TRADING NONENFORCEMENT

Ryan Snyder*

ABSTRACT

In recent years, federal agencies have increasingly used nonenforcement as a bargaining chip—promising not to enforce a legal requirement in exchange for a regulated party's promise to do something else that the law doesn't require. This Article takes an in-depth look at how these nonenforcement trades work, why agencies and regulated parties make them, and the effects they have on social policy. The Article argues that these trades pose serious risks: Agencies often use trading to evade procedural and substantive limits on their power. The trades themselves present fairness problems, both because they tend to reward large, well-connected firms and because they often coerce regulated parties that lack bargaining power. Moreover, the agency's nonenforcement promises aren't binding—thus, even if a regulated party upholds its end of the bargain, the agency can always renege on the deal. The Article concludes by identifying several possible solutions that might discourage agencies from trading nonenforcement.

* Associate Professor, University of Missouri School of Law. I am grateful for the comments and suggestions of Justice Amy Coney Barrett, Will Baude, A.J. Bellia, Lisa Bernstein, Sam Bray, Emily Bremer, Jud Campbell, Nathan Chapman, Robin Effron, David Freeman Engstrom, David Hyman, Ben Johnson, Dan Kelly, Jim Lindgren, Josh Macey, Michael McConnell, John McGinnis, Anne Joseph O'Connell, Kish Parella, Chas Tyler, Chris Walker, and Ryan Watson.

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INTRODUCTION

In recent years, federal agencies have increasingly tried to use nonenforcement to achieve policy goals.[1] This practice spans multiple administrations, both major political parties, and topics as diverse as air pollution, healthcare, and immigration.[2] This use of nonenforcement has received much scholarly attention: for example, scholars have debated the limits of the nonenforcement power,[3] how to enforce those limits,[4] and to a lesser extent, how nonenforcement works in practice.[5]

These debates tend to assume, however, that agencies use nonenforcement only to deregulate—allowing regulated parties to do something that the law prohibits or excusing them from doing something that the law requires.[6] But agencies also use nonenforcement to regulate—effectively imposing new rules that govern regulated parties' actions.

To achieve this counterintuitive result, agencies use a combination of offers and threats. First, the agency offers not to enforce a legal

1. Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1034 (2013); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 685 (2014).

2. *See* Andrias, *supra* note 1, at 1060–69; Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 807–16 (2010); Price, *supra* note 1, at 756–63.

3. *See, e.g.*, Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013); Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195 (2014); Price, *supra* note 1; Symposium, *The Bounds of Executive Discretion in the Regulatory State*, 164 U. PA. L. REV. 1587 (2016).

4. *See, e.g.*, Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157 (1996); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004); Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571 (2016); Daniel E. Walters, *The Judicial Role in Constraining Presidential Nonenforcement Discretion: The Virtues of an APA Approach*, 164 U. PA. L. REV. 1911 (2016).

5. *See, e.g.*, Aaron L. Nielson, *How Agencies Choose Whether to Enforce the Law: A Preliminary Investigation*, 93 NOTRE DAME L. REV. 1517 (2018).

6. *See, e.g.*, Andrias, *supra* note 1, at 1054 (explaining that presidents have "used nonenforcement as a strategy of deregulation"); Love & Garg, *supra* note 3, at 1238 (explaining that "unchecked presidential inaction" creates "a bias in favor of smaller government"); Price, *supra* note 1, at 749–50 ("A broad conception of executive nonenforcement power could be a powerful tool for Presidents with deregulatory goals that conflict with statutory mandates."); Deacon, *supra* note 2, at 796 (describing how presidents can "ease regulatory burdens by curtailing agency enforcement").

requirement if the regulated party agrees to do something that the agency wants. Second, the agency makes a threat: if the regulated party fails to uphold its end of the bargain, the agency will reverse course and enforce the legal requirement. If the regulated party accepts such an offer—and they often do—the resulting trade effectively changes the law on the ground without amending the law on the books.

To be sure, nonenforcement trades don't formally have the force of law. And on the surface, they might look like voluntary transactions between two parties. In many cases, however, such trades are "the practical equivalent of a rule that obliges [regulated parties] to comply or to suffer the consequences."[7] Once the deal is done, regulated parties have only two choices: comply with the trade's terms or face legal sanctions. Thus, from a regulatory party's perspective, nonenforcement trades can be just as binding as any other type of regulation.[8]

This Article argues that nonenforcement trades are normatively and legally problematic. In theory, such trades could enable agencies to promote values that undergird the administrative state. For example, nonenforcement trades could make it easier for agencies to use their expertise to solve complex problems. They could also give agencies maximum flexibility to tailor their solutions to the problem at hand. And they could empower agencies to work collaboratively with regulated parties, potentially leading to better policy.[9]

At the same time, however, nonenforcement trades pose serious risks. Administrative law rests on the presumption that constraints—such as notice-and-comment procedures and judicial review—can improve agencies' decisions and enhance their legitimacy. But nonenforcement trades allow agencies to sidestep those constraints and

7. Chamber of Com. v. U.S. Dep't of Lab., 174 F.3d 206, 210 (D.C. Cir. 1999).

8. Using similar logic, scholars have described other types of "voluntary" transactions as types of regulation. *See, e.g.*, Alfred C. Aman Jr., *Bargaining for Justice: An Examination of the Use and Limits of Conditions by the Federal Reserve Board*, 74 IOWA L. REV. 837, 838–39 (1989); Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 466–67 (2009); Matthew C. Turk, *Regulation by Settlement*, 66 U. KAN. L. REV. 259, 260 (2017).

9. *See infra* Section III.B.

exercise virtually unfettered discretion.[10] As a result, these trades increase the odds of "lawlessness, carelessness, overzealous regulatory controls, and inadequate regulatory protection."[11]

For example, when agencies trade nonenforcement, they are less likely to practice the type of deliberative democracy that leads to good social policy. The rulemaking process strongly encourages agencies to seek out diverse perspectives from experts throughout the executive branch, as well as from the public. It also requires agencies to reflect on the information that they receive and give reasoned explanations for their choices. When agencies trade nonenforcement, however, they don't need to do any of these things—they can act on their own, without input from anyone, without careful reflection, and without explaining their decisions.

Nonenforcement trades also place regulated parties in a precarious position. Unlike formal waivers, nonenforcement promises don't erase legal liability.[12] As a result, even if regulated parties uphold their end of the bargain, agencies can always decide later to enforce the law. Although agencies don't appear to renege often, some have—and the results have been deeply troubling.[13]

Moreover, nonenforcement trades rest on a shaky legal foundation. Administrative law views agencies as agents that have a responsibility to follow their principals' instructions.[14] But nonenforcement trades allow agencies "to go beyond, and perhaps even against, orders made by the principal."[15] To be sure, some principals give agents that power.[16] Yet neither the Constitution nor regulatory statutes do so

10. *See infra* Section III.A.

11. Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 529; *see infra* Section III.C.

12. *See* David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 274–75 (2013).

13. *See infra* Section I.A.5.

14. Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENV'T L. REV. 1, 6–7 (2009); Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1146 (2014).

15. William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 327 (1989).

16. *See infra* Section IV.A.

explicitly. And in most (if not all) cases, they don't do so implicitly either.

Two parts of the Constitution strongly suggest that agencies don't have an implicit power to trade nonenforcement. The first is the Faithful Execution Clause, which provides that the President "shall take Care that the Laws be faithfully executed."[17] This clause imposes a duty on agencies to enforce the law and creates a presumption that they "lack inherent authority either to prospectively license statutory violations or to categorically suspend enforcement of statutes for policy reasons."[18] But agencies appear to violate that duty when they trade nonenforcement—indeed, such trades often involve an express promise by the agency not to enforce the law in the future. Thus, the most logical conclusion is that the Constitution doesn't give agencies the implicit power to regulate in this way.[19]

The Necessary and Proper Clause, along with the Constitution's lawmaking procedures, reinforce this conclusion. Through the Necessary and Proper Clause, the Framers gave Congress primary responsibility for deciding how to implement its legislative powers.[20] The Framers also designed an elaborate procedure—bicameralism and presentment—for making those decisions.[21] That suggests that the Framers wanted Congress to decide how federal law would be enforced, and that they wanted Congress to do so in a particular way. It seems highly unlikely that, at the same time, the Framers implicitly gave agencies the power to set aside Congress's decisions and substitute their own without following any procedure whatsoever.[22]

Under current law, Congress could give agencies the power to trade nonenforcement. In most cases, however, normal principles of interpretation suggest that Congress hasn't done so implicitly. First, as the Supreme Court has recognized, it is reasonable to assume that Congress "speak[s] clearly when authorizing an agency to exercise

17. U.S. CONST. art. II, § 3.
18. Price, *supra* note 1, at 704.
19. *See infra* Section IV.B.1.
20. U.S. CONST. art. I, § 8, cl. 18.
21. *Id.* § 7.
22. *See infra* Section IV.B.2.

powers of vast economic and political significance."[23] Thus, in cases involving such issues, agencies can't rely on an implicit power to trade nonenforcement.

Second, the negative-implication canon often suggests that agencies lack this power. Whenever a statute specifies how to do something, the negative-implication canon "directs interpreters to ask whether a reasonable person reading the words in context would have understood the specification to be exclusive."[24] This principle comes into play any time an agency trades nonenforcement because, by definition, the statute tells the agency to enforce the law in a particular way and the agency is choosing not to. And in at least some cases, the statute's specification of a particular enforcement method will imply that the agency lacks the power to use others.[25]

Third, in recent years, Congress has increasingly given agencies an explicit power to waive legal requirements. In addition, many of these provisions give agencies the power to place conditions on any waivers. But Congress has never explicitly given agencies the similar power to place conditions on nonenforcement. That too suggests that Congress has chosen to withhold this power.[26]

In some ways, nonenforcement trades are an old problem. In 1937, future Justice Abe Fortas argued that agencies needed "bargaining power," such as "sanctions or desired favors," so they could "trade for changes in practices" that would advance their "conception of equity and justice."[27] And prominent, real-world examples started to appear "as early as the mid-1970s."[28] This practice has become more important in recent years, however, and will continue to grow more

23. Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022) (per curiam) (quoting Ala. Ass'n of Realtors v. Dep't Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam)).

24. Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2310 (2006).

25. *See infra* Section IV.C.

26. *Id.*

27. Abe Fortas, *The Securities Act and Corporate Reorganizations*, 4 LAW & CONTEMP. PROBS. 218, 239 (1937).

28. Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENV'T L. REV. 297, 300 (1999).

important in the future. Agencies often resort to nonenforcement trades to close large gaps between their responsibilities and resources, to bypass expensive rulemaking proceedings, and to respond to pressure from political officials who can't get legislation through Congress.[29] These problems won't disappear in the years ahead—if anything, they will intensify.

This Article proceeds in five parts. Part I analyzes how nonenforcement trades work. As this part shows, these trades vary widely, and that variation can have a large effect on a trade's desirability and legality. Part II explains why agencies might want to trade nonenforcement and why regulated parties might comply. Part III describes the ways in which the power to trade nonenforcement frees agencies from constraints and examines the potential advantages and risks of doing so. Part IV argues that, in the vast majority of cases, neither the Constitution nor regulatory statutes give agencies this power—either explicitly or implicitly. Part V concludes by identifying several possible ways to discourage agencies from trading nonenforcement.

I. HOW NONENFORCEMENT TRADES WORK

In the abstract, nonenforcement trades are simple to describe: an agency promises not to enforce a legal requirement in exchange for a regulated party's promise to do something the agency wants but the law doesn't require. In practice, however, such trades take many forms. Some involve regulated parties that have already violated the law; others involve parties that want to do so in the future. Sometimes agencies have clear authority to enforce the legal requirement at issue; other times their authority is murky or nonexistent. Sometimes regulated parties promise to do things the agency could require if it used the proper procedures; other times they promise to do something Congress has expressly barred the agency from requiring, even through legislative rulemaking.

29. *See infra* Section II.A.

This Part captures these variations in two ways. First, I walk through several well-known examples of agencies trading nonenforcement. Second, I catalogue many of the ways in which these trades can differ from each other. In so doing, I hope to demonstrate how malleable this practice can be and highlight a key point: some nonenforcement trades pose greater risks than others.

A. Trading in Action

1. The EPA's Project XL

In 1995, the U.S. Environmental Protection Agency (EPA) started a program called Project XL.[30] Under this program, the EPA offered a trade to regulated parties: The EPA would promise not to enforce various laws that limited the amount of pollution the regulated party could emit, and in return, the regulated party would agree to "produce greater environmental benefits" than the law required.[31]

Project XL gave the EPA and regulated parties a lot of flexibility. The EPA would allow a regulated party to violate "virtually any regulatory requirement" if the party could "demonstrate that doing so would enable it to achieve superior environmental performance."[32] For example, the EPA would make "cross-pollutant trades," allowing a regulated party to emit more than the law allowed for one pollutant in exchange for an agreement to emit less than the law allowed for another.[33] Likewise, the EPA would make "multi-media trades," allowing a regulated party to emit more than the law allowed in one medium, such as air, in exchange for an agreement to emit less than the law allowed in another medium, such as water.[34]

30. Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. 27282 (May 23, 1995).

31. *See id.* at 27283.

32. Cary Coglianese & Jennifer Nash, *Performance Track's Postmortem: Lessons from the Rise and Fall of EPA's "Flagship" Voluntary Program*, 38 HARV. ENV'T L. REV. 1, 72 (2014); *accord* Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENV'T L. REV. 103, 122–23 (1998).

33. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 55 (1997).

34. *Id.*

Despite the promise of flexibility, Project XL struggled to attract participants.[35] In 2003, after almost twenty years of accepting applications, only fifty or so regulated parties were still participating in the program.[36]

2. The CFPB's Regulation of the Auto Loan Industry

In 2013, the Consumer Financial Protection Bureau (CFPB) used nonenforcement trades to regulate the auto loan industry. The CFPB enforces the Equal Credit Opportunity Act, which makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of race . . . [or] sex."[37] The CFPB believed that many auto dealers were violating this provision by charging women and minorities higher interest rates than white men.[38] But the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) specifically barred the CFPB from enforcing this anti-discrimination law against auto dealers.[39] So the CFPB decided to "circumvent Congress's prohibition" by trading nonenforcement.[40]

In March 2013, the CFPB took its first step toward that goal by issuing a guidance document.[41] The CFPB knew that many auto dealers sold their financing agreements to third parties known as "indirect auto lenders."[42] The guidance document therefore declared that buying such agreements made indirect auto lenders liable for the auto dealers' discrimination under the Equal Credit Opportunity Act.[43] The guidance then offered indirect auto lenders a trade: the CFPB

35. *See* Steinzor, *supra* note 32, at 124.

36. Coglianese & Nash, *supra* note 32, at 73.

37. 15 U.S.C. §§ 1691(a)(1), 1691c(a)(9).

38. Roberta Romano, *Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB's Design for Administrative Governance*, 36 YALE J. ON REGUL. 273, 332 (2019).

39. *Id.*; 12 U.S.C. § 5519(a)–(b).

40. *See* Romano, *supra* note 38, at 332–33.

41. *See* CONSUMER FIN. PROT. BUREAU, CFPB BULL. NO. 2013-02, INDIRECT AUTO LENDING AND COMPLIANCE WITH THE EQUAL CREDIT OPPORTUNITY ACT (2013) [hereinafter CFPB BULL. NO. 2013-02].

42. Romano, *supra* note 38, at 332–33.

43. CFPB BULL. NO. 2013-02, *supra* note 41, at 2–3.

wouldn't enforce the Act against them if they took steps to prevent auto dealers from discriminating.[44] For example, the guidance suggested that indirect auto lenders could "impos[e] controls" on the interest rates that auto dealers charged, monitor dealers for discrimination, and "commenc[e] prompt corrective action against dealers" when they identified potential violations.[45]

In April 2013, the CFPB began discussing the possibility of bringing a lawsuit against a major indirect auto lender to encourage regulated parties to accept the trade laid out in the guidance document.[46] But the CFPB feared that its case wouldn't hold up in court. As an internal agency document put it, some of the CFPB's claims "pose litigation risk of enough significance to merit serious consideration prior to taking administrative action or filing suit in district court."[47] So the CFPB decided to sue a company over which it had substantial leverage: Ally Financial.[48] The federal government had recently acquired a 73.8% ownership stake in Ally through the Troubled Asset Relief Program.[49] To repay that money, Ally needed to convert from a bank holding company to a financial holding company—a process that required approval from the Federal Reserve and the Federal Deposit Insurance Corporation (FDIC).[50] And the CFPB had enormous influence over those approvals. The CFPB knew that, if it accused Ally of discrimination, the FDIC "could downgrade Ally's safety and soundness rating . . . , and that the Fed would deny Ally's application

44. Romano, *supra* note 38, at 333.

45. CFPB BULL. NO. 2013-02, *supra* note 41, at 4–5.

46. CONSUMER FIN. PROT. BUREAU, BRIEFING MEMORANDUM FOR THE DIRECTOR, AUTO FINANCE DISCRIMINATION INITIATIVE UPDATE MEETING 6–9 (2013) [hereinafter CFPB BRIEFING MEMO] (describing the proposed plan as the "Market-Tipping Consent Order" strategy).

47. REPUBLICAN STAFF OF H. COMM. ON FIN. SERVS., 114TH CONG., UNSAFE AT ANY BUREAUCRACY: CFPB JUNK SCIENCE AND INDIRECT AUTO LENDING 51 (2015) (quoting CFPB enforcement attorneys).

48. *See id.* at 48.

49. *Id.* at 48–49.

50. *See id.* at 49 & n.150.

based on such an FDIC downgrade."[51] That gave Ally a strong incentive to settle—and the CFPB knew it.[52]

According to Ally's former CEO, the CFPB "absolutely knew they had tremendous leverage" and effectively "strong-armed" Ally by "threaten[ing] to derail the bank's efforts to obtain key regulatory approvals if it didn't agree to settle."[53] Not surprisingly, Ally did settle, agreeing to a $98 million fine and a regulatory condition that wasn't required by law—namely, that Ally adopt "monitoring and compliance systems" designed to prevent auto dealers from discriminating.[54] Four days later, Ally announced that the Federal Reserve had approved its application.[55]

3. OSHA's Voluntary Protection Programs

The Occupational Safety and Health Administration (OSHA) has the power to inspect workplaces and issue citations for violations of OSHA standards.[56] But OSHA lacks the resources to do so effectively: it regulates 130 million workers at more than 8 million worksites but has only approximately 1,850 inspectors.[57]

In 1982, OSHA tried to deal with this problem by adopting the Voluntary Protection Programs.[58] These programs offer regulated

51. Ronald L. Rubin, *The Rogue Regulator*, WKLY. STANDARD, Feb. 15, 2016, at 23, 25.

52. CONSUMER FIN. PROT. BUREAU, DECISION MEMORANDUM FOR THE DIRECTOR 22 (2013) [hereinafter CFPB DECISION MEMO].

53. Paul Sperry, *Bank CEO Reveals How Obama Administration Shook Him Down*, N.Y. POST (Feb. 21, 2016, 6:00 AM), http://nypost.com/2016/02/21/bank-ceo-reveals-how-obama-administration-shook-him-down [https://perma.cc/SXQ7-6SAG].

54. Press Release, U.S. Dep't of Just., Justice Department and Consumer Financial Protection Bureau Reach $98 Million Settlement to Resolve Allegations of Auto Lending Discrimination by Ally (Dec. 20, 2013), https://www.justice.gov/opa/pr/justice-department-and-consumer-financial-protection-bureau-reach-98-million-settlementto [https://perma.cc/2XK2-GPUK]; *see infra* Section I.B.2.d (explaining that settlement agreements like this one involve *underenforcement* trades, which poses many of the same risks as nonenforcement trades).

55. REPUBLICAN STAFF OF H. COMM. ON FIN. SERVS., 114TH CONG., UNSAFE AT ANY BUREAUCRACY: CFPB JUNK SCIENCE AND INDIRECT AUTO LENDING 52 (2015).

56. 29 U.S.C. §§ 657(a)(2), 658(a).

57. *Commonly Used Statistics*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/data/commonstats [https://perma.cc/8ZFN-8V3A].

58. *See* Voluntary Protection Programs to Supplement Enforcement and to Provide Safe and Healthful Working Conditions, 47 Fed. Reg. 29025, 29025 (July 2, 1982).

parties a trade: OSHA promises not to perform surprise inspections; instead, employers go through an initial inspection and then regularly scheduled inspections in future years.[59] In return, regulated parties promise to implement safety systems that "go beyond" OSHA standards "to provide the best feasible protection" at their worksite.[60] At the end of January 2023, the programs had 1,219 federal participants.[61]

4. The FDA's Regulation of Flavored E-Cigarettes

Over the past few years, the U.S. Food and Drug Administration (FDA) has made nonenforcement trades that regulate flavored e-cigarettes. In 2016, the FDA issued a regulation that prohibited manufacturers from selling e-cigarettes without first obtaining the agency's authorization.[62] At the same time, the FDA announced that it wouldn't enforce this premarket-review requirement for several years.[63] Between 2017 and 2018, however, minors started using e-cigarettes in record numbers: during that time, high-school students' use increased 78% and middle-school students' use increased 48%.[64]

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59. *Id.*; Voluntary Protection Programs to Supplement Enforcement and to Provide Safe and Healthful Working Conditions; Changes, 53 Fed. Reg. 26339, 26347 (July 12, 1988).

60. Voluntary Protection Programs to Supplement Enforcement and to Provide Safe and Healthful Working Conditions; Changes, 53 Fed. Reg. 26339, 26341 (July 12, 1988); *accord* Marshall J. Breger, *Regulatory Flexibility and the Administrative State*, 32 TULSA L.J. 325, 329–31 (1996).

61. OCCUPATIONAL SAFETY & HEALTH ADMIN., CURRENT VPP STATISTICS (2023), https://www.osha.gov/sites/default/files/VPP-Jan-2023-Stats.pptx [https://perma.cc/XA88-FHNJ].

62. The Family Smoking Prevention and Tobacco Control Act authorizes the FDA to regulate certain tobacco products (such as cigarettes and smokeless tobacco) and "any other tobacco products that the Secretary by regulation deems to be subject to [the Act]." Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1781 (2009) (codified at 21 U.S.C. § 387a(b)). In 2016, the FDA exercised its "deeming" authority to regulate all tobacco products, including e-cigarettes. Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, 81 Fed. Reg. 28974 (May 10, 2016) (to be codified at 21 C.F.R. pts. 1100, 1140, 1143). That action caused e-cigarettes "to be subject to [the Act]," including the requirement that manufacturers obtain FDA authorization before selling their products. *Id.* at 28975; 21 U.S.C. §§ 387a(b), 387j.

63. Am. Acad. of Pediatrics v. Food & Drug Admin., 379 F. Supp. 3d 461, 468 (D. Md. 2019).

64. Press Release, Scott Gottlieb, M.D., Commissioner, U.S. Food & Drug Admin., Statement from FDA Commissioner Scott Gottlieb, M.D., on Proposed New Steps to Protect Youth by Preventing Access to Flavored Tobacco Products and Banning Menthol in Cigarettes (Nov. 15, 2018) [hereinafter November 2018 FDA Press Release], https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-proposed-new-steps-protect-youth-preventing-access [https://perma.cc/2G32-8UXL].

All told, 3.6 million middle- and high-school students were using e-cigarettes in 2018—1.5 million more than the previous year.[65]

The FDA responded not by enforcing the premarket-review requirement but by offering e-cigarette manufacturers a nonenforcement trade. The FDA started with an enforcement threat. Specifically, the agency announced that it was "actively considering" whether to "enforce the premarket review provision," which "would lead to the immediate removal of [flavored e-cigarettes] from the market."[66] The FDA then made an offer to the five largest e-cigarette manufacturers: if they developed "robust plans" that "convincingly address[ed] the widespread use of their products by minors," the agency would allow them to continue selling those products without premarket authorization.[67] The FDA warned that manufacturers "must step up to this challenge"; they had "60 days to respond with forceful plans of their own" or they would "face regulatory consequences."[68]

Over the next few years, the FDA repeatedly tweaked the terms of the offered trade. In March 2019, the agency issued a draft guidance document suggesting that the FDA wouldn't enforce the premarket-review requirement if regulated parties complied with several proposed restrictions on the sale of flavored e-cigarettes.[69] And in January 2020, the FDA issued a final guidance document, which announced that the agency wouldn't enforce the premarket-review requirement if regulated parties complied with a different set of

65. *Id.*

66. Press Release, U.S. Food & Drug Admin., Scott Gottlieb, M.D., Commissioner, U.S. Food & Drug Admin., Statement from FDA Commissioner Scott Gottlieb, M.D., on New Steps to Address Epidemic of Youth E-Cigarette Use (Sept. 11, 2018), https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-new-steps-address-epidemic-youth-e-cigarette-use [https://perma.cc/86P4-WKND].

67. *Id.*

68. *Id.*

69. *See* CTR. FOR TOBACCO PRODUCTS, U.S. FOOD & DRUG ADMIN., MODIFICATIONS TO COMPLIANCE POLICY FOR CERTAIN DEEMED TOBACCO PRODUCTS 12–13 (2019) [hereinafter FDA DRAFT GUIDANCE].

restrictions.[70] First, manufacturers couldn't sell flavored, cartridge-based e-cigarettes unless they were tobacco- or menthol-flavored.[71] Second, manufacturers couldn't sell e-cigarettes "for which the manufacturer has failed to take (or is failing to take) adequate measures to prevent minors' access."[72] And third, manufacturers couldn't sell e-cigarettes that were "targeted to, or whose marketing is likely to promote use [of e-cigarettes] by, minors."[73]

5. DHS's DACA and DAPA Programs

During the Obama Administration, the U.S. Department of Homeland Security (DHS) launched two programs that involved nonenforcement trades. In both programs, DHS announced that it wouldn't initiate removal proceedings against people who were in the country illegally if they met certain criteria.[74] The Deferred Action for Childhood Arrivals (DACA) program applied to people who entered the country as children.[75] And the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program applied to people whose children were citizens or lawful permanent residents.[76] To qualify for these programs, immigrants had to "provide identifying information, such as their names and addresses, and document that they met specified eligibility criteria."[77] In short, DHS promised not to enforce certain immigration laws if immigrants agreed to provide identifying information that they otherwise wouldn't have provided.

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70. *See* Enforcement Priorities for Electronic Nicotine Delivery Systems and Other Deemed Products on the Market Without Premarket Authorization; Guidance for Industry; Availability, 85 Fed. Reg. 720, 721 (Jan. 7, 2020) (announcing the issuance of a final guidance document). The final guidance document was revised in April 2020. CTR. FOR TOBACCO PRODUCTS, U.S. FOOD & DRUG ADMIN., ENFORCEMENT PRIORITIES FOR ELECTRONIC NICOTINE DELIVERY SYSTEM (ENDS) AND OTHER DEEMED PRODUCTS ON THE MARKET WITHOUT PREMARKET AUTHORIZATION (REVISED) 10–11 (2020) [hereinafter FDA ENFORCEMENT PRIORITIES].

71. FDA ENFORCEMENT PRIORITIES, *supra* note 70, at 10.

72. *Id.*

73. *Id.* at 11.

74. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901–02 (2020).

75. *Id.* at 1901.

76. *Id.* at 1902.

77. Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937, 1002 (2017).

This trade worried many immigrants, who realized that immigration authorities could later use the identifying information to remove them.[78] To assuage those concerns, DHS promised not to share the information with enforcement authorities.[79] As time went by, however, it looked increasingly likely that DHS would renege on that promise. One of the first signs that this might happen came during a legal challenge to the DAPA program. In dissent, a Fifth Circuit judge noted that the DACA and DAPA programs had allowed DHS to "collect information (names, addresses, etc.) that will make it easier to locate these aliens in the future—if and when DHS ultimately decides to remove them."[80] The judge viewed that as a positive feature: "DHS is, of course, a law enforcement agency, and this is what we would call 'good policing.'"[81]

When President Trump was elected, many people feared that his Administration would take the same view.[82] Those fears were heightened when it was revealed that "immigration enforcement agencies already had access to databases containing detailed information, such as home addresses, about DACA recipients and millions of other immigrants."[83] To be sure, it is unclear whether the enforcement agencies used any of this information in removal proceedings. But the possibility that they might highlights the risk that regulated parties take when they rely on a nonenforcement trade.

78. *See id.* at 959.

79. *Id.*; Dara Lind, *ICE Has Access to DACA Recipients' Personal Information Despite Promises Suggesting Otherwise, Internal Emails Show*, PROPUBLICA (Apr. 21, 2020, 11:15 AM), https://www.propublica.org/article/ice-has-access-to-daca-recipients-personal-information-despite-promises-suggesting-otherwise-internal-emails-show [https://perma.cc/8X8V-Y3AW].

80. Texas v. United States, 809 F.3d 134, 191 (5th Cir. 2015) (King, J., dissenting), *aff'd by an equally divided court*, 579 U.S. 547 (2016).

81. *Id.*

82. Dara Lind, *Donald Trump Isn't President Yet. But He's Already Making 740,000 Immigrants Live in Fear.*, VOX (Nov. 17, 2016, 10:10 AM), https://www.vox.com/policy-and-politics/2016/11/17/13632408/trump-daca-deferred-action [https://perma.cc/4M2D-RHUT].

83. Lind, *supra* note 79.

B. Breaking Down the Trade

As the above examples show, nonenforcement trades can vary in many ways. This Section analyzes four major sources of variation: (1) the parties involved in the trade, (2) the agency's nonenforcement promise, (3) the regulated party's promise, and (4) what happens after the trade.

1. The Parties Involved in the Trade

Nonenforcement trades often occur between one agency and one regulated party: for example, when OSHA decides whether to admit a worksite into the Voluntary Protection Programs. Agencies can also trade with an entire industry, as the FDA did when regulating flavored e-cigarettes. Other trades are more complicated, potentially involving multiple federal agencies, multiple regulated parties, and maybe even state agencies or public-interest groups. For example, under Project XL, the EPA would approve projects only if they had "[s]takeholder support," which required the regulated party to negotiate with "communities near the project, local or state governments, businesses, environmental and other public interest groups, or other similar entities."[84] To simplify the analysis, I will look only at (a) trades between one federal agency and one regulated party and (b) trades between one federal agency and an entire industry.

To analyze a nonenforcement trade, one must identify the specific agency employee responsible for making the trade. Regulated parties can't trade with the agency as a whole; instead, they trade with a specific person inside the agency.[85] And different agencies give this power to different people. For example, the CFPB runs a no-action letter program, which allows the agency to trade nonenforcement.[86] Specifically, these letters include a statement that the agency doesn't plan to bring an enforcement action against a regulated party if (among

84. Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. 27282, 27287 (May 23, 1995).

85. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 20 (Bruce Patton ed., Penguin Books 3d. ed. 2011).

86. *See* Policy on No-Action Letters, 84 Fed. Reg. 48229 (Sept. 13, 2019).

other things) that party complies with certain regulatory conditions.[87] When the CFPB first started this program, agency staff could issue no-action letters on their own.[88] But the agency later required that letters be approved by agency leadership.[89] Such differences can affect the agency's interest in trading nonenforcement.[90]

2. The Agency's Nonenforcement Promise

To trade nonenforcement effectively, agencies must credibly promise not to enforce the law. But agencies can't make legally binding nonenforcement promises.[91] As a result, agencies always have the option of backing out of the deal and enforcing the law. And agencies often say so expressly—for example, the FDA's guidance on e-cigarettes said that it is "not binding on FDA or the public."[92]

As a practical matter, however, agencies often make implicit nonenforcement promises that regulated parties rely on. The agency "winks" at regulated parties, assuring them that, if they do what the agency has asked them to do, the agency won't enforce the law.[93] For example, many regulated parties view a no-action letter from the U.S. Securities and Exchange Commission (SEC) as "a promise that the division staff will not bring that particular transaction to the Commission's attention for enforcement action."[94] Although that promise isn't legally binding, it is highly credible because "the

87. *Id.* at 48243–44.

88. *Id.* at 48231.

89. *Id.*

90. *See* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 27–28 (1989) (explaining that agency staff, managers, and executives have different interests).

91. Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165, 266–67 (2019); *see* Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 948 (D.C. Cir. 1987) (holding that the FDA couldn't make a binding nonenforcement promise without going through notice-and-comment rulemaking).

92. FDA ENFORCEMENT PRIORITIES, *supra* note 70, at 2; *see also* Parrillo, *supra* note 91, at 267 (providing additional examples).

93. William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1335 (2001).

94. Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 943 (1998).

Commission appears to have *never* proceeded against the recipient of a no-action letter who acted in good faith on the letter's advice."[95]

These implicit promises vary in several different ways.

a. Backward-Looking v. Forward-Looking Promises

As an initial matter, agencies can make backward-looking and forward-looking promises. The agency makes a backward-looking promise when the regulated party has already taken an action that potentially violates the law.[96] Instead of bringing an enforcement action, the agency offers to trade nonenforcement for the regulated party's promise to do something that the law doesn't require. The FDA often uses this approach to deal with potentially adulterated or misbranded drugs that manufacturers have introduced to the marketplace. The Food, Drug, and Cosmetic Act prohibits the sale of such drugs and gives the FDA several powers to enforce that prohibition, including product seizures, injunctions, and criminal penalties.[97] But the FDA lacks the power to order manufacturers to recall drugs.[98] So the FDA turns to nonenforcement trades—the agency promises not to use its statutory enforcement powers if the manufacturer voluntarily recalls its product.[99]

Forward-looking promises involve actions that regulated parties want to take in the future.[100] In this situation, the agency promises not to enforce the law when the regulated party takes that action, so long as the party does something else that the agency wants. For example,

95. *Id.* (emphasis added).

96. *See* Farber, *supra* note 28, at 306 (explaining that "slippage"—a concept that can include nonenforcement trades—often "occurs during the enforcement stage, when individual sources are faced with sanctions of some sort").

97. 21 U.S.C. §§ 331(a), 332, 333, 334.

98. 21 C.F.R. § 7.40(a) (2022) (explaining that recalls are a "voluntary action"); Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 887; 2 FOOD AND DRUG ADMINISTRATION *Legal Status of the Recall* § 21:2, Westlaw (database updated Aug. 2022).

99. *See* 21 C.F.R. § 7.40(c) (2022) (explaining that the FDA will seize products or take "other court action [if] a firm refuses to undertake a recall requested by [the agency]"); Noah, *supra* note 98, at 888; 2 FOOD AND DRUG ADMINISTRATION, *supra* note 98.

100. *See* Farber, *supra* note 28, at 306.

a regulated party might apply for a no-action letter from the CFPB before taking steps that might violate the law.

b. The Agency's Enforcement Power

The next source of variation involves the agency's enforcement power: does the agency have the power to enforce the law that it is promising not to enforce? This will involve a range of possibilities: the agency might have clear authority to enforce the law, its authority might be ambiguous, or it might have no authority whatsoever.[101]

Project XL is an example where the agency had clear authority to enforce the legal requirement at issue. There, the EPA often negotiated agreements that allowed regulated parties to exceed pollution thresholds set under the Clean Air Act or the Clean Water Act.[102] Assuming that the regulated parties actually exceeded those thresholds, the EPA plainly had the authority to enforce the law that it promised not to enforce.

The Federal Communications Commission (FCC) provides an example where the agency's enforcement authority was somewhat murky. In February 2004, FCC Chair Michael Powell gave a speech urging regulated parties to voluntarily adopt the principles of net neutrality.[103] Later that year, a local telecommunications company, Madison River Communications, violated those principles when it blocked its customers from using a technology called "Voice over Internet Protocol," which allowed people to make telephone calls using a broadband internet connection.[104] The FCC started an investigation, and Madison River quickly agreed to settle.[105] Madison

101. *See* Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 88–89 (2015); Noah, *supra* note 98, at 897 tbl.1.

102. *See* Freeman, *supra* note 33.

103. *See* Michael K. Powell, Chair, Fed. Commc'ns Comm'n, Speech at the University of Colorado School of Law Silicon Flatirons Symposium on "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age": Preserving Internet Freedom: Guiding Principles for the Industry (Feb. 8, 2004), *in* 3 J. ON TELECOMM. & HIGH TECH. L. 5, 13–14 (2004).

104. *See* Bambauer, *supra* note 101, at 79–80.

105. *See* Madison River Commc'ns, LLC, 20 FCC Rcd. 4295, 4297 (2005). For an explanation of why settlement agreements like this one count as nonenforcement trades, see *infra* Section I.B.2.d.

River agreed to pay a voluntary fine of $15,000 and to stop blocking the technology.[106] At the time, however, it wasn't clear whether the FCC actually had the authority to enforce the law against Madison River. The FCC based its actions on 47 U.S.C. § 201(b), which required that all common carriers of telecommunications services use practices that are "just and reasonable."[107] But that rationale depends, of course, on Madison River being a common carrier. Within a few months, however, the FCC had issued an order classifying companies like Madison River as "information service[s]" rather than common carriers.[108] Thus, the FCC's authority to enforce the law was unclear.

Why would a regulated party agree to do more than what the law requires when the agency's enforcement authority is unclear or nonexistent? Two reasons exist. First, defending against a lawsuit is expensive—both in legal fees and in negative publicity.[109] Second, the regulated party doesn't know if it will win. Even if the agency plainly lacks enforcement authority, "courts differ on statutory interpretation, and can make mistakes."[110] Thus, risk-averse firms will often avoid "bet-the-company litigation, regardless of the underlying merits."[111] CFPB's lawsuit against Ally Financial proves the point. The case had "major weaknesses," as even the agency realized.[112] But Ally couldn't afford to risk its approvals from the Federal Reserve and the FDIC. Doing so would have had a catastrophic effect on the company, and so it agreed to settle.

c. The Agency's Nonenforcement Power

The flip side of the agency's enforcement authority is its *non*enforcement authority. Scholars generally agree that the Constitution gives agencies some power to decline enforcement,

106. Madison River Commc'ns, LLC, 20 FCC Rcd. 4295, 4297 (2005).
107. *Id.* at 4296 & n.1.
108. Bambauer, *supra* note 101, at 81.
109. *Id.* at 56.
110. *Id.*
111. Turk, *supra* note 8, at 266.
112. William E. Kovacic & David A. Hyman, *Regulatory Leveraging: Problem or Solution?*, 23 GEO. MASON L. REV. 1163, 1175 (2016); *see* CFPB DECISION MEMO, *supra* note 52.

although they disagree about how much.[113] But Congress can limit that power by mandating enforcement in some or all circumstances.[114] For example, after the FDA announced that it wasn't planning to enforce the premarket-review requirement for e-cigarettes, a group of public-interest organizations filed suit in federal district court.[115] The court later held that the Tobacco Control Act included "mandatory language," which required the FDA to enforce the premarket-review provisions.[116]

The scope of an agency's enforcement discretion is a key factor when determining whether the agency can trade nonenforcement. If an agency has unfettered enforcement discretion, then regulated parties can't predict with certainty what the agency will do. And that uncertainty creates the power to extract concessions.[117]

d. Nonenforcement v. Underenforcement

Finally, the agency can use its nonenforcement powers in several different ways. First, the agency can promise not to enforce the law at all. Second, the agency can promise not to enforce the law against people who partially comply with its requirements. For example, if a law requires that regulated parties reduce pollution by 50%, the agency can promise not to enforce the law against parties that reduce pollution by 25%.[118] Third, the agency can bring an enforcement action but impose a lesser punishment in exchange for the regulated party's promise to do something that the law doesn't require.

The EPA's Supplemental Environmental Projects Policy shows how agencies can trade lesser punishments for such promises. Under this

113. *See, e.g.*, Cox & Rodríguez, *supra* note 3; Delahunty & Yoo, *supra* note 3; Love & Garg, *supra* note 3; Price, *supra* note 1.

114. *See* Price, *supra* note 1, at 711; Heckler v. Chaney, 470 U.S. 821, 833 (1985) ("Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue.").

115. *See* Am. Acad. of Pediatrics v. Food & Drug Admin., 379 F. Supp. 3d 461, 468–69 (D. Md. 2019).

116. *Id.* at 485.

117. AARON L. NIELSON, WAIVERS, EXEMPTIONS, AND PROSECUTORIAL DISCRETION: AN EXAMINATION OF AGENCY NONENFORCEMENT PRACTICES 30 (2017); WILSON, *supra* note 90, at 330.

118. *See* Gerd Winter, *Bartering Rationality in Regulation*, 19 LAW & SOC'Y REV. 219, 221–22 (1985).

policy, the EPA agrees to reduce a regulated party's penalty for violating the law if the party agrees to complete an "environmentally beneficial project[]" that the party is "not otherwise legally required to perform."[119] Many agencies have started using regulatory settlements like these; indeed, they now occupy a "central role" in the administrative state.[120]

These settlements enforce the law to some extent; thus, they should perhaps be thought of as "underenforcement trades." But these settlements have much in common with pure nonenforcement trades: the agency promises not to bring the full weight of the law against the regulated party in exchange for something the agency couldn't legally require. Thus, although they are technically distinct, I count them as a type of nonenforcement trade.

3. The Regulated Party's Promise

a. Who Is Being Regulated?

Agencies can use nonenforcement trades to regulate multiple groups of people. In a normal case, the agency uses this practice to regulate the people who are subject to the law that the agency promises not to enforce. But occasionally, agencies use this practice to regulate someone else. For example, the CFPB promised not to enforce the law against indirect auto lenders if they, in turn, promised to regulate the auto dealers that were beyond the agency's reach.[121]

Agencies can even use nonenforcement against individuals to regulate state governments. The U.S. Department of Justice's approach to marijuana legalization provides a recent example. Federal law prohibits the possession of any amount of marijuana.[122] In 2013,

119. Interim Revised EPA Supplemental Environmental Projects Policy Issued, 60 Fed. Reg. 24856, 24857 (May 10, 1995); *accord* Breger, *supra* note 60, at 337.

120. Turk, *supra* note 8, at 269; *see* Rachel E. Barkow, *Foreword: Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1137 (2016).

121. *See supra* Section I.A.2; *see also* PHILIP HAMBURGER, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM 32, 222–23 (2021) (providing additional examples).

122. *See* 21 U.S.C. §§ 844(a) (prohibiting possession of controlled substances without "a valid prescription or order"), 802(6), 812 (listing marijuana as a Schedule I controlled substance).

however, Colorado and Washington passed laws that legalized recreational marijuana use.[123] James Cole, the U.S. Deputy Attorney General, wrote a memo describing how the Justice Department would respond,[124] and Eric Holder, Jr., the U.S. Attorney General, sent a copy to the governors of both states.[125] Together, the letter and the memo effectively offered the states a trade. The Justice Department promised not to prosecute "individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property," but only if the states would "implement strong and effective regulatory and enforcement systems" that "contain robust controls and procedures on paper" and are "effective in practice."[126] A robust system would contain (among other things) "effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibit[] access to marijuana by minors, and replac[e] an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for."[127] The Justice Department thus promised not to enforce the law against regulated parties (individual citizens), but only if someone else (the states) agreed to do more than the law required.[128]

b. Relation to the Agency's Regulatory Power

A regulated party's promise can relate to the agency's statutory powers in many ways. First, the agency might trade for compliance with a different legal requirement.[129] For example, the agency might

123. Price, *supra* note 1, at 758.

124. Memorandum from James M. Cole, U.S. Deputy Att'y Gen., U.S. Dep't of Just., on Guidance Regarding Marijuana Enforcement to U.S. Atty's 3 (Aug. 29, 2013) [hereinafter Cole Memo], https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf [https://perma.cc/BQL3-62RQ].

125. Letter from Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Just., to John W. Hickenlooper, Governor, Colorado, and Jay Inslee, Governor, Washington (Aug. 29, 2013), https://dfi.wa.gov/documents/banks/holder-letter-08-29-13.pdf [https://perma.cc/L3BV-96HX].

126. Cole Memo, *supra* note 124, at 2.

127. *Id.* at 3.

128. *See* Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 982 (2016).

129. *See, e.g.*, Aman Jr., *supra* note 8, at 888; Winter, *supra* note 118, at 222.

promise not to enforce statute A, but only if the regulated party agrees to comply with statute B.[130] Second, the agency might trade for something that it could legally require through legislative rulemaking or an enforcement action but has failed to do so.[131] For example, the FDA used a nonenforcement trade to limit the sale of flavored e-cigarettes, which the agency could do "by regulation" if it wanted.[132]

Third, the agency might trade for something that it can't legally require because Congress hasn't delegated it the power.[133] For example, the FDA almost certainly lacks the power to force regulated parties to recall adulterated or misbranded drugs. Congress has given the agency potent powers to use against those drugs—including seizures, injunctions, and criminal penalties.[134] But Congress hasn't given the FDA the power to compel manufacturers to recall them. And that doesn't look like an oversight, given that Congress has repeatedly expanded the FDA's recall power over other products.[135]

Fourth, the agency might trade for something that it can't legally require because Congress has expressly prohibited the agency from doing so.[136] The CFPB's regulation of indirect auto lenders fits into this category. The agency believed that auto dealers were violating the Equal Credit Opportunity Act. But Congress had specifically barred the CFPB from enforcing the law against auto dealers. So the agency used a nonenforcement trade to "circumvent Congress's prohibition."[137]

130. The agency might do that for several reasons. First, it might be the most efficient way for the agency to carry out its enforcement obligations. Noah, *supra* note 98, at 876. The agency might lack the practical ability to enforce statute B, or perhaps the agency just wants to kill two birds with one stone. *See* Breger, *supra* note 60, at 338. Second, the agency might be trying to encourage regulated parties to comply with a legal requirement that is enforced by a different agency. *E.g.*, Kovacic & Hyman, *supra* note 112, at 1174–75.

131. *See* Winter, *supra* note 118, at 222.

132. 21 U.S.C. § 387f(d)(1); *see supra* Section I.A.4.

133. NIELSON, *supra* note 117, at 24, 32; *see* Aman Jr., *supra* note 8, at 889; Kovacic & Hyman, *supra* note 112, at 1166; Noah, *supra* note 98, at 874–75.

134. 21 U.S.C. §§ 332, 333, 334.

135. *See* 21 U.S.C. §§ 350l, 360h(e), 387h(c).

136. *See* Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277, 278; Noah, *supra* note 98, at 877.

137. Romano, *supra* note 38, at 332–33.

Of course, the scope of the agency's regulatory authority might be unclear.[138] Once again, the FDA provides a good example. In the early 1990s, the FDA agreed to consent decrees with several drug manufacturers that had allegedly violated restrictions on prescription-drug advertisements.[139] In one of those consent decrees, the company "agreed to undertake an extensive corrective advertising campaign and also to preclear all of its promotional materials with the FDA for a period of two years."[140] But the Food, Drug, and Cosmetic Act provided that the FDA could "require prior approval by the Secretary of the content of any advertisement" only in "extraordinary circumstances."[141] Thus, the agency's power to require preclearance was uncertain at best.

c. Relation to the Agency's Regulatory Purposes

A regulated party's promise can likewise relate to the agency's regulatory purposes in several ways. First, the promise might advance the same purpose that the unenforced legal requirement does. For example, the EPA's Supplemental Environmental Projects Policy requires that regulated parties' promises "must relate to the underlying violation(s) at issue in the enforcement action."[142] Second, the promise might advance another purpose of the relevant statutory scheme. For example, in 1990, the U.S. Nuclear Regulatory Commission (NRC) tried to adopt a settlement policy that would have "mitigate[d] civil penalties levied against licensees who violate NRC requirements."[143] Under the policy, the NRC would have allowed regulated parties to "fund nuclear safety research projects at universities or other nonprofit institutions" instead of paying a penalty.[144]

138. *See* Aman Jr., *supra* note 8, at 888; Noah, *supra* note 98, at 897; Winter, *supra* note 118, at 222.
139. Noah, *supra* note 98, at 892.
140. *Id.*
141. 21 U.S.C. § 352(n) (1991); *see also* 21 C.F.R. § 202.1(j)(1)(i) (1991) (requiring prior approval when, among other things, using a drug "may cause fatalities or serious damage").
142. U.S. ENV'T PROT. AGENCY, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY 2015 UPDATE 8 (2015).
143. U.S. Nuclear Regulatory Comm'n, 70 Comp. Gen. 17, 17 (1990).
144. *Id.*

Third, the promise might advance another legitimate agency purpose. For example, under Project XL, the EPA might permit a regulated party to emit air pollution in violation of the Clean Air Act if the party agreed to reduce its water pollution below what the Clean Water Act would require.[145] And finally, the promise might be wholly unrelated to the agency's purpose. For example, a deferred prosecution agreement between the Justice Department and Bristol-Myers Squibb for a securities-law violation "required the corporation to endow an ethics chair at Seton Hall Law School."[146]

4. After the Trade

The desirability and legality of a nonenforcement trade also depends on what the agency does after the deal is done.

First, did the agency disclose the trade and its terms to the public? Agencies sometimes do. For example, trades that result in consent decrees must receive judicial approval and will likely be publicly available.[147] In addition, if the agency wants to trade with an entire industry, it will probably do so in a public guidance document, like the CFPB did when it regulated indirect auto lenders and the FDA did when it regulated flavored e-cigarettes. But agencies don't always disclose trades; they may want to hide what they are doing,[148] and they may encourage or even require that regulated parties follow their lead.[149]

Second, is the trade subject to judicial review? For trades that result in consent decrees, the answer is yes, although courts usually don't apply much scrutiny.[150] For many other types of trades, however, the answer is no.

145. *See* Freeman, *supra* note 33.
146. Barkow, *supra* note 120, at 1165–66, 1166 n.174.
147. Noah, *supra* note 98, at 924, 928 & n.205.
148. Bambauer, *supra* note 101, at 98; Aaron L. Nielson, *Nonenforcement and the Danger of Leveraging*, LOY. U. CHI. J. REGUL. COMPLIANCE, Fall 2018, at 19, 27.
149. *See* Bambauer, *supra* note 101, at 104; HAMBURGER, *supra* note 121, at 98.
150. Noah, *supra* note 98, at 924; Barkow, *supra* note 120, at 1167.

Cases involving nonenforcement trades rarely make it to court for practical reasons. Regulated parties bring most of the lawsuits against agency action, but they rarely bring lawsuits challenging nonenforcement trades. If a regulated party made the trade willingly, it probably won't want to sue.[151] For example, regulated parties must apply to participate in OSHA's Voluntary Protection Programs; thus, successful applicants have little incentive to litigate. If the regulated party was coerced into making the trade, those same coercive pressures will likely dissuade the party from suing.[152] The regulated party may fear retaliation, or as a part of the trade, the regulated party might have agreed not to sue.[153] Other regulated parties who find out about the deal may decline to sue for similar reasons.[154] And regulatory beneficiaries who might want to sue in theory may never find out about the trade.[155]

Finally, even if someone does sue, they will face legal obstacles. Regulatory beneficiaries often lack standing.[156] Individual trades that haven't been written down might not qualify as the type of "final agency action" that is subject to review.[157] And courts might hold that such challenges are unreviewable under *Heckler v. Chaney*, which generally bars courts from reviewing agency nonenforcement decisions.[158]

To be sure, some regulated parties or regulatory beneficiaries sue, and some win. For example, in the late 1990s, OSHA issued a guidance document establishing the "High Injury/Illness Rate Targeting and Cooperative Compliance Program."[159] Under this program, OSHA

151. *See* Parrillo, *supra* note 91, at 243 (explaining that agency actions "requested by regulated parties will favor those parties," which makes them less likely to sue); Winter, *supra* note 118, at 240.

152. *See* Parrillo, *supra* note 91, at 243 (explaining that, even when agency actions harm a regulated party, "that party may have various incentives to refrain from suing").

153. HAMBURGER, *supra* note 121, at 98; *see* Parrillo, *supra* note 91, at 253.

154. *See* Parrillo, *supra* note 91, at 239 (explaining that, if a regulated party makes a deal with an agency, other regulated parties may "seek similar dispensations for their own benefit").

155. *See* Bambauer, *supra* note 101, at 104 (describing trades as "hard to detect").

156. *Id.* at 102; Barkow, *supra* note 120, at 1132 n.6; Bressman, *supra* note 4, at 1675.

157. *See* 5 U.S.C. § 704.

158. Heckler v. Chaney, 470 U.S. 821, 832 (1985); *see also* Love & Garg, *supra* note 3, at 1237; Price, *supra* note 1, at 684.

159. Chamber of Com. v. U.S. Dep't of Lab., 174 F.3d 206, 208 (D.C. Cir. 1999).

placed "12,500 relatively dangerous workplaces" on a "primary inspection list."[160] OSHA said that it planned to subject each workplace to a "comprehensive inspection before the end of 1999."[161] These inspections were time-consuming and could be "quite as onerous for an employer as paying a fine imposed by [] OSHA."[162] OSHA then offered to remove a workplace from the list—which would reduce its odds of inspection by 70 to 90%—if the employer agreed to various regulatory conditions.[163] For example, one condition required that employers adopt a "comprehensive safety and health program," which included "safety policies more stringent than any required by [law]."[164] A group of regulated parties challenged the guidance document, and the D.C. Circuit invalidated it on the ground that it was a legislative rule that should have gone through notice and comment.[165]

Finally, does the agency renege on the deal? Some trades result in binding agreements, such as consent decrees, which limit agencies' ability to back out. But many trades involve only nonenforcement promises, which don't bind the agency. For example, under Project XL, the agency and the regulated party negotiated a "Final Project Agreement" laying out each side's commitments.[166] But the EPA could "withdraw from an [agreement] at any time and revert to traditional permitting or pursue an enforcement action."[167]

If an agency reneges on a trade, regulated parties have little recourse. And as the DACA and DAPA examples show, such reversals can have extremely serious consequences for regulated parties. DHS offered not to enforce certain immigration laws against people who (among other things) gave the agency identifying information, such as their names and addresses. DHS then turned around and gave that information to immigration enforcement agencies—despite the

160. *Id.*
161. *Id.*
162. *Id.* at 209.
163. *Id.* at 208.
164. *Id.* at 210.
165. *Chamber of Com.*, 174 F.3d at 213.
166. Freeman, *supra* note 33.
167. *Id.* at 87.

agency's promise not to do so. Even though DHS's promises weren't technically binding, such actions are profoundly disturbing.

II. WHAT DRIVES NONENFORCEMENT TRADES

A. Agencies' Incentives

Why do agencies trade nonenforcement? This question doesn't have a simple answer. The administrative state is "a complex and varied phenomenon," and no two agencies are exactly alike.[168] That said, it is possible to make some useful generalizations. Below I describe many of the important factors that drive agencies to use this practice, including (1) the agency's overall mission, (2) the agency's statutory goals, (3) the day-to-day challenges that agency officials face, (4) the personal motives that those officials have, and (5) the external pressure that agencies receive from constituents.

1. Overall Mission

Agencies often develop an understanding about their overarching mission.[169] That mission may be heavily influenced by the laws that the agency enforces, but it isn't coextensive with them.[170] If someone tries to place limits on the agency that prevent it from pursuing this mission, the agency may try to use nonenforcement trades to evade those limits.

For example, an agency might believe that Congress has placed a limit on its authority for political reasons. That appears to be what happened with the CFPB when it regulated indirect auto lenders. As explained above, the Dodd-Frank Act barred the agency from regulating auto dealers directly. Some people thought that prohibition was the result of "egregious lobbyist influences" and would prevent

168. WILSON, *supra* note 90, at 10.

169. Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 308 (2013); J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2219 (2005); WILSON, *supra* note 90, at 95–101.

170. Barkow, *supra* note 169, at 307; DeShazo & Freeman, *supra* note 169, at 2236, 2219.

the CFPB from fulfilling its true mission.[171] So the agency decided to "circumvent Congress's prohibition" using a nonenforcement trade.[172]

An agency might also believe that the President is hostile to its mission. For example, during the Trump Administration, agencies might have wanted to avoid the President's executive order requiring that they eliminate two regulations for every new regulation they promulgated.[173] Or the agency might want to adopt a specific policy that the President disagrees with. In that situation, agencies might want to take steps to insulate their policies from presidential review.[174] And of course, the incentive to engage in this type of insulation "increases the more an agency expects the President to disagree with and thus reverse" those policies.[175]

Finally, the agency might also believe that the courts or the public will interfere with the agency's mission. That too would give the agency an incentive to trade nonenforcement, which bypasses notice and comment and judicial review.

2. Statutory Goals

When Congress creates an agency, it gives the agency statutory goals to pursue. Those goals influence what tasks agency employees perform.[176] They also help "determine the pressures on [the] agency to exercise certain forms of authority and the strength of the agency's internal incentives to resist or succumb to the pressures."[177] These goals might influence whether the agency trades nonenforcement in at least four ways.

171. *See, e.g.*, Daniel Indiviglio, *5 Ways Lobbyists Influenced the Dodd-Frank Bill*, ATLANTIC (July 5, 2010), https://www.theatlantic.com/business/archive/2010/07/5-ways-lobbyists-influenced-the-dodd-frank-bill/59137/ [https://perma.cc/V9KG-NSJ2].

172. Romano, *supra* note 38, at 332–33.

173. *See* Exec. Order No. 13,771, 3 C.F.R. 284 (2018).

174. Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1771 (2013).

175. *Id.* at 1761.

176. *See* WILSON, *supra* note 90, at 32–34.

177. James V. DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399, 421 (1986).

First, the clarity of the agency's goals matters. When an agency enforces a vague statute, it can more easily assert that regulated parties have violated the law. This expands the agency's opportunity to make nonenforcement promises. At the same time, a vague statute makes it easier for the agency to claim that it has the authority to take actions that the law doesn't obviously require. Together, these two features of vague statutes make it easier for agencies to trade nonenforcement.[178]

For example, the Federal Trade Commission (FTC) enforces a broad statute that prohibits "unfair or deceptive acts or practices in or affecting commerce."[179] Since 2002, the FTC has brought at least eighty cases under that statute against telecommunications firms for "inadequate protection of consumers' personal data."[180] The FTC offered to settle those suits in exchange for the firms' agreement to adopt heightened data-security standards and to let the FTC monitor their compliance for twenty years.[181]

Some have objected to these settlements as illegitimate nonenforcement trades. As Philip Hamburger has argued, the FTC "uses the threat of administrative enforcement and adjudication to secure consent to data security standards not set by law."[182] But that argument is questionable given the vagueness of the statutory standard. At the very least, it seems plausible that the failure to adopt adequate data security violates the statute, and that the FTC has the authority to impose this type of punishment.[183]

Second, agencies that must pursue conflicting goals tend to trade nonenforcement more often than agencies with a cohesive portfolio. When agencies have conflicting goals, they often pick one to pursue at

178. Kovacic & Hyman, *supra* note 112, at 1176.

179. 15 U.S.C. § 45(a)(1).

180. FED. TRADE COMM'N, FEDERAL TRADE COMMISSION 2020 PRIVACY AND DATA SECURITY UPDATE 3 (2020), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-2020-privacy-data-security-update/20210524_privacy_and_data_security_annual_update.pdf [https://perma.cc/RW5X-AZ2J].

181. *See id.* at 3–4; Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 GEO. WASH. L. REV. 2230, 2297 (2015) (explaining that most settlement agreements allow the FTC to monitor a firm's compliance for twenty years).

182. HAMBURGER, *supra* note 121.

183. Hartzog & Solove, *supra* note 181, at 2246.

the expense of the other.[184] Which goal they pick varies: Some agencies pursue the goal that best fits with its sense of mission.[185] Other agencies pursue the goal with the greatest political importance.[186] And still other agencies pick whichever goal is the easiest to measure, so they can show they're making progress.[187]

The existence of conflicting goals gives agencies the opportunity to trade nonenforcement: the agency can offer not to enforce a legal requirement that advances a secondary goal in exchange for a regulated party's promise to do something that isn't legally required but advances the agency's primary goal. The FDA's regulation of flavored e-cigarettes is a good example. The Tobacco Control Act gave the FDA conflicting goals: On the one hand, the Act gave the FDA authority "to promote cessation to reduce disease risk and the social costs associated with tobacco-related diseases."[188] On the other hand, the Act required that the FDA "continue to permit the sale of tobacco products to adults."[189] The agency has shifted back and forth between these goals over time. The FDA initially declined to enforce the Act's premarket-authorization requirement because the agency seemingly thought that doing so would force e-cigarettes off the market.[190] When minors started using them, however, the agency largely reversed course.

Although it's impossible to know the FDA's true motives, it seems likely that the agency was motivated at least in part by its public-health mission and by politics. At first, the FDA thought that e-cigarettes would help adults quit smoking and that it would be politically unpopular to remove them from the shelves.[191] When minors' use

184. Barkow, *supra* note 169; Biber, *supra* note 14, at 17.

185. *See* Barkow, *supra* note 169; DeShazo & Freeman, *supra* note 169, at 2220; WILSON, *supra* note 90, at 101–05.

186. Barkow, *supra* note 184, at 309.

187. *Id.* at 309–10.

188. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 3(9), 123 Stat. 1776, 1782 (2009).

189. § 3(7).

190. *See supra* note 66 and accompanying text.

191. *See* Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, 81 Fed. Reg. 28974, 28977 (May 10, 2016) (to be codified at 21 C.F.R. pts. 1100, 1140, 1143).

increased, however, leaving flavored e-cigarettes on the market raised public-health concerns and created the possibility of political backlash. The FDA therefore made a nonenforcement trade—something it might not have done if Congress had given it only one goal.

Third, whether an agency focuses more on policymaking or enforcement will affect whether it trades nonenforcement. In general, people are more likely to trade with each other when they view themselves as partners rather than adversaries.[192] And policymaking officials are more likely to adopt this mindset than enforcement officials.[193]

The EPA's staff reflect these differences. As the former director of the EPA's Office of Civil Enforcement has said, policymaking officials often develop an "affinity" with industry because they "*must* interact with industry in order to move their business forward, particularly to finish rulemakings that will (ideally) not be challenged in court."[194] Enforcement officials, however, "are not socialized to the kind of routine cooperative give-and-take with industry that program offices have on matters like rulemaking."[195] Thus, the more emphasis the agency places on policymaking, the more likely it is to trade nonenforcement.

Of course, this isn't an absolute rule—enforcement agencies can and often do regulate through nonenforcement.[196] All things equal, however, agencies that focus more on policymaking seem more likely to use this practice.

Finally, whether the agency regulates a single industry or multiple affects whether it trades nonenforcement. Some agencies, like the SEC, are primarily responsible for a single sector of the economy.[197] This single-sector focus allows the agency to interact and facilitate

192. *See* Freeman, *supra* note 33, at 23 & n.59; LEIGH L. THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR 236–37 (6th ed. 2015); FISHER & URY, *supra* note 85, at 22.

193. *See* Parrillo, *supra* note 91, at 260.

194. *Id.* (internal quotation marks omitted).

195. *Id.*

196. *See supra* notes 122–28 and accompanying text (discussing the Justice Department's use of nonenforcement trades).

197. DeLong, *supra* note 177, at 421–22.

cooperation with many regulated parties. As a result, these agencies often care "not only for the welfare of consumers, but for the welfare of the regulated industries as well."[198] Other agencies, like OSHA, are responsible for a single issue across all sectors of the economy.[199] This broad focus limits the number of regulated parties that the agency can interact with and undermines cooperation.[200] All else equal, therefore, agencies that regulate a single sector of the economy are more likely to negotiate with regulated parties and thus more likely to trade nonenforcement.

3. Day-to-Day Challenges

Agency officials often care deeply about the agency's mission and its statutory goals. But they also care about the practical challenges that they face every day.[201] And these challenges often have a greater influence on officials' behavior than anything else.[202] Two day-to-day challenges seem particularly likely to drive agency officials to trade nonenforcement.

The first is the agency's resources. Agencies always have limited resources,[203] and they aren't always particularly efficient with the resources they have.[204] Agencies can try to cope with these problems by setting priorities and focusing their efforts on the things that will get the biggest return for their investment.[205] When the mismatch gets

198. Aman, Jr., *supra* note 136, at 288–89.

199. DeLong, *supra* note 177, at 422.

200. *Id.*; John T. Scholz, *Cooperation, Deterrence, and the Ecology of Regulatory Enforcement*, 18 LAW & SOC'Y REV. 179, 211 (1984).

201. *See* WILSON, *supra* note 90, at 36.

202. *See id.* at 37–40.

203. Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 17 (2008); David A. Hyman & William E. Kovacic, *Competition Agencies with Complex Policy Portfolios: Divide or Conquer?*, *in* COMPETITION LAW ON THE GLOBAL STAGE: DAVID GERBER'S GLOBAL COMPETITION LAW IN PERSPECTIVE 20 (Nicolas Charbit & Elisa Ramundo eds., 2014).

204. WILSON, *supra* note 90, at 349–50.

205. *See* Barron & Rakoff, *supra* note 12, at 273; Bambauer, *supra* note 101, at 86; Biber, *supra* note 203.

large enough, however, they may start to struggle.[206] At that point, resource-starved agencies often respond by getting creative: for example, by making policy through informal guidance rather than legislative rules.[207]

Agencies in this situation might turn to nonenforcement trades to help "spread limited regulatory resources over a wider area."[208] Agencies can use this practice to bypass the expensive notice-and-comment process.[209] They can also trade nonenforcement to enforce the laws they care about more efficiently.

A good example is the FDA's use of voluntary recalls. In the early 1970s, the FDA responded to adulterated drugs by using its statutory enforcement tools: seizures, injunctions, and criminal penalties.[210] In the late 1970s, however, the FDA's workload increased and its budget shrank, so the FDA closed the gap by switching to nonenforcement trades.[211] The agency promised not to use its statutory enforcement tools if regulated parties would voluntarily recall products that were allegedly adulterated or misbranded.[212]

Agencies have also tried to use settlement agreements to cope with their lack of resources. When agencies receive money in a settlement, federal law requires them to give that money to the U.S. Department of the Treasury unless the agencies have statutory authority to do something else with the funds.[213] Agencies have routinely sought to use nonenforcement trades to avoid this limit. For example, in 1983, the Commodity Futures Trading Commission (CFTC) proposed a settlement policy that "would allow the Commission to accept a charged party's promise to make a donation to an educational

206. Hyman & Kovacic, *supra* note 203, at 20–22 (describing how agencies respond to a severe lack of resources); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1462 (1992).

207. Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1814–15 (2015); McGarity, *supra* note 206.

208. Winter, *supra* note 118, at 221 n.4.

209. Bambauer, *supra* note 101, at 65–66.

210. Mary Olson, *Substitution in Regulatory Agencies: FDA Enforcement Alternatives*, 12 J.L. ECON. & ORG. 376, 387 (1996); *see* 21 U.S.C. §§ 331(a), 332, 333, 334.

211. Olson, *supra* note 210, at 387–89, 388 fig.3.

212. *Id.* at 389.

213. 31 U.S.C. § 3302(c).

institution as all or part of a settlement agreement."[214] The regulated party was allowed to donate money to an institution that had "no relationship to the violation and that has suffered no injury from the violation."[215] Likewise, in 1991, the EPA proposed a policy that would "allow alleged violators to fund public awareness and other projects relating to automobile air pollution in exchange for reductions of the civil penalties assessed against them."[216] Both of these policies would have allowed the agency to circumvent the appropriations limits found in 31 U.S.C. § 3302.[217]

The second real-world challenge that encourages agencies to trade nonenforcement is a highly complex or rapidly changing field. Agencies in such fields often have a greater interest in the flexibility that nonenforcement trades can provide.[218] For example, agencies can trade nonenforcement to make policy quickly as new situations arise.[219] If the regulation proves unwise or the situation changes again, agencies can change policy again just as quickly.[220] And as regulated parties identify new ways to evade legal requirements—always a problem with complex statutory schemes—agencies can rapidly close any loopholes. Because nonenforcement trades are highly flexible, agencies in these fields seem likely to make greater use of them.

4. Personal Motives

Agency officials could use nonenforcement trades to advance their own careers. To be sure, many officials care greatly about pursuing the public good. But some will care as much or more about pursuing their

214. Commodity Futures Trading Comm'n, B-210210, 1983 WL 197623, at *1 (Comp. Gen. Sept. 14, 1983).

215. *Id.* at *2.

216. U.S. Gov't Accountability Office, B-247155, Opinion Letter on EPA Settlement Authority Under 42 U.S.C. § 7524, 1992 WL 726317, at *1 (July 7, 1992), https://www.gao.gov/assets/b-247155.pdf [https://perma.cc/2V67-NSYU].

217. *See id.*; Commodity Futures Trading Comm'n, B-210210, 1983 WL 197623, at *1 (Comp. Gen. Sept. 14, 1983).

218. *See* Aman, Jr., *supra* note 136, at 289.

219. *See* Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841, 1851 (2011).

220. *Id.*

own interests,[221] and nonenforcement trades could offer them a way to do that.

For example, as explained below, regulated parties often prefer nonenforcement trades to other types of regulation. That could create an opportunity for agency officials who want to obtain "lucrative post-government employment with the firms they once regulated."[222] In particular, an official could offer to trade nonenforcement as a way of buying goodwill with a regulated party, not because doing so advanced the agency's goals.

Agency executives might also be tempted to use nonenforcement trades as a quick fix toward the end of their tenure. Executives tend to stay in office for only a short time, and once they've left, they often go to the private sector.[223] Thus, if a problem crops up toward the end of an executive's tenure, he or she will have a strong incentive to address it quickly so it doesn't disrupt any future career plans or undermine the executive's reputation. Given the need for speed and flexibility, trading nonenforcement might be the best option available.

In late 2018 and early 2019, former FDA Commissioner Scott Gottlieb faced such a scenario. Gottlieb became commissioner in May 2017, and within a few months, he had announced a new comprehensive plan for tobacco regulation, which relied heavily on the use of noncombustible products like e-cigarettes.[224] As a key part of that plan, the FDA announced that it wouldn't start enforcing the premarket-review requirement for e-cigarettes until August 2022.[225] By late 2018, however, minors had started using e-cigarettes in record numbers, calling into question Gottlieb's decision to rely on them as a key part of the comprehensive plan.[226] Although the public didn't know it at the time, Gottlieb was planning to leave office in just a few

221. *See* WILSON, *supra* note 90, at x–xi.

222. *Id.* at 86.

223. Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 919 (2009).

224. *See* Scott Gottlieb, Comm'r, U.S. Food & Drug Admin., Protecting American Families: Comprehensive Approach to Nicotine and Tobacco (June 27, 2017).

225. FDA ENFORCEMENT PRIORITIES, *supra* note 70, at 5.

226. *See* November 2018 FDA Press Release, *supra* note 64.

months. It isn't surprising, therefore, that the FDA chose to address the problem by trading nonenforcement—one of the fastest, most flexible tools the agency had. On March 14, 2019, the FDA issued a draft guidance document, which threatened to start enforcing the premarket-review requirement unless regulated parties took steps to reduce minors' use of e-cigarettes.[227] A few weeks later, Gottlieb left office and returned to the private sector.[228]

To be clear, I don't mean to suggest that anyone at the FDA made this nonenforcement trade for self-serving reasons. Instead, this analysis simply illustrates the reality that agency executives often confront serious problems toward the end of their tenure and risk being blamed if they don't appear to solve them quickly. In such a situation, agencies will have strong incentives to trade nonenforcement.

5. Constituent Pressure

Agencies might also face pressure from their constituencies: Congress, the President, and the public. For the most part, these groups care more about substance than procedure; thus, they will tend to support nonenforcement trades when they like the deal and oppose trading when they don't. For example, President Obama supported the CFPB's nonenforcement trade with indirect auto lenders because it allowed the agency to achieve a policy goal that couldn't get through Congress.[229] And unsurprisingly, congressional Republicans opposed that decision.[230]

One major exception to this trend is public-interest groups. Such groups generally don't trust regulated parties and therefore "tend to be

227. FDA DRAFT GUIDANCE, *supra* note 69, at 13.

228. Laurie McGinley, *FDA's Gottlieb Heads Back to AEI to Tackle Drug Prices*, WASH. POST (Apr. 4, 2019, 7:00 AM), https://www.washingtonpost.com/health/2019/04/04/fdas-gottlieb-heads-back-aei-tackle-drug-prices/ [https://perma.cc/NU72-4MJC].

229. Romano, *supra* note 38, at 335–36, 336 n.183.

230. Letter from various members of Congress to Patrice Ficklin, Assistant Dir., Consumer Fin. Prot. Bureau (June 20, 2013), https://www.responsiblelending.org/other-consumer-loans/auto-financing/research-analysis/CFPB_Auto_Lenders_Letter.pdf [https://perma.cc/RUC6-DMDB] ("[I]t is highly concerning that the agency is issuing such significant new directives without affording the public a proper opportunity to comment on its methodology and analysis for determining whether discrimination has occurred . . . .").

suspicious of cooperative programs."[231] As a result, public-interest groups are more likely to challenge nonenforcement trades regardless of their substance.[232]

In some circumstances, constituencies will also try to protect their institutional interests, regardless of their policy views. For example, Congress has an institutional interest in preventing agencies from circumventing the appropriations process. The CFTC, the EPA, and the NRC have all tried to adopt settlement policies that would have evaded the limits found in 31 U.S.C. § 3302. But each time, the Comptroller General (who is an agent of Congress) prevented the agency from doing so.[233]

B. Regulated Parties' Incentives

Regulated parties face a different set of incentives than agencies. But those incentives will often lead regulated parties to embrace nonenforcement trades—or at the very least, acquiesce to them.

First, regulated parties generally have a strong interest in minimizing the time and money they spend on regulatory compliance. In certain situations, a nonenforcement trade can help them do that. For example, it's cheaper for many large employers to qualify for one of OSHA's Voluntary Protection Programs than it is to deal with surprise inspections.[234] The unsurprising result is that regulated parties tend to support trades that reduce compliance costs and oppose trades that increase them.

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231. AL IANNUZZI, JR., INDUSTRY SELF-REGULATION AND VOLUNTARY ENVIRONMENTAL COMPLIANCE 20 (2002); *accord* Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 428 (2000).

232. *See, e.g.*, Am. Acad. of Pediatrics v. Food & Drug Admin., 379 F. Supp. 3d 461 (D. Md. 2019) (challenging the FDA's use of nonenforcement to regulate flavored e-cigarettes).

233. *See, e.g.*, U.S. Gov't Accountability Office, B-247155, Opinion Letter on EPA Settlement Authority Under 42 U.S.C. § 7524, 1992 WL 726317, at *1 (July 7, 1992), https://www.gao.gov/assets/b-247155.pdf [https://perma.cc/2V67-NSYU]; U.S. Nuclear Regulatory Comm'n, 70 Comp. Gen. 17, 17 (1990); Commodity Futures Trading Comm'n, B-210210, 1983 WL 197623 (Comp. Gen. Sept. 14, 1983).

234. *See* Parrillo, *supra* note 91, at 223; *see also* Voluntary Protection Programs to Supplement Enforcement and to Provide Safe and Healthful Working Conditions, 47 Fed. Reg. 29025, 29030 (July 2, 1982) (explaining that OSHA intended the "exemption from general schedule inspections [to] serve as an incentive to participate in Voluntary Protection programs").

Second, regulated parties also want to gain advantages over their competitors, and nonenforcement trades may offer them a way to do so. For example, if Firm A reduces its compliance costs by qualifying for one of the Voluntary Protection Programs and Firm B does not, then Firm A will have a competitive advantage.[235] Once again, the unsurprising result is that regulated parties tend to support nonenforcement trades that give them an advantage and oppose trades that give their competitors an advantage.[236]

Finally, even if a nonenforcement trade raises regulated parties' compliance costs, they may go along with it to maintain a good relationship with the agency. This interest may have the largest effect on regulated parties' willingness to trade.

Regulated parties might have several reasons for caring about their relationship with the agency. For example, regulated parties might depend on the agency for certain benefits and believe that maintaining a good relationship will increase their ability to obtain them. This belief is common with regulated parties who are subject to a licensing or permitting regime.[237] It also comes into play when regulated parties depend heavily on the agency for guidance.[238]

Likewise, regulated parties might be subject to sanctions (like enforcement actions) in the future and believe that maintaining a good relationship will decrease the odds of those sanctions. This belief occurs most frequently where regulated parties are subject to a complex regulatory scheme that is difficult to avoid violating.[239]

Moreover, these two situations can overlap: for example, regulated parties might face a pre-approval requirement and be subject to a complex regulatory regime at the same time. That gives these parties a strong incentive to develop a good relationship with the agency.[240] And that, in turn, gives them a strong incentive to support a nonenforcement trade if that is what the agency wants to do.

235. *See* Bhagwat, *supra* note 4, at 179–80.
236. *See* Parrillo, *supra* note 91, at 232.
237. *Id.* at 192.
238. *See* Bambauer, *supra* note 101, at 103–04.
239. *See* Parrillo, *supra* note 91, at 191–92; Scholz, *supra* note 200, at 183.
240. Parrillo, *supra* note 91, at 192, 198.

Nick Parrillo has identified several regulatory schemes that create strong incentives for regulated parties to maintain a good relationship with an agency. Unsurprisingly, his list is dominated by agencies (such as the FDA, the Federal Reserve, the FDIC, the CFPB, and the EPA) that have traded nonenforcement.[241]

A few examples flesh out how these incentives work together. In OSHA's Voluntary Protection Programs, employers can trade fewer inspections for compliance with higher regulatory standards than the law requires. That is a good deal for large employers. For many of them, complying with the higher regulatory standards is cheaper than facing surprise inspections, which allows them to reduce their compliance costs and possibly gain a competitive advantage. The deal isn't as good for small employers. OSHA is less likely to inspect them, so complying with higher regulatory standards wouldn't lower their compliance costs or give them a competitive advantage, at least not to the same extent as large employers.[242] Moreover, given the low chance of inspection and OSHA's lack of preapproval authority, small firms don't have much incentive to maintain a relationship with the agency.[243] As a result, large firms have joined the Voluntary Protection Programs to a much greater extent than small firms. For example, in 2008, 61% of participating employers had more than 100 employees.[244]

By contrast, e-cigarette manufacturers faced a starkly different set of incentives. As explained above, the FDA first declined to enforce the premarket-review requirement for e-cigarettes in 2016. And in late 2018, the FDA announced that it would start enforcing that requirement unless e-cigarette manufacturers complied with several regulatory conditions. At that point, complying with the conditions—whatever they turned out to be—was far cheaper than complying with the premarket-review requirement, which would have required

241. *See id.* at 191–200.
242. *See id.* at 223.
243. *See id.* at 221, 223.
244. U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-395, OSHA'S VOLUNTARY PROTECTION PROGRAMS: IMPROVED OVERSIGHT AND CONTROLS WOULD BETTER ENSURE PROGRAM QUALITY 10 fig.4 (2009) [hereinafter GAO OSHA REPORT].

manufacturers to pull their products off the shelves entirely. In addition, manufacturers had a strong incentive to maintain a relationship with the FDA, given that, at some point, they would need the agency's authorization. As a result, virtually every manufacturer agreed to the FDA's restrictions.[245]

C. Bargaining Power

The incentives described above shape whether agencies and regulated parties *want* to trade nonenforcement. But that's only half the story. The other half is the parties' bargaining power, which shapes the terms of the trade.

Some scholars seem to assume that, when an agency negotiates with a regulated party, the agency will inevitably have the upper hand. These scholars have described similar negotiations as "administrative arm-twisting" and "jawboning"—words that conjure up images of governmental strength.[246] That is an understandable assumption, and it will often be correct. But not always.

When two parties negotiate with each other, their "relative negotiating power . . . depends primarily upon how attractive to each is the option of not reaching agreement."[247] In other words, what are the parties' alternatives? A party with good alternatives can walk away from the negotiating table; a party with lousy alternatives really can't. So here, the parties' bargaining power will largely depend on their alternatives to making a deal.

245. In January 2020, the FDA announced that it would start enforcing the premarket-review requirement against manufacturers unless they stopped selling flavored, cartridge-based e-cigarettes (other than tobacco and menthol flavors). *See* FDA ENFORCEMENT PRIORITIES, *supra* note 70. After that announcement, the sale of those products plummeted to almost nothing. *See* CDC FOUNDATION, MONITORING U.S. E-CIGARETTE SALES: *NATIONAL TRENDS* 5 fig.4 (July 2022), https://www.cdcfoundation.org/National-E-CigaretteSales-DataBrief-2022-July22?inline [https://perma.cc/8WZB-DECG].

246. Noah, *supra* note 98, at 874 (internal quotation marks omitted); Bambauer, *supra* note 101, at 57.

247. FISHER & URY, *supra* note 85, at 104; *see also* THOMPSON, *supra* note 192, at 13.

1. The Agency's Alternatives

In a normal nonenforcement trade, the agency wants regulated parties to do something that the law doesn't require, and the agency is willing to trade nonenforcement of a legal requirement to achieve that goal. The agency therefore has two primary alternatives worth considering. First, it could enforce the legal requirement that it has offered not to enforce. And second, the agency could adopt a rule that compels regulated parties to take whatever action the agency wants them to take.

As for the first alternative, successfully enforcing the legal requirement would likely have some benefits for the agency, although they might not be particularly large if the requirement advances a goal that the agency doesn't care about. In addition, the agency would have to consider the costs of attempting enforcement and whether it would succeed. If the agency lacks the resources to bring the enforcement action or if the action would likely fail, this alternative would be weak and wouldn't give the agency much bargaining power.[248]

OSHA's Voluntary Protection Programs illustrate this point. As noted above, OSHA has 8 million worksites to inspect, and only 1,850 inspectors to do it. Because of that mismatch, the agency doesn't really have the option of doing widespread inspections, which drastically limits its bargaining power. This might explain the agency's reluctance to remove unsafe workplaces from the program, a fact that both the U.S. Department of Labor's Office of Inspector General and independent journalists have observed.[249]

248. Winter, *supra* note 118, at 221 n.4.

249. *See* OFF. OF INSPECTOR GEN., U.S. DEP'T OF LABOR, REPORT NO. 02-14-201-10-105, VOLUNTARY PROTECTION PROGRAM: CONTROLS ARE NOT SUFFICIENT TO ENSURE ONLY WORKSITES WITH EXEMPLARY SAFETY AND HEALTH SYSTEMS REMAIN IN THE PROGRAM 5 (2013) (explaining that (1) OSHA allowed workplaces with above-average rates of injury and illness to stay in the program for up to six years and (2) 70% of participants with serious violations of OSHA standards remained in the program); Chris Hamby, *'Model Workplaces' Not Always So Safe*, CTR. FOR PUB. INTEGRITY (July 7, 2011), https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/worker-health-and-safety/model-workplaces/model-workplaces-not-always-so-safe/ [https://perma.cc/5FWY-5B29] (finding that, from 2000 to 2011, at least 80 workers died at "model workplaces" in the program, and that 65% of those workplaces remained in the program).

As for the second alternative, the agency could try to compel the regulated party to do what the agency wants by adopting a legislative rule. But this also has downsides. First, legislative rulemaking is costly and time-consuming.[250] To issue a legislative rule, agencies must use the Administrative Procedure Act's notice-and-comment procedures, which can take years.[251] The agency may lack the resources to do that or may face a pressing situation that requires faster action. For example, when the FDA discovered that minors had started using e-cigarettes in large numbers, the agency couldn't really afford to spend years on notice and comment. Second, the agency may lack the authority to adopt a legislative rule or at least worry that it might.[252] In large part, that is what caused the CFPB to avoid going through legislative rulemaking when it wanted to regulate auto dealers. Third, if the agency lacks the authority to adopt the rule, it might consider seeking that authority from Congress. In a gridlocked world, however, that might not be an option.

2. Regulated Parties' Alternatives

The regulated party's primary interest in a nonenforcement trade is (unsurprisingly) the nonenforcement of a legal requirement. Regulated parties thus have two primary alternatives to consider: they could comply with the legal requirement, or they could violate it and run the risk that the agency will enforce the law.

The costs and benefits of these alternatives depend heavily on the type of enforcement authority the agency possesses. There are two main types of enforcement authority: *ex post* and *ex ante*. Under the *ex post* model, the agency tries to enforce the law after it has been violated.[253] Under the *ex ante* model, regulated parties are prohibited from taking a specified action until they have obtained approval from

250. Parrillo, *supra* note 91, at 168; Freeman, *supra* note 33, at 9 n.19; McGarity, *supra* note 206, at 1385.

251. Turk, *supra* note 8, at 300.

252. *See* Winter, *supra* note 118, at 222.

253. Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1281–82 (1999).

the agency.[254] These models aren't mutually exclusive: an enforcement regime might combine elements of the two.[255] The important point, however, is that *ex ante* enforcement authority gives agencies the power to block regulated parties from taking desirable actions until they have gone through judicial review.[256]

If the agency has *ex post* enforcement authority, complying with the legal requirement means that the regulated party must decline to take an action that it would rather take. The regulated party will therefore need to consider the benefits of taking that action and compare them to the costs of violating the law. The costs will depend on several factors, including the likelihood that (a) the agency would detect the violation, (b) the agency would decide to initiate enforcement, (c) the chances that the agency would win the case, (d) the regulated party's cost to defend itself, and (e) the cost of any sanctions if the regulated party loses.[257] These costs can be substantial. Thus, if the regulated party wants to take an action that violates the law, a nonenforcement trade might be the only viable option.

If the agency has *ex ante* enforcement authority, complying with the legal requirement means that the regulated party must go through an approval process before taking its desired action. Here, the regulated party would need to compare the value of the approval to the costs of the application process, including the cost of preparing the application, the risk of denial, and the risk that the agency will delay its decision.[258]

The main cost here is the risk of delay. In an *ex ante* regime, the regulated party can't do what it wants to do until it gets approval.[259] If the agency takes its time making a decision, however, there is little the regulated party can do. The regulated party could seek judicial review of the delay, but that would just slow the process down more and almost certainly wouldn't work.[260] Meanwhile, the regulated party

254. *Id.* at 1282–83; *see* Nielson, *supra* note 148, at 22.
255. Bhagwat, *supra* note 253, at 1281, 1287.
256. *Id.* at 1295–96.
257. *See* Parrillo, *supra* note 91, at 208.
258. *Id.* at 185.
259. Bhagwat, *supra* note 253, at 1282–83; Kovacic & Hyman, *supra* note 112, at 1166.
260. Bhagwat, *supra* note 253, at 1297.

couldn't take what might be a very profitable action.[261] Until the agency makes a decision, therefore, the "regulated party is at the agency's mercy."[262]

This risk of delay explains why virtually every e-cigarette manufacturer went along with the FDA's nonenforcement trade for flavored e-cigarettes. The FDA had *ex ante* enforcement authority: manufacturers couldn't lawfully sell e-cigarettes without the agency's authorization. Moreover, getting the FDA's authorization was expensive and time-consuming. The FDA estimated that a single application for premarket authorization would cost between $117,000 and $466,000, while others estimated it could cost millions.[263] And the authorization process can take years.[264] Given these alternatives, regulated parties had little bargaining power when negotiating with the agency.

Ultimately, whether agencies have *ex post* or *ex ante* enforcement authority, they will have the ability to influence the value of regulated parties' alternatives. In an *ex post* enforcement regime, the agency can influence the value of regulated parties' alternatives by deciding whether to initiate an enforcement action. And in an *ex ante* enforcement regime, the agency can control regulated parties' alternatives simply by sitting on their approval applications. This ability to shape regulated parties' alternatives often gives the agency immense bargaining power.[265]

261. *Id.* at 1295–96.

262. Parrillo, *supra* note 91, at 185.

263. *Commonly Asked Questions: About the Center for Tobacco Products*, U.S. FOOD & DRUG. ADMIN., https://web.archive.org/web/20211128194737/https://www.fda.gov/tobacco-products/about-center-tobacco-products-ctp/commonly-asked-questions-about-center-tobacco-products (July 10, 2020); Richard Craver, *Finding Marketing Balance for E-Cigarettes Will Challenge FDA, Reynolds*, WINSTON-SALEM J. (Oct. 17, 2021), https://journalnow.com/business/local/finding-marketing-balance-for-e-cigarettes-will-challenge-fda-reynolds/article_717dfff8-2c49-11ec-9996-6bcf22b1538a.html [https://perma.cc/YRL2-DJE5].

264. *See* Letter from Matthew R. Holman, Dir., Ctr. for Tobacco Prods., to Aaron P. Williams, Senior Vice President, R.J. Reynolds Vapor Co. (Oct. 12, 2021), https://www.fda.gov/media/153010/download [https://perma.cc/NT7Y-7S3Y] (showing that the FDA took two years to authorize the sale of Vuse Solo).

265. *See* FISHER & URY, *supra* note 85, at 23; THOMPSON, *supra* note 192, at 15.

III. THE NEED FOR CONSTRAINTS

The discussion so far has been primarily descriptive, explaining how and why agencies trade nonenforcement. This Article will now take a normative turn and analyze the effects that this practice has on the values that undergird the administrative state. I will start by explaining how nonenforcement trades allow agencies to make important policy decisions without facing constraints. I will then explore the potential advantages and risks this practice creates. Ultimately, I conclude that nonenforcement trades sharply increase the potential for "lawlessness, carelessness, overzealous regulatory controls, and inadequate regulatory protection."[266]

A. The Absence of Constraints

Administrative law reflects two premises that often conflict. On the one hand, the law reflects the premise that experts should use their "technocratic expertise" to solve the "complex problems that arise in an advanced capitalist society."[267] On the other hand, it reflects the Madisonian premise that no one deserves absolute trust.[268] As a result, the law delegates a lot of authority and flexibility to agencies, but also applies many constraints.[269]

Some of these constraints are substantive; for example, regulatory statutes often prohibit agencies from regulating certain parties or doing so in particular ways. Many other constraints are procedural. For example, to promulgate a legislative rule, an agency must publish a notice of proposed rulemaking in the Federal Register, give interested parties a chance to comment, and then consider and respond to those comments.[270] If the rule is "significant," the agency also needs to submit it, along with a detailed analysis of its costs and benefits, to the

266. Sunstein, *supra* note 11.
267. Turk, *supra* note 8, at 294.
268. DeLong, *supra* note 177, at 405; *see* THE FEDERALIST NO. 51, at 400–01 (James Madison) (Sweetwater Press 2006).
269. DeLong, *supra* note 177, at 405–06; THE FEDERALIST NO. 51, *supra* note 268, at 401.
270. 5 U.S.C. § 553.

Office of Information and Regulatory Affairs (OIRA).[271] After the rule becomes final, the Congressional Review Act requires that the agency submit the rule to both houses of Congress.[272] If Congress passes a joint resolution of disapproval, the rule can't take effect.[273] And of course, if someone wishes to challenge the rule, it is subject to judicial review.

These constraints were designed to promote both better decision-making and democratic legitimacy. For example, notice-and-comment procedures encourage agencies to use their technical expertise to propose a solution, seek out diverse viewpoints from other parts of the executive branch and the public, reflect on what they've heard, and then explain their thinking to the public.[274] At the same time, notice and comment promotes democratic legitimacy by requiring agencies—before committing to a course of action—to "listen to the people they are privileged to serve."[275]

Judicial review likewise promotes both values. Courts require that agencies engage in reasoned decision-making, which "has often provided significant benefits both in bringing about desirable regulatory initiatives and in preventing unreasonable or unlawful regulation."[276] Judicial review also promotes agencies' legitimacy by making sure they "comply with congressional commands."[277]

Nonenforcement trades allow agencies to sidestep all these constraints. These trades don't go through notice and comment or OIRA review. The Congressional Review Act doesn't apply. And judicial review is often unlikely.[278] To be sure, agencies occasionally use some of these procedures voluntarily. For example, when the FDA regulated flavored e-cigarettes through nonenforcement trades, the agency published a draft guidance document and went through

271. Exec. Order No. 12866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2022).
272. 5 U.S.C. § 801(a).
273. § 801(b).
274. *See* Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1622–25 (2016).
275. Cass R. Sunstein, *"Practically Binding": General Policy Statements and Notice-and-Comment Rulemaking*, 68 ADMIN. L. REV. 491, 500 (2016).
276. Sunstein, *supra* note 11, at 528.
277. *Id.* at 522.
278. *See supra* Section I.B.4.

something that resembled notice-and-comment rulemaking. And agencies often make nonenforcement trades in consent decrees, which receive modest judicial review.[279] But those procedures are optional—if the agency wants, it can simply decide how to regulate and then do so.

Moreover, agencies can use nonenforcement trades to circumvent substantive limits on their authority. Agencies can use means that Congress didn't give them, like the FDA does when it compels voluntary recalls of drugs. They can pursue ends that Congress didn't tell them to pursue, like the Justice Department did when it required a regulated party to endow an ethics chair at Seton Hall Law School. They can avoid express statutory limits, like the CFPB did when it encouraged indirect auto lenders to regulate auto dealers. Indeed, they can even avoid limits established by the Constitution itself.[280]

So how does the absence of constraints change agency behavior? And how do those changes affect the values that administrative law seeks to promote? The next two sections deal with these questions.

B. Potential Advantages

The absence of constraints can—in certain circumstances—advance values that administrative law seeks to promote.

1. Expertise

First, nonenforcement trades allow agencies to use their expertise to solve complex problems. The administrative state rests on the assumption that, "[w]ith respect to the acquisition of information, the executive branch is usually in a far better position than the legislative and judicial branches."[281] Moreover, because agencies are more insulated from politics than legislators, they can use their knowledge to craft better solutions.[282]

279. *See* Turk, *supra* note 8, at 301–02.
280. *See* Bambauer, *supra* note 101, at 125–26; Bhagwat, *supra* note 253, at 1316–17.
281. Sunstein, *supra* note 274, at 1613.
282. Freeman, *supra* note 33, at 20; Turk, *supra* note 8, at 294.

Based on these points, one could argue that nonenforcement trades are a "relatively powerful way to leverage agency expertise."[283] Agencies could use such trades to "stretch statutory language liberally," avoid "second-guessing by courts," and limit "significant public scrutiny and popular pressure."[284] Although these features might "appear questionable at first glance," perhaps they are "assets" so long as agencies are deciding "highly technical issues" rather than making "broad value judgments."[285]

2. Flexibility

Second, nonenforcement trades give agencies maximum flexibility to tailor their solutions to the problem at hand. Statutes involve both ends and means: Congress has a particular goal in mind and selects a particular means to achieve it.[286] But the means and ends don't always fit perfectly; instead, they can be both overinclusive (by requiring an action that fails to efficiently advance the statute's goals) and underinclusive (by failing to require an action that *does* efficiently advance those goals).[287]

Nonenforcement trades can solve both problems at the same time. The agency solves the overinclusivity problem by promising not to enforce an ineffective legal requirement.[288] And the regulated party solves the underinclusivity problem by promising to do something that advances the statute's goals more efficiently.[289]

That has several benefits: Both parties advance their goals.[290] The regulated party's compliance costs go down, which allows it to shift resources elsewhere.[291] The agency's enforcement costs likewise go

283. Turk, *supra* note 8, at 318.
284. *Id.*
285. *Id.*
286. John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1310 (2010).
287. *See* Nielson, *supra* note 148, at 23.
288. Scholz, *supra* note 200, at 183.
289. *See* Nielson, *supra* note 148, at 23; Scholz, *supra* note 200, at 183.
290. Scholz, *supra* note 200, at 183–84.
291. *See* Nielson, *supra* note 148, at 24; Scholz, *supra* note 200, at 183–84.

down, allowing the agency to shift resources elsewhere.[292] And the public benefits from the efficiency.[293]

Agencies can also use nonenforcement trades to make rules more quickly. As explained above, legislative rulemaking is long and costly. But agencies may need to move quickly when facing an emergency or rapidly changing circumstances. Nonenforcement trades allow them to do that.[294] For example, after the FDA learned that minors had started using e-cigarettes in record numbers, the agency used a nonenforcement trade to respond more quickly than other forms of policymaking would have allowed. Nonenforcement trades also allow agencies to adopt provisional rules and to experiment before adopting permanent solutions.[295]

3. Collaboration

Third, nonenforcement trades could promote many of the values embraced by the collaborative-governance model of administration. Under this model, the administrative process should be a "problem-solving exercise" in which agencies, regulated parties, and other stakeholders meet, share information, and devise solutions together.[296] Moreover, those solutions should be "provisional": the parties should "agree about regulatory goals and standards, devise mechanisms to achieve them, and create a system for evaluating and reassessing those agreements on a regular basis."[297]

Supporters argue that the collaborative-governance approach has several benefits. For example, it encourages deliberation among parties (agencies and regulated parties) who wouldn't usually share information with each other, which can lead to creative solutions.[298] It also encourages regulated parties to take ownership of the resulting

292. Nielson, *supra* note 148, at 24; Scholz, *supra* note 200, at 184.
293. Nielson, *supra* note 148, at 24.
294. Aman Jr., *supra* note 8, at 839; Bambauer, *supra* note 101, at 59; Freeman, *supra* note 33, at 56; Turk, *supra* note 8, at 318.
295. Freeman, *supra* note 33, at 28; Aman, Jr., *supra* note 136, at 319.
296. Freeman, *supra* note 33, at 6, 22–23.
297. *Id.* at 28–29.
298. *Id.* at 22–23.

rule—something that might increase their willingness to comply in the future.[299] And it allows agencies to gain knowledge about regulated parties' individual circumstances.[300] In theory, agencies could use nonenforcement trades in a similar way. For example, the EPA's Project XL gathered multiple stakeholders together and "allowed at least some companies to devise a more adaptive permitting regime, one more capable of responding to changed circumstances or new information."[301]

4. Coping with Limited Resources

Fourth, nonenforcement trades give agencies a tool to manage extreme mismatches between their responsibilities and resources. Unfortunately, Congress has a "notorious propensity . . . to pass unrealistic or symbolic statutes" that agencies simply can't enforce.[302] For example, the Clean Water Act's goal was to "end *all* water pollution by 1985, a quixotic demand that is still part of the statute today."[303] Unless Congress reduces agencies' responsibilities, increases their resources, or both, many agencies will be charged with a job that they simply can't do. In such a world, perhaps nonenforcement trades are the best solution agencies have.

C. Risks

Despite these potential advantages, nonenforcement trades pose serious risks to the values of the administrative state.

1. Deliberation

As an initial matter, nonenforcement trades undermine agencies' incentives to practice the type of deliberative democracy that leads to good social policy. Deliberative democracy combines "accountability

299. *Id.* at 23.
300. *See id.* at 27; Scholz, *supra* note 200, at 184.
301. Freeman, *supra* note 33, at 56.
302. Farber, *supra* note 28, at 311.
303. *Id.* at 325 (emphasis added); *see also* 33 U.S.C. § 1251(a)(1).

with a commitment to reflection and reason-giving," rather than merely "respond[ing] to popular pressure."[304] Agencies often engage in this type of process. When the executive branch starts working on a problem, there is often "a great deal of deliberation, and it often involves people with diverse perspectives and high levels of technical expertise."[305] When agencies submit rules for notice and comment, the public—including regulated parties and public-interest groups—also have the chance to submit their views to the agency.[306] And much of the time, those comments "help produce substantial changes" to the proposed rule.[307]

Nonenforcement trades undercut this process by omitting other agencies (which participate through OIRA review) and the public. Without these participants offering their diverse views, the agency is left to act on its own. And when that happens, "there might well be reason to worry about myopia, mission orientation, and tunnel vision, potentially compromising the ultimate judgment."[308] But the problem is even worse than that. Nonenforcement trades also escape judicial review, which further decreases agencies' incentives to deliberate and give explanations for their actions. Although courts don't review every agency action, the "mere presence of the possibility" of judicial review "places significant demands on an agency to provide a rationale for its decisions and its policies."[309] Without the participation of other agencies, the public, or the courts, the resulting process takes place "very much in the shadow of the law, not in the light of public deliberation."[310]

The CFPB's regulation of indirect auto lenders shows what can happen to the deliberative process when agencies are freed from all constraints. As explained above, the CFPB believed that auto dealers

304. Sunstein, *supra* note 274, at 1619.
305. *Id.* at 1621.
306. *Id.* at 1623.
307. *Id.* at 1624.
308. *Id.*
309. T. Alexander Aleinikoff, *Non-Judicial Checks on Agency Actions*, 49 ADMIN. L. REV. 193, 194 (1997).
310. Farber, *supra* note 28, at 319.

were violating the Equal Credit Opportunity Act. The agency wanted to bring enforcement actions against them but couldn't because the Dodd-Frank Act expressly barred those actions. So the CFPB threatened to bring enforcement actions against indirect auto lenders unless they took steps to stop the auto dealers' alleged discrimination.

From the beginning, the agency's case had several problems. First, it rested on "questionable legal interpretations."[311] The Equal Credit Opportunity Act prohibits "any creditor" from discriminating during a credit transaction.[312] It wasn't at all clear, however, that indirect auto lenders were acting as "creditor[s]" when they purchased auto loans from dealers.[313]

Second, the CFPB lacked reliable evidence that auto dealers were violating the law. The CFPB believed that auto dealers' practices had a disparate impact on minorities. But the agency had "no actual sales data to support this belief, as the race and ethnicity of car buyers are not recorded."[314] So the agency used a "statistical analysis using proxies for race and ethnicity, such as surnames and zip codes."[315] The agency believed that its statistical method was "prone to significant error" and that "known factors affecting interest rates not related to race were not controlled for in the analysis, which when included, produced dramatically different results."[316]

Despite these issues, the CFPB discussed using a legislative rule to regulate indirect auto dealers.[317] But for two main reasons, the agency decided against it. First, the CFPB worried that the rule wouldn't hold up in court. As a CFPB memo explained, the "rule could be perceived as an attempt to circumvent [the agency's] lack of regulatory authority over auto dealers, and that presents both legal and political risks that [the] rule could be overturned by a court or by Congress."[318] Second,

311. Romano, *supra* note 38, at 334.
312. 15 U.S.C. § 1691(a)(1).
313. Romano, *supra* note 38, at 333.
314. *Id.* at 332.
315. *Id.*
316. *Id.* at 334; *accord* Kovacic & Hyman, *supra* note 112, at 1175 n.67; Rubin, *supra* note 51, at 24–25.
317. *See* Romano, *supra* note 38, at 334.
318. CFPB BRIEFING MEMO, *supra* note 46, at 5.

the rulemaking process would likely require the CFPB to disclose and defend the statistical method that it had relied on.[319]

Had the CFPB gone through notice and comment, it would have engaged in something that looked like deliberative democracy—soliciting, considering, and responding to the views of other agencies and the public. Armed with the ability to trade nonenforcement, however, the CFPB chose to hide what it viewed as the weaknesses in its case, asked for input from no one, and failed to explain its actions to the public.

2. Rationality

Nonenforcement trades also increase the possibility of arbitrary decisions. Free from constraints, agency employees could use their discretion to give better deals to firms that they like or to benefit themselves.[320] Moreover, even if agency officials act with the best motives, nonenforcement trades will introduce an element of randomness. Indeed, the rules governing a regulated party might "depend as much upon the attitude of the [agency's] negotiator or the persuasive ability of industry officials" as anything else.[321]

The biggest risk, however, is that nonenforcement trades will systematically subsidize larger, more well-connected firms.[322] These firms are better equipped to deal with the variation, instability, and unpredictability that nonenforcement trades create.[323] They are more likely to know that trading is an option, if they want to do it.[324] They

319. Romano, *supra* note 38, at 334.

320. *See* Bhagwat, *supra* note 253, at 1303; Nielson, *supra* note 148, at 20; *see also* NetworkIP, LLC v. FCC, 548 F.3d 116, 127 (D.C. Cir. 2008) (explaining how too much discretion can lead to "arbitrariness (or worse)").

321. Breger, *supra* note 60, at 336; *cf.* Kovacic & Hyman, *supra* note 112, at 1181 ("[T]he details of the resulting settlements may well vary, depending on the priorities of agency leadership at the time the merger was reviewed, and the extent to which firm management was willing to give away the store to get the merger approved.").

322. *See* Winter, *supra* note 118, at 244 ("Bartering rationality in regulation may be expected to preserve or even to promote inequalities among the regulated.").

323. *See id.*

324. Andrias, *supra* note 1, at 1098; *see also* THOMPSON, *supra* note 192, at 28.

can better afford going through the trading process.[325] And when they do, they will have more bargaining power.[326]

3. Fundamental Fairness

Nonenforcement trades can also create acute fairness problems. The first problem occurs when agencies promise not to take an enforcement action they lacked the authority to take in the first place. In most circumstances, it is immoral for someone to profit from threatening to do something that they don't have a right to do.[327] Indeed, some have argued that this is one of the central problems with blackmail.[328] The same principle should apply here—agencies shouldn't be allowed to extract concessions from regulated parties by promising not to do something they plainly lack the authority to do.[329]

Another fairness problem occurs when agencies use improper sources of leverage. For example, in April 2013, the CFPB decided to sue Ally Financial to encourage industry-wide compliance with the agency's guidance document. As explained previously, the CFPB knew that Ally desperately needed regulatory approval from the Federal Reserve and the FDIC. And the CFPB appears to have used that leverage to obtain a settlement including various regulatory conditions.

The third fairness problem stems from the fact that nonenforcement promises aren't binding. Once someone has violated the law, a nonenforcement promise doesn't absolve them of legal liability.[330] That gives the agency a huge advantage: even if the regulated party upholds its end of the bargain, the government still has the same amount of leverage that it had before.

An agency could misuse that leverage in two ways. First, the agency could make a trade, get what it wants, and then change the terms of the

325. *See* Freeman, *supra* note 33, at 76.
326. Winter, *supra* note 118, at 244.
327. *See* Michael Gorr, *Liberalism and the Paradox of Blackmail*, 21 PHIL. & PUB. AFFS. 43, 46 (1992).
328. *See, e.g.*, *id.*
329. *See* Bambauer, *supra* note 101, at 88.
330. Barron & Rakoff, *supra* note 12, at 272.

deal. This is especially problematic if the regulated party has relied on the agency's nonenforcement promise to keep violating the law. The more the regulated party has relied on the promise, the more leverage the agency has. And at some point, the regulated party will be locked into the deal. Even if the agency imposes draconian conditions, the regulated party will have little choice but to comply.[331] This is another of the central problems with blackmail.[332]

Second, the agency could make a trade, get what it wants, and then go back on its word.[333] As explained previously, this is effectively what happened to DACA recipients. DHS initially promised not to remove certain immigrants if they (among other things) gave the agency their names and addresses. And the agency also promised not to share those names and addresses with immigration enforcement agencies. After President Trump was elected, however, DHS revealed that it had shared those names and addresses with enforcement agencies after all. That was profoundly unfair—yet immigrants had little recourse but to hope that immigration enforcement agencies wouldn't use the information.

4. Accountability

Nonenforcement trades can also prevent the public from holding agencies accountable for their decisions.

First, nonenforcement trades avoid the notice-and-comment process, which was designed in part to help the public know what the government is doing and who to hold accountable.[334] Second, nonenforcement trades create a type of "secret law" that widens the gap between the law on the books and the law on the ground.[335] Agencies don't always tell the public when they have traded

331. *See* David Freeman Engstrom, *Drawing Lines Between* Chevron *and* Pennhurst*: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1242–43 (2004).

332. *See* Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 675 (1988); George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617, 1626 (1993).

333. Scholz, *supra* note 200, at 185.

334. *See* Farber, *supra* note 28, at 319.

335. Aman, Jr., *supra* note 136, at 320; Breger, *supra* note 60, at 349.

nonenforcement.[336] And even if agencies do announce their decisions, they will often be widely dispersed in documents that are not easily accessible or widely known to the public—in guidance documents, no-action letters, settlement agreements, and the like.[337] That makes the law "less observable to third parties (and therefore less vulnerable to criticism)."[338]

Third, nonenforcement trades often deflect blame away from the agency by making regulated parties' actions look voluntary. If the agency fails to disclose a trade, the public may believe that the regulated party's actions—which are necessary to comply with the trade's terms—are of the party's own invention.[339] The regulated parties may therefore "bear the brunt of public disapproval, while the [agency] officials who devised the regulatory program" avoid any accountability.[340]

Fourth, agencies can use nonenforcement trades as cover for more traditional deregulation. OSHA's Voluntary Protection Programs may be an example of this phenomenon. On the one hand, OSHA tells the public that program participants must "exceed" existing safety and health standards.[341] On the other hand, government investigators have found that many participants had poor safety records and that OSHA doesn't take the necessary steps to ensure that only qualified worksites participate.[342] As a result, it is difficult to tell whether the programs are increasing worker safety or undermining it.

336. *Cf.* Aman Jr., *supra* note 8, at 896 (noting that "many voluntary commitments do not appear in the Board's final order").

337. HAMBURGER, *supra* note 121, at 30–31.

338. Turk, *supra* note 8, at 301.

339. *Cf.* Gluck et. al., *supra* note 207, at 1841 (describing a similar problem when Congress outsources policymaking to state governments).

340. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 578 (2012) (quoting New York v. United States, 505 U.S. 144, 169 (1992)).

341. GAO OSHA REPORT, *supra* note 244, at 3.

342. *See supra* note 249 and accompanying text.

5. Feedback Effects

Widespread nonenforcement trading could also have troubling effects on how Congress, agencies, and the public act. As an initial matter, nonenforcement trades increase uncertainty, which could make it harder to legislate.[343] In a world without such trades, Congress could adopt a standard and assume that the agency would try to enforce it as written. In a world where nonenforcement trades are the norm, however, that assumption wouldn't be safe. Instead, Congress would need to assume that the agency might—but might not—use the standard as a bargaining chip in negotiations.

If Congress approved of nonenforcement trading, it would need to adopt a standard that was stricter than necessary so the agency would have room to bargain.[344] If Congress disapproved of nonenforcement trading, it would have to expressly limit the agency's enforcement discretion. In all likelihood, however, Congress simply wouldn't know how the agency planned to enforce the law.[345]

Different legislators would respond to that uncertainty in different ways. Some legislators might be willing to continue supporting legislation but want to spend more time on oversight. Others might respond by opposing legislation that they otherwise would have supported. Still others might want to ban nonenforcement trades, which would take up time and resources that could have been used elsewhere. The upshot is that nonenforcement trades would likely make legislating harder.

Widespread nonenforcement trading would also give Congress an incentive to stop passing laws and instead let agencies solve problems through bargaining. By doing so, Congress could plausibly take credit for the agencies' solutions when they are popular and deny blame when they are not. Thus, this practice—which is in large part a

343. *See* Farber, *supra* note 28, at 317.
344. *Id.* at 315–16; Winter, *supra* note 118, at 242.
345. *See* Winter, *supra* note 118, at 242.

response to congressional gridlock—could result in yet more congressional gridlock.[346]

Nonenforcement trading could also have negative effects on agencies. As with Congress, agencies might pass regulations that are stricter than necessary to give themselves extra leverage in negotiations.[347] They might also bring enforcement actions in cases where they otherwise wouldn't or threaten higher punishments than they otherwise would—all with an eye to extracting concessions at the bargaining table.[348]

Finally, widespread nonenforcement trading would have "inevitable cost in terms of damage to our concept of the rule of law."[349] This practice "undermines the concept that good citizens—and even more so, governmental officials—obey the law."[350] And that might lead the public to reduce its compliance with the law or lose faith in public institutions. Thus, even if nonenforcement trading results in good policy in the short run, it "must also remain a troubling concept."[351]

IV. THE NEED FOR EXPRESS DELEGATION

In addition to the normative questions discussed above, nonenforcement trades raise legal questions: Do agencies have the authority to trade nonenforcement in the first place? If so, where does that authority come from? This Part grapples with these questions. I start by sketching a possible defense of the practice's legality: namely, that the Constitution or regulatory statutes implicitly delegates this power to agencies as a way of making federal law more effective. Although this defense has much to recommend it, I ultimately

346. *Cf.* Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501, 534–35 (2015) ("[T]he pressures that induce Congress to enact 'big waivers' often dissuade it from legislating at all. In these circumstances, agencies will often be tempted to waive legal requirements on their own. And somewhat paradoxically, that practice will further weaken the legislature's incentives and ability to legislate.").

347. Nielson, *supra* note 148, at 22 n.15.

348. *See id.* at 22; HAMBURGER, *supra* note 121, at 223.

349. Farber, *supra* note 28, at 325.

350. *Id.*

351. *Id.*

conclude that the Constitution doesn't implicitly delegate the power to trade nonenforcement, and that regulatory statutes rarely—if ever—do so.

A. Implicit Delegation and Relational Agency

Administrative law assumes that agencies are the "agents" of their principals—Congress, the President, and ultimately the public. That raises the question: what kind of agent are they?

In a different context, Bill Eskridge has thoughtfully described and defended the view that judges should be considered "relational agents."[352] As he explains, a "relational contract" creates a long-term relationship between a principal and an agent.[353] That contract establishes a general goal and instructs the agent to use his or her best efforts to achieve it.[354] The contract also includes specific instructions about how the agent should act.[355] When possible, the agent has a duty to follow those instructions. But the agent's primary duty is to achieve the contract's overarching goal over a long period of time.[356] That requires giving the agent a lot of discretion—indeed, the discretion "to go beyond, and perhaps even against, orders made by the principal."[357]

The agent needs that discretion for three reasons. First, "changed circumstances will often undermine assumptions underlying the principal's order and impel the agent to bend the order when responding to these new circumstances."[358] Second, "the principal will often give orders that become inconsistent over time, thereby impelling the agent to alter one or more of the orders."[359] And third, the principal may adopt "new meta-policies over time," which "supersede one or more of the principal's orders."[360]

352. *See* Eskridge, Jr., *supra* note 15, at 326.
353. *Id.*
354. *Id.*
355. *See id.*
356. *Id.*
357. *Id.* at 327.
358. Eskridge, Jr., *supra* note 15.
359. *Id.*
360. *Id.*

Professor Eskridge illustrates his theory with a familiar hypothetical about "soupmeat."[361] In this hypothetical, Williams, the head of the household, hires a relational agent, Diamond, to run the household while she's away.[362] Because Williams is going on a long trip, she writes out some instructions for Diamond.[363] One of those instructions is that Diamond buy five pounds of soupmeat each week so that he can make soup for the children.[364] After Williams leaves for the trip, several things might happen that, in Eskridge's view, require Diamond to deviate from his instructions. The first is changed circumstances. For example, if the store doesn't have any soupmeat when Diamond arrives, he could reasonably buy an alternative.[365] The second is new instructions. For example, assume that Williams sends Diamond a letter explaining that he should put the children on a low-cholesterol diet.[366] After receiving those instructions, Diamond stops buying soupmeat (which is high in cholesterol) and starts buying chicken (which is low in cholesterol).[367] The third is a new meta-policy. For example, assume that Williams writes to Diamond and says that he must reduce spending on food to $200 per week.[368] So Diamond starts buying less soupmeat, which is the most expensive ingredient in the soup.[369] Professor Eskridge argues that, in each situation, Diamond has been a faithful agent, even though he "create[d] substantial exceptions to, or even negate[d], the original specific meaning of the directive."[370]

Although Professor Eskridge's argument focuses on judges, it applies equally well to agencies. Regulatory statutes, like relational contracts, are often written in vague terms and will stay on the books for many years.[371] Agencies, like relational agents, are responsible for

361. *Id.* at 327 & n.25.
362. *Id.* at 327.
363. *Id.*
364. Eskridge, Jr., *supra* note 15.
365. *Id.*
366. *Id.* at 328.
367. *Id.*
368. *Id.* at 329.
369. *Id.*
370. Eskridge, Jr., *supra* note 15, at 330.
371. *Id.* at 326.

implementing those instructions over a long period of time.[372] And it is reasonable to assume that Congress, like the relational principal, cares more about achieving its ultimate goals than about the means.[373] Thus agencies, like relational agents, should "exercise great creativity in applying prior legislative directives to specific situations," even if that requires deviating from Congress's instructions.[374]

If adopted, the relational-agent model could authorize agencies to trade nonenforcement in at least some circumstances. Agencies know that Congress wants them to pursue more than one goal. And agencies know that Congress's specified means aren't always as effective as Congress expected. If agencies are relational agents, therefore, it would make sense for them to deviate from Congress's instructions in situations where Congress would want them to do so.

To be sure, the Constitution doesn't expressly give agencies the power to act as relational agents. Instead, the Constitution gives the President the "executive Power" and then says that the President "shall take Care that the Laws be faithfully executed."[375] Likewise, no statute expressly gives agencies relational-agent powers—or even expressly authorizes them to decline enforcement.[376] But it's possible that one or both sources implicitly give agencies that power.

At the founding, people widely accepted the principle that delegated powers carried with them some amount of "implied, incidental authority."[377] The scope of that incidental authority wasn't always clear, but it typically included smaller powers that were necessary to carry out the delegated power.[378] Early debates about the Necessary and Proper Clause reflect this background principle. During these

372. *See id.*
373. *See id.* at 333.
374. *Id.* at 326.
375. U.S. Const. art. II, §§ 1, 3.
376. Price, *supra* note 1, at 745–46.
377. GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 60 (2010); *accord* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1750 (2013); Samuel L. Bray, *"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution*, 102 VA. L. REV. 687, 741–42 (2016); *see also* THE FEDERALIST NO. 44, at 352 (James Madison) (Sweetwater Press 2006).
378. Baude, *supra* note 377; Bray, *supra* note 377; LAWSON ET AL., *supra* note 377, at 63–64.

debates, constitutional interpreters repeatedly said that the clause gave Congress only the incidental powers that it would have had anyway.[379] As a result, the Constitution would have functioned the same whether the Necessary and Proper Clause was "entirely obliterated" or "repeated in every article."[380]

When discussing the incidental-powers principle, most early constitutional interpreters focused on the Necessary and Proper Clause. But that principle extends to "all other powers declared in the Constitution," including the Executive Power Clause.[381] Thus, this clause gives the President both the express power to execute federal law and any incidental powers needed to do so.[382] The same is true for regulatory statutes. These statutes vest important lawmaking and other powers in federal agencies.[383] That delegation too carries some amount of incidental power. As a result, it seems at least possible that the Constitution itself, or the regulatory statutes that Congress has passed, implicitly give agencies the power to act as relational agents and therefore to trade nonenforcement.

B. The Constitution and Implicit Delegation

Although the theory sketched above is plausible, it runs into a serious problem: namely, that incidental powers must be relatively minor.[384] They can't be what the founders referred to as "great powers"—powers that are "so important, or so substantive, that we should not assume that they were granted by implication, even if they might help effectuate an enumerated power."[385] These powers were either delegated expressly or not at all. For example, in *McCulloch v.*

379. Baude, *supra* note 377; Bray, *supra* note 377, at 740; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 408 (1819); John Marshall, A Friend of the Constitution, No. 3 (July 2, 1819), *reprinted in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 167, 170 (Gerald Gunther ed., 1969).

380. THE FEDERALIST NO. 33, at 243–44 (Alexander Hamilton) (Sweetwater Press 2006).

381. *Id. at* 244 (making this argument about the taxing power but explaining that the same argument applied "to all other powers declared in the Constitution").

382. Goldsmith & Manning, *supra* note 24, at 2304–08.

383. Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 888 (2015).

384. *See* Baude, *supra* note 377, at 1749; LAWSON ET AL., *supra* note 377, at 61, 63–64.

385. Baude, *supra* note 377, at 1749 (emphasis omitted).

Maryland, Chief Justice Marshall wrote that the taxing power was a "great substantive and independent power, which cannot be implied as incidental to other powers."[386]

The power to trade nonenforcement closely resembles several great powers: namely, the dispensing and suspending powers that English monarchs had long claimed. But the Framers refused to give those powers to the executive branch. As a result, we shouldn't lightly assume that the Constitution implicitly gave executive officials the power to trade nonenforcement.

In addition, the Necessary and Proper Clause, along with the Constitution's lawmaking procedures, suggests the Constitution doesn't implicitly delegate this power. The Constitution gives Congress primary responsibility for deciding how to implement its legislative powers and requires that Congress do so through an elaborate procedure. Thus, it is unlikely that the Constitution would implicitly allow agencies to add or subtract from the results of that process.

1. The Faithful Execution Clause

To trade nonenforcement, agencies must promise that they won't enforce the law against regulated parties who promise to do something else that the law doesn't require. Such promises create tension with the Faithful Execution Clause—and in many situations outright violate it.

The Faithful Execution Clause provides that the President "shall take Care that the Laws be faithfully executed."[387] That clause creates an obligation that the President enforce the law,[388] and agencies exist to help the President carry out that task.[389] As a result, agencies likewise exercise executive power and are subject to the same duty of

386. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411 (1819); *accord* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1640 (2002).

387. U.S. CONST. art. II, § 3.

388. Delahunty & Yoo, *supra* note 3, at 799; *see* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 144 (2020).

389. *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020).

faithful execution.[390] The Faithful Execution Clause thus "implies a principle of legislative supremacy in lawmaking: the President's duty is to ensure execution of Congress's laws, not to make up the law on his own."[391]

The Faithful Execution Clause emerged from "a long history of struggle in England and the United States over executive power."[392] English monarchs long claimed the power to "dispense with" or "suspend" the law.[393] These powers were similar: the dispensing power allowed monarchs to excuse individuals from complying with the law and the suspending power allowed them to excuse everyone from compliance.[394] Before King James II, few people objected to this power.[395] But King James "enraged Protestants in Parliament by using his suspending and dispensing powers to exempt officials from statutory restrictions on office holding by Catholics and Protestant dissenters."[396] So after the Glorious Revolution of 1689, Parliament abolished these executive powers.[397] Thus, by the founding, it was "entirely obvious" that the power to execute the law didn't include the power to dispense with or suspend it.[398]

The Constitution's text affirms that view. In light of the struggle over the dispensing and suspending powers, the Framers viewed them as great powers that could be delegated only expressly.[399] But the Constitution didn't do so; to the contrary, it provided that the President had a duty to make sure that laws were "faithfully executed."[400] Early constitutional interpreters recognized what that meant. For example, during the ratification debates, neither the Constitution's Federalist supporters nor its Anti-Federalist opponents suggested that the

390. City of Arlington v. FCC, 569 U.S. 290, 304 n.4 (2013).
391. Price, *supra* note 1, at 688; *see also* MCCONNELL, *supra* note 388, at 146.
392. Price, *supra* note 1, at 690.
393. Delahunty & Yoo, *supra* note 3, at 804; Price, *supra* note 1, at 690.
394. Delahunty & Yoo, *supra* note 3, at 804 n.135; Price, *supra* note 1, at 690.
395. *See* Delahunty & Yoo, *supra* note 3, at 805.
396. Price, *supra* note 1, at 691; *accord* Delahunty & Yoo, *supra* note 3, at 805.
397. Price, *supra* note 1, at 691; Delahunty & Yoo, *supra* note 3, at 807.
398. Delahunty & Yoo, *supra* note 3, at 807–08.
399. *See id.*; Price, *supra* note 1, at 694.
400. U.S. Const. art. II, § 3.

President had dispensing or suspending powers.[401] And "in the decades after ratification, courts invoked the absence of suspending and dispensing powers as a virtual truism."[402]

Together, the constitutional text and history supports a presumption that "executive officials lack inherent authority either to prospectively license statutory violations or to categorically suspend enforcement of statutes for policy reasons."[403] Prospective nonenforcement "is a particular offense to legislative supremacy because it undermines the deterrent effect of the law."[404] And "categorical nonenforcement for policy reasons usurps Congress's function of embodying national policy in law; it effectively curtails the statute that Congress enacted, replacing it with a narrower prohibition."[405]

This presumption complicates the argument that the Constitution implicitly delegates the power to trade nonenforcement. Agencies often use this power to free whole industries from the obligation to comply with the law, as the FDA did when it regulated flavored e-cigarettes. And agencies often use it to license future violations of the law, as the EPA did in Project XL. But the Faithful Execution Clause strongly suggests that agencies lack the power to do that—at least without an affirmative delegation from Congress.

It is somewhat less clear whether the Faithful Execution Clause prohibits agencies from making nonenforcement trades with individuals who violated the law in the past. Scholars disagree about the President's nonenforcement power in this context. For example, Zach Price argues that the Faithful Execution Clause allows agencies to decline to enforce the law against regulated parties where punishment "is factually or morally unwarranted."[406] In contrast, Robert Delahunty and John Yoo argue that the clause doesn't permit such equitable exceptions.[407] Even if such an equitable exception

401. *See* Price, *supra* note 1, at 694.
402. *Id.*
403. *Id.* at 704.
404. *Id.* at 705.
405. *Id.*
406. *Id.* at 703.
407. *See* Delahunty & Yoo, *supra* note 3, at 842.

exists, however, the Faithful Execution Clause still creates at least some tension with nonenforcement trades. When agencies use this practice, they don't appear to believe that punishment is factually or morally unwarranted—to the contrary, they seem to assume that the regulated party has violated the law and deserves some form of punishment. Indeed, it would be deeply troubling if the agency believed that punishment was factually or morally unwarranted and nevertheless tried to use the threat of punishment as leverage.

Agencies are on their strongest footing when they trade reduced penalties for a regulated party's promise to do something the law doesn't require. Here, agencies are enforcing the law to some extent, which clears them of any charge that they are dispensing with or suspending the law. But some tension remains: one could at least plausibly argue that agencies fail to "faithfully" execute the law when they elevate their own regulatory preferences over Congress's preferred penalties.

2. The Necessary and Proper Clause and the Legislative Process

The Necessary and Proper Clause, along with the Constitution's lawmaking procedures, likewise suggest that the Constitution doesn't implicitly delegate the power to trade nonenforcement. The Necessary and Proper Clause gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[408] That provision gives Congress, rather than agencies, primary responsibility for deciding how to implement governmental powers. Section Seven of Article I also lays out the elaborate procedure of bicameralism and presentment, which Congress must use to exercise its lawmaking powers.[409]

These parts of the constitutional system cut against the argument that the Constitution implicitly gives agencies the power to trade

408. U.S. CONST. art. I, § 8, cl. 18.
409. *Id.* § 7.

nonenforcement. When agencies use that power, they necessarily set aside Congress's implementation decisions and substitute their own. It seems doubtful, however, that the Framers would have assigned the implementing power to Congress, and designed an elaborate lawmaking procedure, while simultaneously giving agencies an implicit power to alter the results without using any procedure whatsoever.[410]

Allowing agencies to exercise this power would also undermine the purposes that bicameralism and presentment were meant to serve. First, the Framers designed these procedures to promote "deliberation and consideration of a variety of competing interests."[411] As explained above, however, agencies can trade nonenforcement without engaging in any deliberation or considering any views other than their own. These trades therefore "undermine the Constitution's finely wrought lawmaking procedures and suppress the democratic deliberation associated with them."[412]

Second, the Framers adopted bicameralism and presentment to protect against faction.[413] Each of the actors involved (the House, Senate, and President), represent a different constituency, which effectively creates a supermajority requirement.[414] That gives political minorities the power to block legislation and the lesser power of

410. *Cf.* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 70–71 (2001) (arguing that the Framers wouldn't have "designed an elaborate method of legislation, while simultaneously giving judges broad independent authority to alter the results outside that carefully constructed process").

411. Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1279 (2002); *see also* INS v. Chadha, 462 U.S. 919, 948–49 (1983).

412. Molot, *supra* note 411 (internal quotation marks omitted).

413. Manning, *supra* note 410, at 72; Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1249 (1989).

414. 2 JAMES M. BUCHANAN & GORDON TULLOCK, THE SELECTED WORKS OF GORDON TULLOCK: THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 235 (Charles K. Rowley ed., Liberty Fund 2004) (1962); Manning, *supra* note 410, at 74–75; Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 32 (2009).

insisting on concessions as the price of an affirmative vote.[415] Minorities embed those concessions in the statute, often by defining the methods that agencies use to enforce the law.[416] When agencies trade nonenforcement, however, they set aside these enforcement mechanisms and adopt new ones—ones that might not have been able to pass through Congress. Thus, nonenforcement trades undercut political minorities' power to protect themselves against self-interested majorities.

C. Regulatory Statutes and Implicit Delegation

If the Constitution doesn't implicitly delegate relational-agency powers to the executive branch, could a regulatory statute do so? That seems possible, but unlikely for several reasons.

First, as the Supreme Court has recently held, it is reasonable to assume that Congress will "speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[417] This principle suggests that Congress wouldn't implicitly delegate the power to "prospectively license statutory violations or to categorically suspend enforcement of statutes for policy reasons."[418] As explained above, these powers closely resemble the dispensing and suspending powers that English monarchs had long claimed and that the Constitution had denied to the executive branch. It seems likely, therefore, that if Congress wanted to delegate something like dispensing and suspending powers, it would do so expressly.

Second, the negative-implication canon will often lead to the conclusion that agencies lack the power to trade nonenforcement. This

415. Manning, *supra* note 410, at 77; *see* Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1130 (2011); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 809 (1983).

416. *See* Manning, *supra* note 410, at 77.

417. Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022) (per curiam) (quoting Alabama Ass'n of Relators v. Dep't of Health & Human Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam)); *see also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

418. Price, *supra* note 1, at 704.

canon provides that, whenever a statute expressly says how to do something, interpreters should "ask whether a reasonable person reading the words in context would have understood the specification to be exclusive."[419] That principle has serious bite for nonenforcement trades because, by definition, the statute tells the agency to enforce the law in a particular way and the agency has decided to substitute something else. Thus, in at least some cases, the statute's instructions about how to enforce the statute will be exclusive.

For example, as explained previously, Congress has given the FDA several enforcement tools to use against adulterated and misbranded drugs, including seizures, injunctions, and prosecutions. And for many other products, Congress has given the FDA the power to order recalls. Given these enforcement tools, it seems extremely unlikely that Congress intended for the FDA to rely on voluntary recalls as its chief enforcement method.

To be sure, this type of negative-implication argument depends heavily on context. In the usual case, however, a negative-implication argument, which draws an inference from something Congress said, will be stronger than an implicit-delegation argument, which draws an inference from Congress's silence. If Congress passes a statute that expressly includes an enforcement mechanism, the most obvious conclusion is that Congress wants the agency to use it.

Third, in recent years, Congress has increasingly given agencies the power to *waive* legal requirements, which—unlike nonenforcement—wipes away legal liability. Many of those waiver provisions explicitly or implicitly allow agencies to place conditions on the waiver.[420] That creates a strong negative implication against the argument that Congress implicitly delegated the power to trade nonenforcement.[421]

419. Goldsmith & Manning, *supra* note 24.

420. *See* Barron & Rakoff, *supra* note 12, at 267–68 (noting that waiver provisions have become "increasingly important" and listing recent examples); Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 235, 257 (2016) ("In rough parallel to the rise of nonenforcement as an important category of executive action, statutory provisions expressly authorizing executive cancelation of key features of substantive statutes also appear to have grown in salience.").

421. *See* Kovacic & Hyman, *supra* note 112, at 1181–82.

When Congress wants to give agencies the power to set aside a statute in exchange for other things, Congress knows how to do so.

This argument is all the stronger because waiver authority is normatively superior to nonenforcement trades.[422] Waiver provisions are often subject to constraints that foster deliberative democracy.[423] Waivers also have a firmer claim to legality.[424] And waiver provisions provide "legal security to waiver recipients" and are therefore less susceptible to abuse.[425] Because waivers are normatively superior, and because Congress has increasingly included them in statutory schemes, one should be slow to conclude that Congress's silence implicitly delegates the power to trade nonenforcement.

Although these arguments suggest that an implicit delegation is unlikely, they don't establish that it is impossible. For example, one could plausibly argue that Congress has implicitly given OSHA the power to establish something like the Voluntary Protection Programs: the programs don't license future violations of the law or suspend the law on a categorical basis, the agency has clear authority to enforce the inspection requirement and a large amount of discretion about how to do so, the regulated party's promise to improve safety is closely related to the agency's purpose, and the programs seem to avoid many of the normative problems described in Section III.C. Given these facts—plus the large mismatch between the agency's responsibilities and resources—one could reasonably conclude that Congress has implicitly delegated the power to trade nonenforcement.

Even if Congress has implicitly delegated this power, however, agencies can't use it to pursue regulatory conditions that are unrelated to the unenforced legal requirement. As the Supreme Court has held, delegations of lawmaking power must include an "intelligible principle" to guide the agency.[426] To be sure, the Court has been "extremely permissive as to what counts as an intelligible

422. Price, *supra* note 420, at 263–64.
423. *Id.* at 264–65.
424. *Id.* at 262.
425. *Id.* at 265.
426. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)).

principle."[427] But a statute that implicitly allowed an agency to trade nonenforcement for anything the agency wanted should still fail that test. Moreover, if Congress implicitly delegates the power to trade nonenforcement, it seems reasonable to conclude that Congress wants the agency to use that power to advance the same goals as the unenforced legal requirement.[428]

V. REESTABLISHING CONSTRAINTS

Nonenforcement trades place "unique strains on our system of administrative law."[429] But they may prove resistant to control.[430] They often operate behind the scenes.[431] Regulated parties often lack the incentive to challenge them or are deterred from doing so.[432] Others who want to challenge them may struggle to obtain judicial review.[433] And political officials may find them too "easy, attractive, and powerful" to avoid encouraging.[434] Thus, nonenforcement trading "is not a dynamic that can be stopped."[435]

That said, improvements are possible. Although a complete analysis of possible solutions is beyond the scope of this Article, the discussion that follows highlights steps that Congress and the President could take to discourage agencies from trading nonenforcement.

As an initial matter, Congress could take steps to improve oversight of agency enforcement practices. For example, Congress could require that agencies write down and publish all nonenforcement promises, including any conditions that regulated parties agree to. Ideally, agencies would allow the public to comment on any such deals before

427. Stack, *supra* note 383, at 875.

428. *Cf.* Barron & Rakoff, *supra* note 12, at 326 (arguing that agencies have an implicit power to place conditions on statutory waivers, but that these conditions must be "germane . . . to Congress's purposes"); *see also* Price, *supra* note 420, at 266–67.

429. Breger, *supra* note 60, at 344.

430. *See* Noah, *supra* note 98, at 912.

431. Bambauer, *supra* note 101, at 104.

432. *See* Nielson, *supra* note 148, at 28.

433. Bambauer, *supra* note 101, at 105.

434. *Id.* at 109.

435. Barkow, *supra* note 120, at 1166; *see also* DeLong, *supra* note 177, at 414.

they are made.[436] Congress has adopted similar requirements elsewhere: for example, the Antitrust Procedures and Penalties Act requires that agencies allow the public to comment on proposed antitrust consent decrees before the court approves them.[437] And some agencies have adopted these types of requirements voluntarily.[438] This increased transparency and public participation would encourage agencies to be more deliberative and help the public hold them accountable.

Congress could buttress this approach with increased monitoring. For example, Kate Andrias and Rachel Barkow have suggested that Congress create an office charged with monitoring how agencies use their enforcement discretion; such an office could also monitor whether agencies used nonenforcement trading as a method of regulation.[439] In particular, this office could accept confidential complaints from regulated parties or do anonymous surveys to root out secret trades.[440] Congress could also charge inspectors general with the task of exposing nonenforcement trades[441] or adopt a whistleblower statute that rewards agency staff or regulated parties for doing so.[442]

In addition to improving oversight, Congress could try to reduce agencies' incentives to trade nonenforcement. For example, many agencies resort to the practice to close the gap between their responsibilities and resources. Ideally, Congress would respond by giving agencies more resources, giving them less to do, or both. In the real world, however, Congress seems likely to choose "none of the above." At the very least, Congress could take steps to help agencies stretch their resources further. For example, Congress might increase the use of disclosure requirements, which make it easier for agencies to detect wrongdoing.[443]

436. *See* NIELSON, *supra* note 133, at 64.
437. 15 U.S.C. § 16(b); Barkow, *supra* note 120, at 1169; Noah, *supra* note 98, at 928.
438. *See* NIELSON, *supra* note 133, at 64.
439. Andrias, *supra* note 1, at 1104; Barkow, *supra* note 120, at 1152.
440. *See* Parrillo, *supra* note 91, at 255.
441. *See* Barkow, *supra* note 120, at 1175–76.
442. *Id.* at 1181.
443. *See* Barkow, *supra* note 127, at 1166.

At the same time, Congress could take steps to reduce agencies' bargaining power. For example, if an agency is consistently trading nonenforcement of a particular legal requirement, Congress could empower a second entity to enforce it, such as another federal agency, a state agency, or private parties. That would greatly reduce the value of the agency's nonenforcement promise. Indeed, the EPA's Project XL failed largely for this reason: even when the EPA promised not to enforce environmental laws against regulated parties, private parties made no such promise.[444]

Moreover, Congress should be particularly careful about giving agencies strong incentives to trade nonenforcement and strong bargaining power to force a trade. Indeed, doing so virtually guarantees that, if the agency wants to trade nonenforcement, regulated parties will allow the agency to do so. For example, the Food, Drug, and Cosmetic Act gives the FDA strong incentives to trade nonenforcement (by giving the agency conflicting goals and a great deal of policymaking authority) and overwhelming bargaining power (by giving the agency *ex ante* approval authority). As a result, it shouldn't be surprising that the FDA uses nonenforcement trades so often and so effectively.

CONCLUSION

At first blush, nonenforcement sounds purely deregulatory. But agencies can also use nonenforcement to impose new rules that effectively regulate how parties act. Although agencies might find this practice attractive, it is normatively and legally problematic. It allows agencies to regulate with few constraints, which leads to subpar policy and undermines agencies' legitimacy. In addition, neither the Constitution nor regulatory statutes expressly give agencies this power, and there are good reasons to doubt that either source does so implicitly either. As a result, agencies should avoid trading

444. Thomas E. Caballero, *Project XL: Making It Legal, Making It Work*, 17 STAN. ENV'T L.J. 399, 422 (1998); *see* Seidenfeld, *supra* note 231, at 465.

nonenforcement, and Congress and the President should try to prevent agencies from doing so where possible.