator for the U.S.*, 6 Op. O.L.C. 47, 60 (1982).

191. *Constitutionality of an Appropriations Bill Denying Funds for Certain Civil Litig.*, 1 Supp. Op. O.L.C. 147 (1952). Under this interpretation, Congress may direct *which* litigation to undertake, not *how* to conduct litigation.

192. *United States v. McIntosh*, 833 F.3d 1163, 1174-75 (9th Cir. 2016).

ter, the Executive likely controls decisionmaking. But even if appropriations language is not ultimately judicially enforceable, DOJ might acquiesce as a matter of policy in order to appease Congress.<sup>193</sup>

### *B. Expanding the Congressional Review Act*

If the appropriations power is too blunt, Congress might create an expedited procedure for considering legislation. This mechanism could mirror another device to prevent presidential entrenchment: the Congressional Review Act (CRA).<sup>194</sup> The CRA provides expedited procedures for disapproving of—and thereby overturning—regulations. Because CRA resolutions require bicameralism and presentment, they differ from substantive legislation principally in their expedited consideration in both chambers.<sup>195</sup>

Practically, the CRA matters most during presidential transitions when a new President may wish to disapprove of regulations promulgated by the predecessor administration.<sup>196</sup> Similarly, if a fast-track override procedure for settlement agreements had a limited timeframe, it would likely only have practical effect during presidential transitions. Presidents are unlikely to sign resolutions overriding settlements approved by DOJ officials they appointed, and Congress would only rarely, if ever, successfully override a veto. Because of the difficulty in avoiding a veto, Congress could likely only succeed in using a CRA-like procedure shortly after a presidential transition. As a result, this option would likely offer Congress only a limited check against the executive branch's settlement practices.

### *C. Expanding the Tunney Act*

Finally, if Congress would rather deputize the judiciary to review settlements, it could build off existing law that empowers the courts to scrutinize proposed settlements (particularly consent decrees). By following the model of antitrust law, Congress could enact legislation that would guarantee notice-

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193. See JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 71-73 (2017).

194. See 5 U.S.C. §§ 801-802 (2018).

195. See generally RICHARD S. BETH, CONG. RESEARCH SERV., RL31160, DISAPPROVAL OF REGULATIONS BY CONGRESS: PROCEDURE UNDER THE CONGRESSIONAL REVIEW ACT (2001) (explaining the mechanics of the CRA).

196. *Id.* at 14. A President is unlikely to sign a CRA disapproval resolution of a regulation promulgated by her own administration, and Congress rarely succeeds in overriding a presidential veto. As a practical matter, then, the CRA matters most during presidential transitions.

and-comment opportunity for settlements. The Tunney Act explicitly requires the Attorney General to undertake notice-and-comment procedures prior to an antitrust consent decree's effective date.<sup>197</sup> The Act requires the Attorney General to respond to the comments and file a copy of those responses with the district court.<sup>198</sup> If applied to civil settlements more broadly, Tunney Act procedures would guarantee that agencies cannot evade notice and comment by substituting litigation for repealing previously promulgated rules.

Moreover, the Tunney Act provides a model for more robust judicial review of settlements. Congress requires the district court considering the proposed consent judgment to make a finding that the judgment is in the public interest and explicitly authorizes procedures for taking evidence outside of the administrative record to make that finding.<sup>199</sup> If robust judicial review is desirable, prescribing analogous procedures would aid courts reviewing settlement agreements generally.

But the Tunney Act solution poses at least two major challenges. First, it would require a significant new legislative enactment. Second, the generalizability of these procedures is not a foregone conclusion. For example, what substantively constitutes the "public interest" in the antitrust context can be more clearly defined than for policymaking settlements as a category.<sup>200</sup> Congress would need to offer significant guidance unless it wants courts to engage in freewheeling exercises of authority to determine what constitutes the public interest.

As described in Part III, courts can solve the problem of APA evasion on their own by shifting the timing of judicial review. Congress need not enact new legislation to ensure robust judicial oversight of agency actions arising from settlement agreements.

## V. POLICYMAKING SETTLEMENTS AND GOOD GOVERNANCE

The point of discretion-limiting settlements is to make policy that is difficult for a future administration to modify. Although such settlements are legally permissible, do they make good policy? The answer might be "yes" in individual cases—such as the *Flores* settlement—but as a systematic matter, likely

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197. 15 U.S.C. § 16 (2018).

198. *Id.* § 16(d).

199. *Id.* § 16(e)-(f).

200. The Tunney Act itself lists factors the court must consider about the competitive impact of the settlement and its adequacy. *Id.* § 16(e).

“no.” Two principal good-governance reasons stand out: poor administration and different intragovernmental institutional competencies.

### A. Current Governance Problems

First, DOJ cannot currently be trusted accurately to administer settlements on an ongoing basis. Although DOJ regulations require approval of policymaking settlements by high-ranking officials, the Department does not have a systematic method of memorializing such settlements.<sup>201</sup> Nor does DOJ’s Civil Division have a means of identifying settlements where the Division sought higher-level approval.<sup>202</sup> This oversight gap not only undermines the transparency mandates of DOJ’s own regulations<sup>203</sup> but also raises serious good-governance concerns.

Because DOJ has no centralized mechanism to track the discretion it has surrendered via settlement, DOJ could apply settlement principles unevenly (e.g., by treating two substantially similar settlement offers differently), the government might fail to meet its obligations, or DOJ might enter into contradictory settlements over time. Neither client agencies nor settlement counterparties adequately guard against these dangers. Even under the dubious assumption that client agencies maintain their own records perfectly, settled cases may intersect the jurisdiction of multiple agencies, requiring DOJ to play a coordinating role as part of its litigation authority. And settlement counterparties may be unaware of other potential or finalized settlement agreements that contain contradictory commitments.

At a minimum, DOJ should be more transparent about its discretion-limiting settlements and develop mechanisms for tracking them. Rather than merely making settlement agreements presumptively public, DOJ regulations

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201. Specifically, there is no way of locating policymaking settlements, as defined by DOJ’s own approval regulations, by reference to the approving official. Telephone Conversation with Eric Hotchkiss, Senior Gov’t Info. Specialist, Off. Info. Pol’y, U.S. Dep’t of Justice (Mar. 4, 2019).

202. Email from Hirsh D. Kravitz, Senior Supervisory FOIA Counsel, Off. of Freedom of Info. Act, Records & E-Discovery, Civil Div., U.S. Dep’t of Justice (Oct. 31, 2018, 1:07 PM) (on file with author).

203. “[DOJ] will not enter into final settlement agreements or consent decrees that are subject to confidentiality provisions, nor will it seek or concur in the sealing of such documents. This policy flows from the principle of openness in government and is consistent with the Department’s policies regarding openness in judicial proceedings and the Freedom of Information Act.” 28 C.F.R. § 50.23(a) (2019) (citations omitted). The regulation contains a catch-all provision allowing the approving official to authorize individual exceptions, but “any confidentiality provision must be drawn as narrowly as possible.” *Id.* § 50.23(b).

should require proactive disclosure of all finalized settlements.<sup>204</sup> More fundamentally, administrations should refrain from using settlements as a policy tool without a robust means of cataloguing and memorializing the agreements' decisional inputs and outputs.

Second, DOJ's wide-ranging authority to negotiate settlements without the consent of client agencies also risks disrupting the internal balance of power between government lawyers and other experts. This problem is a familiar one in administrative law. The *Chenery* principle,<sup>205</sup> for example, allocates power away from DOJ lawyers and toward other policymaking experts by prohibiting post hoc rationalizations.<sup>206</sup> Because they are fundamentally litigation devices, discretion-limiting settlement agreements have the potential to untether litigation outcomes from the expertise and competence of agency personnel.

The extent to which this problem is real rather than purely theoretical depends on DOJ's norms of respect for agency decisions in the litigation process. The Trump Administration seems comfortable using litigation strategy as a means to achieve policy that it otherwise would be unable to enact. The opacity of consent decrees and settlement contracts means that they may provide avenues for an opportunistic administration to circumvent normal agency procedures and experts. In fact, the imbalances between DOJ and client agencies in both litigation and settlement are mutually reinforcing. The Office of the Solicitor General's monopoly on appellate positions, combined with structural features of the Office, keeps it functionally independent from client agencies.<sup>207</sup> Because DOJ has the choice between litigating on the merits and settling cases, client agencies are in an even weaker position: even if they could make one path more difficult for DOJ—for instance, by certifying an unfavorable administrative record for litigation—DOJ can always elect to settle. Constraining DOJ's ability to act independently in settlement may therefore constrain its independence in litigation as well.

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204. Cf. 5 U.S.C. § 552(a)(2) (2018) (requiring proactive public disclosure of certain government records).

205. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

206. Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 *YALE L.J.* 1032, 1043-44 (2011).

207. The Solicitor General can “check client initiatives” by “rejecting requests to appeal or petition, declining to make certain proposed arguments in briefs to the courts, and even confessing error.” Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 *MICH. L. REV.* 676, 704-09 (2005). Agencies have no recourse when the Solicitor General rebuffs their position because they generally cannot litigate the issue without the Office of the Solicitor General's approval.

Moreover, the use of settlement agreements as policymaking devices may jeopardize the independence of DOJ. If litigation authority generally, including settlement authority, becomes increasingly politicized, it will likely undermine DOJ's traditional independence from the White House. For example, only political appointees, rather than career attorneys, signed DOJ's brief in the ACA case.<sup>208</sup> An autonomous Attorney General provides the benefits of independent judgment<sup>209</sup> and internal separation of powers. But allowing DOJ to run roughshod over other federal agencies creates incentives to politicize DOJ, which is a long-term loss for the executive branch and for thoughtful, evidence-based policymaking.<sup>210</sup>

### *B. Principles for Good-Governance Settlement*

Given the governance concerns about policymaking settlements, I conclude by offering suggestions for DOJ to improve its practices. Each could be unilaterally implemented by the executive branch without any new legal authority.

#### *1. Publicly Memorialize the Settlements and Their Justifications*

DOJ should publicly and proactively memorialize policymaking settlements in a permanent catalogue. Public documentation would provide transparency benefits for the public and a body of precedent for executive-branch lawyers. In addition to creating a digital repository of the settlement agreements themselves, DOJ should publicly memorialize its reasons for entering into the settlement. This practice would waive certain litigation privileges that ordinarily attach to documents related to settlement decisions.<sup>211</sup> But the government can

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208. Ellis Kim, *Career Staff MIA as DOJ Reverses on ACA Defense*, LAW.COM (June 8, 2018, 12:20 PM), <https://www.law.com/2018/06/08/career-staff-mia-as-doj-reverses-on-aca-defense> [<https://perma.cc/E6DN-8G43>].

209. Cf. Memorandum from David J. Barron, Acting Assistant Att'y Gen., to OLC Att'ys, OLC (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> [<https://perma.cc/KYC2-KDNL>] (explaining the benefits of OLC independence).

210. See Metzger, *supra* note 176, at 433-34 (noting that Presidents might support internal separation of powers "if they believe that doing so will yield more effective performance" by the executive branch).

211. See, e.g., U.S. DEP'T OF JUSTICE, *Exemption 5*, in UNITED STATES DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT 397-98 & n.195 (2014) (discussing the application of the work-product doctrine); *id.* at 409, 414 (discussing possible settlement-negotiation privilege).

unilaterally waive these privileges unless otherwise prohibited by law.<sup>212</sup> And DOJ already discusses aspects of its litigation strategy and decisionmaking publicly in its section 530D letters.<sup>213</sup> Providing a public accounting of the reasons for entering into settlements would help reassure the public that these settlements are not merely mechanisms of political entrenchment, but rather reflect considered judgments about the merits of a case.<sup>214</sup> And publicly available memoranda memorializing the settlement can, like OLC memoranda more generally, help constitute a body of executive-branch precedent.<sup>215</sup> Because courts do not adjudicate the merits of settled cases, the executive branch can help fill in the “missing” reasoning.<sup>216</sup>

If the judiciary adopted the ex post review procedures I propose, this policy would be virtually costless for DOJ. Under ex post review procedures, DOJ need not worry that publicly disclosing its reasons for settlement would provide a “hook” for judicial review of the settlement agreement. Instead, the object of the agreement—the underlying policy to which the parties agreed—would rise or fall on its own merits under traditional administrative law principles. But even under an ex ante review regime, DOJ can largely mitigate the potential costs by waiting until after approval of the settlement to disclose its considerations voluntarily. The public can still reap the benefits of voluntary disclosures without threatening the Department’s litigation and settlement strategies in the first instance.

If DOJ is unwilling to adopt these procedures voluntarily, Congress ought to force its hand. Congress already requires the Attorney General to report settlement agreements for claims *against* the United States where the monetary sum exceeds or is likely to exceed two million dollars.<sup>217</sup> By contrast, the same

212. U.S. DEP’T OF JUSTICE, *Discretionary Disclosure*, in UNITED STATES DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT 2-3 (2014).

213. See generally *Letters Submitted to Congress Pursuant to 28 U.S.C. § 530D*, U.S. DEP’T JUST. (Aug. 21, 2019), <https://www.justice.gov/oip/letters-submitted-congress-pursuant-28-usc-%C2%A7-530d> [<https://perma.cc/W7DB-Y3H4>] (database of section 530D letters).

214. Cf. Barron, *supra* note 209, at 5 (explaining that publication “assur[es] that Executive action is based on sound legal judgment and in furtherance of the President’s obligation to take care that the laws, including the Constitution, are faithfully executed”).

215. See Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1494-97 (2010) (exploring the benefits of executive-branch precedent in OLC memoranda).

216. *Id.* at 1522.

217. 28 U.S.C. § 530D(a)(1)(C)(i) (2018). Interestingly, a review of the section 530D letters posted online by the Department through June 2020 reveals only one letter reporting a settlement since 2009, in a case about federal judges’ salaries. Letter from Eric H. Holder, Att’y Gen., to John Boehner, Speaker of the House of Representatives (Dec. 4, 2013), <https://www.justice.gov/oip/osg-530d-letters/12-04-2013.pdf> [<https://perma.cc/HUT2-X8GE>].



provision requires reporting of settlement agreements for claims by the United States where the injunctive or other nonmonetary relief will exceed three years in duration.<sup>218</sup> Congress could easily extend the section 530D reporting obligations to encompass injunctive or other nonmonetary settlements in the government's defensive litigation. Because the letters would only memorialize existing settlements, and not prescribe criteria or limitations on the Executive's substantive conduct in the litigation, the reporting requirement would not present constitutional hurdles.

## 2. *Decline to Settle Cases Against the Wishes of the Client Agency*

DOJ should amend its regulations to prohibit settlement against the wishes of the client agency. Current regulations implicitly approve this practice.<sup>219</sup> But because policymaking settlements ultimately require agency implementation, DOJ should secure client consent before settling. And guaranteeing acceptance from the implementing agency will preserve the proper institutional role for each.<sup>220</sup> DOJ need not worry that this will drag the government into agonizing litigation over the approval process for settlement agreements: DOJ regulations confer no private right of action.<sup>221</sup> The only cost to the government is internal deliberation, which is outweighed by the benefits of protecting the integrity of the settlement process.

If it wished, Congress could also intervene to ensure that DOJ respected these norms. By requiring settlements to receive the approval of the Attorney General (or her delegee) *and* the agency head, Congress could preclude settlements that lack agency agreement from having any legal effect. In my view, such a requirement would not offend the constitutional separation of powers because it would merely reallocate authority within the executive branch—rebalancing only the internal separation of powers between agencies. Administrative reorganization raises no constitutional separation-of-powers concerns.<sup>222</sup>

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218. 28 U.S.C. § 530D(a)(1)(C)(ii) (2018).

219. See *supra* note 177 and accompanying text.

220. See *supra* Section V.A.

221. See 28 C.F.R. app. to subpart Y of pt. 0, Civil Division § 10 (2019).

222. See CHAFETZ, *supra* note 193, at 98 (“[W]hile the Constitution’s text clearly contemplates the existence of ambassadors, judges, heads of departments, and so on, it leaves to Congress the details of what departments to create and how to structure them.”).

### 3. *Implement Settlements in Good Faith*

Administrations should respect their predecessors' settlements and attempt to implement them in good faith. Where changing factual circumstances or law justifies modifications to a settlement, officials can and should request such modifications. And if there are good-faith disagreements about the proper interpretation of ambiguous settlements, executives can properly interpret them in light of after-arising policy, legal, or political concerns. But where an administration merely disagrees with the policy rationales behind the settlement, they should not shirk implementation. These settlements grew out of their predecessors' legitimate authority to control litigation strategy.

Because later-in-time administrations must implement settlement agreements, genuine questions of interpretation will arise. If settlement language is ambiguous, what deference, if any, is owed to agency interpretations of contract settlements and consent decrees? Currently, the D.C. Circuit applies *Chevron*-style<sup>223</sup> deference to interpretation of government contracts<sup>224</sup> and, by extension, contract settlement agreements.<sup>225</sup> As a result, ambiguities in a contract settlement are likely to be construed in the government's favor, particularly where review is guaranteed in the D.C. Circuit.<sup>226</sup> Deference to executive-branch interpretation effectively provides a mechanism for future officials to "modify" settlement agreements unilaterally without the consent of either opposing parties or the court. Those pseudomodifications can facilitate shirking by later-in-time administrations seeking to escape earlier settlements. But deference can also promote flexibility when factual circumstances change.

The extent to which deference is appropriate depends, in part, on whether the government is capable of committing to implementing earlier settlements in good faith. If later administrations are faithful agents of earlier settlements, then courts should be more willing to extend deference to their interpretations. Administrations should commit to faithful interpretation to preserve their own and their successors' interest in receiving judicial deference to executive inter-

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223. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

224. See *Cajun Elec. Power Coop., Inc. v. Fed. Energy Regulatory Comm'n*, 924 F.2d 1132, 1135 (D.C. Cir. 1991).

225. See *Ameren Servs. Co. v. Fed. Energy Regulatory Comm'n*, 330 F.3d 494, 498-99 (D.C. Cir. 2003); see also Patricia M. Wald, *ADR and the Courts: An Update*, 46 DUKE L.J. 1445, 1452 (1997) (explaining courts' *Chevron*-like review of contract settlement agreements).

226. While the Fourth Circuit has also adopted this approach to contract interpretation, see *Kerpen v. Metro. Wash. Airports Auth.*, 907 F.3d 152, 164 (4th Cir. 2018), other circuits have rejected deference to agencies, see *Scenic Am., Inc. v. Dep't of Transp.*, 138 S. Ct. 2, 2 (2017) (statement of Gorsuch, J.) (collecting cases demonstrating a circuit split).

pretation. Admittedly, *ex post* review puts an administration in an uncomfortable position. The relevant agency would have to make a good-faith effort to comply with the settlement while simultaneously hoping the action does not survive subsequent judicial review. But legal and institutional norms already largely drive compliance with courts' equitable orders.<sup>227</sup> These norms should encompass good-faith implementation of settlement agreements.

Finally, Congress could play a role here too—albeit a more limited one. Congress can and should use its oversight and appropriations powers to ensure that administrations continue to honor the policy agreements that they have made, particularly when those agreements have engendered serious reliance interests. Even absent good-faith implementation, a background norm of deference would actually promote effective oversight. If litigants know they need to draft settlements unambiguously to avoid interpretations that undermine the litigants' goals, they will explicitly describe their assumptions and meticulously document their agreements. This cat-and-mouse dynamic—where litigants try to draft against the backdrop of potential later agency evasion—should result in agreements with clearly specified legal obligations *ex ante*. That clarity, in turn, should be helpful for oversight by Congress and the public.

## CONCLUSION

DOJ's long-term institutional legitimacy depends on representing the interests of the United States over time, not particular administrations. Although the settlement authority does not ultimately violate the constitutional separation of powers, indiscriminate use fairly raises concerns about the Department's competence and legitimacy. By voluntarily disclaiming some of the executive branch's constitutional prerogatives, DOJ can protect the long-term interests of both the Department itself and the broader executive branch.

But nothing in this Note describes what substantive ends the executive branch should pursue through settlements or when particular goals are sufficiently important to warrant policymaking settlements. To return to the *Flores* settlement: the protection of immigrant children, a particularly powerless group, while in government custody is, to me, an unusually worthy goal. But nothing in administrative law can provide those substantive commitments and goals. Ultimately, only politics can. And that is why we hold elections.<sup>228</sup>

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227. See Parrillo, *supra* note 59.

228. Cf. McConnell, *supra* note 8, at 300 (“The conduct of the executive branch, no less than the legislative, is intended to be politically accountable. That is why we hold elections for President.”).