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# Executing the Laws or Executing an Agenda: Usurpation of Statutory and Constitutional Rights by the Department of Justice

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# EXECUTING THE LAWS OR EXECUTING AN AGENDA: USURPATION OF STATUTORY AND CONSTITUTIONAL RIGHTS BY THE DEPARTMENT OF JUSTICE

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*The Department of Justice (DOJ) can compel individuals and entities to sacrifice their constitutional or statutory rights. The DOJ can do so through brute political force, settlements and consent decrees, selective statutory enforcement, and prosecutions that coerce future actors not to pursue goals contrary to the policy desires of the executive branch. The current regime provides few constraints on the DOJ's ability to abuse its legal authority to achieve political objectives. This unbridled power jeopardizes the rights of both opposing and third parties.*

*This Note examines, in a bipartisan manner, the methods the Justice Department employs that deprive opponents or third parties of statutory or constitutional rights. It weighs the need for efficient law enforcement against the government's duty to protect individual and group liberties. The Note concludes that the current legal checks on DOJ power are insufficient. Congress should continue its present system of legislative policing and pass a modified version of the Tunney Act to limit DOJ abuses beyond the antitrust field.*

## I. INTRODUCTION

Over recent decades, political life in the United States has been shaped by a marked expansion of executive branch power. Recent examples include executive agencies attempting to expand the scope of their regulatory powers and the Office of the President itself claiming expanded authority in areas such as foreign affairs.[1] The legislative and judicial branches have been passive in the face of this movement and have even endorsed the expansion of presidential authority. One means through which the executive branch

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1. *See, e.g.*, Christopher C. Sabis, Note, *Congress and the Treaty Power: An Originalist Argument Against Unilateral Presidential Termination of the ABM Treaty*, 31 DENV. J. INT'L L. & POL'Y. 223 (2002); Stuart Taylor, Jr., *Bad Aftertaste: The FDA Tobacco Case May Have Unsatisfying Outcome, Whoever Wins*, LEGAL TIMES, May 10, 1999, at 21 (discussing attempts by the Food and Drug Administration to begin regulating tobacco products).

wields its power is legal action by the Department of Justice (DOJ).[2] This follows naturally, since the Constitution charges the executive branch with enforcing the laws of the United States.[3] However, power to enforce the law begets the ability to abuse that power. The DOJ, using standard tools at its disposal, has the ability to compel individuals and entities to sacrifice their constitutional or statutory rights. Many scholars recognize the difficulties created by these powers of the DOJ, but most accept them with either contentment or frustration. As prosecutors have near complete control over the cases they bring, some may accept these uses of prosecutorial discretion as standard and not problematic. Individuals and entities can voluntarily sacrifice their rights in settlements that are not subject to judicial review.[4] As this article will describe, the Department can use selective statutory enforcement, brute political force, settlements and consent decrees, and prosecutions that coerce future actors not to pursue goals contrary to the policy desires of the executive branch.

This paper examines the methods the DOJ employs to deprive a party opponent or third party of statutory or constitutional rights. It then considers whether our government should delegate such wide discretion to the Attorney General in bringing and settling actions. Section II of this paper details four specific methods that the DOJ can use to exploit executive authority and provides examples of each type of abuse. Section III examines the policy arguments for and against the DOJ having the unchecked authority described in Section II. Section IV analyzes potential measures that are available to check the DOJ's authority in these matters. Finally, Section V concludes that, while broad executive discretion is inevitable, Congress should legislate to prevent the DOJ from taking actions that unnecessarily infringe on the statutory or constitutional rights of litigants and third parties.

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2. *See, e.g.*, Peter M. Shane, *Federal Policy Making By Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241, 241 (1987).

3. U.S. CONST. art. II, § 3.C1.

4. *See, e.g.*, Brief of Amici Curiae United States Telephone Assoc. at n.15, United States v. Chesapeake & Potomac Tel. Co. of Va., 1994 U.S. Briefs 1893 (1995) ("Because the restriction was the result of a voluntary settlement, it was not subject to First Amendment challenge.").

## II. ABUSIVE TECHNIQUES EMPLOYED BY THE DOJ

Of the many methods available to the DOJ to enforce the Constitution and laws of the United States, four are particularly susceptible to abuse. These are selective statutory enforcement, brute political force, settlements and consent decrees, and prosecutions that coerce future actors not to pursue goals contrary to the policy desires of the executive branch. In carrying out its duties, the DOJ uses these methods to usurp statutory and constitutional liberties. Defining these practices and recounting recent examples of their use can illustrate the overall policy problem and demonstrate how the DOJ undermines the laws it is sworn to enforce.

### *A. Selective Enforcement of Statutory Law*

Conservatives and liberals often have different priorities in law enforcement. These disparities were apparent during the confirmation hearings of Attorney General John Ashcroft. Ashcroft told Congress that, despite his conservative ideals, he would not work to overturn *Roe v. Wade* and that he would vigorously enforce the civil rights laws.[5] His promises met with skepticism from Democrats, including a cutting jibe from Senator Charles Schumer (D-NY).

> You know, Senator (Ashcroft), I sit here and listen to the hearing, and my jaw almost drops. Senator Ashcroft believes that *Roe v. Wade* is the settled law of the land? Senator Ashcroft believes that the assault weapons ban should be continued? You know, Senator, we fought a lot of these battles in the Senate over the last two years. Where were you when we needed you?[6]

Despite Ashcroft's assertions that "no part of the Department of Justice was more important than the Civil Rights Division,"[7] it is difficult to believe that the Ashcroft DOJ will enforce statutes such as the Fair Housing Act[8] (FHA) as aggressively as the DOJ did under former Attorney General Janet Reno. Under Reno, the DOJ

5. Jim Oliphant, *Ashcroft's Redemption Ticket*, LEGAL TIMES, Jan. 22, 2001, at 1.
6. *Id.* at 15.
7. *Id.*
8. 42 U.S.C. §§ 3601–3631 (2003).

undertook an unprecedented campaign to enforce the Act.[9] This campaign illustrates how different policy preferences compel different enforcement standards and how zealous law enforcement can push the boundaries of legislative intent.

After Bill Clinton took office as President, enforcement of the FHA became a DOJ priority. The goal of these prosecutions was to reform the business practices of most real estate entities by bringing a small number of high-profile cases.[10] However, in order to make these cases high profile, the DOJ had to enter consent decrees that "reflect[ed] an aggressive DOJ interpretation of the reach of the Fair Housing Act, and impose[d] significant damages and penalties."[11]

Naturally conservatives are going to interpret a statute's reach differently from liberals; it is a matter of interpretation whether the DOJ's application of the Act was inappropriate in any particular instance. However, some of the consent decrees reveal remedies that appear to stretch the Fair Housing Act beyond the goals authorized by Congress. For example, in August 1995, the DOJ settled a FHA case with the owners of a North Miami Beach, Florida apartment complex. The Department alleged that the complex charged African-American residents higher rents than it charged white residents, and that prospective black tenants were falsely informed that there were no apartments available for rent.[12] As part of the settlement, the apartment owners agreed to pay $650,000 to HOPE [Housing Opportunities Project for Excellence] and the individual plaintiffs and $200,000 in civil penalties to the U.S. treasury; create two funds totaling $375,000 to compensate any individuals who may subsequently be identified as victims of the discrimination; advertise in local papers to locate possible victims of the discrimination; and, fund future testing by HOPE.[13] The damages Jose Milton, the owner of the apartments, paid to individual victims and to HOPE totaled $1.2 million.[14]

While this settlement successfully furthered the Clinton Administration's fair housing policy, it circumvents the Fair Housing Act's limits on court-ordered monetary damages in civil actions brought

9. Andrew J. Sandler, *Fair Housing Campaign: DOJ Takes Aggressive Stance on Housing Discrimination*, LEGAL TIMES, Apr. 21, 1997, at S42.

10. *Id.*

11. *Id.*

12. *Id.* at 543.

13. Press Release, Department of Justice, South Florida Apartment Owner Who Refused to Rent to African Americans to Pay $1.2 Million Under Justice Department Settlement (August 30, 1995) *available at* http://www.usdoj.gov/opa/pr/Pre_96/August95/460.txt.html (on file with the University of Michigan Journal of Law Reform).

14. *Id.*

by the DOJ. The Fair Housing Act caps civil penalties for repeat offenders at $100,000:[15] Milton paid double that, $200,000, in civil penalties in this settlement. Furthermore, while not clearly contrary to the statute, the $1.2 million total damage award seems high in light of the relatively low civil penalties authorized by the Act. The disbursement to HOPE also constitutes a somewhat broad interpretation of the Act's authorization of an award of "such other relief as the court deems appropriate."[16] It is apparent that the DOJ, through settlement, obtained a more favorable result than it would have had it gone to trial for enforcement of the statute.

In addition to inflated monetary awards, the DOJ also compelled many of the parties with whom it settled to take affirmative action-like steps "to encourage minority applications and make themselves more hospitable to minority residents."[17] One example of this is a January 1996 settlement that, in addition to monetary damages, required seven mobile park homes in California to "hire a fair housing organization to conduct testing of the mobile home parks; implement a fair housing training program; notify the public that they welcome families with children, and; submit periodic compliance reports."[18] Had this case made it to trial, the appropriate relief provision of 42 U.S.C. § 3614(d)(1)(b) might have allowed this type of remedy. However, it is unclear if a judge would have granted such relief.

Arguably, the DOJ's Fair Housing Act settlements throughout the 1990's exceeded Congress's intended remedies. This aggressive stance demonstrates that the zeal with which the executive enforces the law can affect the law itself. While the potential systemic problem is apparent in cases where the DOJ is seeking high-profile settlements, it is less obvious when the Department subtly minimizes its efforts in certain areas of enforcement. Thus, by aggressively enforcing certain laws and ignoring others, the DOJ can affect the substance of the law itself.

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15. 42 U.S.C. § 3614(d)(1)(C)(ii) (2003).

16. 42 U.S.C. § 3614(d)(1)(B) (2003).

17. Sandler, *supra* note 9, at 543.

18. Press Release, Department of Justice, Mobile Home Park Owners to Pay More than $2 Million For Allegedly Discriminating Against Families with Children (Jan. 23, 1996), *available at* http://www.usdoj.gov/opa/pr/1996/January96/012.txt (on file with the University of Michigan Journal of Law Reform).

### *B. Use of Brute Political Force*

While the selective enforcement problem involves litigation, the DOJ does not necessarily need to threaten litigation to compel a result that may violate statutory or constitutional rights. As an executive branch department, the DOJ has a great deal of coercive political power at its disposal. Parties often do not want conflicts with political subdivisions of the US Government, or with actors or parties within the Government. They may fear retaliatory interference in future interactions with the political infrastructure.[19] By exercising political power, the DOJ can enforce its policy agenda, even in legally questionable circumstances, without involving the judicial branch.

1. *The DOJ and Playboy Magazine*—The DOJ Reagan-era dispute with Playboy is one example of its ability to abuse political influence to achieve a policy objective. In 1986, Playboy magazine filed suit against the DOJ claiming that the Department, under Attorney General Edwin Meese, had violated the magazine's First Amendment rights.[20] Meese chaired the Commission on Pornography, which he founded within the DOJ. On February 11, the Commission warned retailers to cease carrying Playboy Magazine or the Commission would report them as distributors of pornography; 5,000 7-Eleven stores subsequently stopped selling the magazine. Playboy alleged that the Commission had coerced a total of 15,000 retailers to stop selling Playboy magazine.[21] Though the DOJ attorney said there was no First Amendment violation because the Commission was merely advisory and could not exert "coercive government power," it nonetheless acted quickly to settle the case out of court.[22]

The DOJ's eagerness to settle may be an indication that, while it put up a brave front, it feared that its approach had violated the First Amendment. Twenty-three years prior in *Bantam Books, Inc. v. Sullivan*,[23] the Supreme Court considered whether Rhode Island could actively encourage vendors not to carry certain forms of con-

19. *See, e.g.*, Shane, *supra* note 2, at 272 ("[A]n agency's settlement may be shaped more by the agency's internal political agenda or by its responsiveness to an ongoing relationship with the suing party or parties than by a faithful, disinterested assessment of the most appropriate implementation of its statutory responsibilities.").

20. NY TIMES News Service, *U.S. Tries to Settle Suit with Playboy*, CHI. TRIB., Nov. 8, 1986, at C4.

21. *Id.*

22. *Id.*

23. 372 U.S. 58 (1963).

stitutionally protected speech that might be "objectionable" for viewing by underage children.[24] Writing for a majority of the Court, Justice Brennan found that this system constituted an unconstitutional prior restraint on speech.[25] The Commission's actions in the *Playboy* case were almost identical to those of Rhode Island in *Sullivan.*

Ultimately, the U.S. District Court for the District of Columbia granted a permanent injunction to Playboy.[26] Even if the Commission's actions were unconstitutional, this situation shows the potential for unconstitutional results through the coercive actions of the DOJ. Since many entities have repeated interactions with the executive branch they are unlikely to contest every such use of power.[27]

*2. The Strength of Political Coercion—An Illustrative Exercise of Potential Power*—While it may or may not have been abusive in itself, the Clinton-ADA settlement illustrates the potential for abuses due to coercive political power in private settlements as well. In 1992, Bill Clinton's Presidential Campaign booked several rooms in the Hotel Inter-Continental New York.[28] The campaign did not realize that the Hotel was, at that time, subject to a DOJ complaint under the Americans with Disabilities Act (ADA).[29] Apparently, the Hotel had not removed barriers preventing access for disabled individuals.[30]

This situation was potentially embarrassing for both Bill Clinton and the Democratic Party. A representative of the group Disabled in Action, the citizen group that had filed the complaint with the DOJ, noted that "things started rolling" as soon as the Clinton Campaign realized its blunder.[31] The Campaign, the Hotel, and the complainants eventually reached a settlement under which the hotel would become ADA compliant by a certain date. In return, the group dropped its complaint with the DOJ and agreed not to "engage in any form of public protest" in the vicinity of the hotel while Clinton and his campaign were staying there.[32]

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24. *Id.* at 59–61.
25. *Id.* at 70–71.
26. Playboy Enterprises, Inc. v. Meese, 639 F. Supp. 581 (D.D.C. 1986).
27. *See, e.g.*, Shane, *supra* note 2.
28. Susan Harrigan, *Hotel Dispute Ironed Out*, NEWSDAY, June 30, 1992, at 27.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*

Since Disabled in Action achieved its goal and Bill Clinton and the Democrats avoided a major embarrassment, many would say the settlement was successful and efficient. However, the situation does demonstrate that political power can coerce a party to sacrifice a constitutional right. Disabled in Action must have known that if Bill Clinton won the presidency, it would have repeat dealings with his administration in regards to the ADA. Had it been tougher in this settlement and insisted on maintaining its right to protest in order to highlight its cause, there could have been retribution from the Clinton administration. By allowing the future President to save face, Disabled in Action may have gained political influence and put itself in a position to benefit in the long term.

The potential political power of the presidency and the many subdivisions within the executive branch can coerce a private entity to sacrifice a fundamental Constitutional right. In the DIA case, Bill Clinton did not even need to be president to use the power he had the potential to inherit. In the *Playboy* case, Playboy was effectively a third party, as it was the 7-Eleven stores and other retailers who were threatened with political action if they continued to carry the magazines.[33] These two scenarios, read together, illustrate how easy it is for the DOJ to abuse the political power inherent in the executive branch, and directly or indirectly usurp the rights of an individual or group.

### *C. Legislation by Consent Decree*

As noted in Section II-B, the DOJ often enforces statutory law through consent decrees, which give the DOJ the power to selectively enforce certain congressional legislation. A further problem with DOJ consent decrees is that they can ignore or usurp an established standard of constitutional or statutory law. Though reviewed by the presiding judge in the case, consent decrees are not subject to the same level of scrutiny as a case that goes to trial. In a consent decree,

> the private settlement is not scrutinized in the same way as a judgment on the merits. Rather, the court must accept the settlement unless there is evidence of procedural unfairness, unreasonableness, or inadequacy. The only grounds on which to vacate a consent decree are fraud, lack of consent, or lack

33. NY TIMES News Service, *supra* note 20.

> of jurisdiction. . . .[W]ith a consent decree, courts will not scrutinize the merits.[34]

In 1987, Peter M. Shane, a Professor of Law at the University of Iowa, noted that these consent decrees also raise questions when they bind future executive branch actions, limiting the discretion of future executives to enforce the laws as they see fit.[35]

*1. The Criminal Context*—Individuals may freely give up their rights in a voluntary settlement. However, what appears to be a voluntary sacrifice of a Constitutional or statutory right may, when litigating against the DOJ, actually be coerced. In the criminal context, one right a defendant may be coerced into sacrificing is the statutory right to appeal a sentence imposed by a trial court.[36]

Over the last several years, the DOJ has relied heavily on plea agreements in enforcing criminal law.[37] As part of these plea agreements, the Department has often required defendants to waive their right to appeal their sentence under 18 U.S.C. § 3742(a).[38] This does not seem peculiar on its face since the Supreme Court has held that criminal defendants can legally sacrifice

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34. Michael P. O'Mullan, Note, *Seeking Consistency in Judicial Review of Securities Arbitration: An Analysis of the Manifest Disregard of the Law Standard*, 64 FORDHAM L. REV. 1121, 1149 (1995) (citing Swift & Co. v. United States, 276 U.S. 311, 324 (1928); United States v. Metro. St. Louis Sewer Dist., 952 F.2d 1040 (8th Cir. 1992); Sierra Club v. Electronic Controls Design, Inc., 909 F.2d 1350, 1355 (9th Cir. 1990)). *But see* Frazar v. Gilbert, 300 F.3d 530, 537, 540 (5th Cir. 2002) (holding that a consent decree between a plaintiff and a State could not be enforced if its provisions were incompatible with statute and such enforcement would violate the Eleventh Amendment to the Constitution), *cert. granted* Frew v. Hawkins, 123 S.Ct. 1481 (2003).

35. Shane, *supra* note 2.

36. 18 U.S.C. § 3742(a) (2000) gives the defendant the right to appeal "an otherwise final sentence if the sentence—

> was imposed in violation of law; or
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> was imposed as a result of an incorrect application of the sentencing guidelines; or
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> is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or
>
> was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable."

37. Mark Flanagan & Christina M. Carroll, *Getting Greedy: Justice Department Asks too Much in Waivers Under Plea Agreement*, LEGAL TIMES, Oct. 1, 2001, (Practice Focus), at 32.

38. *Id.*

even Constitutional rights in plea agreements.[39] Accordingly, federal circuits have generally found statutory waivers to be enforceable.[40] The U.S. Court of Appeals for the First Circuit, perhaps responding to the increased use of these waivers in recent years, has decided that such waivers should be examined on a case-by-case basis.[41]

In *United States v. Teeter*,[42] the First Circuit acknowledged its break with precedent and instituted a stricter level of judicial scrutiny of § 3742(a) waivers.[43] Teeter involved a woman charged with multiple criminal counts, including conspiracy and two counts of use of a firearm in a violent crime.[44] Although the court found the defendant's waiver of the right to appeal her sentence was valid,[45] it held that

> plea-agreement waivers of the right to appeal from imposed sentences are presumptively valid (if knowing and voluntary), but are subject to a general exception under which the court of appeals retains inherent power to relieve the defendant of the waiver, albeit on terms that are just to the government, where a miscarriage of justice occurs.[46]

The First Circuit acknowledged that these agreements allow the government to conserve resources, and that the defendant receives a benefit in exchange for sacrificing her statutory right to appeal.[47] However, the court seemed concerned by the appellant's argument that such waivers are anticipatory. "At the time the defendant signs the plea agreement," wrote the court, "she does not have a clue as to the nature and magnitude of the sentencing errors that may be visited upon her."[48] The court agreed with appellant that this makes these waivers unique from other waivers of statutory and constitu-

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39. *See, e.g.*, Town of Newton v. Rumery, 480 U.S. 386, 393 (1987) (defendants may waive constitutional rights as part of a plea agreement); Adams v. United States, 317 U.S. 269, 275 (1942) (criminal defendant can waive the right to a jury trial); Johnson v. Zerbst, 304 U.S. 458, 464–67 (1938) (criminal defendant can waive the right to counsel).

40. Flanagan, *supra* note 37.

41. *Id.* The use of these waivers has become systemic in the executive branch. Both the U.S. Attorney's Manual § 9–16.330 (2000) and The Department of Justice Criminal Procedure Manual § 626 encourage government attorneys to include these waivers in plea-agreements.

42. 257 F.3d 14 (1st Cir. 2001).

43. *Id.* at 26. For one precedent with a contrary holding, see *United States v. Marin*, 961 F.2d 493 (4th Cir. 1992).

44. *Id.* at 20.

45. *Id.* at 18.

46. *Id.* at 25–26.

47. *Id.* at 22.

48. *Id.* at 21.

tional rights often found in plea agreements.[49] Such broad waivers can have the overall effect of damaging sentencing integrity and depriving defendants of their liberty.[50]

The First Circuit did not directly discuss the possibility of coercion by the Federal Government in obtaining these plea waivers and expressed a hope to apply its somewhat amorphous "miscarriage of justice" test sparingly.[51] However, the imbalance of power between the DOJ and the underpaid, overworked public defenders is often striking.[52] While parties may enter such agreements "knowingly and willingly," there is inherent coercion resulting from the disparity of information and resources between the parties. These problems are becoming clear to legal commentators, particularly those focusing on white-collar crime. These commentators believe a defendant cannot enter into such an agreement knowingly because it is impossible to accurately predict the sentence a defendant will receive.[53]

The *Teeter* case represents an emerging acknowledgement of the coercive nature and, at times, unjust results of these agreements. This trend began in 1997 when the Second Circuit adopted a standard for appeal waivers similar to (and possibly more stringent than) that pronounced in *Teeter*, holding that it would examine on a case-by-case basis plea-agreement appeal waivers.[54] In the same month, the District Court for the District of Columbia first decided that these agreements were presumptively invalid because no defendant could possibly enter into them knowingly.[55] In response,

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49. *See id.* at 21.

50. Flanagan, *supra* note 37.

51. *See Teeter*, 257 F.3d at 26.

52. *See generally* Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401 (2001); Brenna K. DeVaney, *The "No-Contact" Rule: Helping or Hurting Criminal Defendants in Plea Negotiations?*, 14 GEO. J. LEGAL ETHICS 933 (2001); Inga L. Parsons, *"Making It a Federal Case": A Model For Indigent Representation*, 1997 ANN. SURV. AM. L. 837 (1997).

53. Flanagan, *supra* note 37. While affected by these waivers, those involved in white-collar litigation may have less to complain about in these cases than indigent defendants, as the defendants themselves are more educated and have more resources at their disposal. See Sections III's policy analysis for further discussion of the factors at issue in these types of cases.

54. United States v. Rosa, 123 F.3d 94, 98 (2d Cir. 1997) ("[P]lea agreements are subject to the public policy constraints that bear upon the enforcement of other kinds of contracts.").

55. United States v. Johnson, 992 F. Supp. 437 (D.C.C. 1997); United States v. Raynor, 989 F. Supp. 43 (D.D.C. 1997). This presumption, was later adopted by a Massachusetts District Court in *United States v. Perez*, 46 F. Supp. 2d 59 (D. Mass. 1999), setting the stage for its rejection by the First Circuit in *Teeter*.

the U.S. Attorney's Office for the District of Columbia altered its policy favoring such agreements.[56]

Current Supreme Court precedent maintains that criminal defendants can waive statutory and constitutional rights. The DOJ already has advantages over criminal defendants, such as the inadmissibility of Government admissions[57] and superiority of available resources and institutional knowledge. As the power and wherewithal of the executive branch continue to grow in comparison to the time and resources of public defenders, the issue of whether the legislature or the Court itself should override this policy becomes more important. If this imbalance is readily apparent, similar concerns arise involving other statutory and constitutional rights negotiated away by defendants during their interactions with the DOJ.

*2. The Civil Context*—The ability of the DOJ to bypass constitutional or statutory law is as apparent in the context of civil cases as in that of criminal cases. The previous subsection discussed this problem in the context of a party-defendant. This subsection illustrates the same problem in a civil context by showing that consent decrees can usurp third parties' rights to litigate. One such example is a 1980's segregation case in Bakersfield, California.

The Bakersfield school district had operated a segregated system since the 1950's.[58] During the Nixon Administration, the district was pressured to desegregate and, in 1978, Administrative Law Judge John Ohanian issued a two-hundred and twenty page ruling finding that the "Bakersfield City Schools had intentionally and by law created a system that segregated black and Hispanic elementary students from white students."[59] Despite agreement between Carter and Reagan administration officials that busing would be necessary to desegregate four of the city's schools, the Reagan DOJ refused to work toward that goal.[60] Instead, the DOJ settled with Bakersfield.

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56. Flanagan, *supra* note 37 (further noting that the D.C. Circuit has yet to rule on this issue). Flanagan and Carroll also note that similar concerns have arisen concerning waivers of rights to *Brady* evidence. *See* United States v. Ruiz, 241 F.3d 1157 (9th Cir. 2001) (holding that waivers to *Brady* evidence in plea agreements are invalid because, since the defendant does not know what the evidence is, it cannot be a knowing and intelligent waiver).

57. *See* Anne Bowen Poulin, *Party Admissions in Criminal Cases: Should the Government Have to Eat its Words?*, 87 MINN. L. REV. 401 (2002).

58. Judith Cummings, *Voluntary Desegregation of Schools Divides Bakersfield, Calif.*, N.Y. TIMES, Feb. 12, 1984, at 28.

59. *Id.*

60. *Id.* This was probably due to President Reagan's opposition to busing.

The two parties agreed to a system of voluntary transfers and magnet programs.[61] The first of the two magnet programs was a Short Term Mini Magnet Program "whereby fourth, fifth, and sixth grade students from varied . . . backgrounds come together for programs designed to provide concentrated, short term enrichment experiences and enhance academic achievement, social awareness, and racial harmony.[62] The second program, a full term program, included magnet school programs such as extended day programming, computer assisted instruction, science concentrations, and creative and performing arts programs.[63]

While the consent decree may have reflected the policy desires of the Reagan Administration, it may not have satisfied the constitutional requirements that the Attorney General is bound to implement. Judge Ohanian found that Bakersfield had intentionally run a segregated school system for over thirty years.[64] By 1984, in cases where intentional segregation had taken place over a period of years, courts had held that the Constitution requires more than voluntary measures such as those agreed to in the Bakersfield settlement.[65] Even after voluntary measures were taken in response to Judge Ohanian's opinion, four of the district's schools remained segregated. It is in exactly these kinds of cases, where voluntary measures have not completely solved a decades-old segregation problem, that courts have imposed an "affirmative duty" on the district to resolve the situation.[66]

While constitutional standards are always open to debate, the Bakersfield settlement was a particularly weak enforcement mechanism for the DOJ in light of the case law. It is likely that the administration could have gone further to secure the complete

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61. *Id.*

62. Consent Decree, United States v. Bakersfield School Dist., January 25, 1984 (E.D. Cal.) at 4–5.

63. *Id.* at 6.

64. Cummings, *supra* note 58.

65. *E.g.* Green v. County Sch. Bd., 391 U.S. 430, 441–42 (1968) ("Rather than further the dismantling of the dual system, the [voluntary] plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board."); Raney v. Bd. of Ed., 391 U.S. 443 (1968); United States v. CRUCIAL, 722 F.2d 1182, 1189 (5th Cir. 1983) ("[M]agnet programs as desegregation techniques require careful scrutiny by the district court."); United States v. School Dist. of Ferndale, 616 F.2d 895, 912 (6th Cir. 1980) ("'[F]reedom of choice' plans correct denial of equal protection of laws to black students only where they effectuate a conversion to 'a unitary, non-racial system.'").

66. Cummings, *supra* note 58 (quoting William L. Taylor, then director of the Center for National Policy Review at Catholic University, who maintained that, "The major defect of this Justice Department settlement is that it simply does not accord with what the Constitution requires. . . it did not act in accordance with the law, and did not protect the rights of the children of Bakersfield."). *See also Green*, 391 U.S. at 437–38.

desegregation of Bakersfield. In an interview given after the settlement, Judge Ohanian expressed his disappointment with the settlement:

> The punishment should fit the crime. Here's a school system that had deliberately segregated for many years, including busing to maintain segregation. Now, when they're finally brought to justice, it would seem appropriate to me that since they had compelled busing to create segregation, they ought to be required to use busing to correct the segregation that was brought about.[67]

The Bakersfield desegregation case provides just one example of how the DOJ can infringe upon the statutory and constitutional rights of American citizens through consent decrees. In this case, the children compelled to attend segregated schools were the victims.[68]

### *D. Intimidation Through Litigation*

The preceding three parts of this Section have shown that the DOJ can usurp statutory or constitutional rights of Americans by selective enforcement, brute political force, and consent decree, or a combination of those means. A fourth mechanism available to the DOJ is that of a simple civil prosecution, such as that in *United States v. Wagner*,[69] which involved the Fair Housing Act (FHA) and its use during the Clinton Administration.

The FHA contains anti-discrimination provisions designed to prevent interference with the operation of the Act.[70] In 1991,

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67. Cummings, *supra* note 58.

68. Of course, this was not the fate of every desegregation case when the Reagan Administration took over the White House. The Reagan DOJ, for example, expressed a desire to settle a segregation case with Charleston, South Carolina. Robert Pear, *Justice Department Moving Ahead with Charleston Segregation Case*, N.Y. TIMES, Feb. 10, 1981, at A18. However, the case did eventually go to trial. James Feron, *Why Yonkers? The Long Path to an Integration Order*, N.Y. TIMES, Jan. 19, 1988, at B1. This case probably received closer scrutiny from the Reagan Administration because the Carter administration filed it and some others just before they left the DOJ. Due to the last minute nature of these filings, the Reagan DOJ likely concluded (correctly it would seem) that these cases would receive extra scrutiny from the press as a measure of how the new regime would handle civil rights cases. Even with the potential political and media pressure on the Administration to push these cases hard, the Reagan DOJ withdrew from or settled all but two of these Carter desegregation cases.

69. United States v. Wagner, 940 F. Supp. 972 (N.D. Tex. 1996).

70. 42 U.S.C. § 3617 (2003) ("It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exer-

eleven Fort Worth residents learned that neighbors were selling their home to a county agency that planned to use it as a group home for the mentally retarded.[71] The eleven filed suit in state court claiming that the sale would violate local zoning restrictions and were successful in obtaining a temporary injunction.[72] They also passed out leaflets that warned of decreased property values and the inevitable influx of "drug disabled adults" if the community allowed mentally retarded children into the neighborhood.[73]

Four years later, upon referral from the Department of Housing and Urban Development (HUD), the DOJ filed suit against the Fort Worth residents for violating the anti-discrimination provisions of the FHA.[74] The District Court for the Northern District of Texas, in an opinion by Judge Barefoot Sanders, found the defendants liable under the Fair Housing Act. In relevant part, the court held that:

> Defendants' state lawsuit is not protected by the First Amendment because Defendants sought an illegal objective under federal law: the exclusion of a group home for mentally retarded children from their neighborhood because of the disabilities of the children in violation of the FHA, as amended.[75]

The court used prior statements of the defendants to conclude that they had filed their state court claim to discriminate against the potential residents of the group home because of their disability, and not to enforce the local zoning laws.[76] The court levied total damages and attorney's fees of $46,045.61.[77]

While the defendant's statements that "drug disabled adults" would soon follow the mentally retarded children into their neighborhood were discriminatory, the defendants still had a right to protection under the First Amendment. According to Nat Hentoff, writer for *The Washington Post*, even the DOJ conceded that the

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cised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.").

71. Nat Hentoff, *Watch What You Say; The Government Is!*, WASH. POST, Feb. 4, 1996, at C7.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Wagner*, 940 F. Supp. at 981.

76. *Id.* at 982.

77. United States v. Wagner, 930 F. Supp. 1148, 1155 (N.D. Tex. 1996).

leaflets passed out by the defendants constituted protected speech.[78] Furthermore, despite the district court's factual findings concerning the invidious motives of the defendants, the temporary injunction issued by the state court signaled that the defendants were likely to succeed in their original local claim.[79]

Regardless of the intent of or the emotions behind the lawsuit, it does not appear to have been baseless as a matter of state law. The DOJ's decision to file suit rested on a belief that a suit with a basis in state law "coerced, intimidated, threatened, or interfered" with the right of their neighbors to sell their home.[80] This standard creates a wide range of cases in which the DOJ can use the anti-discrimination provisions of the Fair Housing Act to silence protected speech that it does not want to hear.[81] Furthermore, cases like *Wagner* can have a significant chilling effect on future parties who wish to assert their constitutional rights. Similarly situated individuals and groups will think twice before exercising their rights if they believe that they may face prosecution under a federal statute such as the FHA.

## III. THE POLICY ISSUES

In most cases, there are no legal constraints on the Attorney General's ability to wield the weapons discussed in Section II.[82] However, several policy considerations factor into an analysis of whether checks on the DOJ's power would be in the best interest of the United States and its citizens. These policy issues comprise three major categories: efficiency, good government, and representation reinforcement.

78. Hentoff, *supra* note 71.

79. *E.g.*, Butnaru v. Ford Motor Co., 84 S.W.3d 198, 204 (Tex. 2002) ("To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.").

80. *See* 42 U.S.C. § 3617.

81. In fact, Hentoff notes that other suits similar in nature were filed in the same period in the states of California and Michigan. Hentoff, *supra* note 71.

82. In the antitrust context, the Tunney Act levies certain requirements on consent decrees and requires the court to examine the decree and ensure in is in the public interest. 15 U.S.C. § 16(e) (2003). For further discussion of this Act, see Section IV of this Note.

### *A. Efficiency*

In general, efficiency arguments favor leaving the DOJ with a great deal of discretion in these matters. As the *Teeter* court pointed out, plea-agreement right of appeal waivers allow the DOJ to conserve resources.[83] This benefit also flows from the other tools discussed in Section II. By choosing to focus on certain areas of law, the DOJ is able to effect the agenda that, theoretically, the voters prefer. The DOJ can prevent costly litigation by using political power to nudge entities in the directions the Administration wishes them to go. In a similar way, consent decrees and example-setting litigation save Department attorneys courtroom time, allowing them to work more efficiently on their log of cases. On a broader scale, the *Teeter* court recognized that discouraging frivolous appeals and lawsuits preserves judicial resources.[84] This is a central defense of the DOJ's enforcement of the FHA's anti-discrimination clauses.

As with all efficiency arguments, this analysis must factor in a cost. In these cases, the cost of the efficient system is sentencing integrity in individual verdicts, and the potential for large-scale deprivation of individual and group rights.[85] While the use of consent decrees may appear voluntary in nature, a closer look at the circumstances often reveals intentional or unintentional coercion. It may also reveal a political agenda that violates current constitutional and statutory law.

This cost, however, may not be as heavy as it first seems. If the citizens elect a conservative to the presidency, that is an indication that Americans want the DOJ to enforce the policies of the new chief executive. The public often perceives conservatives as tougher on crime:[86] having elected a conservative, the people would expect that administration to be tougher on criminals. This may mean that allowing a criminal defendant to bargain away the statutory right to an appeal, for example, is more palatable to the majority of American citizens during that election cycle. If the people elect a liberal, it could be an indication that the majority of

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83. *Teeter*, 257 F.3d at 22 ("The benefit to the prosecution—conservation of resources—is obvious.").

84. *Id.*

85. Flanagan, *supra* note 37.

86. *See, e.g.*, Sara Sun Beale, *Rethinking Federal Criminal Law: What's Law Got To Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 41–44 (1997).

Americans want the DOJ to focus on the FHA and segregation in public schools.

Viewed in this way, the overzealous or apathetic enforcement of particular laws appears efficient. The legislature passes laws at the place of the median voter:[87] the Attorneys General enforce these laws with varying zeal depending on the position of a majority of the citizens. The DOJ's is better able to adjust to public preferences year by year, while legislative amendments represent lasting trends in public opinion. When viewed from a national policy perspective, the DOJ's discretion appears efficient. Efficiency at the national level, however, comes at a loss to the individuals or groups that may suffer a deprivation of their rights. Regardless of the efficient nature of the current system, efficiency is no consolation to those who lose the protections promised them by the Constitution and laws of the United States.

### *B. Good Government*

This efficiency argument is similar to the good government argument; good government is responsive to the people.[88] When the people elect a president, they trust that president to enforce the law in keeping with the positions he expressed during his campaign. Presumably, the majority will elect an individual who will further its wishes. For this reason, the Attorney General has traditional prosecutorial discretion,[89] and can enforce the laws in the manner in which the chief executive believes the citizens desire.

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87. *See, e.g.*, John D. Colombo, *Why is Harvard Tax-Exempt? (And Other Mysteries of Tax-Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 874 (1993) ("Government failure occurs as a result of the vagaries of the democratic system, which requires a majority vote of the legislature to enact government programs. Economist Burton Weisbrod observed that because of this phenomenon, minority blocs of voters will lack the voting strength to force the government to meet their demand for certain goods and services. In effect, the government will provide any good or service at approximately the demand of the median voter, since any attempt to provide more than this will be voted down by the majority." (citing Burton A. Weisbrod, *Toward a Theory of the Voluntary Nonprofit Sector in a Three-Sector Economy*, THE VOLUNTARY NONPROFIT SECTOR 51, 53–61 (Burton A. Weisbrod ed., 1977)); BURTON A. WEISBROD, THE NONPROFIT ECONOMY 25–31 (1988).

88. *See, e.g.*, E. Thomas Sullivan, *Evolving Voices in Land Use Law: A Festschrift in Honor of Daniel R. Mandelker*, 3 WASH. U. J. L. & POL'Y 473, 481 (2000) (citing Columbia v. Omni Outdoor Ad., Inc., 499 U.S. 365, 375 (1991)).

89. One poignant example of this discretion is the Cohen-Strong case. The DOJ brought suit under the FHA on behalf of a poor mother whose landlords refused to relieve her of routine fees despite her exceptional circumstances. After losing the case, the DOJ decided not to appeal. Cohen-Strong, the victim, subsequently appealed without the DOJ and won a reversal from the 9th Circuit. *See* United States v. Cal. Mobile Home Park Mgmt.

An analogy to administrative law is useful, since the president appoints the heads of regulatory agencies as well as the head of the DOJ. The decisions of administrative agencies, like the decisions of the DOJ, are largely a result of the political beliefs of the president. Therefore, a brief discussion of administrative law may illustrate the DOJ's broad discretion.

In *Chevron v. NRDC*, the Supreme Court responded to the expansion of legislative authority to the executive branch, holding that executive agency interpretations of the statutes they enforce are entitled to deference from the courts.[90] This holding cleared the way for increased executive law-making. Although the Constitution had originally reserved law-making to the legislative branch, Justice Blackmun reasoned, "'in our increasingly complex society... Congress simply cannot do its job absent an ability to delegate power under broad general directives.'"[91]

The administrative law analogy is imperfect, however, and does not justify broad DOJ discretion. Legislative delegation to regulatory agencies is based upon an express or implicit statutory authorization.[92] Congress grants the DOJ no such rule-making or adjudicatory authority.

Furthermore, in *United States v. Mead Corp.*,[93] the Supreme Court began a retreat from *Chevron*. In *Mead*, the Court held that a regu-

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Co., 29 F.3d 1413 (9th Cir. 1994); *see also* Ann Mariano, *Ruling Favors the Disabled on Fee Issue; Appeals Court Finds Some Housing Charges may Be Discriminatory*, WASH. POST, September 24, 1994, at F1.

90. Chevron U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837, 842–43 (1984). Countless authors have written on *Chevron* deference and the Nondelegation Doctrine. It is not the purpose of this section to rehash these arguments, but merely to provide an analogy to those cases and that issue. The analysis here provides one way of examining these precedents, but is not exhaustive of the potential arguments on this issue. For further information on agency deference, see, e.g., Thomas J. Byrne, *The Continuing Confusion Over Chevron: Can the Nondelegation Doctrine Provide a (Partial) Solution?*, 30 SUFFOLK U. L. REV. 715 (1997); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996); Ernest Gellhorn & Paul Verkuil, *Delegation: What Should We Do About It? Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989 (1999); Thomas W. Merrill & Kristen E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001); Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from Chevron Principles in United States v. Mead*, 107 DICK. L. REV. 289 (2002); William K. Shirley, Note, *Accountability and Influence After Chevron: Is the Regulatory State Consistent with Our Constitutional Heritage*, 86 GEO. L.J. 2735 (1998).

91. Gellhorn, *supra* note 90, at 990 (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989) (holding that Congress did not delegate excessive legislative power or upset the separation of powers amongst the branches in passing the Sentence Reform Act of 1984)).

92. Gellhorn, *supra* note 90, at 1007–12; Merrill, *supra* note 90, at 870–71 (citing Dunn v. Commodity Futures Trading Comm'n, 519 U.S. 465, 479 n.14 (1997) ("Because 'the statute, as a whole, clearly expresses Congress' intention' to include foreign currency options within the Treasury Amendment's exemption, administrative deference is improper." (quoting Dole v. Steeelworkers, 494 U.S. 26, 42 (1990))).

93. 533 U.S. 218 (2001).

latory agency only gets deference in its interpretation of legislation if "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[94] While the nondelegation doctrine may not be dead, the Court is still concerned about the unprincipled delegation of law-making authority to the executive branch.[95] Too much law-making power in the hands of the executive branch creates separation of powers problems. The lack of legislative delegation to the DOJ and the Court's retreat from *Chevron* deference argue against leaving the DOJ with unchecked discretion.

A policy of unchecked DOJ discretion meets another fundamental difficulty. The Framers designed the Constitution, at least in part, to protect certain individual liberties against the actions of the majority.[96] The actions of the Attorney General may be efficient and consistent with the views of the majority, but sacrificing certain basic individual or minority-group rights at the insistence of the majority runs counter to the principles of our constitutional system.[97]

Making law is no longer a purely legislative function in this era of expanding administrative law, but the legislature still controls when and to whom it delegates its authority.[98] Even if one accepts the argument that broad DOJ discretion allows for the efficient rule of the American majority, the question of where to draw the line remains, as it does in the case of executive agencies. Allowing the executive branch some discretion does create an efficient system, but limiting that discretion would ensure that the DOJ does not transform a responsive government into an oppressive one.

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94. *Id.* at 226–27. *See also* Womack, *supra* note 90, at 311.

95. *Mead*, 533 U.S. at 337.

96. *See, e.g.*, THE FEDERALIST NO. 51, at 291 (James Madison) (Clinton Rossiter ed., 1961) ("It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure."); Rex E. Lee, *Federalism, Separation of Powers, and the Legacy of Garcia*, 1996 BYU L. REV. 329, 329 (1996) ("The Constitution's purpose is to protect the freedom of the individual.").

97. *See, e.g.*, THE FEDERALIST NO. 70 (Alexander Hamilton) ("It is here too that they may be most pernicious. In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and *serve to check excesses in the majority.*") (emphasis added)).

98. Of course, executive orders and the policies of the Office of Management and Budget (OMB) also govern agencies.

### *C. Representation Reinforcement*

A third policy theory relevant in this analysis is representation reinforcement.[99] In a representation reinforcement model, the methods used to enforce the laws through the executive branch could compensate for under-representation of certain parties in the legislature or the courts—the inverse of the model first enunciated by the Supreme Court in the famous fourth footnote of the *Caroline Products* case.[100] A hypothetical example of this would be enforcement of the Americans with Disabilities Act (ADA).

Over the past decade, the Supreme Court has come to adopt a narrow definition of "disability" under the ADA.[101] Due to this narrow definition, courts have not been amenable to parties seeking redress for potential violations of ADA rights.[102] Individuals with disabilities are currently underrepresented on the Supreme Court. Under a representation reinforcement model, it would be proper for the executive, through the means available to that branch, to zealously enforce the provisions of the Act because such individuals are under-represented in the branch normally assigned the duty of interpreting the laws of the United States.[103]

Since *Caroline Products*, academics have debated this approach to democratic institutions. However, this model would only apply where the DOJ exercised its discretion to help those underrepresented in Congress or the courts. Therefore, this theory cannot justify the settlement in the *Bakersfield* case discussed in Section II,

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99. *See* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements of Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2267 (2002) (defining representation reinforcement from a judicial perspective as a situation where "the Court makes a judgment as to whether the disadvantaged class can rely on the political process to correct irrational laws that hurt them").

100. *See* United States v. Carolene Products, Co., 304 U.S. 144, 153 n.4 (1938) (pondering "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry); *see also* J. ELY, DEMOCRACY AND DISTRUST (1980).

101. *See* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 139–60 (2000).

102. *See, e.g.*, Toyota v. Williams, 534 U.S. 184, 200–01 (2002) (holding that an employee with a physical handicap must show impairment when performing a variety of life activities, rather than the job for which the employee seeks reasonable accommodation).

103. One can easily envision a similar situation involving the legislative branch. For example, African-Americans and Hispanics are underrepresented in Congress. Thus, under a representation reinforcement model, it would be proper for the Civil Rights Division of the executive branch to go further in enforcing civil rights laws that the legislature may have intended.

Part C-2. The African-American children potentially harmed by the settlement are underrepresented minorities: rather than benefiting from the questionable settlement, they are suffering the injury of continued school segregation.[104] Because the laws of the United States can be enforced in ways that both help and harm the underrepresented and historically oppressed, this model sheds little light on the general constitutional and separation of powers issues at the heart of the problem.

### *D. Summary of the Policy Issues*

The DOJ has finite resources with which to carry out a great number of possible enforcement actions.[105] Even if an Attorney General wanted to vigorously enforce all congressional enactments, such an ambitious goal would be impossible. The limited availability of lawyers, funds, and investigative tools, in conjunction with good government and efficiency arguments, justifies the DOJ's discretion in allocating the majority of its focus and resources. If the DOJ attempted to enforce all laws with equal vigor, it would be unable to enforce any law properly. With different parties and different agendas enforcing the law on a rotating basis, there is a high likelihood that the DOJ will enforce the law in a manner consistent with the changing political leanings of the American public.

The Supreme Court has recognized that review of every agency decision would tax the resources of both the DOJ and the courts. For this reason, the courts defer to each executive agency's interpretation of its authorizing statute.[106] Given that the DOJ is responsible for the enforcement of a much broader set of statutes than other executive agencies, which are each only responsible for one specific area of regulation, it is appropriate to grant the DOJ wide discretion in its day-to-day prosecutorial decisions. If Congress became concerned about a chilling effect on fundamental rights, it could amend or repeal statutes granting the DOJ authority to prosecute. Furthermore, it may be unreasonable and inefficient to demand that the Justice Department enforce all laws equally and

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104. *See* Cummings, *supra* note 58.

105. *See, e.g.*, Richard J. Favretto, *Settlement of Government and Private Cases: The Antitrust Division*, 50 ANTITRUST L. J. 7, 11 (1981–1982) ("[R]esource limitations make the Department [of Justice] realize that the settlement process is an obvious and important part of antitrust enforcement.").

106. *See, e.g., Chevron*, 467 U.S. at 842–43.

completely without prejudice. Nonetheless, there must be limitations on the discretion to enter settlements. While the DOJ's resources are limited, they are vast in comparison to the resources of many of the parties with whom they litigate, such as indigent defendants.[107] This power imbalance, in addition to the fact that many entities face repeated interactions with the executive branch, creates the risk that the DOJ will consciously or unconsciously coerce parties to sign away their rights in settlements. The *status quo* is not sufficient to protect parties in light of the DOJ's ability to pursue policy goals. To assure that the DOJ does not unnecessarily compromise the constitutional and statutory rights of third parties, more rigorous standards are necessary.

## IV. POTENTIAL SOLUTIONS

One prerogative of the executive branch is the ability to control law enforcement policy.[108] Any corrective mechanism to prevent broad discretion over these day-to-day choices and large-scale policy decisions would meet heavy resistance from the executive branch. Further, applying such restrictions to all DOJ decisions and enforcement actions would be a bureaucratic nightmare. However, Congress should address the concerns created by the broad discretion wielded by the DOJ. Specifically, Congress needs to limit the DOJ's ability to over-enforce or virtually ignore a particular law. It also needs to check the DOJ's ability to impede the statutory or constitutional rights of party opponents or third parties. Congress can achieve these goals through a combination of traditional legislative policing and passing an express authorization for an increased judicial role in reviewing the validity of settlements reached by the DOJ.

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107. *See, e.g.*, DeVaney *supra* note 52.

108. The Reagan and Bush I administrations strongly championed this kind of "categorical separationism" in relation to the functions of the executive and legislative branches. "[C]ategorical separationists insist that reliance on the President's self-discipline is both inevitable and sufficient to fulfill the rule of law ideal." Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 386 (1993). While the 'sufficient' part may be questionable, this presidential discretion does appear to be inevitable.

### *A. Legislative Policing*

Legislation is not Congress's only tool for monitoring the DOJ.[109] Congress can conduct hearings and issue reports on the conduct of executive officials. For example, in 1984, the House Judiciary Committee issued a 1,200-page report accusing former DOJ officials of withholding EPA files from Congress.[110] As a result of the investigation, the Committee recommended that the Attorney General appoint special counsel to review the allegations.[111]

The usefulness of this policing mechanism is limited. It is a powerful tool to prevent gross misconduct, but it is less effective for monitoring daily activities and decisions of the DOJ. Congress could review DOJ inaction through its committee system. However, without a legal standard for the level of Department enforcement, it would be difficult to develop political pressure for the appointment of a special counsel. Congress can best use the legislative committee system as it did in 1984, as a mechanism to check grossly unlawful actions of officials in the executive branch.

### *B. Courts as Protectors*

*1. In Litigation*—Under the Constitution, the courts protect individual liberties from unauthorized infringement by the legislative or executive branches.[112] In this way, courts can serve as a check on the Attorney General's ability to violate constitutional or statutory law in litigation. An example of this occurred as recently as April 2002. In *Oregon v. Ashcroft*, the U.S. District Court for the District of Oregon held that John Ashcroft's attempt to override Oregon's

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109. Congress can use legislation to regulate a field that has already been subject to judicial consent decrees. However, this approach is corrective rather than proactive, and there are potential constitutional constraints on Congress' ability to do this in every situation. *See* Brian M. Hoffstadt, *Retaking the Field: The Constitutional Constraints on Federal Legislation That Displaces Consent Decrees*, 77 WASH. U. L. Q. 53 (1999).

110. *House Panel Hits Former Justice Aides*, CHICAGO TRIBUNE, Dec. 6, 1985, §§ 1, 3.

111. *Id.*

112. *See* Marbury v. Madison, 5 U.S. 137, 177–178 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.").

physician-assisted suicide law by applying the Federal Controlled Substances Act was not a valid application of the federal statute.[113] While the court decided the case strictly on statutory grounds,[114] courts can invalidate similar actions of the Attorney General on constitutional grounds as well. Implicit in the decision is the idea that the Constitution vests legislative authority in Congress and that the Attorney General is limited to enforcement of that legislation rather than expansion of it.[115]

*2. Reviewing Consent Decrees—Oregon v. Ashcroft* illustrates that the courts provide a check on DOJ actions through litigation. However, the DOJ may still perpetrate constitutional and statutory abuses in settlements.[116] When, in *Martin v. Wilks*, the Supreme Court held that a third party was not bound by a consent agreement between the original parties,[117] Congress immediately overturned this decision.[118] Presumably, Congress did not want the threat of future suits by third parties to discourage settlements. However, despite Congress's desire to protect settlement, the court still retains the ability to review settlements in certain fields, such as antitrust.

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113. Oregon v. Ashcroft, 192 F. Supp. 2d 1077, 1087 (D. Or. 2002)

114. *Id.* at 1093 ("I again emphasize that I resolve this case as a matter of statutory interpretation.").

115. *Id.* at 1081, 1088.

116. The DOJ has often urged the Supreme Court not to approve civil rights settlements that involve race-conscious remedies that go beyond those authorized by Title VII of the Civil Rights Act of 1964. However, the Supreme Court expressly rejected this position in *Local Number 93, International Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986). Shane, *supra* note 2.

117. 490 U.S. 755, 762 (1989) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings."). *See also* Christopher Edley, Jr., *How to Save the Second Reconstruction*, LEGAL TIMES, July 24, 1989, at 24.

118. 42 U.S.C. § 2000e-2(n) (2003) (providing that a judgment or consent decree entered into in an employment discrimination case cannot be challenged "(i) by a person who, prior to the entry of the judgment . . . had actual notice of the proposed judgment or order . . . [and] a reasonable opportunity to present objections to such judgment or order; or (ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact").

This case is particularly interesting in that it involved the intervention of white firefighters who felt they were being disadvantaged by an affirmative action program entered into in a consent decree between the NAACP and Birmingham, Al. *Martin v. Wilks*, 490 U.S. at 758. If the situation of the minority actors were reversed, as in the Bakersfield case discussed in Section II-C, a representation reinforcement model would have supported the court's intervention. One wonders if Congress would have overturned this decision in the situation was more like that of Bakersfield. The overruling statute cuts both ways. While it may express a desire to help minorities in reaching helpful voluntary settlements, it may impair their ability to challenge harmful ones.

*a. Expansion of the Tunney Act*—During the Watergate era, there was growing suspicion of the executive branch due to the actions of Richard Nixon.[119] In response, Congress passed the Tunney Act in 1974.[120] The Act prescribes that settlements the DOJ reaches in antitrust cases are reviewable by the courts. The DOJ must provide to the court, as well as publish in the Federal Register, an account of the case and the consent decree.[121] The court has the power to reject the consent decree if, in its estimation, it is not in the public interest.[122] In this way, the court provides a check on the DOJ's authority to settle antitrust cases.

Commentators have criticized the Tunney Act as a result of Judge Sporkin's application of the Act in the Microsoft antitrust case.[123] "It is the executive's job," maintain Mark Leddy and Michael Shea, "not the judicial's to 'take care that the laws be faithfully executed.'"[124] Leddy and Shea further argue that the Act violates policies behind the Supreme Court's holdings that the courts cannot review an agency's decision not to bring an enforcement action.[125] Leddy and Shea believe that Congress should modify the Tunney Act by "limiting judicial review to a determina-

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119. Mark Leddy & Michael Shea, *Reaching Consent Under a Judicial Shadow*, LEGAL TIMES, Apr. 10, 1995, at 45.

120. 15 U.S.C. § 16 (2000).

121. 15 U.S.C. § 16(b) ("[T]he United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

(1) the nature and purpose of the proceeding;

(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

(6) a description and evaluation of alternatives to such proposal actually considered by the United States.").

122. 15 U.S.C. § 16(e) ("Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest."). Congress provided guidelines to the courts for reaching this determination in 15 U.S.C. § 16(f).

123. *See, e.g.*, Leddy, *supra* note 119.

124. *Id.* at 45 (quoting U.S. CONST. art. II, § 3).

125. *Id.* (citing Heckler v. Chaney, 470 U.S. 821 (1985) (holding that the FDA's decision not to take enforcement actions requested by inmates was not subject to judicial review under the Administrative Procedure Act)).

tion that the parties have acted in good faith and that the DOJ has not grossly abused its discretion."[126]

While it would be prudent to narrow judicial discretion in reviewing consent decrees, as Leddy and Shea suggest, applying the general principles of the Act on a broader scale would help to check the potential abuses of the DOJ. Given the ability of the DOJ to abuse its discretion in fields beyond antitrust, Congress should expand the Tunney Act to other fields of law. Such legislation would require the courts to review consent decrees, and to assure that they do not violate constitutional standards or statutory law. Thus, Congress would expressly authorize the courts to scrutinize settlements, such as that in the *Bakersfield* segregation case, but would not allow the direct intervention of third parties that Congress has specifically rejected. Consequently, the executive branch would not decide for itself if its methods of law enforcement are constitutional or statutorily permissible. Parties, of course, would still be able to give up their rights in a consent decree, as long as the court did not find such bargains to be unjust on a case-by-case basis.[127]

Under this proposal, the court's role would remain limited. It would merely confirm that the consent decree did not unjustly violate any party's constitutional or statutory rights.[128] This extra step will be no more taxing on government and judicial resources than the Tunney Act is presently in the antitrust field. In fact, courts should already be taking this step as a matter of law. Under *Local No. 93 v. Cleveland*, a consent decree "must further the objectives of the law upon which the complaint was based."[129] However, courts do not scrutinize the legal ramifications of voluntary agreements as closely as they do judgments derived from the adversarial proc-

126. Leddy, *supra* note 119.

127. This part of the test is similar to the present fairness test that courts generally apply in reviewing consent decrees. The courts, while they have had the authority to examine consent decrees for fairness between the parties, are beginning to assert this authority more willingly in areas like waivers of appellate rights in criminal cases.

128. The Supreme Court has applied a similar standard in civil rights cases. For example, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court faced the issue of when government officials can assert qualified immunity as an affirmative defense to a lawsuit. The Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known." *Id.* at 818 (emphasis added). Congress, within the limitation of this standard, can provide procedures and factors for consideration as it sees fit, in a similar manner to the present Tunney Act.

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

ess.[130] Further statutory guidance would prompt courts to exercise their authority to review consent decrees, and would provide clear authorization for a court to void a facially voluntary agreement between litigants.

This procedure can provide clarity on legal issues and may actually contribute to the conservation of judicial and DOJ resources over time. For example, in *United States v. Olin Corp.*, a district court, in a relatively rare exercise of its authority under *Local No. 93*, rejected a consent decree reached between the DOJ and Olin Corp. The consent decree allowed for retroactive liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[131] The court found that CERCLA could not apply retroactively without exceeding Congress' authority under the Commerce Clause.[132] Although the Eleventh Circuit subsequently reversed this decision, holding that CERCLA can apply retroactively and that the consent decree was valid, the lower court's review of the consent decree was never questioned.[133] This gives the DOJ a stronger hand in future cases and may encourage companies to settle rather than fight the DOJ in court.

The *Olin* case demonstrates that, in the context of a standard fairness review of consent decrees, courts do occasionally examine the constitutional and statutory ramifications of the decree. By modifying and expanding the principles of the Tunney Act, Congress can provide a uniform check on the DOJ and the potential for settlements to evade statutory and constitutional law. However, it does not allow third party intervention in every case, and does not expand the court's subject matter jurisdiction beyond the case before it. At a minimum, this will shine more light on these decrees by bringing their results into the mainstream of legal discussion and debate while keeping their negotiation private. This minimum of extra scrutiny will help restrain the DOJ in efforts to unjustly promote its policy goals.

*b. The Judicial Standards for a DOJ Consent Decree*—Codifying judicial review of consent decrees as described in Subpart (a) requires

130. *See, e.g.*, Burt Neuborne & Frederick A.O. Schwarz, Jr., *A Prelude to the Settlement of Wilder*, 1987 U. CHI. LEGAL F. 177, 188 (1987); O'Mullan, *supra* note 34; Eric A. Rosand, *Consent Decrees in Welfare Litigation: The Obstacles to Compliance*, 28 COLUM. J.L. & SOC. PROBS. 83, 104 (1994) ("A consent decree . . . is negotiated behind closed doors, with few procedural protections.").

131. United States v. Olin Corp., 927 F. Supp. 1502 (S.D. Al. 1996).

132. *Id.* at 1533. *See also District Court Rejects Superfund's Retroactive Reach*, COMM. LENDING LITIG. NEWS, June 24, 1996, Vol. IX, No. 4.

133. United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997). *See also Eleventh Circuit Reverses Controversial Olin Decision, Declares CERCLA Constitutional*, REAL ESTATE/ENVIRONMENTAL LIABILITY NEWS, Apr. 18, 1997, Vol. VIII, No. 12.

a uniform standard of review. Supreme Court doctrine offers a number of possible standards. For example, the courts could review DOJ consent decrees for compliance with settled constitutional law principles.[134] Another possible solution would be for the courts to give the DOJ Chevron deference when entering into consent decrees. By holding the DOJ to a reasonable interpretation of the law on which it bases its settlement, the courts would treat the DOJ like any other executive agency.[135] However, because settlements affect first and third parties differently each of these standards of review are required, albeit in different situations.

*i. Rights of a Party to the Litigation*—The first situation is that in which a party to the litigation is coerced to sacrifice a right, rather than voluntarily give it up. The case of criminal defendants waiving their statutory right to appeal sentences exemplifies this situation.[136] Here, the *Teeter* court's standard is the proper one. Private parties can voluntarily waive their rights in a consent decree. Since the consent decree in these cases only affects the rights of the parties involved, the standard is whether the waiver is truly voluntary.[137]

In making this determination, the court would weigh the facts of the case as the First Circuit did in *Teeter.* An entity with knowledge and resources, like a large private company, usually waives its rights knowingly in a consent decree. It has the legal knowledge and monetary resources necessary to determine if the case is worth litigating. In contrast, an indigent defendant is likely to be coerced due to a lack of knowledge and resources. As the *Teeter* court concluded, courts must examine these waivers on a case-by-case basis.[138]

*ii. Rights of Third Parties*—When a consent decree between the DOJ and a party opponent usurps the constitutional or statutory rights of a third party, the question of what standard courts should apply is more difficult to answer. In entering into such a consent decree, the DOJ effectively avoids full argument on the legal issues and the opportunity for third parties to intervene in the litigation.[139] The purpose of scrutinizing these consent decrees is to prevent the DOJ from avoiding constitutional and statutory obligations. Therefore, the logical conclusion appears to be application

134. *Harlow*, 457 U.S. at 800.
135. *See, e.g., Chevron*, 467 U.S. at 837.
136. *See supra* note 9.
137. *Teeter*, 257 F.3d at 26.
138. *Id.*
139. *See, e.g.*, Rosand, *supra* note 130.

of the same judicial analysis to a consent decree as would be applied to a case argued before the court.

This standard is simpler in some cases than in others. For example, a consent decree that imposes a prior restraint on a third party's speech would, under settled constitutional law, trigger strict scrutiny.[140] Government actions imposing a prior restraint almost never survive the strict scrutiny test, and thus any such consent decree would be invalid. However, not all constitutional and statutory standards are as clear as the ban on prior restraints on speech. While the *Bakersfield* segregation consent decree appears to violate constitutional standards under the Court's school segregation precedents, the point is arguable. The problem these situations present is that any standard Congress can create is malleable, since the precedents of constitutional law itself are malleable. The best way to approach this problem, therefore, is to create two different standards of review for consent decrees that usurp the rights of third parties—one standard when the settlement implicates statutory rights, and another, stricter standard when constitutional rights are at stake.

In enforcing statutory law, Congress should provide for *Chevron*-like deference when the DOJ's consent decree is reasonable under the statute being enforced. Congress should also clarify that a district court's decision not to sign a DOJ consent decree is subject to appellate review. In such cases, the DOJ is acting much like a federal regulatory agency, and should receive deference in its interpretations of statutory law. Furthermore, greater scrutiny would be counterproductive. If the DOJ faced strict judicial scrutiny each time it enforced a statute, it might exercise its prosecutorial discretion and not sue under that statute at all. A *Chevron*-like standard secures the statutory rights of third parties without impairing the enforcement of statutory law as a whole . In contrast, where a consent decree arguably infringes on the constitutional rights of a third party, courts should analyze it under the same constitutional standards as if the case had gone to trial. It is the judiciary's duty to interpret the Constitution; the executive branch should not decide for itself whether its methods of law enforcement meet constitutional standards.[141] If a court applied a less

140. *See, e.g.*, Near v. Minnesota, 283 U.S. 697, 713–14 (1931) ("The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.").

141. *See, e.g.*, *Marbury*, 5 U.S. at 177.

stringent standard of review than that usually applied to a constitutional analysis of the same legal issue, the DOJ would have effectively avoided that standard and potentially harmed third parties. Constitutional liberties are fundamental to our society, and require an extra degree of protection from DOJ encroachment.

*c. Potential Problems*

*i. Deference to the DOJ*—Perhaps the most difficult problem with codifying judicial review of DOJ consent decrees is the application of deference to the DOJ when a statutory right of a third party is at issue. The *Chevron* standard is inherently malleable, regardless of how the Supreme Court limits its application. This is as true for DOJ consent decrees as for administrative agency decisions. While one court may find the DOJ's actions reasonable, another court may rule otherwise. Implementing this standard runs the risk of subjecting all DOJ settlements to judicial scrutiny and seriously inhibiting the law enforcement process.

While this is a viable concern, such a standard still represents an improvement from the *status quo*. The deference standard has not significantly slowed the expansion of administrative regulation, as is evident by the rapid growth of regulatory law. Periodically, courts have found that agencies have acted unreasonably under the two-pronged *Chevron* test. On a day-to-day basis, however, agencies act within their discretion without undue interference from the judiciary. Furthermore, *Chevron* deference is much more forgiving to the DOJ than expansion of the current Tunney Act policy to DOJ consent decrees, which would make every decision subject to a judicial public interest analysis. Finally, district court decisions to reject DOJ consent decrees will still be subject to appellate scrutiny. This provides another protection against abuse of discretion by district courts when applying the deference standard to consent decrees.

This solution is not a perfect one, but it has two significant benefits. First, it does not constitute a major departure from the ideals endorsed in Supreme Court precedents. Instead, it serves to create a unified standard for the review of DOJ consent decrees by federal courts. Second, some level of guaranteed judicial analysis will serve to protect individual and group rights from the powers of political coercion far better than the current system protects those rights. When one balances the risks of a slightly increased burden on the DOJ with the potential protection of fundamental individual and group liberties, it becomes apparent that, while imperfect, the deference standard represents a viable solution.

*ii. Legal or Political Problems- When do Courts Step In?*—The application of constitutional standards to consent decrees creates difficulties. First, district courts will apply constitutional standards differently from one district court to another, as they will apply deference differently. While this standard may lead to some inconsistency at the district court level, the appeals process can serve as a check on district court reviews of consent decrees in the same way it serves as a check on their decisions after a trial.[142] Second, Congress has stated its opposition to allowing third parties to directly oppose consent decrees in the courts.[143] This proposed form of judicial review is different, however, since actual intervention of the third party would further minimize the chances of settlement of the case. This proposal will not affect the chances of reaching a *lawful* settlement. Settlement is still a desired goal, as long as the consent decree reached does not overstep the bounds of the Constitution.

Finally, while this change may solve the perceived problem as a theoretical matter, there is some question as to whether it would truly change anything in practice. Commentators routinely criticize courts, particularly the Supreme Court, for deciding cases based on politics rather than law.[144] Regardless of the exact language Congress may use in drafting statutes authorizing review of DOJ consent decrees, the result may ultimately be the transfer of inherently political decisions from the executive branch to an un-elected judiciary branch.[145] Yet courts, like the district court in *Olin*, can already invalidate settlements on these grounds. Providing uniform, detailed guidelines and procedures can only minimize, rather than exacerbate, this problem.

### *C. Summary of Possible Solutions*

The DOJ's discretion in law enforcement may produce inconsistent implementation of certain laws. However, any procedure to force the Department to enforce certain laws more or less vigorously creates problems of efficiency and legal standards. Congress

142. *See Olin Corp.*, 107 F.3d at 1506.

143. *See* 42 U.S.C. § 2000e-2(n) (2000).

144. *See, e.g.*, Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1973 (1990) ("The Supreme Court has never sustained significant independence from the demands of ordinary politics, and likely never will.").

145. *See, e.g.*, Shane, *supra* note 108, at 383 ("[T]he Constitution cannot execute itself. Human beings must implement the Constitutional text, and the text's operational, rather than denotative, meaning determines the document's efficacy.").

does have control over the language of statutes that authorize the DOJ to prosecute cases, and can manipulate that language to prevent prosecutions that could chill constitutional rights. While this gives the legislative branch the ability to monitor some of the cases brought by the executive branch, the powers of unchecked political force and settlement authority remain in the arsenal of the DOJ.

As noted in Section II, parties can usually check the use of brute political force, like that used by Meese's Pornography Commission, by seeking a preliminary injunction against illegal coercion by the DOJ. The weakness in this mechanism is that some parties may have ongoing relationships with the executive branch that make them hesitant to fight every illegitimate use of executive authority.[146] However, in the *Playboy* case, Playboy was not actually on the blacklist, but was a directly affected third party.[147] Groups or individuals other than those directly interacting with the DOJ can challenge any unconstitutional effect of the abuse of political influence by the DOJ, so long as they have standing. The standard tools of temporary and permanent injunctions, therefore, are adequate to check DOJ actions that take place entirely outside of the judicial system.

In contrast, the *status quo* is not enough to prevent the DOJ from abusing its authority through settlements. Congress should expand the Tunney Act to cover other areas of DOJ enforcement, such as civil rights issues, while modifying its scope to curtail questionable application of the act by zealous courts. Under this new legislation, Congress should require courts to review consent decrees to ensure that a party's sacrifice of constitutional or statutory rights is fair in light of the other terms of the decree. When third parties' constitutional rights are implicated, standard trial-type judicial review should apply, but when a statutory interpretation is at issue, the court should defer to the DOJ. With minimal costs in efficiency and resources, this change would provide a check on the DOJ's unbridled authority to evade statutory and constitutional requirements through consent decrees.

146. *See, e.g.*, Shane, *supra* note 2.
147. *Meese*, 639 F. Supp. at 583–84.

## CONCLUSION

The president's policy preferences will inevitably color the DOJ's decisions regarding which cases to prosecute and how to enforce the laws passed by Congress. In this way, the spoils of electoral victory go to the executive branch in the same way that the fruits of legislative power go to the party that wins a majority in Congress.[148] However, concerns that transcend partisan politics arise when the DOJ's actions are questionable on statutory and, especially, constitutional grounds. The *status quo* does not provide an effective mechanism to assure the Attorney General is acting within the boundaries of the law the Office is sworn to enforce.

With the exception of rare cases like *Olin*, courts often sign off on consent decrees without so much as a statement of why the settlement falls within the reasonable bounds of the law governing the dispute. Many of these consent decrees, while occasionally noted in newspapers and press releases, never permeate the mainstream of American consciousness. Courts are already beginning to give certain settlements involving the DOJ closer scrutiny. Codifying this process is not a radical change in the law, but rather a legislative reminder of the duty a court has to look into these consent decrees with some scrutiny. Legislation would create uniform standards for all federal courts to use when reviewing consent decrees. Congress should be proactive and announce a policy on how far courts should go in examining these settlements. Otherwise it could be faced with a court decision that expands the role of the judicial branch beyond the bounds that it, or the executive branch, desires.

148. As a matter of interest, the phrase "To the victor go the spoils" is attributed to Senator William Learned Marcy in 1832. In its original form, the quote was "They (Democrats) see nothing wrong in the rule that to the victor belong the spoils of the enemy." GREGORY Y. TITELMAN, RANDOM HOUSE DICTIONARY OF AMERICA'S POPULAR PROVERBS AND SAYINGS (2000).