

NOTES

DEREGULATION THROUGH NONENFORCEMENT

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This Note examines the phenomenon of deregulation through nonenforcement, drawing on examples from the George W. Bush Administration. It argues that the presumption of nonreviewability afforded to agency refusals to prosecute creates incentives for presidential administrations pursuing deregulatory agendas to manipulate agency enforcement practices. Furthermore, it contends that deregulation through nonenforcement is undesirable because it shields executive branch policy decisions from public view, thereby reducing accountability. Perhaps counterintuitively, the Note suggests that one way to counteract the negative effects of the presumption of nonreviewability is to reduce the level of review applied to other categories of agency action, such as notice-and-comment rulemaking, thus increasing the executive's ability to act through more accountable means.

INTRODUCTION

A new President typically brings with him a new administration, a new outlook, and, often, a new “agenda.” Some forms of presidential policymaking, such as the ability to propose legislation and to veto bills passed by Congress, are both well known and uncontroversial.¹ Others engender more debate. These disputes range from disagreements about the extent of the President’s inherent constitutional power in foreign affairs and national security² to debates over his

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¹ See U.S. CONST. art. II, § 3 (granting President authority to recommend to Congress “such Measures as he shall judge necessary and expedient”); U.S. CONST. art. I, § 7 cl. 1 (establishing veto power).

² Compare, e.g., Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1158–59 (2006) (arguing for narrowly circumscribed role of President over foreign affairs and war), with John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 174–75 (1996) (arguing for flexible understanding of President’s constitutional power to initiate and conduct war).

authority to assume supervisory or directive control over the executive branch.³

This Note is concerned with a form of presidential policymaking that has received far less attention: the ability of a President and his administration to shape policy by manipulating executive branch enforcement practices and, specifically, by achieving what I refer to as “deregulation through nonenforcement.” I examine this phenomenon against the background of the presumption of nonreviewability that courts afford to agency decisions not to undertake enforcement actions. I argue that this presumption creates incentives for presidential administrations pursuing deregulatory agendas to ease regulatory burdens by curtailing agency enforcement. Furthermore, such policymaking through nonenforcement may undermine the very quality that makes presidential policymaking generally desirable—the President’s greater accountability vis-à-vis the courts and administrative agencies—by encouraging the President to pursue a deregulatory agenda in a manner less accountable than the available alternatives. Perhaps counterintuitively, I suggest that one way to counteract the accountability deficit created by the presumption of nonreviewability is not to impose more searching review of agency refusals to enforce, as others have advocated,⁴ but rather to *ease* the judicial scrutiny applied to agency policy reversals and, perhaps, to agency policymaking through rulemaking more generally, thus making it easier for the executive branch, and the President, to act through other means.

This Note makes two critical assumptions. First, I assume that presidents, or at least their political appointees, can achieve a certain degree of control over the bureaucracies they administer such that conservative- or libertarian-leaning administrations can actually push agencies in a deregulatory direction through enforcement practices. Second, I proceed from the premise that the availability and stringency of judicial review not only affects the relationship between the courts and the President, but also influences the President’s choice of policymaking form.⁵ All else being equal, a deregulatory presidential

³ Compare, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541, 568–70 (1994) (defending “unitary executive” theory giving President control over all administrative agencies), with Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 703–05 (2007) (arguing that President is often limited to oversight role and not vested with authority to decide particular matters).

⁴ See *infra* note 164 (citing literature arguing for more searching review of decisions not to enforce).

⁵ See M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1426–31, 1435–37 (2004) (explaining how courts can influence agency choice of poli-

administration would prefer to proceed by rulemaking or legislation because these forms of policymaking exhibit a “stickiness,” or obduracy, that enforcement practices do not.⁶ However, by altering the consequences of executive choices—for example, by insulating certain categories of agency action from judicial review—courts can tip the balance in the other direction.⁷

I depart from previous scholarship on executive nonenforcement in several key respects. Prior work has tended to critique executive branch nonenforcement in two ways. First, scholars have argued that nonenforcement threatens individual rights—for example, the right to a certain level of air quality—that Congress has guaranteed by statute.⁸ A second, related critique focuses on separation of powers considerations. Here, scholars argue that nonenforcement allows the executive branch too much latitude to roll back congressionally enacted laws, thus undermining the constitutional requirements of bicameralism and presentment.⁹ These are, in some respects, valid cri-

cymaking form by expanding or limiting availability and scope of judicial review); Cf. JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 151–67 (1990) (arguing that stringent judicial review of notice-and-comment rulemaking contributed to National Highway Traffic Safety Administration’s (NHTSA) shift from rulemaking to recall).

⁶ Since agency rules have the force of law, they naturally extend into the next administration, which cannot change them without complying with applicable procedures. On the related issue of regulatory “ossification,” see *infra* note 187 and accompanying text.

⁷ One assumption I do not make is that deregulation is always misguided or that regulation is an unalloyed good. If we are to adopt cost-benefit analysis as our guide, it is likely that certain areas suffer from over-regulation and others from under-regulation. See RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 155 (2008) (“The decision not to regulate can be as costly as the decision to regulate too much. Efficient regulations deliver large benefits, and counteract important failures of the unregulated market.”).

⁸ See, e.g., Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 666–69 (1985) (arguing that complete abandonment of review of agency inaction reflects improper privileging of common law private rights over public rights created by statute).

⁹ See, e.g., Mary M. Cheh, *When Congress Commands a Thing To Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 285–86 (2003) (arguing that executive nonenforcement violates “direct command from Congress,” and courts “must intervene”); Ruth Colker, *Administrative Prosecutorial Indiscretion*, 63 TUL. L. REV. 877, 882 (1989) (arguing that decisions not to enforce “can seriously undermine Congress’ statutory mandate”). Two other authors have recently dealt with the presumption of nonreviewability and review of agency inaction more generally. Eric Biber offers a limited defense of the *Chaney* presumption—nonreviewability of refusals to enforce—rooted in resource-allocation concerns. Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 485–86 (2008). Lisa Schultz Bressman critiques *Chaney* by reviving the concern over executive “arbitrariness.” Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L.

tiques, but in other ways they fail to capture a more pressing concern. The modern era is characterized by very broad executive policymaking discretion: The executive must make choices, including whether to regulate at all in a given area. It will often be difficult or impossible to determine, in any meaningful way, that a certain choice has deprived an individual of a right or violated a statutory requirement.¹⁰ This Note offers a process-based critique that looks at *how* those choices are made. The courts should encourage the executive to act in ways that maximize its inherent advantages, including—most importantly—its greater accountability.¹¹ I argue that the current legal framework may strike the wrong balance when it comes to this issue.

The argument proceeds in several steps. Part I outlines the presumption of nonreviewability afforded to agency decisions not to pursue enforcement actions. It contrasts this presumption with the availability and scope of judicial review authorized in other categories of executive branch deregulation or inaction, specifically the rescission of administrative rules and agency nonpromulgation decisions. Part II turns from doctrine to practice and, taking examples primarily from the George W. Bush Administration, outlines several available techniques for reducing regulation through enforcement practices. These techniques include a general lessening of enforcement in a particular area, the use of informal enforcement policies to limit the scope of statutory prohibitions, and, most recently, industry-wide consent agreements. Part III examines the main theoretical argument for broad presidential policymaking authority in the administrative realm—the President’s greater accountability compared to that of the courts and (unelected) administrative officials. Using the examples from Part II, I show that the presumption of nonreviewability may in fact undermine accountability in the administrative state by encouraging the executive to pursue deregulation through nonenforcement as opposed to other, more accountable forms of policymaking. Part IV suggests a novel solution: In order to promote more accountable gov-

REV. 1657, 1659–60 (2004). She assumes, however, that the *Chaney* rule is supported by accountability considerations, an assumption which I critique. *See infra* notes 151–63 and accompanying text (arguing that this assumption overlooks fact that executive can act in more, or less, accountable ways).

¹⁰ *See* Antonin Scalia, *The Role of the Judiciary in Deregulation*, 55 ANTITRUST L.J. 191, 195–96 (1986) (“Many of the decisions whether to regulate or deregulate under existing statutes are political decisions. . . . [M]any statutes can go either way, both as a legal . . . and . . . policy matter. Which way the agency picks typically depends upon how much value it and . . . society . . . put upon various competing interests.”).

¹¹ *See infra* Part III (noting that executive is more accountable than courts but that executive can act in more, or less, accountable ways).

ernment, courts should *lessen* the review afforded to agency policy reversals and perhaps to rulemaking more generally.

I

THE LEGAL FRAMEWORK FOR AGENCY ENFORCEMENT DECISIONS

A. *The Presumption of Judicial Review of Agency Action*

Typically, agency actions are subject to judicial review, the scope of which depends on a combination of the agency's "authorizing statute," the Administrative Procedure Act (APA),¹² and prior judicial precedent. The standard applied in a given situation "reflect[s] judgments about the degree to which courts should defer to agency decisionmaking."¹³ As such, the scope of judicial review varies depending on the type of agency action involved, the nature of the question presented, and courts' judgments concerning the degree of deference appropriate to the circumstances.¹⁴

Two types of review are particularly relevant. First, when scrutinizing an agency action, a court typically asks whether the agency has acted within its lawful authority or, alternatively, whether its action transgressed statutory or constitutional bounds.¹⁵ The second important form of review—the determination of whether an agency's action was "arbitrary and capricious"—is more amorphous.¹⁶ This determination includes, but is not limited to, fixing the outer bounds of agency

¹² 5 U.S.C. §§ 551–559, 701–706 (2006).

¹³ HARRY T. EDWARDS & LINDA A. ELLIOT, *FEDERAL COURTS STANDARDS OF REVIEW: APPELLATE COURT REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS* 100 (2007).

¹⁴ See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (distinguishing different degrees of deference to agency legal interpretations depending on whether "Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . [whether] the agency interpretation claiming deference was promulgated in the exercise of that authority"); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 376–79 (1998) (outlining judicial review of factual determinations made in course of agency adjudication); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–44 (1983) (explaining framework for judicial review of agency notice-and-comment rulemaking); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 523–25 (1978) (limiting judicial review of agency choice of procedure); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414–17 (1971) (defining scope of review over informal agency action).

¹⁵ This forms the backbone of what has been called the "traditional model" of judicial review of agency action. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975) (explaining that "[t]he traditional model of administrative law . . . conceives of the agency as a mere transmission belt for implementing legislative directives," and that judicial review "is directed toward keeping the agency within the directives which Congress has issued").

¹⁶ This language is derived from the Administrative Procedure Act (APA). See 5 U.S.C. § 706 (2006).

discretion by reference to a more general standard of administrative arbitrariness.¹⁷

Both forms of review derive from the judicial review provision found in the APA. Section 706 of the Act provides that “the reviewing court shall decide all relevant questions of law” and shall “hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁸ This provision is central to securing the APA’s goal of taming agency discretion through procedural requirements, including judicial review of matters of law.¹⁹

Apart from setting the scope of judicial review of agency action, the APA also creates an expansive individual right of review. Section 702 of the Act guarantees that “[a] person suffering legal wrong because of *agency action*, or adversely affected or aggrieved by *agency action* within the meaning of a relevant statute, is entitled to judicial review thereof.”²⁰ Importantly, the APA includes within the definition of “agency action” the “failure to act.”²¹ Further, section 706 directs the courts to “compel agency action unlawfully withheld or unreasonably delayed.”²² The text of the APA, as well as its background purposes,²³ thus points toward a prominent role for courts in reviewing agency action and inaction, with one important exception: APA sec-

¹⁷ The question posed by this second form of review is not so much whether the agency has acted contrary to the authorizing statute, but whether it has violated other important norms—for example, by failing to engage in reasoned decisionmaking or to consider relevant factors. As the Supreme Court stated in its main decision defining the arbitrary and capricious standard in the context of agency rulemaking:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

State Farm, 463 U.S. at 43.

¹⁸ 5 U.S.C. § 706.

¹⁹ See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1265 (1986) (“The APA is, in essence, a highly conventional lawyer’s view of how to tame potentially unruly administrators.”); Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 440–41 (2003) (arguing that APA “reflected an uneasy accommodation of the traditional model of administrative law” and expansive view of agency power held by New Deal reformers).

²⁰ 5 U.S.C. § 702 (emphasis added).

²¹ *Id.* § 551(13).

²² *Id.* § 706.

²³ See *supra* note 19 and accompanying text (describing APA as means of taming agency discretion).

tion 701 excepts from judicial review “agency action . . . committed to agency discretion by law.”²⁴

The case law, at least in the formative period from the mid-1960s to the early 1980s, also tended to interpret judicial review of agency action as quite expansive,²⁵ while reading section 701 exception narrowly. In *Abbott Laboratories v. Gardner*, the Court held for the first time that the APA creates a rebuttable presumption in favor of judicial review of agency action.²⁶ Furthermore, in *Citizens To Preserve Overton Park, Inc. v. Volpe*, the Supreme Court announced that the “committed to agency discretion” exception to review is not implicated as long as the court has “law to apply,” a minimal standard that is easily met.²⁷

B. Agency Inaction and *Heckler v. Chaney*

Agency inaction poses a particular problem for courts exercising their power of judicial review. As noted above, the APA appears to treat judicial review of agency inaction as governed by the same principles as review of agency action.²⁸ An agency’s decision *not to act* therefore seems to be reviewable on the same basis as a decision *to act*. In fact, however, courts presented with a plaintiff who is properly before the court and challenging an agency’s refusal to act face fundamental difficulties.²⁹ The Supreme Court’s 1985 decision in *Heckler v. Chaney*³⁰ brings these difficulties into starkest view.

The plaintiffs in *Chaney* were a number of inmates who had been sentenced to death by lethal injection.³¹ They petitioned the Food and Drug Administration (FDA), alleging that the drugs to be used in their executions were not approved for such use and therefore violated the Food, Drug, and Cosmetic Act’s prohibition on “mis-

²⁴ 5 U.S.C. § 701(a)(2).

²⁵ See Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHL.-KENT L. REV. 1039, 1050–52 (1997) (explaining how courts and commentators during this period viewed aggressive judicial review of agency action as antidote to agency “capture” by regulated entities).

²⁶ 387 U.S. 136, 140 (1967) (finding that APA “embodies the basic presumption of judicial review” for persons aggrieved by agency action).

²⁷ 401 U.S. 402, 413 (1971); see also Merrill, *supra* note 25, at 1078–79 (describing Court’s narrow approach to “committed to agency discretion” exception during era and “presumption in favor of reviewability”).

²⁸ See *supra* notes 20–24 and accompanying text.

²⁹ For the most part, this Note will not address the issue of standing. As a practical matter, lack of standing may block many potential plaintiffs from asserting claims of agency inaction. For a helpful overview of current standing doctrine concerning agency refusals to act, see Bressman, *supra* note 9, at 1669–75.

³⁰ 470 U.S. 821 (1985).

³¹ *Id.* at 823.

branding.”³² The plaintiffs also claimed that the FDA was statutorily required, before the drugs could be used in such a manner, to approve the drugs as “safe and effective for human execution.”³³ They requested that the FDA undertake various enforcement actions, including, most dramatically, that the FDA “adopt procedures for seizing the drugs from state prisons and . . . recommend the prosecution of all those in the chain of distribution who knowingly distribute or purchase the drugs with intent to use them for human execution.”³⁴

The FDA Commissioner refused to take the requested actions, and the plaintiffs subsequently filed suit.³⁵ When the case reached the D.C. Circuit, that court, relying on the Supreme Court’s prior decisions in *Gardner* and *Overton Park*, as well as *Dunlop v. Bachowski*,³⁶ concluded that the FDA did not have unreviewable discretion to decline enforcement actions.³⁷ The D.C. Circuit found “law to apply” in the form of an agency policy statement regarding its discretion to regulate the unapproved use of approved drugs,³⁸ and held that the FDA had acted arbitrarily in refusing to take the requested actions.³⁹

The Supreme Court reversed. Invoking APA section 706(1), the Court held that “an agency’s decision not to prosecute or enforce . . . is a decision generally committed to an agency’s absolute discretion.”⁴⁰ It listed three reasons in support of “the general unsuitability for judicial review of agency decisions to refuse enforcement.”⁴¹ First, the Court stressed that decisions not to enforce frequently involve the complicated balancing of numerous factors, including how best to allocate an agency’s scarce resources.⁴² The Court concluded that individual agencies, and not the courts, are “far better equipped . . . to deal with the many variables involved in the proper ordering of [the agency’s] priorities.”⁴³ In a second argument, the Court noted that an agency’s refusal to act normally does not lead to direct government

³² *Id.* at 823–24.

³³ *Id.* at 824 (internal quotation marks omitted).

³⁴ *Id.*

³⁵ *Id.* at 824–25.

³⁶ 421 U.S. 560 (1975). In *Dunlop*, the Supreme Court had allowed review of the Secretary of Labor’s decision not to bring a civil action to set aside a union election. *Id.* at 566.

³⁷ *Chaney v. Heckler*, 718 F.2d 1174, 1184–88 (D.C. Cir. 1983).

³⁸ *Id.* at 1185–87. The policy statement provided that “[w]here the unapproved use of an approved new drug becomes widespread or endangers the public health, the Food and Drug Administration is obligated to investigate it thoroughly and to take whatever action is warranted to protect the public.” *Id.* at 1186 (quoting 37 Fed. Reg. 16,504 (1972)).

³⁹ *Id.* at 1189–91.

⁴⁰ *Chaney*, 470 U.S. at 831.

⁴¹ *Id.*

⁴² *Id.* at 831–32.

⁴³ *Id.*

encroachment against individual liberty or property rights.⁴⁴ Thus, the argument that judicial review of executive action is necessary to protect against arbitrary encroachments by government upon the rights of private parties did not apply. Finally, the Court pointed to the similarity between an agency's decision not to enforce and a prosecutor's determination not to indict—a power traditionally vested within the sole discretion of the executive.⁴⁵

The Court stressed that the agency's refusal to act "is only presumptively unreviewable" and that "the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers."⁴⁶ The majority also left open other circumstances in which an agency's refusal to enforce might be reviewable.⁴⁷ First, courts might review where an agency's refusal to act is based exclusively on the grounds that it lacks statutory jurisdiction, a purely legal determination.⁴⁸ Second, the Court indicated that an agency's adoption of a conscious and express policy tantamount to "an abdication of its statutory responsibilities" might be subject to review.⁴⁹ Third, the Court left open the possibility that review might be available when there is a colorable claim that an agency's enforcement activity is in violation of constitutionally protected rights.⁵⁰

Subsequent lower court decisions have somewhat limited the reach of the *Chaney* decision, usually along the lines of the exceptions to nonreviewability suggested by the majority. Some lower courts, for instance, have seized upon and, in some cases, slightly expanded the *Chaney* majority's jurisdiction exception.⁵¹ It is also widely accepted that agencies may not refuse enforcement based on constitutionally impermissible motives, such as racial animus.⁵² Furthermore, *Chaney*

⁴⁴ *Id.* at 832.

⁴⁵ *Id.* Some scholars have criticized the Court's stated reasoning. See, e.g., Cheh, *supra* note 9, at 280–83 (critiquing *Chaney*'s three arguments and contending that there is no reason to believe Congress would have agreed with them).

⁴⁶ *Chaney*, 470 U.S. at 832–33.

⁴⁷ The Court was careful to state that it was not deciding these questions but merely noting that its decision did not reach them. See *id.* at 833 n.4 ("[W]e express no opinion on whether such decisions would be unreviewable . . .").

⁴⁸ *Id.*

⁴⁹ *Id.* (citing *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973)).

⁵⁰ *Id.* at 838 (citing *Johnson v. Robison*, 415 U.S. 361, 366 (1974); *Yick Wo v. Hopkins*, 118 U.S. 356, 372–74 (1886)).

⁵¹ See Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 164 (1996) (explaining how lower courts held that *Chaney* allowed courts to review agency legal determinations under jurisdiction exception and citing *UAW v. Brock*, 783 F.2d 237 (D.C. Cir. 1986)).

⁵² Cf. *Hopkins*, 118 U.S. at 373–74 (1886) (establishing that racially discriminatory enforcement may violate Fourteenth Amendment).

never gained a strong foothold in the analogous area of agency refusals to promulgate rules. In this context, lower courts, and especially the D.C. Circuit, continued post-*Chaney* to subject such agency refusals to review—though limited and deferential⁵³—a practice recently endorsed by the Supreme Court in *Massachusetts v. EPA*.⁵⁴

The exception with perhaps the most limited reach allows review of nonenforcement that rises to the level of a “consciously and expressly adopted . . . policy” tantamount to “an abdication of [an agency’s] statutory responsibilities.”⁵⁵ This exception stems from *Adams v. Richardson*, a pre-*Chaney* decision by the D.C. Circuit.⁵⁶ In *Adams*, plaintiffs alleged that the Department of Health, Education, and Welfare had “consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty.”⁵⁷ The district court had taken extensive evidence on cross-motions for summary judgment and concluded that, by failing to cut off federal funds from public schools engaging in racial segregation, the Agency was indeed in dereliction of its responsibilities under Title VI of the Civil Rights Act of 1964.⁵⁸ The court of appeals affirmed, holding that the APA authorized review.⁵⁹ Yet despite the Supreme Court’s apparent blessing of the *Adams* decision in *Chaney*, the exception has remained quite limited.⁶⁰ The reason is clear: Agencies will not often state that they are abandoning enforcement in an entire area, something that the exception seems to require before courts can engage in review.⁶¹ Thus, plaintiffs alleging a pattern of agency inaction will have a hard time proving that the pattern amounts to a conscious and express abdication of an agency’s statutory responsibility. In sum, while agency action is not entirely insulated from judicial review, the executive has substantial discretion when making enforcement decisions.

⁵³ See, e.g., *Am. Horse Prot. Ass’n v. Lyng*, 812 F.2d 1, 3–5 (D.C. Cir. 1987) (holding that *Chaney* did not bar review of “refusals to institute rulemaking proceedings” but that review should be particularly deferential); see also Bhagwat, *supra* note 51, at 162 (chronicling lower court resistance to *Chaney* doctrine in context of nonpromulgation).

⁵⁴ 549 U.S. 497, 527–28 (2007) (holding that agency refusals to promulgate rules are properly subject to review, though it is to be “extremely limited” and “highly deferential”).

⁵⁵ *Chaney*, 470 U.S. at 833 n.4 (internal quotation marks omitted).

⁵⁶ 480 F.2d 1159 (D.C. Cir. 1973).

⁵⁷ *Id.* at 1162.

⁵⁸ *Id.* at 1161.

⁵⁹ *Id.* at 1161–63.

⁶⁰ See, e.g., *Am. Disabled for Attendant Programs Today v. HUD*, 170 F.3d 381 (3d Cir. 1999) (rejecting, on pleadings and without taking discovery, plaintiffs’ claim that HUD failed completely to enforce certain regulations promulgated pursuant to Rehabilitation Act of 1973).

⁶¹ See Sunstein, *supra* note 8, at 678–79 (discussing difficulty of distinguishing between isolated refusal to act and pattern of nonenforcement constituting “abdication”).

C. *The Implications of the Nonreviewability Doctrine on Executive Deregulation Strategies*

A President committed to deregulation may attempt to pursue his agenda in a number of ways. Most obviously, he may attempt to repeal or amend the laws through the legislative process. Of course, this requires the cooperation of Congress, and, especially in periods of divided government, such cooperation will rarely be forthcoming. Furthermore, prudent politicians will recognize that amending certain symbolic legislation—such as the Clean Air Act⁶²—to make regulation less burdensome will risk the loss of political capital.⁶³ More likely, an administration pursuing a deregulatory agenda will seek not to amend the statute itself but instead to rescind prior regulations promulgated by the executive branch and to prevent the promulgation of new ones. Following the lead of the Reagan presidency,⁶⁴ subsequent Administrations have circulated “hit lists” of particularly costly regulations targeted for elimination.⁶⁵ Moreover, cost-benefit review by the Office of Management and Budget (OMB), coupled with the twin forces of delay and inaction, have been potent weapons for preventing the promulgation of new regulations.⁶⁶ Thus, once a regulation has been eliminated, it becomes even more difficult to pass a new regulation to take its place—even for later administrations.

Both rescission and nonpromulgation are subject to judicial review. In *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*,⁶⁷ the Supreme Court subjected the Reagan Administration’s attempt to rescind certain motor vehicle safety regulations to “hard look” review under the APA.⁶⁸ The Court stated that a decision to change course through rescission places an obligation on the agency “to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first

⁶² 42 U.S.C. §§ 7401–7671q (2006).

⁶³ Cf. John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 233, 247–50 (1990) (analyzing section 112 of Clean Air Act as symbolic legislation).

⁶⁴ See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 *COLUM. L. REV.* 1260, 1263–66 (2006) (explaining Reagan Administration’s use of Office of Management and Budget (OMB) and Office of Information and Regulatory Affairs (OIRA) to pursue deregulatory agenda).

⁶⁵ See *id.* at 1279–80 (describing OIRA compilation of “hit lists” solicited from industry groups seeking to reduce regulatory burdens).

⁶⁶ See REVESZ & LIVERMORE, *supra* note 7, at 153–56 (arguing that, with OMB review, “[n]ew regulations are delayed” while “old regulations are dispatched with haste,” and that system improperly exempts agency inaction from cost-benefit review).

⁶⁷ 463 U.S. 29 (1983).

⁶⁸ *Id.* at 41–42; see also Merrill, *supra* note 25, at 1039–40 (describing *State Farm* as ratification of D.C. Circuit’s “hard look” doctrine).

instance.”⁶⁹ The Court found the Agency’s reasons for rescinding the regulation deficient in a number of respects and remanded the case for further consideration.⁷⁰ Subsequent cases in the lower courts have repeatedly reaffirmed the principle that an agency’s decision to change course is subject to a requirement of explanation for the change.⁷¹

This difference between agency nonenforcement decisions, which are effectively insulated from review, and agency rulemaking, which is subject to hard look review, creates an important regulatory asymmetry in the administrative state. Such asymmetries exist when the law strictly regulates one activity while leaving a parallel activity unregulated.⁷² To the extent that the two activities serve the same purpose, the natural effect will be to shift a certain amount of activity from the regulated area, where action is more costly, to the unregulated area.⁷³ The same insight can be applied to public law, where the object of regulation is the government itself. A compelling case can be made, for example, that the effect of the Fourth Amendment’s special protection of the home has been to shift police resources to places—such as the street corner—where police activity is substantially less regulated, with potentially negative implications for individual rights.⁷⁴

The same phenomenon occurs when agency actions that are subject to more or less strict judicial review. Emerson Tiller and Pablo

⁶⁹ 463 U.S. at 42.

⁷⁰ See *id.* at 54–57 (dismissing defects in agency’s reasoning, including failure to consider passive belt option).

⁷¹ See *infra* note 176 and accompanying text (discussing “hard look” review for agency reversals). Agency nonpromulgation decisions, properly termed *nonregulation* as opposed to deregulation, are also subject to judicial review. In the case of inaction in the face of a nondiscretionary duty, courts are generally able to force agency action through the vehicle of a citizen suit, see RICHARD L. REVESZ, ENVIRONMENTAL LAW AND POLICY 1072–73 (2008) (describing various citizen suits provisions), if available, or under APA section 706, which requires courts “to compel agency action unlawfully withheld,” 5 U.S.C. § 706(1) (2006). Even when an agency’s refusal to promulgate a rule involves some exercise of discretion, the Supreme Court has signaled that a limited form of review is available. See *Massachusetts v. EPA*, 549 U.S. 497, 527–28 (2007) (endorsing limited review of agency nonpromulgation decisions).

⁷² Cf. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1710–17 (1999) (discussing differential treatment of contributions and expenditures in campaign finance law).

⁷³ Cf. *id.* (discussing shift of money into independent expenditures as result of differential treatment of contributions and expenditures in campaign finance law).

⁷⁴ See William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1274 (1999) (arguing that because Fourth Amendment law makes it more difficult to police activity in homes, where transactions are likely to take place in higher income neighborhoods, it shifts police resources into streets, where transactions are likely to occur in poorer neighborhoods).

Spiller make precisely this point: “The more likely it is that a court will reverse an agency policy, the more likely that an agency will attempt to impose higher decision costs on the court (through the selection of an instrument with high review costs), . . . expect[ing] that a strict review will not take place.”⁷⁵ In other words, agencies will generally choose to act through means that reduce the opportunity for judicial review. In the context of deregulation, this means that an agency, and the presidential administration at its helm, will often act through nonenforcement as opposed to administrative rulemaking. The various ways in which an agency may attempt to pursue such a course are the subject of the next Part.

II

MODES OF NONENFORCEMENT

This Part surveys the means, normally insulated by *Chaney*’s presumption of nonreviewability, by which the executive may pursue an agenda of deregulation through nonenforcement. I call these methods: (A) “case-by-case nonenforcement,” by which the executive lessens enforcement in a particular area by making repeated, but isolated, decisions against undertaking enforcement actions; (B) informal enforcement policies, by which the executive creates norms against prosecution of particular practices; and (C) industry-wide consent agreements, as seen in the recent case of *Association of Irrigated Residents v. EPA*.⁷⁶ Roughly, these methods range from the least formal and permanent (case-by-case nonenforcement) to the most formal and permanent (the consent agreement). Truly formal, binding enforcement policies are intentionally excluded from this discussion because they are treated as administrative rules and are thus subject to judicial review; they do not qualify for the presumption of nonreviewability afforded to other types of executive nonenforcement.⁷⁷

A. Case-by-Case Nonenforcement

The first way in which deregulation through nonenforcement can occur is both the most obvious and, at the same time, the most difficult for nonexecutive actors to police. This is the general lessening of

⁷⁵ Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J.L. ECON. & ORG. 349, 370 (1999).

⁷⁶ 494 F.3d 1027 (D.C. Cir. 2007).

⁷⁷ See *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676 (D.C. Cir. 1994) (“[A]n agency’s statement of a *general enforcement policy* may be reviewable for legal sufficiency where the agency has expressed the policy as a formal regulation after the full rulemaking process . . .”).

enforcement in a particular area, achieved through repeated, but individually isolated, decisions not to undertake enforcement actions. This can be analogized to individual prosecutorial discretion: the decision whether or not to prosecute a *particular* suspect. Several areas over the eight years of the Bush Administration exhibit this trend.

For example, a 2006 report commissioned by the Minority Staff of the United States House of Representatives Committee on Government Reform chronicled enforcement practices between 2000 and 2005 at the FDA, the federal agency responsible for protecting the public from dangerous drugs and medical devices.⁷⁸ The report found that, during this period, the number of warning letters issued by the agency decreased by over fifty percent⁷⁹ and that a particular unit of the FDA, the Center for Devices and Radiological Health, issued sixty-six percent fewer warning letters in 2005 than in 2000.⁸⁰ At the same time, the report found that the overall number of violations discovered by field inspectors had not declined significantly.⁸¹ Instead, the report concluded that FDA headquarters frequently refused to follow the recommendations of its field officers to pursue enforcement actions or undertook enforcement actions weaker than those recommended.⁸² The report concluded that “FDA officials in Washington undermined the efforts of field officials through extended delays in acting on the enforcement recommendations,”⁸³ including several cases where death or serious injury resulted from violations.⁸⁴ The only type of enforcement action that increased during the period was product recall—normally used when a product has already caused serious harm—which increased forty-four percent.⁸⁵ As summarized by one former FDA enforcement official, “these documents tend to represent a culture of disapproval or a lack of full dedication to the protection of public health.”⁸⁶

⁷⁸ SPECIAL INVESTIGATIONS DIV., MINORITY STAFF OF H. COMM. ON GOV'T REFORM, 109TH CONG., PRESCRIPTION FOR HARM: THE DECLINE IN FDA ENFORCEMENT ACTIVITY 5 (2006), available at <http://oversight.house.gov/images/stories/documents/20060627101434-98349.pdf> [hereinafter PRESCRIPTION FOR HARM].

⁷⁹ *Id.* at 7.

⁸⁰ *Id.* at 8.

⁸¹ *Id.* at 9–10.

⁸² *Id.* at 10–12.

⁸³ *Id.* at 11.

⁸⁴ *Id.* at 12–17.

⁸⁵ *Id.* at 9. As the report explained, a high recall rate is actually an indicator of lax enforcement because it indicates more harmful products are reaching consumers, while the goal of the agency is to “keep dangerous products off of the market.” *Id.*

⁸⁶ Letter from Sammie R. Young to Henry A. Waxman, Ranking Minority Member, U.S. House Comm. on Gov't Reform (June 23, 2006), available at <http://oversight.house.gov/images/stories/documents/20060626112240-73343.pdf>; see also Catherine M. Sharkey, *The Fraud Caveat to Agency Preemption*, 102 Nw. U. L. REV. 841, 862 (2008) (“[T]he

A similar story emerges from reports on the enforcement practices of the Environmental Protection Agency (EPA) during the Bush Administration. According to a 2007 *Washington Post* article, the number of lawsuits the EPA filed against nonsettling defendants fell seventy percent between 2002 and 2006, compared with a four-year period in the late 1990s.⁸⁷ As Eric Schaeffer, former director of the EPA's Office of Civil Enforcement, stated, "I don't think this is a problem with agents in the field. . . . They lack the political support they used to be able to count on, especially in the White House."⁸⁸ Of course, such evidence might also be consistent with the existence of an informal enforcement policy, discussed below. Indeed, the decrease in enforcement at EPA during the Bush years was likely caused by a confluence of factors, operating both at the level of individual cases and policy. I now consider such informal enforcement policies.

B. Informal Enforcement Policies

The line between case-by-case nonenforcement and an informal enforcement policy limiting an agency's enforcement powers is difficult to draw. It is complicated by the fact that enforcement policies may develop organically over time from repeated but discrete enforcement decisions. By an informal enforcement policy, I simply mean a norm regarding enforcement against certain practices or in certain areas of an agency's jurisdiction. They differ primarily from what I have been calling case-by-case nonenforcement in their levels of formality and generality. Whereas case-by-case nonenforcement would be akin to a prosecutor's decision not to indict an individual for criminal activity, informal enforcement policies resemble a category-wide determination not to prosecute certain crimes altogether. Thus, while case-by-case nonenforcement depends upon repeated, but discrete, decisions not to enforce (which may nevertheless amount to a pattern over time), informal enforcement policies are more general enforcement norms designed to exempt entire categories of action from regulatory oversight. Such policies may—but need not—be set forth in official agency materials.⁸⁹ Informal enforcement policies

picture that emerges is one of the FDA pulling back on enforcement, contrary to the recommendations of its field officers.").

⁸⁷ John Solomon & Juliet Eilperin, *Bush's EPA Is Pursuing Fewer Polluters: Probes and Prosecutions Have Declined Sharply*, WASH. POST, Sept. 30, 2007, at A1.

⁸⁸ *Id.*; see also Eric Schaeffer, *Clearing the Air: Why I Quit Bush's EPA*, WASH. MONTHLY, July–Aug. 2002, at 20, 20–21, available at <http://www.washingtonmonthly.com/features/2001/0207.schaeffer.html> (describing Bush Administration's rolling back of environmental enforcement).

⁸⁹ Informal (i.e., nonbinding) agency documents can take many forms. They are often styled as "interpretive rules," which, under the APA, are exempted from notice-and-

should be distinguished, however, from legally binding enforcement policies that “cabin[]” an agency’s enforcement discretion to such an extent that they are subject to judicial review as “legislative rule[s].”⁹⁰

Perhaps the most well-known example of remaking a statutory scheme through informal enforcement policies occurred during the Reagan Administration in the area of antitrust.⁹¹ Influenced by pioneering work in law and economics, and especially by the ideas coming out of the University of Chicago,⁹² the Reagan antitrust policies eschewed much of the previous decades’ regulatory choices.⁹³ Specifically, Reagan’s Federal Trade Commission (FTC) and Department of Justice officials viewed nearly all competitiveness concerns other than horizontal price-fixing as either innocuous or positive, thus not requiring prosecution or sanction.⁹⁴ Despite a record level of merger activity during the period, Department of Justice challenges were rare.⁹⁵ In response to weakened federal enforcement, the states became considerably more active in antitrust enforcement.⁹⁶

comment procedures. See John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893 (2004) (noting agencies promulgate “interpretive rules” and “general statements of policy,” exempt from notice-and-comment rulemaking, through “circulars, advice letters, guidance documents, staff manuals and the like”).

⁹⁰ See *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987) (“[C]abining of an agency’s prosecutorial discretion can in fact rise to the level of a substantive, legislative rule.”). For a discussion of courts’ efforts to distinguish between legislative and nonlegislative rules, see Manning, *supra* note 89, at 917–27.

⁹¹ Antitrust law may be sui generis in that much policy innovation in the area occurs through enforcement practices and judicial interpretation as opposed to the more formal means of agency rulemaking. This may be attributed, in part, to the unusually open-ended nature of the antitrust statutes and to their development through common law decision-making. See Douglas H. Ginsburg, *The Appropriate Role of the Antitrust Enforcement Agencies*, 9 CARDOZO L. REV. 1277, 1277–78 (1988) (describing enforcement role of agencies in developing antitrust policy).

⁹² See ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE* 66–67 (2d ed. 2008) (discussing emergence of “Chicago School” of antitrust analysis).

⁹³ See Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 944–47 (1987) (describing views of Reagan antitrust officials, which included “chang[ing] both the vocabulary and the central paradigm of antitrust”).

⁹⁴ See *id.* at 947 (“The enforcement record of the Reagan Administration directly corresponds with its repeated assertion that virtually all business activity except horizontal price fixing is good for the American consumer and good for the economy.”). My point is not to critique the Reagan approach to antitrust law. Rather, I am simply using this example to illustrate how wide-ranging policy change is possible through enforcement practices.

⁹⁵ See *id.* at 948 (noting that despite rise in merger activity and total value of mergers, “the Department of Justice challenged only twenty-eight mergers”).

⁹⁶ See Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 677 (2003) (“[D]uring the Reagan years, states perceived that the federal government was slacking in antitrust enforcement . . . [and] became a force with which to be reckoned.”).

Recent years have also seen various informal policies designed to limit enforcement of certain laws. One notable example concerns the practice known as “New Source Review” (NSR) that began under the 1970 and 1977 amendments to the Clean Air Act.⁹⁷ As originally enacted, the stringent standards of the Clean Air Act amendments did not apply to preexisting stationary sources of pollution.⁹⁸ As “grandfathered” sources, these facilities were generally free to continue to pollute at historical levels.⁹⁹ However, the 1970 and 1977 amendments contained an important caveat: A “modified” source was subject to the same requirements as a completely new source, and therefore an old source might become regulated as a new source if it underwent a “modification.”¹⁰⁰ Because of the high cost associated with EPA regulations of new sources, what constituted a modification became an immensely important—and contentious—issue.¹⁰¹

The EPA has long embraced the position that “routine maintenance, repair and replacement” does not constitute a modification for purposes of NSR.¹⁰² What counted as “routine maintenance,” however, was determined on a case-by-case basis using a number of factors.¹⁰³ In 2003, the Bush Administration published a rule with the potential to vastly increase the number of projects that would qualify for the “routine maintenance” exception.¹⁰⁴ Known as the “twenty percent rule,” it applied to a project when “the fixed capital cost of the replaced component(s), plus costs of any activities that are part of the replacement activity . . . , does not exceed 20 percent of the current replacement value of the process unit.”¹⁰⁵

⁹⁷ Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, 697–703; Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1685. The Clean Air Act in its current form is codified at 42 U.S.C. §§ 7401–7671 (2006). For a general discussion of New Source Review (NSR), see REVEZ, *supra* note 71, at 403–05.

⁹⁸ Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 Nw. U. L. REV. 1677, 1681–84 (2007).

⁹⁹ *Id.* at 1678.

¹⁰⁰ See 42 U.S.C. § 7411(a)(2) (2006) (including within definition of “new source” any stationary source that commenced “modification”); see also Nash & Revesz, *supra* note 98, at 1681–83 (discussing “modification” and disparity of regulation between new and old sources).

¹⁰¹ Nash & Revesz, *supra* note 98, at 1684–1705 (describing controversy over EPA’s definition of “modification” under Clean Air Act).

¹⁰² 40 C.F.R. § 52.21(b)(2) (2009); see REVEZ, *supra* note 71, at 404 (describing 1980 regulations exempting certain minor modifications from NSR).

¹⁰³ See, e.g., *Wisc. Elec. Power Co. v. Reilly*, 893 F.2d 901, 910 (7th Cir. 1990) (describing EPA’s “case-by-case” approach to determining whether proposed work is “routine”).

¹⁰⁴ Nash & Revesz, *supra* note 98, at 1702–04.

¹⁰⁵ Prevention of Significant Deterioration and Non-attainment New Source Review: Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion, 68 Fed. Reg. 61,248, 61,252 (Oct. 27, 2003) (to be codified at 40 C.F.R. pts. 51 &

This rule was the result of a multi-year effort by the Bush Administration, spearheaded by Vice President Cheney's energy task force, to ease regulatory burdens on existing power plants.¹⁰⁶ The effort also included several other rules designed to limit the reach of the NSR program—a response to a Clinton-era enforcement initiative against power plant owners.¹⁰⁷ Seeking relief from multi-billion dollar lawsuits filed against them by the Department of Justice, the energy industry first looked to Congress, but received no relief.¹⁰⁸ Sensing an ally in the Bush Administration, the companies turned their attention to EPA rulemaking and were rewarded with the new rules.¹⁰⁹

Victory was partial, however. In 2006, the D.C. Circuit struck down the twenty percent rule as a violation of the Clean Air Act.¹¹⁰ The legal question concerned whether the Act, which defined “modification” to include “*any* physical change that increased emissions,” was ambiguous enough to support the twenty percent exclusion.¹¹¹ The court ruled that it was not and struck down the replacement rule in toto.¹¹²

However, this ruling did not end the Administration's efforts. The Administration had one more option: implementing the replacement rule through an unspoken, informal enforcement policy. There is evidence that this is exactly what occurred. New enforcement activity for NSR violations all but disappeared.¹¹³ Some reports indicate that the twenty percent rule lived on throughout the Bush Administration as an informal enforcement policy, with the practical effect of halting NSR enforcement altogether.¹¹⁴

The story of the Bush Administration's NSR reform highlights that, as a practical matter, agencies can sometimes achieve through informal enforcement practices what they cannot through rulemaking because of the asymmetrical standards of review: What the D.C.

52). The twenty percent rule only applies to replacement of an existing component with a component that is identical to, or serves the same purpose as, the existing component and that does not alter the basic design of the unit. *Id.*

¹⁰⁶ Joel A. Mintz, “*Treading Water*”: A Preliminary Assessment of EPA Enforcement During the Bush II Administration, 34 ENVTL. L. REP. 10,912, 10,918 (2004), available at <http://www.elr.info/articles/vol34/34.10912.pdf>.

¹⁰⁷ *Id.* at 10,917–18.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *New York v. EPA*, 443 F.3d 880, 883 (D.C. Cir. 2006).

¹¹¹ *Id.* at 884–85 (emphasis added).

¹¹² *Id.* at 890.

¹¹³ See Mintz, *supra* note 106, at 10,919.

¹¹⁴ See Nash & Revesz, *supra* note 98, at 1678–79 (“[T]he EPA has indicated that in any event it may apply the safe harbor in its case-by-case analysis of whether to bring enforcement actions, thus giving it de facto effect.”).

Circuit struck down as a clear violation of statutory authority could simply be transformed into an enforcement policy and insulated from judicial scrutiny. It also highlights the limits of this strategy, however. Power plant owners would have undoubtedly preferred legislative relief or relief through administrative rulemaking, which would have bound future administrations.¹¹⁵ The final category of nonenforcement practice I will now discuss combines the lack of judicial review afforded to informal enforcement policies with the binding effect of a legal judgment.

C. Industry-Wide Consent Agreements

The recent case of *Association of Irrigated Residents v. EPA*¹¹⁶ illustrates a potentially powerful, but rarely used, tool at the executive's disposal: the industry-wide consent agreement. At issue were so-called animal feeding operations (AFOs) involved in the production of swine, broiler chickens, turkeys, dairy, and eggs.¹¹⁷ These AFOs, which include some of the nation's largest farms, emit a number of pollutants regulated under federal environmental laws, including the Clean Air Act;¹¹⁸ the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA);¹¹⁹ and the Emergency Planning and Community Right-To-Know Act (EPCRA).¹²⁰

The EPA had long claimed that it lacked a precise methodology for calculating the amount of pollutants emitted by AFOs.¹²¹ In 2005, through publication in the Federal Register, the EPA offered to all

¹¹⁵ Indeed, it appears that the Obama Administration has already stepped up enforcement against power plants. See Joe Koncelik, In a Major Reversal, Obama Administration Restarts NSR Enforcement Initiative, <http://www.ohioenvironmentallawblog.com/2009/03/articles/air/in-a-major-reversal-obama-administration-restarts-nsr-enforcement-initiative/> (Mar. 6, 2009) (describing EPA press release announcing administration's plans for new NSR initiative).

¹¹⁶ 494 F.3d 1027 (D.C. Cir. 2007).

¹¹⁷ *Id.* at 1028.

¹¹⁸ 42 U.S.C. §§ 7401–7671q (2006).

¹¹⁹ 42 U.S.C. §§ 9601–9675 (2006). CERCLA (often referred to as “Superfund”) imposes civil liability on persons or entities responsible for land contamination by hazardous waste. See *id.* § 9607 (providing CERCLA liabilities).

¹²⁰ 42 U.S.C. §§ 11001–11050 (2006). EPCRA, among other things, imposes reporting requirements on facilities storing hazardous substances. REVESZ, *supra* note 71, at 880–81. See also Benjamin R. Merrill, Note, *What Stinks . . . The Animal Feeding Operations Consent Agreement and Final Order or EPA Involvement in the Area?*, 13 *DRAKE J. AGRIC. L.* 285, 289–92 (2008) (describing laws potentially applicable to animal feeding operations). These pollutants are largely the result of the sometimes gargantuan amounts of manure produced at animal feeding operation (AFO) sites, which cause various problems for residents living near AFOs, including health impairment and decreased property value. *Ass'n of Irrigated Residents*, 494 F.3d at 1028.

¹²¹ *Ass'n of Irrigated Residents*, 494 F.3d at 1029.

qualifying AFO owners the opportunity to enter into a Consent Agreement and Final Order (the Agreement) with the EPA.¹²² Each individual AFO would enter into a separate agreement with the EPA, but the terms of each would be identical.¹²³ Each AFO would agree to pay a civil fine (calculated according to the size of the AFO) to help fund a nationwide study on monitoring AFO emissions and, if requested, to permit the EPA to monitor emissions from the AFO.¹²⁴ In return, the EPA agreed not to sue the participating AFOs for past and ongoing violations while the study was undertaken, provided that once the study was complete, AFOs would take steps to comply with the various statutes within 120 days.¹²⁵

When several entities—including community and environmental groups—challenged the legality of the Agreement, a divided panel of the D.C. Circuit Court of Appeals held the EPA’s action unreviewable under *Chaney*.¹²⁶ Writing for the majority, Judge Sentelle had no trouble characterizing the Agreement as an enforcement action and not an instance of rulemaking: “The Agreement merely defers enforcement of the statutory requirements, and makes the deferral subject to enforcement conditions that will ultimately result in compliance.”¹²⁷ Moreover, the Agreement fell well within the bounds of the EPA’s enforcement discretion.¹²⁸ Important in this regard was that the statutes described the Agency’s enforcement authority in “permissive terms.”¹²⁹ Thus, this was not a case in which the presumption against reviewability had been rebutted by “meaningful guidelines defining the limits” of the EPA’s discretion.¹³⁰

Judge Rogers, in dissent, disagreed sharply with the majority’s reasoning, arguing that “by imposing a civil penalty on AFOs in the absence of individualized determinations of statutory violations, EPA has attempted to secure the benefits of legislative rulemaking without the burdens of its statutory duties.”¹³¹ In the dissent’s view, the publication of the consent agreement in the Federal Register was a clear

¹²² Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958, 4958 (Jan. 31, 2005).

¹²³ *Ass’n of Irrigated Residents*, 494 F.3d at 1029.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 1031.

¹²⁷ *Id.* at 1033.

¹²⁸ *Id.* at 1031–32 (concluding EPA’s judgment to pursue consent agreements “ar[ose] from considerations of resource allocation, agency priorities, and costs of alternatives . . . well within the agency’s expertise and discretion”).

¹²⁹ *Id.* at 1032.

¹³⁰ *Id.* at 1033.

¹³¹ *Id.* at 1037 (Rogers, J., dissenting). By “statutory duties,” Judge Rogers was referring to the notice-and-comment obligations under the APA. *Id.*

instance of rulemaking subject to judicial review. The EPA had, in effect, replaced the statutory enforcement mechanisms with one of its own choosing, “an unauthorized system of nominal taxation of regulated entities.”¹³²

The dispute in *Association of Irrigated Residents* brings into sharp relief the arguments on both sides of the debate on the limits of the executive’s enforcement authority. On the one hand, the agreement could reasonably be characterized as a creative solution to a problem that had long plagued enforcement against AFOs. If the EPA could simply have considered, and declined, to bring individual enforcement actions against any and all AFOs, then why could they not proceed in this manner instead? It would seem that the EPA’s decision to offer the consent agreement on an industry-wide basis resulted from a discretionary policy judgment not easily second-guessed by courts. On the other hand, many of the dissent’s points ring true. The EPA had made no individualized determinations of particular AFOs’ liability. The terms of the Agreement offered to each AFO were identical, with only the amount of the “fine” to vary among them.¹³³ The Agreement in no way resembled the enforcement mechanisms found in the various environmental statutes.¹³⁴ Most importantly, the Agreement represented a sea change in the regulatory environment for an entire industry. Until some future date, AFOs would no longer be subject to a number of important laws.

Agreements such as that between the EPA and the AFO industry raise perhaps the gravest doubts about the desirability of the presumption against reviewability because they combine the ability to broadly remake a statutory scheme with the binding quality of a legislative rule. At least with regard to the AFOs that have entered into individual consent agreements with the EPA, future administrations cannot alter or undo the terms.¹³⁵ Most importantly, such industry-wide agreements are not, as true administrative rules must be, the product of notice-and-comment procedures designed to promote interest group representation and popular accountability in the

¹³² *Id.*

¹³³ See *supra* notes 123–24 and accompanying text.

¹³⁴ For the enforcement mechanisms available under the Clean Air Act, see 42 U.S.C. § 7413(a) (2006), which authorizes the Administrator to bring civil enforcement actions for administrative fines and injunctive relief. On various methods of enforcement generally, see REVESZ, *supra* note 71, at 1031–88, which discusses civil penalties, voluntary audits, overfiling, environmental crimes, citizen suits, and settlements.

¹³⁵ This is because consent decrees, as final judgments, are afforded res judicata effect. See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378–79 (1992) (explaining that consent decrees are final judgments under Federal Rules of Civil Procedure, “subject to the rules generally applicable to other judgments and decrees”).

administrative state.¹³⁶ Although such agreements, once made, are amenable to scrutiny by those willing to look up the terms of the decree, they are not the result of transparent policymaking processes. This creates an accountability gap when compared to other types of executive policymaking.

III

PRESIDENTIAL ADMINISTRATION AND THE ACCOUNTABILITY-BASED CRITIQUE OF DEREGULATION THROUGH NONENFORCEMENT

There are several reasons for preferring presidential control of administration to judicial control, chief among them the greater democratic accountability of the President than that of unelected judges.¹³⁷ This greater accountability has been taken to justify the *Chaney* presumption,¹³⁸ which places greater power in the executive and reduces the opportunity for unaccountable bodies, such as the courts, to second-guess presidential priority-setting.¹³⁹ However, “[t]he extent to which a system of presidential administration promotes [accountability] depends in large part on the form it takes and the methods it uses.”¹⁴⁰ In this Part, I argue that the *Chaney* presumption may have perverse consequences because it forces underground policy determinations that should be made through more transparent—and hence more accountable—means. The phenomenon of deregulation through nonenforcement is, in this way, antithetical to the very goal that proponents of strong presidential administration seek to foster. Prior critics have thus missed at least part of the point.¹⁴¹ Instead of being generally hostile to presidential administration, it is possible to favor broad presidential authority while still believing that executive nonenforcement is a suboptimal means, from

¹³⁶ See *infra* note 162 and accompanying text (explaining accountability-enforcing nature of notice-and-comment rulemaking).

¹³⁷ As Justice Scalia has said, “[i]f Congress is to delegate broadly, as modern times are thought to demand, it seems . . . desirable that the delegee be able to suit its actions to the times, and that continuing political accountability be assured, through direct political pressures upon the Executive.” Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 518.

¹³⁸ See *infra* notes 149–51 and accompanying text.

¹³⁹ This concern with unaccountable bodies reviewing acts of those who have been elected is a species of the “countermajoritarian difficulty” in the administrative law context. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 464–66 (2003) (presenting and critiquing view that accountability is cornerstone of agency legitimacy).

¹⁴⁰ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2332 (2001).

¹⁴¹ See *supra* notes 8–11 and accompanying text (describing and critiquing current literature).

an accountability-based perspective, of achieving a deregulatory agenda.

That presidential control of executive agencies promotes accountability, and thus lessens the democratic anxiety associated with the post–New Deal presence of large numbers of agencies, has become an increasingly popular position embraced by both conservative and liberal scholars.¹⁴² Lisa Schultz Bressman has called this the “presidential control model” of the administrative state.¹⁴³ The model is a reaction to the uneasiness regarding the democratic and constitutional legitimacy of executive agencies with little formal limitation (in the form of legislative guidelines) on their authority.¹⁴⁴ Under the presidential control model, legitimacy is conferred on agency power by subordinating it to the control of the President, who is accountable to the electorate.¹⁴⁵ More than a theoretical model, history since the Reagan Administration indicates that presidential control is increasingly a fact of life in the administrative state.¹⁴⁶

The courts have also pointed to presidential control of administrative agencies as a justification for limiting their own power vis-à-vis these agencies. The most conspicuous limitation is the Supreme Court’s *Chevron* framework for evaluating agency statutory interpretations. Justice Stevens, writing for the majority in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, articulated that judges “are

¹⁴² See, e.g., JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 152 (1997) (arguing that President is more responsive to public pressure than other branches); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58–70 (1995) (defending unitary executive based on accountability considerations); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–3 (1994) (defending unitary executive for functional reasons, including concern with accountability).

¹⁴³ Bressman, *supra* note 139, at 485.

¹⁴⁴ See Bressman, *supra* note 9, at 1659 (“The accountability theory responds to a persistent criticism of agency decisionmaking—specifically, that such decisionmaking is not majoritarian.”).

¹⁴⁵ See Bressman, *supra* note 139, at 490 (arguing that presidential control model “purports to legitimate the administrative state by bringing its decisions (or a large many of them) under political—and therefore popular—control”).

¹⁴⁶ See Kagan, *supra* note 140, at 2277–2319 (chronicling how presidential power over executive branch has increased since Reagan); cf. Cynthia R. Farina, *The “Chief Executive” and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 181–82 (1997) (arguing that, since 1980s, popular structural constitutional theory has led to strong presidential power through control of administrative agencies). Some would argue that the presence of independent agencies limits the President’s power over administration. However, since the initial proliferation of independent agencies during the New Deal, such agencies have been the exception rather than the norm. See BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 81 (6th ed. 2006) (noting that independent agencies fell out of favor during “rights revolution”); Kagan, *supra* note 140, at 2274 n.104 (describing “transfer of power from independent to executive branch agencies”).

not part of either political branch of the Government. . . . In contrast, an agency . . . may, within the limits of [legislative] delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is."¹⁴⁷ Thus, the Court has found agencies' greater accountability, resulting from control by the President, to justify their power, even in areas—such as statutory interpretation—where courts are usually supreme.¹⁴⁸

The *Chaney* Court's presumption of nonreviewability of agency nonenforcement could also be understood as recognizing the greater accountability of the executive. This argument proceeds from the *Chaney* majority's remark that enforcement decisions often involve a "complicated balancing of a number of factors."¹⁴⁹ In a world of scarce resources, *someone* (or some body) must determine the relative priorities of the government's enforcement arm. This includes determining both the priorities of individual agencies administering particular laws and the priorities that cut across different agencies administering sometimes very different laws.¹⁵⁰ The proponents of the presidential control model and—at least if one is willing to read between the lines—the *Chaney* Court, are willing to vest this authority exclusively within the executive branch, and hence the President, on the grounds that the President retains democratic accountability that is lacking in the judiciary. Indeed, Lisa Schultz Bressman, in her critique of the presumption of nonreviewability, accepts that the presumption is in accord with the goal of accountability. Bressman argues, instead, that the presumption should be challenged on other grounds, such as executive "arbitrariness."¹⁵¹

The problem with this argument is that it overlooks the fact that the executive branch can proceed in more, or less, accountable ways. It is not just the comparative accountability of the courts and the executive that warrants attention, but also the way in which the executive performs its duties.¹⁵² Courts manipulating the scope and

¹⁴⁷ 467 U.S. 837, 865 (1984).

¹⁴⁸ See Cass R. Sunstein, *Beyond Marbury: The Executive's Power To Say What the Law Is*, 115 *YALE L.J.* 2580, 2589 (2006) (calling *Chevron* "a kind of counter-*Marbury* for the administrative state").

¹⁴⁹ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

¹⁵⁰ Cf. Bagley & Revesz, *supra* note 64, at 1261 (describing promise of OMB review to harmonize and rationalize regulation through "interagency coordination, rational priority setting, and cost-effective rulemaking").

¹⁵¹ See Bressman, *supra* note 9, at 1678–81 (arguing that presumption derives from presidential control model, which is "[t]he prevailing accountability theory model"). Bressman defines executive arbitrariness as "administrative decisionmaking [designed] to advance private interests at public expense." *Id.* at 1660.

¹⁵² See *supra* note 140 and accompanying text.

stringency of judicial review can affect the ways in which the executive acts.¹⁵³ For example, Mashaw and Harfst have argued that “hard look” review in the rulemaking area has caused agencies to move policymaking into the realm of adjudication, with potentially negative results.¹⁵⁴ Elizabeth Magill likewise points to how courts have indirectly regulated agencies’ choice of policymaking form through manipulating the kinds of review available in a given situation.¹⁵⁵ Thus any gains in accountability to be made by shifting power from courts to the President may be offset or even reversed if that shift also encourages the President to act through less accountable means. This is the fundamental insight offered by this Note, and one which has been ignored in prior works on executive nonenforcement.

Indeed, there are good reasons to think that deregulation through nonenforcement is substantially less likely to produce accountability in government than other types of executive action, such as notice-and-comment rulemaking. The most basic form of accountability is simply to “make an account” of the agent’s actions, i.e., detailing how the agent has acted in furtherance of the principal’s interests.¹⁵⁶ In the case of what I have been calling “case-by-case nonenforcement,” it will be difficult for citizens to track and evaluate what is in effect the gradual accumulation of a series of seemingly unconnected decisions not to pursue alleged violators. Without this ability, political accountability cannot exist. As Elena Kagan has pointed out, one way presidential administration promotes accountability is by “enhanc[ing] transparency, enabling the public to comprehend more accurately the sources and nature of bureaucratic power.”¹⁵⁷ Pursuing broad policy goals, however, through a series of individual, apparently isolated, decisions actually prevents the public from comprehending “the sources and nature of bureaucratic power.”¹⁵⁸ Indeed, “case-by-case” nonenforcement disguises such power by formulating policy *sub rosa*,

¹⁵³ See *supra* Part I.C (explaining how varying levels of review can affect processes through which agency acts).

¹⁵⁴ See MASHAW & HARFST, *supra* note 5 (exploring NHTSA’s shift to policymaking through recall adjudication and resultant harms to public automobile safety).

¹⁵⁵ Magill, *supra* note 5, at 1426–42. See generally Tiller & Spiller, *supra* note 75 (providing theoretical model of how agency choice of policymaking form depends on judicial review).

¹⁵⁶ See Cameron Holley, *Facilitating Monitoring, Subverting Self-Interest and Limiting Discretion: Learning from “New” Forms of Accountability in Practice*, 35 COLUM. J. ENVTL. L. 127, 134 (2010) (describing accountability’s traditional concern with “formal, largely hierarchical, principal-agent accountability relationships” where principal confers on agent “responsibility for the performance of particular tasks, with a duty to explain, justify, and be held accountable for its actions”).

¹⁵⁷ Kagan, *supra* note 140, at 2331–32.

¹⁵⁸ *Id.* at 2332.

leaving the public's ability to hold the government accountable, especially in times of unified government, at the mercy of the press and congressional investigators.¹⁵⁹ In the same way, it also masks the presidential role in setting executive branch priorities, significantly reducing the accountability-enhancing nature of the presidential control model.

Informal enforcement policies, likewise, will often be the result of significantly less accountable processes than the alternative: binding enforcement directives promulgated through rulemaking. The saga of NSR, for example, demonstrates that a significant policy shift involving the regulation of a vast, polluting industry could be implemented without any public acknowledgement.¹⁶⁰ Binding enforcement directives, promulgated through rulemaking, require agencies, and the administration to which they are accountable, to take a public stand on their enforcement priorities. Informal norms regarding enforcement, whether set forth in an agency manual or not, lack this quality. Yet by exempting informal enforcement policies from judicial review, *Chaney* greatly increases their appeal to the executive.

Finally, industry-wide consent agreements such as that at issue in *Association of Irrigated Residents* allow agencies an end run around full notice-and-comment rulemaking. Since these are private agreements between the agency and regulated entities, the agency can avoid judicial review while simultaneously restricting the ability of outside groups to participate meaningfully.¹⁶¹ When acting through rulemaking, the executive must at least invite the participation of, and respond to, interest groups other than the regulated industry itself. Indeed, participation is an essential element of the accountability-promoting nature of the executive branch.¹⁶² Agreements such as those in *Association of Irrigated Residents* raise particular concerns because they are binding to an extent that informal enforcement norms are not.¹⁶³ They therefore allow a presidential administration to freeze a certain policy in place while avoiding the obligations of notice-and-comment rulemaking. Insofar as the practice allows "inside deals" between agencies and regulated industries to remake congressional

¹⁵⁹ On the role of Congress in overseeing the administrative state, see generally Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006).

¹⁶⁰ See *supra* Part II.B (discussing NSR as example of informal enforcement).

¹⁶¹ See *supra* Part II.C (discussing industry-wide consent agreements).

¹⁶² See Stewart, *supra* note 15, at 1683 (arguing that agency consideration of various interests promotes public interest).

¹⁶³ Such agreements are more binding than administrative rules due to their preclusive effects in future litigation. Since consent decrees are final judgments by a court, they bar future suits by the government over matters contained therein. See *supra* note 135 (discussing binding nature of consent decrees).

statutes, these agreements suffer from significant accountability problems that other methods do not.

IV

THE WAY FORWARD? PROMOTING ACCOUNTABILITY

To the extent that scholars have critiqued agency nonenforcement, they have tended to advocate direct review of agency nonenforcement decisions, on arbitrariness or other grounds, as a way to curtail the excesses of executive discretion.¹⁶⁴ This makes sense; if the phenomenon of nonenforcement is exacerbated by lack of judicial review, it is tempting to turn to the courts for a solution. The tendency to seek judicial review is magnified by viewing the problem as one implicating rights or inter-branch separation of powers, as previous scholars have done.¹⁶⁵ We are accustomed to seeing the courts as the final arbiters in such situations. I have argued, however, that the problem is really one of *process*, and that the proper goal is to encourage the mix of agency procedures that best maximizes the executive's institutional advantages—its greater accountability vis-à-vis other actors, in particular the courts. Perhaps paradoxically, I suggest in this Part that the proper response by the courts may be to *lessen* judicial review of agency rulemaking, especially of agency reversals: By making it easier to effect changes in agency policy priorities through rulemaking, courts can encourage agencies to act through means that are more transparent and result in greater public accountability.

Courts are poorly equipped for reviewing individual enforcement decisions by agencies. This conclusion derives from two facts: (1) There are many valid reasons for an agency's failure to enforce in any given case;¹⁶⁶ (2) the courts are ill-suited to separate proper from improper agency enforcement decisions. As Professors Stewart and Sunstein have explained, "enforcement decisions are a highly complex—indeed 'polycentric'—task. In adopting an enforcement plan, the agency presumably has weighed the advantages and disadvantages

¹⁶⁴ See, e.g., Bressman, *supra* note 9, at 1702 (arguing that reviewability under "arbitrariness" standard should be norm for agency refusals to enforce); Cheh, *supra* note 9, at 285–88 (recognizing importance of judicial review of agency inaction and arguing that *Marbury* duty "to say what the law is" requires courts to review nonenforcement decisions); Colker, *supra* note 9, at 910–12 (arguing for review of individual prosecutorial decisions not to enforce in some circumstances).

¹⁶⁵ See *supra* notes 8–9 and accompanying text.

¹⁶⁶ These include, for example, the likelihood of prevailing against a particular party, the fear of making "bad law," and the severity of the violation. See Sunstein, *supra* note 8, at 672–73, 682–83 (arguing against review of agency nonenforcement decisions under "generalized arbitrariness" standard because of insurmountable practical problems).

of a variety of alternative regulatory initiatives.”¹⁶⁷ As a result, direct review of agency nonenforcement decisions is likely to be a clumsy and ineffective solution to overly politicized agency enforcement practices. In light of these institutional shortcomings, it should be no surprise that most of the proposals for how courts should review agency nonenforcement decisions are either too vague to be helpful or simply lack teeth.¹⁶⁸

When direct judicial review is unavailable or ineffective, however, the courts are not powerless to influence agency practices. As is increasingly understood, courts can sometimes act by using carrots instead of sticks. This is one way to view the Supreme Court’s holding in *United States v. Mead Corp.* that only in certain circumstances (for example, when an agency acts through rulemaking) does *Chevron* deference apply to agency legal interpretations.¹⁶⁹ Although the courts are generally without power to dictate that agencies act through specific procedures,¹⁷⁰ courts can push agencies in certain directions by

¹⁶⁷ Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1269–70 (1982) (footnotes omitted).

¹⁶⁸ For example, it is difficult to see how a generalized arbitrary and capricious review of agency enforcement decisions would work in practice; it would seem nearly impossible for agencies to articulate a reason not to enforce that could properly be evaluated by a court, or for courts to weigh the costs and benefits of agency inaction. See *supra* note 164 and accompanying text (citing advocates of judicial review of agency nonenforcement). A second possibility is placing an obligation on agencies to explain their enforcement decisions and then reviewing those decisions only if the agency response so lacks reason that it raises alarm bells. The risk, of course, is that agencies will almost always be able to explain away individual decisions not to enforce by reference to benign considerations. Finally, Ashutosh Bhagwat suggests requiring agencies to state their enforcement policies through rulemaking; courts would then review individual enforcement decisions against the agency’s stated policy. Bhagwat, *supra* note 51, at 183–84. This is an interesting suggestion, but it is unclear, under the APA and existing precedent, from where such an obligation would derive. See *id.* at 183 (conceding that requirement would be “an admittedly significant departure from existing practice”). Additionally, and importantly, all of the suggestions above assume there will often be plaintiffs with proper standing, a precarious assumption under current law. See *supra* note 29 (noting that standing may be obstacle to judicial review to nonenforcement).

¹⁶⁹ 533 U.S. 218, 226–27 (2001). *Mead* dealt with whether tariff classification rulings by the U.S. Customs Service are entitled to *Chevron* deference, a question the Court answered in the negative. *Id.* at 221. *Mead* has spawned a considerable amount of literature on when agencies should be able to invoke the *Chevron* regime. See, e.g., Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-rules and Meta-standards*, 54 ADMIN. L. REV. 807, 809 (2002) (arguing *Mead* should be replaced by more rule-like test); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191–93 (2006) (arguing that test for whether agency interpretation qualifies for *Chevron* deference should be substantially simplified).

¹⁷⁰ *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524–25 (1978).

attaching positive consequences to the use of some procedures but not others.¹⁷¹

The problem I have identified results essentially from an asymmetry between the type and scope of review courts apply in evaluating agency refusals to enforce (no review) and that applied to agency rulemaking (“hard look” review).¹⁷² One way to address this asymmetry is to heighten the review applied to agency nonenforcement. Though advocated by previous commentators,¹⁷³ I believe this approach is doomed for the reasons stated above. Furthermore, as a practical matter, the Supreme Court has shown little interest in abandoning the core *Chaney* doctrine.¹⁷⁴ Thus, I argue instead that reducing the stringency of review applied to agency rulemaking, and particularly agency policy reversals, better addresses the asymmetry.

Since the Supreme Court’s decision in *State Farm*, the nature of review applied to agency policy reversals, such as the rescission of administrative rules, has been a cause of controversy,¹⁷⁵ with some courts holding that an agency decision to rescind a regulation is subject to a heightened form of review that might be described as “super” hard look review.¹⁷⁶ This further exacerbates the asymmetrical treatment between deregulation pursued through nonenforcement and deregulation pursued by rescission because it exempts the former from

¹⁷¹ See Bressman, *supra* note 139, at 538–41 (discussing how *Mead* promotes administrative law values by incentivizing certain procedures over others).

¹⁷² See *supra* Part I.C (exploring consequences of regulatory asymmetry).

¹⁷³ See *supra* note 164 and accompanying text (cataloguing proposals for direct review of agency nonenforcement decisions).

¹⁷⁴ See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007) (reiterating *Chaney*’s holding that agency nonenforcement decisions are not subject to judicial review).

¹⁷⁵ See Scalia, *supra* note 10, at 192 (“The inherited view, especially in the D.C. Circuit, I think, is that an agency change in position on a policy matter is a ‘danger signal,’ which provokes heightened judicial scrutiny. One must ask why that should be so.”).

¹⁷⁶ See, e.g., *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 456–57 (2d Cir. 2007) (explaining that agency departure from precedent must be reasoned and must provide explanation for why new policy is *as good as* or *better than* old one), *rev’d*, 129 S. Ct. 1800, 1812–15 (2009) (finding that FCC had sufficient reason for departing from prior policy). The lower courts have been somewhat coy about the standards for judging agency policy changes. For example, the Second Circuit explained that “[w]hile an agency is not locked into the first interpretation of a statute it embraces, it cannot simply adopt inconsistent positions without presenting some reasoned analysis.” *Huntington Hosp. v. Thompson*, 319 F.3d 74, 79 (2d Cir. 2003) (internal quotation marks omitted); see also *N.Y. Council, Ass’n of Civilian Technicians*, 757 F.2d at 508 (“[A] flip-flop must be accompanied by a reasoned explanation of why the new rule effectuates the statute as well as or better than the old rule.”); *Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 129 (2d Cir. 1993) (holding that, when agency shifts interpretations, it must provide “a reasoned analysis that justifies its change of interpretation so as to permit judicial review of its new policies”) (internal quotation marks omitted). The D.C. Circuit has likewise stated that its “review is heightened somewhat by the fact that the . . . action . . . was a reversal of a prior position.” *NAACP v. FCC*, 682 F.2d 993, 998 (D.C. Cir. 1982).

judicial scrutiny while subjecting the latter to an especially severe form of review. This in turn heightens the probability that some kinds of policymaking, ideally pursued through more accountable notice-and-comment rulemaking, will actually take place through enforcement practices.

In this respect, a recent decision by the Supreme Court—albeit the product of a partially fractured Court—may help point the way forward. *FCC v. Fox Television Stations, Inc.* involved the FCC’s decision to abandon its previous policy of not subjecting “fleeting expletives” on broadcast media to sanction.¹⁷⁷ Though the case dealt not with deregulation, but rather the regulation of an activity that had previously enjoyed exempt status, the reasoning of the opinion is equally applicable to other changes in agency policy, such as the rescission of administrative rules.¹⁷⁸ Justice Scalia, writing for the majority, argued strongly against the propriety of subjecting agency reversals to a form of “heightened” arbitrary and capricious review.¹⁷⁹ The Court found “no basis in the Administrative Procedure Act or in [its] opinions for a requirement that all agency change be subjected to more searching review.”¹⁸⁰ Justice Scalia explained the scope of review over agency policy reversals as follows:

[The agency] need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.¹⁸¹

Thus, it appears that *Fox* decisively rejected the idea that agency policy reversals should be categorically subject to a more searching form of review under the arbitrary and capricious test.

A concurrence by Justice Kennedy, the fifth vote in the majority, somewhat complicates this assessment.¹⁸² Justice Kennedy explained that the Court has a duty to scrutinize agency policy changes and, in

¹⁷⁷ 129 S. Ct. 1800, 1809 (2009). Specifically, the case involved the application of the statutory “indecency ban”—prohibiting “utter[ing] any obscene, indecent, or profane language by means of radio communication”—to the single use of a “nonliteral expletive.” *Id.* at 1806–07 (quoting 18 U.S.C. § 1464 (2006)).

¹⁷⁸ The Court’s recognition of the relevance of the *State Farm* decision, which addressed rule rescission, demonstrates the applicability of the analysis to deregulation. *See id.* at 1810–11 & n.2 (noting that *State Farm* involved policy change, but denying that it subjected such change to more searching review).

¹⁷⁹ *Id.* at 1810–11.

¹⁸⁰ *Id.* at 1810.

¹⁸¹ *Id.* at 1811.

¹⁸² *Id.* at 1822 (Kennedy, J., concurring). Curiously, although Justice Kennedy joined all major sections of Scalia’s majority opinion, he did not join Part III.E, which responded to

particular, to determine the extent to which such changes conform to “neutral and rational principles.”¹⁸³ Accordingly, Kennedy concluded that an agency is not at liberty simply to ignore the factual findings that justified a prior policy.¹⁸⁴ Although the Kennedy concurrence in *Fox* appears to cloud the standard for judging agency changes in policy (perhaps leaving it open to enterprising lower courts to find that agency policy reversals are particularly susceptible to challenge as being contrary to “neutral and rational principles”),¹⁸⁵ the immediate takeaway from *Fox*—at least from the majority opinion—appears to be that agency policy reversals are no longer subject to heightened suspicion—or at least not to “super” hard look review.

Beyond the *Fox* opinion, there are additional justifications for the abandonment of heightened review of agency policy reversals. In particular, heightened review is troubling to the extent that courts should, as I have argued, be attentive to encouraging the executive to act through transparent, readily accountable means.¹⁸⁶ By decreasing the flexibility built into administrative rulemaking or formal adjudication, hard look review—especially of the heightened variety—pushes policymaking underground, where it can escape judicial review. Future courts should lean toward Scalia’s approach in *Fox*, thus allowing essentially political decisions to remain above board. Moreover, courts should not second-guess agency reversals unless they are clearly arbitrary—such as when facts previously judged relevant to the policy inquiry are completely ignored.

Courts may also consider altering the scope of review applied in general to administrative rulemaking. Many have pointed out that courts have burdened agencies with excessive requirements in carrying out rulemaking, with the result that many areas are experiencing regulatory “ossification.”¹⁸⁷ Not only can this halt the necessary

various dissents. *Id.*; see also *id.* at 1815–16 (majority opinion) (addressing Justices Breyer and Souter’s dissent).

¹⁸³ *Id.* at 1823 (Kennedy, J., concurring).

¹⁸⁴ *Id.* Justice Scalia also appeared to endorse this idea. See *id.* at 1811 (majority opinion) (noting that when “new policy rests upon factual findings that contradict those which underlay its prior policy,” ignoring prior factual findings would be “arbitrary or capricious”).

¹⁸⁵ See Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 457 (2009) (suggesting that lower courts could seize on parts of Kennedy’s opinion to impose more searching review and rejecting this reading of Kennedy’s opinion).

¹⁸⁶ See *supra* Part I.C (explaining that regulatory assymetry created by *Chaney* rule incentivizes agencies to act through means that avoid judicial review).

¹⁸⁷ See, e.g., Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1387–96, 1400–03, 1410–26 (1992) (cataloguing phenomenon of regulatory ossification and placing substantial blame on analytical and substantive requirements of judicial review); Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60–62 (1995) (discussing problem of ossification).

updating of important statutes,¹⁸⁸ but it also means that changes are not made through rulemaking, but rather through other, less accountable means, such as executive nonenforcement.¹⁸⁹

In the alternative, courts can minimize substantive review of agency rulemaking by limiting themselves to a form of rationality review as well as by ensuring agency conformance with proper procedure.¹⁹⁰ In this way, courts could ensure that important process values are being served without second-guessing substantive judgments by agency decisionmakers.

As with any change in incentive structure, this proposal will have the greatest effect at the margins. Indeed, there is a built-in advantage to pursuing deregulation through nonenforcement that lowering the costs of acting through rulemaking does not address. In some situations, presidential administrations will simply prefer to act through less accountable means. This is particularly so where the desired policies are inherently controversial and the President wishes to mask his involvement. However, it is important to remember that acting through rulemaking has certain natural advantages—advantages that presidential administrations may be keen on capturing.¹⁹¹ First, as noted above, rulemaking has a “stickiness” which enforcement practices do not¹⁹²: Administrative rules are less susceptible to change and naturally carry over to the next administration.¹⁹³ Second, rulemaking fosters greater centralized control over agency practices. Pursuing der-

¹⁸⁸ See generally Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7 (1991) (providing case study of possible negative effects of aggressive judicial review of rulemaking).

¹⁸⁹ A similar concern attaches to agency guidance documents or manuals, whether or not they are enforcement-related. See McGarity, *supra* note 187, at 1393 (explaining how burdensome notice-and-comment procedures have led agencies to engage in “nonrule rulemaking”).

¹⁹⁰ This is the course suggested by Keller, *supra* note 185, at 469–81 (arguing that courts should use “rational basis with bite standard”).

¹⁹¹ Recent presidential administrations, and especially the Clinton Administration, have in fact opted to act through rulemaking when it is in their interest to do so. See Kagan, *supra* note 140, at 2281–2303 (describing Clinton-era regulatory initiatives, including rulemaking regarding tobacco and paid leave); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 965–67 (1997) (presenting Clinton’s rulemaking agenda).

¹⁹² See *supra* note 6 and accompanying text (describing difficulty of changing regulations made through notice-and-comment rulemaking).

¹⁹³ This is perhaps most clearly seen in the phenomenon of the “midnight regulation,” passed at the end of an outgoing administration’s term in office, which may or may not be quickly repealed by the incoming administration. See generally Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the “Midnight” Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441 (2005) (detailing practice of passing “midnight regulations” and arguing that deregulatory administrations may face difficulty amending or repealing such regulations).

egulation through nonenforcement may involve a series of repeated, costly interactions between administration and agency career staff.¹⁹⁴ Rulemaking, on the other hand, is a “one-off” act which is subsequently self-enforcing (since rules have the force of law behind them).¹⁹⁵ For these reasons, reducing the burdens of rulemaking may ensure that more policy decisions will in fact be made through rules, as opposed to enforcement practices, thus promoting accountability.

One might respond that my proffered solution simply opens up a new avenue for presidential deregulation, and that a President would simply pursue a deregulatory course through rulemaking and nonenforcement simultaneously. This is a serious criticism, but there are two potential responses. First, it is unlikely that the deregulatory appetite of any administration will be truly infinite.¹⁹⁶ Assuming a set deregulation agenda, the issue becomes a matter of proportion: Given a particular number of deregulatory goals, how many will proceed through rulemaking or other above-board means, as opposed to through nonenforcement programs? My proposal aims at the modest goal of encouraging *more* action through accountable means than through unaccountable nonenforcement. Second, there may be some policies that the President wants to implement through rulemaking: Aside from the benefits of rulemaking outlined above,¹⁹⁷ certain policies are generally popular, making public rulemaking politically desirable. Under the status quo, however, these policies are nevertheless pursued through nonenforcement because of the review costs associated with the alternatives. If hard look review and the cost of rulemaking were reduced, the executive might instead opt for a more publicly accountable method of enforcement. This is a likely area in which my proposal will have some effect in promoting accountability, even if it is not a panacea.

¹⁹⁴ The FDA example above may provide an illustration. *See supra* notes 79–86 and accompanying text.

¹⁹⁵ *See, e.g.*, Manning, *supra* note 89, at 893–94 (distinguishing between legislative and nonlegislative rules based on former’s ability to bind agency and public).

¹⁹⁶ For example, a President with close industry ties may prefer regulation when it is in the interests of industry itself as a way of seeking rents and keeping out competition. *Cf.* E. Donald Elliot et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326–38 (1985) (explaining how certain industries demanded federal environmental regulation to advance industry interests by avoiding stringent or inconsistent state regulation).

¹⁹⁷ *See supra* notes 191–95 and accompanying text (describing benefits of acting through rulemaking).

CONCLUSION

The purpose of this Note has been to bring to attention the ability of antiregulatory presidential administrations to pursue a substantive, deregulatory agenda through control of executive branch enforcement practices. To the extent we want greater accountability in the administrative state, this is a troubling situation. Presidential policymaking, while generally appropriate in the age of open-ended statutes, should proceed in the eye of the public. True policymaking, that is, genuine changes in the rules governing regulated entities, should be attributable to a politically accountable actor, not relegated to low-level bureaucratic maneuvering and barely articulated enforcement practices. To the extent that the courts have insulated enforcement practices from judicial scrutiny, they have encouraged the erosion of accountable government. For reasons of practical difficulty, however, they will be hard-pressed to mollify this effect by instituting direct review of agency nonenforcement decisions. I have suggested one way in which this erosion might be reversed, but it may require the courts to swallow a bitter pill—namely, lessened judicial oversight of agency rulemaking.