

## ACCOUNTABILITY FOR NONENFORCEMENT

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In recent decades, almost every new presidential administration has come into office after having made campaign promises to deregulate some area of social or economic activity. Democratic candidates promise to lessen the burden on those living in poverty, including limiting enforcement against law-abiding undocumented immigrants. Republican candidates promise to lighten the regulatory burden on business: to pare back laws perceived as excessively costly, to reduce environmental and workplace safety standards, or to deregulate regulated markets. The current administration is no different.

Even large changes in enforcement can generally be defended as reasoned policy shifts, and protected from judicial review by *Heckler v. Chaney*,<sup>1</sup> a 1985 Supreme Court decision that affords agencies considerable enforcement discretion, so long as the change is not a prospective categorical program of nonenforcement, such as President Obama's immigration policies (Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans (DAPA)). This Article suggests that the choice between discretionary nonenforcement, which courts cannot touch, and categorical nonenforcement, which they can, is not binary. Enforcement priorities can result in enforcement declines that are substantial, but not down to zero, even in the absence of a public declaration of nonenforcement. If the availability of judicial review hinges on a public declaration of nonenforcement, the doctrine has a built-in bias in favor of well-heeled, well-connected classes of defendants. When the universe of those affected by the nonenforcement policy is small, an agency can communicate such a shift quietly, without a public declaration, and thus effectively immunize itself from judicial review under *Heckler*. An agency cannot do so when the universe of those

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1 470 U.S. 821 (1985).

affected includes several million undocumented immigrants or a large market of marijuana growers, sellers, and users.

But many significant shifts in enforcement are not categorical in the sense that enforcement does not decline to zero. Instead, enforcement declines by a substantial amount, observable as a pattern of low-priority enforcement. Like a categorical program, large shifts in enforcement over a short period of time are, in effect, similar to rule changes. Unlike categorical shifts, large changes in enforcement are immune from judicial review, and should be immune. Their adoption in the dark, however, is not consistent with the ideas that underpin the rule of law, including transparency, predictability, and accountability.

Changes in enforcement can move in more than one direction: enforcement can increase significantly as the Securities and Exchange Commission saw in the aftermath of the accounting scandals or the Madoff Ponzi scheme, and decrease precipitously, as evidenced at the Consumer Financial Protection Bureau under Acting Director Mick Mulvaney. There is no reason in constitutional or administrative law to treat changes in enforcement policy differently depending on whether enforcement increases or decreases.<sup>2</sup> Policy choices raise similar questions about reviewability and accountability, regardless of whether they increase or decrease enforcement. They also raise symmetrical questions about fair notice and due process and about the separation of powers. We demand that agencies give reasons for changes in rules; reason giving seems appropriate for significant shifts in enforcement, in order to match given reasons with observed enforcement practices, and to subject those reasons to political scrutiny through media coverage and congressional attention, even when judicial review is not available or appropriate.

## I. ALTERNATIVES FOR DEREGULATION

### A. *Three Options for Presidents Who Deregulate*

Presidents can deregulate in a variety of ways. First, a President with solid support in Congress can implement a statutory agenda. During his first (and only) term in office, during which Democrats controlled both chambers of Congress, President Carter passed the Airline Deregulation Act of 1978,<sup>3</sup> on the hope that competition would reduce ticket prices. Second, a President can direct agencies to deregulate by adopting new rules that revoke existing rules and regulations deemed costly or unfair. Additionally, a President can, by executive order, impose roadblocks that make new regulations less likely. Finally, a President can deregulate by appointing department and agency heads who will reduce enforcement of disfavored laws and regulations

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2 At the same time, individual decisions to bring an action are not subject to the same review as individual decisions not to bring an action. Defendants can defend, whereas individuals who are not targeted or victims of misconduct generally do not have a right to sue.

3 Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978).

by directing their enforcement hands to do less, and thereby reduce the impact of existing laws on regulated parties.

The three alternatives are substitutes, if imperfect ones. New statutes are difficult to adopt. They usually require the President to enjoy majority support in both houses of Congress—a feat that ordinarily occurs only in the first two years of an administration but not after that. Even with full control of Congress new statutes are difficult to adopt. This is because statutes, including deregulatory ones, face many layers of review, both inside Congress, as well as in the media, and often in courts. But the advantage of statutory (de)regulation is that statutes are difficult to undo once adopted. President Obama’s marquee achievement, the Affordable Care Act,<sup>4</sup> is a case in point: President Trump and the Republican Congress tried to repeal the statute on several different occasions, only to fail each time.<sup>5</sup>

Deregulatory rulemaking faces considerably fewer political challenges, and less media scrutiny, but is usually no easier to implement than a statute because of significant procedural requirements. Rules and regulations must go through the notice-and-comment process required by the Administrative Procedure Act (APA).<sup>6</sup> The process requires agencies to justify legal rules, including showing that the social welfare benefits of a proposed rule outweigh its costs. Moreover, the interested public has the right to participate in the process and offer comments, to which the agency must respond. In addition, economically significant rules proposed by departments and federal agencies (except for independent agencies that include most financial regulators) must be reviewed by the Office of Information and Regulatory Affairs (OIRA), an agency that is closely associated with the White House and the President of the United States.<sup>7</sup> OIRA often requires substantial amendments to proposed rules, and delays decisions on rules it dislikes, effectively vetoing them.<sup>8</sup> Even if a rule survives the many procedural steps, adopted rules are subject to judicial review, where a court may vacate the rule for failure to respond adequately to public comments or for failure to consider the costs and benefits of adopted rules.<sup>9</sup> There is no safe harbor for deregulatory rules or actions to rescind a properly adopted rule; they, too, must

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4 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

5 See Rachel Roubein, *TIMELINE: The GOP’s Failed Effort to Repeal ObamaCare*, HILL (Sept. 26, 2017), <http://thehill.com/policy/healthcare/other/352587-timeline-the-gop-effort-to-repeal-and-replace-obamacare>.

6 See 5 U.S.C. § 553(c) (2012).

7 Exec. Order No. 12,866, 3 C.F.R. § 638 (1993).

8 See Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1139 (2014).

9 See, e.g., *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (invalidating an SEC rule because the Commission “inconsistently and opportunistically framed the costs and benefits of the rule . . . and failed to respond to substantial problems raised by commenters”).

jump through all procedural hoops.<sup>10</sup> A rule can be repealed by statute, but statutes are difficult to adopt, as explained above. As a result, repealing rules is just as difficult as adopting new rules, if not more so. A statute can pass Congress even if Congress is uninformed and even if the costs of the amendment outweigh its benefits. The same is not true for agency rules. Once a rule has survived the notice-and-comment process, it is very difficult for an agency to reverse course absent compelling evidence showing that the original rule significantly underestimated the costs and/or overestimated the benefits.<sup>11</sup>

Not surprisingly, the vast majority of successful deregulatory regulation by the Trump administration in its first year has been pursuant to the Congressional Review Act.<sup>12</sup> The Act allows a new Congress to repeal rules and regulations published late in the term of an outgoing administration through an expedited legislative process.<sup>13</sup>

There is a third way to deregulate. In recent decades, Presidents have often resorted to nonenforcement as the preferred method to deregulate in lieu of legislative or regulatory processes.<sup>14</sup> The President, and by extension, agency heads, can achieve deregulatory objectives through nonenforcement without significant delays and without any real threat of judicial review, contrary to the very real roadblocks present in legislating and rulemaking. This is because the Supreme Court afforded agencies considerable enforcement discretion for piecemeal enforcement decisions. As long as a change in enforcement policy is not prospective and categorical, it is immune from judicial review.<sup>15</sup> Similar to nonenforcement are soft agency policy positions, such as guidance documents that can be reversed very quickly.<sup>16</sup>

Deregulation through nonenforcement may not outlast the administration but has very real consequences nonetheless. In the first year of the

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10 See, e.g., *Open Cmty. All. v. Carson*, No. 17-2192, 2017 WL 6558502 (D.D.C. Dec. 23, 2017) (holding that the Department of Housing and Urban Development cannot suspend a rule without following the required process).

11 Cf. RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 10–11 (2008) (explaining that neutrally applied cost-benefit analysis can be proregulatory, in particular in environmental, health, and safety regulation).

12 5 U.S.C. § 801 (2012).

13 See Amber Phillips, *Why Republicans' 100-day War on Obama Is About to End*, WASH. POST (Apr. 25, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/04/25/why-republicans-100-day-war-on-obama-is-about-to-end/>.

14 See Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1217 (2014); Daniel E. Walters, *The Judicial Role in Constraining Presidential Nonenforcement Discretion: The Virtues of an APA Approach*, 164 U. PA. L. REV. 1911, 1918 (2016). See generally Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795 (2010).

15 See *Heckler v. Chaney*, 470 U.S. 821 (1985).

16 See generally Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013) (discussing approaches agencies have adopted to avoid or limit presidential, as well as judicial, review).

Trump administration, agency enforcement has declined across the board.<sup>17</sup> Staffing changes at the Environmental Protection Agency (EPA), the Department of Education, and the Food and Drug Administration (FDA) have resulted in laxer enforcement against polluters, for-profit colleges, and medical device manufacturers.<sup>18</sup> Declines in enforcement have also permeated into the financial regulatory agencies that historically have not faced such cutbacks. This development raises several interesting questions about appropriate accountability mechanisms. The following Sections explore, in turn, the legal requirements for enforcement and the history of deregulation through nonenforcement.

*B. The Duty to Enforce the Law and Enforcement Discretion*

The Take Care Clause of the Constitution commands the President “to put the laws into effect, or at least to see that they are put into effect, ‘without failure’ and ‘exactly.’”<sup>19</sup> The words “faithfully executed” do imply some degree of discretion, but most commentators agree that the Clause establishes a presumption that Presidents will dutifully follow existing law, in contrast with the older English tradition of the executive suspending or dispensing with enacted laws.<sup>20</sup> Thus, the executive does not have the authority to either “prospectively license statutory violations or to categorically suspend enforcement of statutes for policy reasons.”<sup>21</sup> By ignoring the mandate to enforce the laws, agencies can nullify statutes, which is inconsistent with the Take Care Clause and the separation of powers.<sup>22</sup>

At the same time, most would agree that the President and, by extension, federal agencies, have the authority to exercise prosecutorial discretion and decline to enforce the law because equity considerations or resource constraints prevent full enforcement.<sup>23</sup> Courts routinely dismiss actions challenging agencies’ failures to enforce explaining that agencies’ individual nonenforcement decisions are not reviewable or that the plaintiff lacks standing. In *Heckler v. Chaney*,<sup>24</sup> the best-known Supreme Court decision on non-

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17 Cf. Lisa Rein & Andrew Ba Tran, *How the Trump Era Is Changing the Federal Bureaucracy*, WASH. POST (Dec. 30, 2017), [https://www.washingtonpost.com/politics/how-the-trump-era-is-changing-the-federal-bureaucracy/2017/12/30/8d5149c6-daa7-11e7-b859-fb0995360725\\_story.html?utm\\_term=.5cb4ed7332b3](https://www.washingtonpost.com/politics/how-the-trump-era-is-changing-the-federal-bureaucracy/2017/12/30/8d5149c6-daa7-11e7-b859-fb0995360725_story.html?utm_term=.5cb4ed7332b3).

18 Cf. Ralph Nader, Opinion, *Trump’s Anti-Consumer Agenda Hurts His Voters*, N.Y. TIMES (Oct. 23, 2017), <https://www.nytimes.com/2017/10/23/opinion/ralph-nader-trump-consumers.html>.

19 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, 799 (2013).

20 See Walters, *supra* note 14, at 1919.

21 Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 704 (2014).

22 See Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1113–14 (2013).

23 See, e.g., Walters, *supra* note 14, at 1924.

24 470 U.S. 821 (1985).

enforcement, the Court held that “an agency’s decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2).”<sup>25</sup>

The two views, the constitutional duty to enforce the law and the discretion not to enforce, are somewhat in tension because the line between discretionary nonenforcement, which is permitted, and categorical nonenforcement, which is not, is quite blurry in the absence of a “smoking gun”: a clear presidential or agency directive to not enforce.<sup>26</sup> Without a public announcement, it is unclear at what point failure to enforce amounts to “abdication,” leading to challenges under *Heckler*, and whether failure to enforce can operate as de facto revocation (i.e., desuetude).<sup>27</sup> Ultimately, for an administration averse to legal challenges and interested in a quick change, *Heckler* makes the choice simple: so long as a time-limited change is acceptable, nonenforcement is always superior to new rules or statutes.

Several scholars have argued that *Heckler v. Chaney* has been misunderstood: it does not grant agencies complete discretion to enforce, or not, any law.<sup>28</sup> Professor Zachary Price contends that nonenforcement amounts to the usurpation of the lawmaking power and is constitutionally infirm.<sup>29</sup> Professor Lisa Bressman and, more recently, Daniel Walters have argued that categorical nonenforcement is inconsistent with the APA’s requirement that agency decisions be supported by substantial evidence and avoid arbitrariness.<sup>30</sup> They both note that one can read *Heckler* to argue that it forecloses judicial review only in a limited set of particular discretionary nonenforcement decisions. According to the Court in *Heckler*, review would be available where an agency “‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”<sup>31</sup> Then, judicial review is appropriate: such a change is equivalent to a repeal of a legal rule and thus should be treated the same. The anti-abdication exception is not large; it includes examples where the agency implemented an enforcement guideline that disregarded the statutory command or where it achieved the same result through a pattern of nonenforcement.<sup>32</sup>

The line between piecemeal and categorical nonenforcement has not been carefully drawn. The following Section reviews the history of nonenforcement, highlighting the different approaches taken by Democratic and Republican administrations, and the different legal consequences.

25 *Id.* at 832.

26 That is, unless only publicly announced programs of nonenforcement, such as President Obama’s DACA/DAPA programs, are prohibited.

27 See discussion *infra* in Section II.C.

28 See, e.g., Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 38 (2008); Walters, *supra* note 14, at 1929.

29 Price, *supra* note 21, at 769.

30 See Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1678 (2004); Walters, *supra* note 14, at 1927.

31 *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)).

32 Walters, *supra* note 14, at 1930–31.

### C. *The History of Deregulation Through Nonenforcement*

Presidents in recent decades have increasingly resorted to nonenforcement as a substitute to deregulatory legislation or rulemaking. Ronald Reagan was elected with a mandate to deregulate. Although much of his effort was directed at reducing affirmative regulatory burdens by amending statutes and requiring cost-benefit review for new regulations,<sup>33</sup> President Reagan was the first to use nonenforcement offensively. While he did not attempt to formally direct enforcement priorities, his administration sought budget reductions in disfavored agencies that limited their capacity to enforce.<sup>34</sup> As a result, enforcement declined at the EPA, the Occupational Safety and Health Administration (OSHA), and the Equal Employment Opportunity Commission (EEOC) by seventy percent or more.<sup>35</sup> Republican Presidents that followed, George H.W. Bush and, to an even greater extent, George W. Bush, relied more heavily on nonenforcement to further their deregulatory agendas.<sup>36</sup> Like Reagan, their efforts focused on disfavored agencies, such as the Department of Labor, OSHA, the EPA, the FDA, and the Civil Rights Division at the Department of Justice.<sup>37</sup>

President Obama, too, resorted to nonenforcement discretion when his legislative efforts went nowhere in a hostile Congress. Whereas Republican administrations deregulated through nonenforcement by appointing agency heads who were anti-enforcement, President Obama acted more transparently and directly, by sending a memorandum to agencies authorized to enforce immigration and marijuana laws, and directing them not to enforce certain legal provisions. Both policies were publicly announced after years of low-priority enforcement.<sup>38</sup>

President Obama's marijuana policy received some support in Congress after it was announced in the form of appropriations riders barring the DOJ from using funds to prevent states from implementing their own, laxer marijuana policies.<sup>39</sup> The immigration policy, on the other hand, was challenged in court. Texas and twenty-five other states successfully sued to enjoin the second of the two deferred action programs, DAPA. The district court, as

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33 See Exec. Order No. 12,291, 3 C.F.R. § 127 (1981). For a longer overview of the history, see Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. RES. L. REV. 1119, 1125–26 (2015).

34 See Andrias, *supra* note 22, at 1059.

35 See Price, *supra* note 33, at 1126.

36 Kate Andrias, who served on President Obama's White House staff, observed that “[George W.] Bush exercised more extensive control over enforcement than did many of his predecessors.” Andrias, *supra* note 22, at 1061.

37 See *id.* at 1061–63.

38 See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 104 (2015); Robert A. Mikos, *Medical Marijuana and the Political Safeguards of Federalism*, 89 DENV. U. L. REV. 997, 1002–03 (2012); Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937, 953–54 (2017).

39 Consolidated Appropriations Act, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332–33 (2016); see also Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2015) (including similar restriction).

well as the court of appeals, held that the program, due to its categorical nature, was not merely an exercise of enforcement discretion but an action, akin to a rule, and thus should have gone through notice-and-comment review.<sup>40</sup>

And President Trump's administration, like his Republican predecessors, has been less willing to enforce laws it perceives as antibusiness, ranging from environmental laws to consumer protection and fair housing. This pattern is not new. Between 1948 and 1977, the National Labor Relations Board remedial action decisions in the area of unfair labor were more pro-union during Democratic administrations and more probusiness during Republican administrations.<sup>41</sup> Unlike his predecessors, Trump's administration has also retreated in enforcement by financial enforcement agencies.<sup>42</sup> The difference between Trump's approach and Obama's, however, is that President Obama deregulated through nonenforcement transparently, with a prospective announcement, whereas President Trump's administration has done so *sub rosa*, all the while publicly denying that enforcement policy and priorities have changed.<sup>43</sup> The legal challenge presented by the different approaches is the fact that transparently announced policies can and have been challenged in court, whereas nontransparent ones have not and, as a general matter, cannot. The asymmetry creates perverse incentives for government to be less transparent.

## II. ACCOUNTABILITY MECHANISMS FOR NONENFORCEMENT ALTERNATIVES

Under *Heckler v. Chaney*, case-by-case decisions not to enforce are not subject to judicial review, while categorical abdications of enforcement are. In between the two extremes is a large gray zone of low-priority enforcement. Low-priority enforcement, or a change to low-priority enforcement, may reflect a policy choice to allocate resources to different areas of activity that are within agency discretion and not subject to judicial review. It may also be true of categorical nonenforcement, but without a smoking-gun public document showing that the agency abdicated its responsibility to enforce the law. I argue that, in theory, the latter is reviewable under *Heckler v. Chaney*. In practice, however, that may prove difficult.

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40 See *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam).

41 See Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 208 (1982).

42 Urska Velikonja, *Behind the Annual SEC Enforcement Report: 2017 and Beyond* (Nov. 27, 2017) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3074073](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3074073).

43 See discussion *infra* in Section II.B.

A. *Publicly Announced Nonenforcement*

The *Heckler v. Chaney* decision, as well as the lower court's decision in *Texas v. United States*,<sup>44</sup> is consistent with the notion that prospective nonenforcement policies are like broadly applicable rules and thus must follow the notice-and-comment process. The Constitution and the APA impose limits on agency prosecutorial discretion, and this is one of them. Even if one likes the policies that DACA and DAPA express, the process for their adoption was not proper.

A contrary holding in *Texas v. United States* would open the back door to rulemaking that avoids all procedural and quality safeguards that have been put in place.<sup>45</sup> It would defeat the principles of separation of powers and due process, not to mention the APA. It would also be unwise, leading to arbitrary outcomes.

To see how, let us analyze what would result if the opposite rule were in place. If categorical nonenforcement decisions were protected from judicial review as an exercise of prosecutorial discretion, individuals and entities might obtain legal rights under the program with appurtenant due process protections. For example, a thirty-year-old without legal status in the United States applies for a temporary work permit under DACA. A few years later, a new administration comes into office and unwinds the policy.<sup>46</sup> There are two possible results: (1) the thirty-year-old loses his work permit and potentially faces deportation based on the information he supplied to the government in order to obtain the work permit; or (2) the thirty-year-old enjoys the legal protections of his entitlement to nonenforcement, barring the government from using the information that the individual supplied.<sup>47</sup> If the new administration cannot implement option 1 because the promise of nonenforcement created legally enforceable reliance, it could, presumably, end the program prospectively.<sup>48</sup> This would create classes of individuals or entities who are similar in every respect, except for the moment when they became eligible. But this is not about DACA alone.<sup>49</sup> DACA is merely the latest manifestation of an old problem. Seemingly arbitrary disparities created by shifts

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44 86 F. Supp. 3d 591, 645 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court sub nom.* *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

45 For a discussion of potential reliance interests by parties that rely on nonenforcement, see Price, *supra* note 38.

46 I am assuming an administration always retains the right to undo a policy and that it can undo under the same process as the process employed to implement it. The assumption is somewhat in tension with the claim that nonenforcement options are substitutes, but not catastrophically. Rules cannot undo statutes, and nonenforcement cannot undo a rule permanently.

47 Because the work permits were, by design, temporary, I do not discuss the third option, which would require the new administration to extend work permits, perhaps indefinitely.

48 See generally Price, *supra* note 38.

49 See *id.* at 943–45 (discussing several cases in which courts credited parties' reliance on governmental assurances of nonenforcement and others in which courts refused to do so).

in enforcement policies push against the ideas of fairness, equality, and governance by the rule of law.

### B. *Quiet Nonenforcement*

A categorical change in enforcement policy can be announced publicly and implemented by way of a publicly distributed memorandum, or quietly. The former is subject to judicial review, whereas the latter is not, yet both may give rise to legally protected reliance interests.<sup>50</sup>

There may be good reasons to treat publicly announced enforcement policies differently from tacitly adopted ones. The first is evidentiary: an announced enforcement policy is easy to identify. The second is that a public announcement of nonenforcement may engender reliance that, in turn, can result in significant legal consequences, protected by due process. It produces these effects quickly, often from the moment that the announced policy becomes effective.

But not every categorical change in enforcement is, or needs to be, publicly announced. Except for a single punitive enforcement action against Wells Fargo for well-publicized abuses in auto and mortgage lending, the Consumer Financial Protection Bureau (CFPB) has not brought a single enforcement action since Director Richard Cordray stepped down in late November 2017 and Trump-appointee Mick Mulvaney took over as Acting Director.<sup>51</sup> By contrast, between April 1, 2016, and March 31, 2017, the CFPB brought sixty-six enforcement actions and secured \$11.9 billion in consumer relief.<sup>52</sup> The CFPB under Mulvaney has also dropped pending actions despite vigorous objections by the enforcement staff.<sup>53</sup> There has been no public announcement that the CFPB would cease all enforcement, but regulated parties can infer as much and proceed accordingly.<sup>54</sup>

Similarly, the Department of Housing and Urban Development (“HUD”) has stopped enforcing civil rights and fair housing laws.<sup>55</sup> Since Trump appointees took over, the Department has frozen enforcement

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50 *See id.*

51 *See Enforcement Actions*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/policy-compliance/enforcement/actions/> (last visited Apr. 3, 2018).

52 *See* CONSUMER FIN. PROT. BUREAU, FACTSHEET: CONSUMER FINANCIAL PROTECTION BUREAU BY THE NUMBERS I (2017), [https://files.consumerfinance.gov/f/documents/201701\\_cfpb\\_CFPB-By-the-Numbers-Factsheet.pdf](https://files.consumerfinance.gov/f/documents/201701_cfpb_CFPB-By-the-Numbers-Factsheet.pdf).

53 *See* Chris Arnold, *Trump Administration Plans to Defang Consumer Protection Watchdog*, NPR (Feb. 12, 2018), <https://www.npr.org/2018/02/12/584980698/trump-administration-to-defang-consumer-protection-watchdog>.

54 In February 2018, Mulvaney suggested that the CFPB would allow state attorneys general to take the lead on enforcement more often. *See* Rachel Witkowski, *AGs, Not CFPB, Should Take a Greater Role on Enforcement: Mulvaney*, AM. BANKER (Feb. 28, 2018), <https://www.americanbanker.com/news/ags-not-cfpb-should-take-greater-role-on-enforcement-mulvaney>.

55 Glenn Thrush, *Under Ben Carson, HUD Scales Back Fair Housing Enforcement*, N.Y. TIMES (Mar. 28, 2018), <https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html>.

actions against local governments and businesses and sidelined officials who were prosecuting civil rights cases.<sup>56</sup> Despite major shifts, Secretary Ben Carson has vigorously denied that the Department has ceased enforcement of antidiscrimination and fair housing laws. He explained, through the Department spokesman, that there was “no mission shift” and the changes were “part of the routine recalibration undertaken from administration to administration.”<sup>57</sup>

Without a public announcement, no legal challenge to the change in enforcement policy appears likely, even if the rules of the game really have changed for firms such as JPMorgan Chase<sup>58</sup> or Citibank.<sup>59</sup> Neither *Heckler* nor *Texas v. United States* mandates that only publicly announced categorical nonenforcement policy is outside the scope of prosecutorial discretion. A quiet decision not to enforce a statute or not to enforce violations by a class of defendants is legally subject to the same constraints as a public one, and should be reversed if challenged in court. But, in reality, a quiet change may not be challenged for a long time, if at all. And even if it were, an agency could plausibly argue that failure to prosecute is merely evidence of policy shifts in the face of budget constraints. At the same time, a quiet change that was communicated to regulated entities or individuals may give rise to the same due process and reliance interests as a publicly announced policy. Even if a publicly announced policy is not challenged in court, a new administration may quickly reverse the program.<sup>60</sup> A quiet program, by contrast, will neither be challenged in court nor reversed by a new administration, at least until the new administration learns of it.

This produces an asymmetry: similarly situated parties are treated differently because one group is subject to a publicly announced categorical change and the other to a quiet one. More concerning is that the effects will not be distributed equally. President Obama did not publicly announce the DACA memorandum because he generally operated transparently, though he did; he did so to get the message out to almost two million individuals who were eligible. It is impossible to send out a message to such a large group quietly. By contrast, an agency such as the CFPB could send a quiet message to regulated entities that all enforcement will stop. To the extent that publicity is relevant for whether an enforcement decision is challenged, the rule against categorical nonenforcement has a built-in bias in favor of

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56 *Id.* (reporting that frozen actions include “a half-dozen fair housing investigations given the highest priority” under Carson’s predecessor in the Obama administration).

57 *Id.*

58 See JPMorgan Chase Bank, N.A., CFPB No. 2017-CFPB-0015 (Aug. 2, 2017), [https://www.consumerfinance.gov/documents/5120/201708\\_cfpb\\_JPMorgan-Chase\\_consent-order.pdf](https://www.consumerfinance.gov/documents/5120/201708_cfpb_JPMorgan-Chase_consent-order.pdf).

59 See Citibank, N.A., CFPB No. 2017-CFPB-0021 (Nov. 21, 2017), [https://www.consumerfinance.gov/documents/5898/cfpb\\_citibank-n.a.\\_consent-order\\_112017.pdf](https://www.consumerfinance.gov/documents/5898/cfpb_citibank-n.a._consent-order_112017.pdf).

60 See, e.g., Tal Kopan, *Trump Ends DACA but Gives Congress Window to Save It*, CNN (Sept. 5, 2017), <https://www.cnn.com/2017/09/05/politics/daca-trump-congress/index.html>.

small, discrete, well-advised, and often deep-pocketed groups. As result, after *Texas v. United States*, it appears unlikely that future administrations will seek to adopt nonenforcement programs like DACA that would benefit thousands or millions. On the other hand, quiet nonenforcement that benefits small, well-heeled groups would continue to flourish.

### C. Low-Priority Enforcement

There are at least two types of low-priority enforcement that do not give rise to the concerns expressed above. But others do raise concerns of the same kind as categorical nonenforcement.

Some statutes are honored in the breach because enforcement agencies do not consider them terribly important. At some point, regulated entities and individuals may begin to rely on nonenforcement. Laws that are not enforced for an extended period of time may lack democratic support, making enforcement unfair to the defendant.<sup>61</sup> Federal courts have reluctantly deployed the desuetude defense of due process, observing that the lack of enforcement could be the product of limited budgets. Prosecutors are forced to choose how to use their resources,<sup>62</sup> so lack of enforcement does not necessarily imply a lack of democratic support for the unenforced statute.<sup>63</sup> As a general matter, defense of desuetude requires a long period of nonenforcement, at least a decade, but probably longer.<sup>64</sup>

Also, low-priority enforcement often reflects a choice driven by budget constraints and policy priorities. Budgets are nearly always painfully small and agency enforcement heads possess considerable discretion in selecting the targets of their investigations. Policy shifts will often correlate with the strength of policy preferences of agency heads and may shift considerably from one administration to the next. For example, SEC Chair Mary Jo White came into office in 2013 announcing a crackdown on “broken windows” and a wide-ranging examination of private equity.<sup>65</sup> She ratcheted up enforcement and faced congressional scrutiny for both the promise to crack down and its execution. White’s programs were a significant departure from the baseline set by Chair Mary Schapiro.

The current SEC Chair Jay Clayton’s priorities, too, are a significant departure from Chair White’s priorities. The SEC is on track to reduce the

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61 See Price, *supra* note 38, at 1016.

62 See Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors Are Wrong for America*, 106 COLUM. L. REV. 2207, 2216 n.13 (2006) (reviewing CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005)) (adding that prosecutions may be absent because no one violated the law or because there was no evidence of violations).

63 The Supreme Court decided *Lawrence v. Texas* on liberty due process grounds, not on desuetude, even though the sodomy statute that led to Lawrence’s conviction had not been enforced. 539 U.S. 558, 558 (2003).

64 See Price, *supra* note 38, at 1018 (proposing a fifteen-year trigger).

65 See Mary Jo White, Chair, SEC, Remarks at the Security Enforcement Forum (Oct. 9, 2013), <https://www.sec.gov/news/speech/spch100913mjw>.

number of employees in the Division of Enforcement by 100 in fiscal year 2018,<sup>66</sup> from 1377 to fewer than 1300.<sup>67</sup> Under Clayton, the SEC has significantly reduced enforcement against Wall Street financial firms.<sup>68</sup> In the previous four years (2013–2016), under the direction of President Obama-nominated SEC Chair Mary Jo White, the SEC secured settlements and monetary penalties of at least \$1 million against twenty-one, twenty-three, twenty-nine, and forty-two Wall Street financial firms each year, respectively.<sup>69</sup> During the first six months of President Trump’s administration, the SEC prosecuted six Wall Street financial firms: of those, five were carryover cases from President Obama’s administration where either former Chair Mary Jo White voted to bring the action or the firm agreed in a parallel DOJ plea deal, entered before Trump’s inauguration, to settle with the SEC.<sup>70</sup> There was only one new action against a Wall Street firm that resulted in a settlement that exceeded \$1 million between Clayton’s appointment and the end of the 2017 fiscal year.<sup>71</sup> In the subsequent four months, the SEC brought three more such cases,<sup>72</sup> a nearly seventy percent decline compared with the average rate from 2013 to 2016.

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66 Fiscal year (FY) 2018 began on October 1, 2017, and will end on September 30, 2018.

67 Dave Michaels, *SEC Signals Pullback from Prosecutorial Approach in Enforcement*, WALL ST. J. (Oct. 26, 2017), <https://www.wsj.com/articles/sec-signals-pullback-from-prosecutorial-approach-to-enforcement-1509055200>. *But see* SEC, FISCAL YEAR 2018 CONGRESSIONAL BUDGET JUSTIFICATION 13 (2017), <https://www.sec.gov/files/secfy18congbudjust.pdf> (predicting a decline of thirty-four staff). In part, the result is due to the hiring freeze imposed on the federal government. The decline is nonetheless regrettable given that the Commission worked hard to increase enforcement staff since FY 2012, when it had 1219 full-time employees. SEC, FISCAL YEAR 2014 CONGRESSIONAL BUDGET JUSTIFICATION 14 (2013), <https://www.sec.gov/about/reports/secfy14congbudjust.pdf>.

68 The term “Wall Street financial firm” includes subsidiaries of public firms and public holding companies, usually registered as broker-dealer or investment advisors, but also in their capacity as transfer agents and intermediaries in other capacities.

69 All data on file with author.

70 *See* Velikonja, *supra* note 42; *see also* Press Release, U.S. Dep’t of Justice, State Street Corporation Agrees to Pay More than \$64 Million to Resolve Fraud Charges (Jan. 18, 2017), <https://www.justice.gov/opa/pr/state-street-corporation-agrees-pay-more-64-million-resolve-fraud-charges> (agreeing to enter into a deferred prosecution agreement and pay \$32.3 million to the DOJ and to offer an equal amount as a civil penalty to the SEC).

71 *See* Press Release, SEC, Barclays to Pay \$97 Million for Overcharging Clients (May 10, 2017), <https://www.sec.gov/news/press-release/2017-98>.

72 *See* Merrill Lynch, Pierce, Fenner & Smith Inc., Exchange Act Release No. 82,382, Advisers Act Release No. 4831 (Dec. 21, 2017), <https://www.sec.gov/litigation/admin/2017/34-82382.pdf> (settling to nonscienter violations and agreeing to pay a \$13 million fine); Wells Fargo Advisors, LLC, Exchange Act Release No. 82,054 (Nov. 13, 2017), <https://www.sec.gov/litigation/admin/2017/34-82054.pdf> (settling to nonscienter violations and agreeing to pay a \$3.5 million fine); UBS Fin. Servs. Inc., Securities Act Release No. 10,433, Exchange Act Release No. 81,974, Advisers Act Release No. 4803 (Oct. 27, 2017), <https://www.sec.gov/litigation/admin/2017/33-10433.pdf> (settling to nonscienter violations and agreeing to pay a \$3.5 million fine).

Unlike White, Clayton's SEC has made no public statement that it would reduce enforcement against large financial firms. To the contrary: SEC leadership denies that any change has taken place.<sup>73</sup> The observed decline may reflect a policy shift in enforcement priorities that is within the outer bounds of prosecutorial discretion, or may be a categorical change in enforcement of a set of rules, a step outside the protected space of prosecutorial discretion. The public does not know, but that does not imply that the targets are in the dark as well. Well-advised by counsel with deep relationships at the Commission, regulated parties are certainly in the position to read the tea leaves.<sup>74</sup>

Categorical nonenforcement is prohibited by *Heckler v. Chaney*,<sup>75</sup> but large shifts in enforcement priorities are not—even when they lead to massive declines in enforcement.<sup>76</sup> This produces an asymmetry. Discretionary nonenforcement decisions receive no judicial scrutiny, even when they lead to very large declines in enforcement. By contrast, massive increases in enforcement do face judicial scrutiny—not on the level of policy, but each individual defendant can challenge the agency's action.<sup>77</sup> Perhaps that is as it should be, because nonenforcement does not threaten individual liberties in the same way as enforcement. To the extent that nonenforcement can substitute for deregulation, the asymmetry produces a deregulatory bias

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73 See Stephanie Avakian, Co-Dir., Div. of Enf't, SEC, *The SEC Enforcement Division's Initiatives Regarding Retail Investor Protection and Cybersecurity* (Oct. 26, 2017), <https://www.sec.gov/news/speech/speech-avakian-2017-10-26> (asserting that the SEC is not directing fewer resources to the prosecution of financial fraud).

74 Nothing in this Article is meant to suggest that the SEC has, in fact, adopted a quiet policy of categorical nonenforcement. It relies on observable evidence of a significant decline in the number of actions and the size of sanctions imposed on Wall Street firms. A couple of speeches Chair Clayton has made since his nomination suggest the shift: during his confirmation hearing before the Senate Banking Committee, Clayton said he would do what he can to root out "fraud and shady practices," and bad actors from our capital markets. See Jay Clayton, Nominee for Chairman, SEC, *Opening Remarks to the Senate Committee on Banking, Housing, and Urban Affairs* (Mar. 23, 2017) [hereinafter *Opening Remarks of Jay Clayton*], [https://www.banking.senate.gov/public/\\_cache/files/640c2f54-9c7d-47c2-8dc7-7d4debd6a13d/559D4F50EF7D195B8291094DA7490CA4.clayton-testimony-3-23-17.pdf](https://www.banking.senate.gov/public/_cache/files/640c2f54-9c7d-47c2-8dc7-7d4debd6a13d/559D4F50EF7D195B8291094DA7490CA4.clayton-testimony-3-23-17.pdf).

Clayton later explained what he meant by his statement that he would make sure to go after the real fraudsters, but pare back enforcement and moderate the size of financial penalties against firms whose employees commit securities violations, including fraud, but where the firm does not benefit from the misconduct. See Dave Michaels & Andrew Ackerman, *SEC Chairman Nominee Jay Clayton Calls for Scaling Back Regulations to Encourage IPOs*, *WALL ST. J.* (Mar. 23, 2017), <https://www.wsj.com/articles/sec-chairman-nominee-jay-clayton-says-past-wall-street-work-is-a-strength-1490281093> (adding that shareholders bear the cost of financial penalties and expressing belief that "individual accountability drives behavior more than corporate accountability").

75 470 U.S. 821 (1985).

76 See, e.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *SUFFOLK U. L. REV.* 881, 896–97 (1983) (arguing in favor of more relaxed review of nonenforcement than of enforcement).

77 A larger share of defendants in follow-on actions contested their charges when Mary Jo White was SEC chair than did when Mary Schapiro was chair. Data on file with author.

regardless of whether the law (not) being enforced is liberal or conservative. An agency that wants to lower the cost of compliance for regulated parties can do so by changing the rule or by not enforcing the rule—the ultimate result is no different. This asymmetry is built into administrative (and criminal) law.

### III. IMPROVING ACCOUNTABILITY

#### A. *Justifying Reform*

Due process may require judicial review of individual enforcement decisions to protect the rights of individuals who are targets of enforcement, even if we do not make such review available in individual decisions not to enforce. This asymmetry is unavoidable in our constitutional system. But there is no principled reason to favor changes in enforcement policy that reduce enforcement over those that increase enforcement.<sup>78</sup> Institutional reform litigation may be past its heyday but could be useful against cases of systematic nonenforcement.

But judicial review is not the only layer of review, particularly for policy choices in enforcement that affect large groups of potential defendants. Presidents may review enforcement policies.<sup>79</sup> Announced shifts in enforcement policy may be subject to public scrutiny on announcement.

Changes to enforcement priorities are not illegal.<sup>80</sup> As explained in Part I, legal precedents secure the agencies' authority to direct enforcement dollars as they believe is best. But it is, or should be, a contestable choice. Shifts in enforcement priorities raise at least three concerns: welfare effects, notice, and transparency that is a prerequisite for meaningful accountability. Yo-yo movements in enforcement are less than optimal from a social welfare perspective. In order to ramp up enforcement in one area, an agency may create a new task force, hire new or reassign existing employees, and train them. Potential defendants respond by increasing compliance in areas of high enforcement activity. Four years later, the agency reassigns those same employees to different tasks, and potential defendants increase compliance in other areas of their business. The effects of high enforcement may persist for a little while, but dissipate over time. Defendants may negotiate with the agency strategically, knowing that a new administration would bring change. Regulated parties may underinvest in needed reform knowing that their investments may only produce returns until the next election. Quick, and, in particular, large changes in enforcement activity produce waste at the agency and for the regulated parties.

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<sup>78</sup> *But see* Frank H. Easterbrook, *On Not Enforcing the Law*, 7 REG. 14, 16 (1983) (arguing for more lenient review of nonenforcement and inaction, than agency action, on the basis of individual autonomy); Scalia, *supra* note 76.

<sup>79</sup> *See* Andrias, *supra* note 22, at 1033–35.

<sup>80</sup> Potential defendants have no legally protected expectations that the law will or will not be enforced with a certain level of intensity absent a public categorical declaration. Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 48–50 (2017).

The second concern is notice, specifically the lack of fair notice about the change in enforcement. When Mary Jo White ramped up enforcement at the SEC, the defense bar complained about fair notice to their clients, even invoking the rule of lenity in criminal cases.<sup>81</sup> At the same time, decisions not to enforce “advantages [the] interests . . . [of] the objects of regulation but not the beneficiaries.”<sup>82</sup> While judges have been receptive to the notice arguments by defendants, they have not been as willing to hear the potential victims. Such disparities should be defended, not presumed. It is not obvious why reliance expectations by defendants should be legally protected while similar reliance interests by the beneficiaries of regulation should not.

Which brings me to the third objection: transparency. For example, the SEC chair might say that the Commission will police “broken windows”<sup>83</sup> or aim to root out “fraud and shady practices” and bad actors from our capital markets.<sup>84</sup> Both statements can be evaluated for effectiveness after allowing a reasonable time for implementation. But agencies have adopted significant policy changes in the dark. As described above, the CFPB no longer enforces anything, and HUD no longer enforces civil rights and fair housing violations. The SEC no longer seeks admissions from defendants it targets, and has issued a waiver of automatic disqualification provisions to defendants who settled 10(b) claims, something it has not done previously.<sup>85</sup> These changes in enforcement policy were implemented quietly. Quiet changes undermine agency credibility and increase “the potential for narrow interests to obtain special treatment.”<sup>86</sup> Selective nonenforcement, such as the apparent decision to go easy (or easier) on large financial firms or payday lenders, also raises the concern that it is an “attractive means of rewarding favored

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81 Cf. Zachary Price, *The Court After Scalia: The Rule of Lenity*, SCOTUSBLOG (Sept. 2, 2016, 2:14 PM), <http://www.scotusblog.com/2016/09/the-court-after-scalia-scalia-and-the-rule-of-lenity/>. See generally Anna Currier, Note, *The Rule of Lenity and the Enforcement of the Federal Securities Laws*, 5 AM. U. BUS. L. REV. 79 (2015).

82 Bressman, *supra* note 30, at 1685; see also William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After Bennett v. Spear*, 49 ADMIN. L. REV. 763, 770 (1997); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 186–88 (1992).

83 Policing “broken windows” was one of SEC Chair Mary Jo White’s early enforcement priorities. See White, *supra* note 65.

84 See Opening Remarks of Jay Clayton, *supra* note 74.

85 See Letter from Elizabeth M. Murphy, Assoc. Dir., Div. of Corp. Fin., SEC, to David S. Huntington, Attorney, Paul, Weiss, Rifkind, Wharton & Garrison LLP (May 22, 2017) [hereinafter Murphy Letter], <https://www.sec.gov/divisions/corpfin/cf-noaction/2017/cooperman-052217-506d.pdf>; see also Letter from David S. Huntington, Attorney, Paul, Weiss, Rifkind, Wharton & Garrison LLP, to Sebastian Gomez Abero, Chief of the Office of Small Bus. Policy, SEC (May 18, 2017), <https://www.sec.gov/divisions/corpfin/cf-noaction/2017/cooperman-052217-506d.pdf>. In fact, whether the defendant violated a scienter-based provision of securities laws is a key factor in SEC waiver determinations.

86 Bressman, *supra* note 30, at 1691 (“When agencies provide explanations for their nonenforcement decisions, they hinder improper influences from dominating those decisions at public expense.”).

constituencies.”<sup>87</sup> None of these were announced publicly, allowing the agency to plausibly deny that any change has taken place.

*B. Remedies for a Lack of Accountability*

Under federal administrative law, categorical abdications of enforcement are subject to judicial review under *Heckler v. Chaney*<sup>88</sup> for violations of the Administrative Procedure Act, but case-by-case decisions not to enforce are not. Low-priority enforcement falls in between, in that (1) in the absence of a smoking-gun public document, one cannot prove that the agency abdicated its responsibility to enforce the law, and thus one cannot show that the agency did so for arbitrary reasons; and (2) a shift to low-priority enforcement may be within agency discretion and thus not subject to judicial review.

There is no reason in constitutional or administrative law to treat discretionary policy choices differently depending on whether they result in an increase or a decrease in enforcement. Both raise similar questions about fair notice and due process, and about the separation of powers. We demand that agencies give reasons for changes in rules. Reason giving seems appropriate for significant shifts in enforcement in order to match given reasons with observed enforcement practices and to subject those reasons to political scrutiny through media coverage and congressional attention, even when judicial review is not available or appropriate.

Lumping patterns of nonenforcement with nonreviewable case-by-case decisions presents several risks. A change on a large scale in a short amount of time significantly changes the de facto legal compliance obligations for a large segment of the financial industry. Since Clayton took over the reins at the SEC, only “real fraud” is truly prohibited—think *The Wolf of Wall Street*—while more sophisticated types of fraud and other serious violations of the securities laws fly under the radar. That change occurred rapidly and largely out of the public eye, even though defendants surely understand the changed landscape.

Whatever the reason for the change, it should not matter from a deterrence perspective or from the separation of powers perspective: a pattern of nonenforcement may be difficult to distinguish from the categorical nonenforcement that courts have held is akin to a rule change. If so, it should be evaluated under similar standards. If not, agencies have an incentive to move lawmaking from more transparent rulemaking to nonenforcement,<sup>89</sup> and to move enforcement policies from more public categorical pronouncements to quiet policy changes. If that is the case, the upshot is that small, discrete, but well-connected minorities will consistently benefit, whereas nonenforcement directed at a more diffuse class of subjects will be reviewed under a more stringent standard.

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87 Price, *supra* note 21, at 687.

88 470 U.S. 821 (1985).

89 See generally Deacon, *supra* note 14.

Subjecting patterns of nonenforcement to judicial review would involve difficult line-drawing questions. The district court in *Texas v. United States*<sup>90</sup> classified President Obama's DAPA program fairly easily as "affirmative action rather than inaction."<sup>91</sup> When is a change in enforcement, absent a public declaration, sufficient? Should such changes be reviewed like rules, implying that unless the change went through a notice-and-comment process, it is illegal? Or should enforcement changes be treated like case-by-case agency decisions, which courts review to ensure that they are based on substantial evidence? It also raises questions about remedies. The *Texas v. United States* court enjoined the program. An injunction ordering an agency to enforce the law may itself be unenforceable. The agency can always claim the change is a result of budget constraints or the fact that no violations were discovered. Institutional reform litigation could serve as a model for judicial intervention against nonenforcement, but raises significant separation of powers concerns.<sup>92</sup>

Alternatively, a better approach would be to insist that all significant policy choices in enforcement be disclosed, so that they can be contested. The best remedy for excessive crackdowns or gaps in enforcement is not judicial but political. Clear legislative guidelines and mechanisms by which the legislature can police enforcement deviations and more honest reporting of enforcement activities may be the better approach.<sup>93</sup> When agency discretion is overbroad the burden lies clearly on Congress.

Similarly, to preserve a semblance of symmetry in enforcement and non-enforcement actions, the rule of lenity should be read narrowly, applying only when no reasonable person would believe that the violation was outside the scope of the prohibition. The victims have no analogous right, and reasonable interpretations of a vague statute satisfy fair notice, even without precedent directly on point. Congress may always intervene if it believes reasonable interpretations are beyond the scope of the statute.

Congressional oversight as proposed here may be of limited effectiveness during periods of unified government, but honest agency reporting has promise. Agencies are already required to report to Congress considerable amounts of information about their activities, including on enforcement.<sup>94</sup> But their incentives are biased. They choose the enforcement metrics that they report, and so they use the ones that are more easily manipulated.<sup>95</sup>

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90 86 F. Supp. 3d 591, 645 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam).

91 *Id.* at 654.

92 For example, a court could appoint a receiver to oversee the enforcement program. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (discussing class action litigation that aims to enforce public constitutional and statutory law).

93 See Sohoni, *supra* note 80, at 91–92.

94 Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (codified in scattered sections of 5, 18, and 22 U.S.C.).

95 See Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 972–74 (2016).

Rather than disclose reports, disclosing raw data and outsourcing analysis to the crowd might be more productive and certainly more transparent. The SEC, for example, already makes available all public company financial disclosures that it receives. In fact, it requires issuers to tag disclosures, so as to facilitate empirical research.<sup>96</sup> Agencies could do the same with their enforcement data. The public interest in such information is considerable.<sup>97</sup>

#### CONCLUSION

Administrative law does not impose substantial constraints on agencies' ability to significantly change enforcement priorities with each change of administration. That is generally as it should be: it keeps courts out of policy choices and allows for flexibility in setting enforcement priorities that may be necessary in light of changed circumstances, such as a series of scandals.

At the same time, discretion can swallow the rule of law. Swift and large changes in enforcement policy mean the rule that people face means one thing under one administration and another under the administration that follows. Worse still, the change occurs quickly, undermining any investments and reliance expectations by those affected. There ought to be some constraint on enforcement discretion but, as discussed in this Article, the constraint is not and, generally, should not be judicial. Rather, congressional oversight and media scrutiny may be the better avenues for accountability.

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96 *Researching Public Companies Through EDGAR: A Guide for Investors*, SEC, <https://www.sec.gov/oiea/Article/edgarguide.html> (last visited Apr. 3, 2018) ("The SEC requires public companies to disclose meaningful financial and other information to the public, which provides a public source for all investors to use to judge for themselves if a company's securities are a good investment.").

97 *See, e.g.*, Renae Merle, *Wall Street's Watchdog Is Pursuing Fewer Cases Since Trump Took Office*, WASH. POST (Nov. 23, 2017), [https://www.washingtonpost.com/news/business/wp/2017/11/23/wall-streets-watchdog-is-pursuing-fewer-cases-since-trump-took-office/?utm\\_term=.50a7dccbfd4a](https://www.washingtonpost.com/news/business/wp/2017/11/23/wall-streets-watchdog-is-pursuing-fewer-cases-since-trump-took-office/?utm_term=.50a7dccbfd4a); Dave Michaels, *Wall Street Fines Fall During First Year of Trump Administration*, WALL ST. J. (Nov. 14, 2017), <https://www.wsj.com/articles/wall-street-fines-fall-during-first-year-of-trump-administration-research-shows-1510655400> (referencing research reported in this Article).

