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Citation: 1997 Wis. L. Rev. 873 1997



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ARTICLES

ADMINISTRATIVE ARM-TWISTING IN THE SHADOW OF CONGRESSIONAL DELEGATIONS OF AUTHORITY

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I. INTRODUCTION

The typical subjects of administrative law scholarship, rulemaking and adjudication, represent only a small fraction of agency activity. This distortion in emphasis is not surprising given the well understood fact that most agency activity inevitably occurs behind the scenes and beyond the reach of the Administrative Procedure Act (APA).¹ Exactly fifty years ago, the Attorney General's Manual on the APA recognized that agency "settlement of cases and issues by informal methods is nothing new," adding that "'even where formal proceedings are fully available, informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process.'"² Half a century later, this observation continues to hold true, as does the seemingly intractable problem of controlling the exercise of such wide-ranging discretionary power.

Arm-twisting represents one broad and important category of informal agency activity. As used in this Article, administrative "arm-twisting" refers to a threat by an agency to impose a sanction or withhold a benefit in hopes of encouraging "voluntary" compliance with a request that the agency could not impose directly on a regulated entity.³ Although it provides agencies with significant flexibility, arm-twisting differs from many of the newfangled regulatory approaches that are

1. 5 U.S.C. §§ 551-559, 701-706 (1994); see also Ronald A. Cass, *Models of Administrative Action*, 72 VA. L. REV. 363, 364 (1986); *infra* note 231.

2. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 48 (1947) (quoting from the Final Report of the Attorney General's Committee on Administrative Procedure); see also KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 22 (1969) ("Not many questions for discretionary justice ever reach the stage of adjudication, whether formal or informal. Discretionary justice includes initiating, investigating, prosecuting, negotiating, settling, contracting, dealing, advising, threatening, publicizing, concealing, planning, recommending, supervising."); Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1488-89, 1500-19 (1983) (suggesting a typology of forms of administrative discretion); Cento G. Veljanovski, *The Economics of Regulatory Enforcement*, in *ENFORCING REGULATION* 171, 172 (Keith Hawkins & John M. Thomas eds., 1984) (describing "accommodations, threats, and tradeoffs between enforcement official and violator that result in compromises and modifications of the law").

3. See THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 115 (2d ed. 1987) (defining "arm-twisting" as "the use of threat, coercion, or other forms of pressure and persuasion to achieve one's purpose"); see also THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 101 (3d ed. 1992) (illustrating the term as follows: "The government arm-twisted the manufacturers into accepting new antipollution standards.").

designed primarily to benefit the targets of administrative control.⁴ Indeed, arm-twisting often saddles parties with more onerous regulatory burdens than Congress had authorized, accompanied by a diminished opportunity to pursue judicial challenges.

This phenomenon may be even more insidious than the frequently discussed tendency of agencies to develop informal but essentially binding policies without adhering to notice and comment rulemaking procedures. The use of informal mechanisms to evade increasingly burdensome procedural requirements and searching judicial scrutiny—the so-called “ossification” of the informal rulemaking process—has attracted significant attention in recent years.⁵ In contrast, the use of informal mechanisms to evade the substantive limitations on an agency’s delegated authority has gone largely unnoticed. Although a few commentators have touched upon discrete aspects of this seemingly troublesome phenomenon, no one has evaluated arm-twisting as such. This Article strives to bridge that gap in the literature.

Part II describes the variety of arm-twisting techniques available to federal regulators, in contexts ranging from licensing and government contracting to product recalls and settlements of enforcement actions. In each of these settings, agencies enjoy significant leverage over regulated entities, allowing federal officials to extract nominally voluntary concessions. Part III draws comparisons to arm-twisting in other contexts, including land use exactions and criminal plea bargaining. Part IV evaluates administrative arm-twisting more broadly, discussing some objections to the practice. After considering the unconstitutional

4. See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 101-32 (1992) (proposing a shift to audited self-regulation); Marshall J. Breger, *Regulatory Flexibility and the Administrative State*, 32 *TULSA L.J.* 325, 329 (1996) (“A number of different types of flexible and cooperative regulatory schemes have been created in the last few years.”); Douglas C. Michael, *Cooperative Implementation of Federal Regulations*, 13 *YALE J. ON REG.* 535, 541 (1996) (“The government would rely on the regulated entities to develop specific and individual implementation plans, and would thus restrict its role to assisting in and providing incentives for self-implementation programs, and to maintaining a credible residual program of detection, surveillance and enforcement.”).

5. See, e.g., Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 *DUKE L.J.* 1385, 1386 (1992) (“[A]gencies are beginning to seek out alternative, less participatory regulatory vehicles to circumvent the increasingly stiff and formalized structures of the informal rulemaking process.”); see also Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 *ADMIN. L. REV.* 59 (1995); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 *TEX. L. REV.* 483 (1997); Paul R. Verkuil, *Rulemaking Ossification—A Modest Proposal*, 47 *ADMIN. L. REV.* 453 (1995); Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 *S. CAL. L. REV.* 621, 626 (1994).

conditions doctrine as well as judicial constraints on plea bargaining and administrative consent decrees, Part IV suggests a series of possible substantive and procedural safeguards aimed at minimizing the risk of overreaching by federal regulatory officials. Because the problem often is not amenable to judicial control, greater agency self-restraint and congressional oversight may offer the only realistic prospects for curbing improper uses of administrative arm-twisting.

II. FORMS OF ARM-TWISTING BY FEDERAL AGENCIES

As suggested in the sections that follow, administrative agencies have numerous opportunities to pursue indirectly ends that they could not impose directly. Arm-twisting may occur during licensing, government contracting, and enforcement proceedings. It may reflect formally announced agency policy or instead result from informal, ad hoc bargaining. Agencies may threaten to deny licenses, refuse to enter into procurement agreements, disseminate adverse publicity, or impose other sanctions against uncooperative parties. Often such threats simply represent a more efficient method of achieving ends explicitly authorized by Congress, but in some cases they may allow agencies to pursue extrastatutory goals, seemingly in contravention of the limits on their delegated authority.

A. Conditions Imposed During Licensing

Licensing requirements provide administrative agencies with substantial leverage over regulated entities.⁶ In some instances, agencies seek to apply informal, technically non-binding guidelines to applicants requesting a license or permit, which represents one common response to the ossification of the informal rulemaking process.⁷ Typically, the substantive terms of these guidelines conform with the agency's enabling

6. "In programs that function through issuing approvals or dispensing largesse, administrators are likely to exercise greater leverage over affected private parties than are those who must take the initiative if they desire to influence private conduct." JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 547 (3d ed. 1992) (citing non-binding FDA food additive testing guidelines as one example).

7. See Robert A. Anthony, "Well, You Want the Permit, Don't You?" *Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 ADMIN. L. REV. 31, 35-38 (1992) (describing "two ways of misusing nonlegislative rules: in taking enforcement action and in passing upon applications"); see also Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation: CNI v. Young and the Aflatoxin Dance*, 44 ADMIN. L. REV. 131, 142 (1992) (suggesting that rulemaking "burdens have often had the perverse effect of driving agencies even further underground, into deeper infernal rings of unreviewable informality and occult decisionmaking"); *supra* note 5.

statute but have been adopted and utilized through a short-cut, without adhering to applicable procedural requirements.⁸

On other occasions, an agency may delay granting a license in hopes of pressuring a related third-party, as sometimes happens during international trade disputes. For instance, at the behest of the Department of Commerce, the Federal Communications Commission (FCC) recently delayed action on pending license applications filed by two Japanese companies in an effort to extract concessions from the Japanese government.⁹

In still other situations, agencies elicit voluntary commitments during the course of licensing that seem contrary to statute. The FCC did this during the 1970s to influence programming content,¹⁰ and the Federal

8. See, e.g., *Public Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 157-58 (D.C. Cir. 1990) (remanding Nuclear Regulatory Commission policy statement on personnel training, applied through the imposition of conditions on operating licenses, so that the agency could properly promulgate these "requirements" as directed by Congress); *American Bus Ass'n v. United States*, 627 F.2d 525, 532 (D.C. Cir. 1980) (remanding policy statement issued by the Interstate Commerce Commission for compliance with notice and comment rulemaking requirements because "each provision of the statement purports on its face to notify applicants for certificates precisely what showings the Commission will or will not require of them").

9. See Helene Cooper, *FCC to Delay Japanese Firms' License Request*, WALL ST. J., Mar. 17, 1997, at A20 ("The U.S., employing a time-honored strategy, is holding hostage Japanese companies' applications for FCC licenses until Japan eases restrictions on foreign investment and buys more U.S. telecommunications services."). Evidently, "delay in granting communications licenses is a frequent U.S. tactic to bend recalcitrant countries to its will." *Id.*; see also John Maggs, *US Stalls Japanese Phone Service: Administration Blocks Long-Distance Access*, J. COM., Mar. 14, 1997, at 1A (describing FCC delays on license applications by firms from Japan and Spain as "arm-twisting," which the World Trade Organization will start to sanction in the future). See generally THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, *RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY* (1994) (discussing aggressive unilateralism by the United States in recent trade disputes).

10. See, e.g., *Writers Guild of Am. v. American Broad. Co.*, 609 F.2d 355, 359-66 (9th Cir. 1979) (describing "jawboning" by the FCC to prompt voluntary industry limits on sex and violence in primetime television broadcasts, and declining to consider constitutional, statutory, and APA challenges to the Commission's conduct); *Action for Children's Television v. FCC*, 564 F.2d 458, 473 n.27 (D.C. Cir. 1977) ("The problem, of course, is necessarily a matter of degree, and an agency may well be found to have abused its authority were it to employ overbearing 'jawboning' or 'arm-twisting' tactics."); *Yale Broad. Co. v. FCC*, 478 F.2d 594, 603 (D.C. Cir. 1973) (statement of Bazelon, C.J., calling for en banc rehearing) (objecting to the FCC's pressure on radio stations not to play certain songs with objectionable language); ERWIN G. KRASNOW ET AL., *THE POLITICS OF BROADCAST REGULATION* 197 (3d ed. 1982) (explaining that the FCC enforced informal limitations on the quantity of advertising by delaying action on license renewal applications of broadcasters that failed to comply); David L. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 215-17 (noting

Energy Regulatory Commission (FERC) did this during the 1980s in an effort to promote deregulation of the wholesale electrical transmission industry.¹¹ This section focuses primarily on the latter phenomenon by considering a pair of recent product approval decisions by the Food and Drug Administration (FDA) that explicitly imposed apparently unauthorized conditions on applicants.

In 1996, the FDA approved Procter & Gamble's food additive petition for the non-caloric fat substitute olestra, though only for use in certain snack foods.¹² Nearly twenty-five years elapsed between the company's initial contacts with Agency officials and final approval, and Procter & Gamble spent more than \$200 million in the product development process.¹³ Indeed, the FDA approved olestra just days before the company's previously extended patents were to expire.¹⁴ The

that the FCC's licensing scheme "permits a wide-ranging and largely uncontrolled administrative discretion in the review of telecommunications programming," though conceding that "the line between permissible regulatory activity and impermissible 'raised eyebrow' harassment of vulnerable licensees will be exceedingly vague").

11. See Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 794 ("Despite FERC's narrow jurisdiction under [the Federal Power Act] to require wheeling, in recent years FERC has issued pro-competitive transmission access orders in the adjudicative context as a voluntary condition to a benefit or approval conferred under other sections of the FPA."); Seidenfeld, *supra* note 5, at 513 (explaining that "FERC initially avoided rulemaking efforts to deregulate electric generation and transmission in favor of conditioning approval of utilities' applications for mergers and market-based rates on the applicants providing competing generators access to their transmission grids"); O. Julia Weller & Ted J. Murphy, *FERC Asserts Vast Power as Utility Mergers Heat Up*, NAT'L L.J., June 23, 1997, at B8, B12 ("FERC has a history of using its merger-conditioning power to implement policy initiatives it arguably lacks direct statutory authority to mandate."); see also *Hercules Inc. v. FPC*, 552 F.2d 74, 77-78 (3d Cir. 1977) (describing the Commission's use of "jawboning" to effectuate its informal pipeline curtailment policy); *Consolidated Edison Co. v. FPC*, 512 F.2d 1332, 1341 (D.C. Cir. 1975) ("Regulation through 'raised eyebrow' techniques seems inherent in the structure of most administrative agencies . . .").

12. See 61 Fed. Reg. 3118, 3172 (1996) (codified at 21 C.F.R. § 172.867(c) (1997)).

13. See Marian Burros, *Intensifying Debate on a Fat Substitute*, N.Y. TIMES, Jan. 17, 1996, at C1 ("Procter & Gamble has spent \$200 million to \$300 million on tests of olestra in the last 25 years."); Jennifer Lawrence, *Whatever Happened to Olestra? How P&G's Hopes for Food Division's Future Got Mired in FDA Quicksand*, ADVERTISING AGE, May 2, 1994, at 16.

14. See Sally Squires, *FDA Decision Nears on Fat Substitute*, WASH. POST, Jan. 23, 1996, at Z8. Upon approval, the company became eligible for limited patent term restoration. See 62 Fed. Reg. 763 (1997); *Procter & Gamble Filed a Two-Year Patent Term Extension Request for Olestra*, FOOD CHEM. NEWS, Mar. 25, 1996, at 31; see also Raju Narisetti, *Anatomy of a Food Fight: The Olestra Debate*, WALL ST. J., July 31, 1996, at B1.

final regulation conditions use of the additive on special labeling, vitamin fortification, and the submission of postmarketing reports to allow for further Agency review.¹⁵

The postmarketing surveillance requirement represents one of the most interesting features of the approval. The regulation itself does not mandate further testing by the petitioner; it only provides that the FDA "will review and evaluate all data and information bearing on the safety of olestra received by the agency."¹⁶ In the preamble accompanying the regulation, however, the Agency explained that "as a condition of approval, Procter and Gamble is to conduct the studies that it has identified in its letter to FDA,"¹⁷ warning that, "if Procter and Gamble does not conduct the identified studies and does not conduct them according to the articulated timetable, FDA will consider the approval set forth in this document to be void *ab initio* and will institute appropriate proceedings."¹⁸

This threat is remarkable insofar as it treats the food additive approval as a private license rather than a public regulation available, subject only to patent limitations, to any firm wishing to manufacture and sell the additive.¹⁹ The FDA's threat also seemingly ignores the

15. See 21 C.F.R. § 172.867(d)-(f) (1997).

16. *Id.* § 172.867(f) (adding that the FDA "will present such data, information, and evaluation to the agency's Food Advisory Committee within 30 months of the effective date of this regulation," and then "will initiate any appropriate regulatory proceedings"). In the preamble, the FDA pointed out that by using the term "will" in the regulation, it "legally bound itself to institute this review and evaluation." 61 Fed. Reg. at 3168.

17. 61 Fed. Reg. at 3168 ("Procter and Gamble has notified FDA that the company will be conducting additional studies of olestra exposure (both amounts consumed and patterns of consumption) and the effects of olestra consumption . . ."); see also GENERAL ACCOUNTING OFFICE (GAO), No. RCED-93-142, FOOD SAFETY AND QUALITY: INNOVATIVE STRATEGIES MAY BE NEEDED TO REGULATE NEW FOOD TECHNOLOGIES 61 (1993) (According to one Agency official, the "FDA may try to negotiate requirements for firms to conduct postmarket surveillance, including the collection and reporting of data on dietary use and on any adverse effects, as a condition for approving novel macro ingredients as food additives.").

18. 61 Fed. Reg. at 3169. The preamble provided little information about the nature of this correspondence, though the letter from the company referenced by the Agency—dated one month after the close of the public comment period and less than one week before publication of the approval—suggests last minute negotiations.

19. See GAO, *supra* note 17, at 27 ("Unlike approvals for new drugs, food additive regulations are not licenses. Once FDA has issued a regulation specifying the uses and conditions of use for a food additive, any company is free to market the additive as long as the additive is in compliance with the regulation and is not patented."); Lars Noah & Richard A. Merrill, *Starting from Scratch? Reinventing the Food Additive Approval Process*, 78 B.U. L. REV. (forthcoming 1998); Alan M. Rulis, *The Food and Drug Administration's Food Additive Petition Review Process*, 45 FOOD DRUG COSM. L.J.

procedures imposed by Congress for withdrawing an approval.²⁰ The Agency responded that its postmarketing surveillance condition "is not without precedent," citing the more limited data collection requirement imposed fifteen years earlier on the manufacturer of the food additive aspartame.²¹ It also emphasized that the imposition of this condition "is not, and should not be interpreted as, an indication that FDA has somehow not determined that there is a reasonable certainty that no harm will result from the use of olestra."²² Such reassurances cannot, however, conceal the unprecedented nature of the Agency's conditions on approval of this controversial new food additive.

Although the procedures differ substantially from those used for food additives, the FDA also must approve all new drug products prior to marketing. In 1992, in response to complaints about excessive delays in approving drugs to treat AIDS and other life-threatening conditions,²³ the Agency promulgated regulations to establish an accelerated approval procedure for new drugs and biologics intended to treat serious or life-

533, 534 (1990).

20. See 21 U.S.C. § 348(h) (1994); 21 C.F.R. § 171.130 (1997). The threat to summarily revoke approval resembles the FDA's procedures governing "interim" food additive regulations, themselves an administrative invention lacking any statutory basis. See 37 Fed. Reg. 25,705 (1972) (codified as amended at 21 C.F.R. pt. 180 (1997)); Noah & Merrill, *supra* note 19. The Agency designed this special transitional category for food-use substances whose safety is called into question. The regulation may demand compliance "with whatever limitations the Commissioner deems to be appropriate," including a promise by one or more sponsors to undertake additional studies. See 21 C.F.R. § 180.1(c)(1) & (2) (adding that "[i]f no such commitment is made, or adequate and appropriate studies are not undertaken, an order [of revocation] shall immediately be published").

21. 61 Fed. Reg. at 3169; cf. GAO, *supra* note 17, at 61 ("In at least one instance, FDA has been able to obtain *voluntary* postmarket surveillance for a food additive (Aspartame, an artificial sweetener) as part of the approval process for this substance. However, FDA does not have the statutory authority to *require* surveillance for food products . . ."). The final decision approving aspartame included the following additional condition: "Searle is to monitor the actual use levels of aspartame and to provide such information on aspartame's use to the Bureau of Foods as the Bureau may deem necessary by an order, in the form of a letter, to Searle." 46 Fed. Reg. 38,285, 38,303 (1981).

22. 61 Fed. Reg. at 3169.

23. See, e.g., Mary M. Dunbar, *Shaking up the Status Quo: How AIDS Activists Have Challenged Drug Development and Approval Procedures*, 46 FOOD DRUG COSM. L.J. 673, 689-704 (1991); Mary T. Griffin, *AIDS Drugs and the Pharmaceutical Industry: A Need for Reform*, 17 AM. J.L. & MED. 363, 378-82 (1991); Steven R. Salbu, *Regulation of Drug Treatments for HIV and AIDS: A Contractarian Model of Access*, 11 YALE J. ON REG. 401, 415-16 (1994); Lois K. Perrin, Note, *The Catch-22 for Persons with AIDS: To Have or Not to Have Easy Access to Experimental Therapies and Early Approval for New Drugs*, 69 S. CAL. L. REV. 105 (1995).

threatening illnesses.²⁴ Before approving a new drug, the FDA must find that it is both safe and effective, but, under the accelerated approval procedures, it will demand weaker evidence of effectiveness than it normally requires.²⁵ The Agency has succeeded in rapidly approving important new therapies during the last few years.²⁶

If a pharmaceutical company wishes to utilize this expedited licensing procedure, it must agree to several conditions on approval not explicitly authorized by Congress. For example, an applicant would have to accept any necessary postmarketing restrictions, including distribution only through certain medical facilities or by specially-trained physicians; distribution conditioned on the performance of specified medical procedures; and advance submission of all promotional materials for FDA review.²⁷ The governing statute does not, however, authorize the imposition of any of these conditions.²⁸ Moreover, the FDA demands that the company waive its right to demand an evidentiary hearing in the

24. See 57 Fed. Reg. 58,942, 58,958 (1992) (codified at 21 C.F.R. pts. 314(H), 601(E) (1997)).

25. For instance, the FDA will accept evidence of drug effectiveness in attaining "surrogate endpoints" (e.g., reductions in CD4 cell counts) in lieu of more difficult to prove "clinical endpoints" (e.g., improved survival). See 21 C.F.R. §§ 314.510, 601.41 (1997); 57 Fed. Reg. at 58,943-44. Approval predicated on surrogate endpoints requires that the applicant agree to conduct postmarketing studies relating to the clinical endpoints. See *id.*

26. See, e.g., Sheila R. Shulman & Jeffrey S. Brown, *The Food and Drug Administration's Early Access and Fast-Track Approval Initiatives: How Have They Worked?*, 50 FOOD & DRUG L.J. 503, 514-17 (1995); *FDA Cleared 139 Products in 1996, A Record Increase*, WALL ST. J., Jan. 15, 1997, at B5. Part of this improvement flows from increased resources recently made available through the imposition of user fees. See Richard A. Merrill, *The Architecture of Government Regulation of Medical Products*, 82 VA. L. REV. 1753, 1838-40 (1996).

27. See 21 C.F.R. §§ 314.520(a), 314.550, 601.42(a), 601.45 (1997).

28. See, e.g., 21 U.S.C. § 352(n) (1994) (providing that, "except in extraordinary circumstances, no regulation issued under this paragraph shall require prior approval by the Secretary of the content of any advertisement"); *American Pharm. Ass'n v. Weinberger*, 377 F. Supp. 824, 831 (D.D.C. 1974) (invalidating FDA restrictions on the distribution of methadone as a condition of drug approval), *aff'd*, 530 F.2d 1054 (D.C. Cir. 1976) (per curiam); David B. Brushwood & Frederick H. Fern, *Clozaril and the Threat of Product Liability: Defensive Drug Distribution Invites Regulatory Reform*, 15 J. PRODS. & TOXICS LIAB. 145, 146 n.10 (1993) (noting limits on the FDA's power to restrict drug distribution); Mark A. Hurwitz, Note, *Bundling Patented Drugs and Medical Services: An Antitrust Analysis*, 91 COLUM. L. REV. 1188, 1192-95 (1991) (same). The FDA responded that the statute provided it with sufficient flexibility to impose these various conditions for accelerated approvals. See 57 Fed. Reg. at 58,949, 58,951 (alluding to the "spirit" of the statute); *id.* at 58,953-54 (citing its broad rulemaking authority). Congress just amended the statute to codify these special procedures for "fast track" approvals. See FDA Modernization Act of 1997, Pub. L. No. 105-115, § 112, 111 Stat. 2296, 2309-10 (to be codified at 21 U.S.C. § 356).

event that the Agency chooses to withdraw the approval.²⁹ In response to industry complaints about such conditions, the Agency explained that any "applicants objecting to these procedures may forego approval under these regulations and seek approval under the traditional approval process."³⁰ However, with potentially millions of dollars in lost revenue for each additional month awaiting FDA approval,³¹ eligible drug companies cannot afford to forego these accelerated procedures, and so far the industry has opted not to challenge the rules in court.

Other federal agencies have begun to experiment with waivers of burdensome licensing requirements in exchange for commitments by applicants to do more than the law requires.³² For example, the Environmental Protection Agency (EPA) recently instituted its "Environmental Leadership Program" to encourage any participating facilities to pursue enhanced pollution prevention goals in exchange for

29. See 21 C.F.R. §§ 314.530, 601.43 (1997) (providing the applicant with only an informal hearing prior to revocation). The Agency only infrequently withdraws its approval of regular NDAs. See Bruce Ingersoll, *Pharmaceuticals: FDA Proposes to Force Seldane Off the Market*, WALL ST. J., Jan. 14, 1997, at B1, B11.

30. 57 Fed. Reg. at 58,955. The FDA also explained that no court interpreted the statute as requiring a formal evidentiary hearing before withdrawing approval, but that its own regulations provided for such a hearing. See *id.* Although the Agency may utilize a summary judgment procedure to deny hearing requests when it withdraws a new drug approval, see *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620-23 (1973), it must provide a hearing when genuine issues are in dispute, see *id.* at 623; *Edison Pharm. Co. v. FDA*, 513 F.2d 1063, 1072 (D.C. Cir. 1975); *Sterling Drug, Inc. v. Weinberger*, 503 F.2d 675, 680-83 (2d Cir. 1974). The FDA also argued that the less formal hearing procedure that it provided for withdrawals of accelerated approvals gives the applicant adequate notice and opportunity to be heard. See 57 Fed. Reg. at 58,955.

31. See *User Fees for Prescription Drugs: Hearing Before the Subcomm. on Health and the Env't of the House Comm. on Energy and Commerce*, 102d Cong. 10 (1992) (statement of David A. Kessler, Commissioner of Food and Drugs) ("For a drug that raises \$200 million a year in annual sales, assuming an 80 percent gross margin, every additional month of delay the Agency takes to review an application would cost the company about \$10 million in lost opportunity."); see also Joseph A. DiMasi, *Cost of Innovation in the Pharmaceutical Industry*, 10 J. HEALTH ECON. 107, 125-26 (1991) (estimating that, on average, drug research and development costs \$231 million and requires 12 years before a new chemical entity is introduced in the United States market).

32. Agencies sometimes have used whatever power they have to grant waivers as a way of introducing flexibility into otherwise rigid regulatory schemes. See Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277; Jim Rossi, *Making Policy Through the Waiver of Regulations at the Federal Energy Regulatory Commission*, 47 ADMIN. L. REV. 255 (1995); Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163; Jefferey M. Sellers, Note, *Regulatory Values and the Exceptions Process*, 93 YALE L.J. 938 (1984).

less frequent inspections and expedited permitting.³³ In addition, the EPA has initiated a pilot program (designated "Project XL") to grant simplified and more flexible pollution permits if a manufacturer agrees to exceed existing pollution control standards.³⁴ Incentive programs of this sort differ somewhat from arm-twisting because the Agency does not ask licensing applicants to abide by any unauthorized conditions for approval or to forego a statutory right in exchange for expedited reviews. Instead, the EPA offers faster reviews and enforcement concessions as an inducement for enhanced environmental protection. Nonetheless, the increased utilization of the power to grant exceptions or waive requirements may facilitate arm-twisting by agencies in the future. Indeed, differentiating inappropriate inducements or threats from legitimate offers represents one of the most difficult tasks in identifying and perhaps attempting to restrain administrative arm-twisting.

One may well ask how far an agency might go in conditioning licenses. In addition to postmarketing studies and the waiver of hearing rights, for example, could the FDA condition product approvals on agreements not to engage in broadcast advertising or not to raise drug prices faster than the rate of inflation? Could the Agency demand waivers of patent rights or promises to contribute some percentage of profits to a public health agency (or perhaps the Republican National Committee)?³⁵

33. See 60 Fed. Reg. 16,875, 16,876 (1995); *Companies Might See Fewer Inspections, Faster Permitting Under EPA Initiative*, 26 Env't Rep. (BNA) 1289 (1995). The Occupational Safety and Health Administration (OSHA) has a similar program in place to reward conscientious employers. See 53 Fed. Reg. 26,339, 26,341-48 (1988) (describing OSHA's "Voluntary Protection Program").

34. See 62 Fed. Reg. 19,872 (1997); John H. Cushman, Jr., *E.P.A. and Arizona Factory Agree on Innovative Regulatory Plan*, N.Y. TIMES, Nov. 20, 1996, at A18 (reporting that the EPA, after "months of arduous negotiations," granted Intel Corp. "extraordinary flexibility to operate under simplified permits in exchange for the company's pledge to do better than the law requires in controlling pollution"); see also Rena I. Steinzor, *Regulatory Reinvention and Project XL: Does the Emperor Have Any Clothes?*, 26 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,527, 10,529 (1996) ("Project XL has become a regulatory free-for-all, with companies requesting lengthy lists of unrelated exemptions in exchange for environmental 'improvements.'").

35. See Breger, *supra* note 4, at 338 & n.75 (hypothesizing "cases where the government is asking for a form of penance not specifically within its enforcement authority (e.g., requiring a child labor violator to make contributions to a college scholarship fund for youthful employees)," and noting that the "propriety of this extended form of individuated agreement remains unclear"); Note, *The ITT Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 COLUM. L. REV. 594, 604 (1973) (recounting apparently unfounded suspicions that a company negotiated a favorable antitrust settlement by offering to help the Republican National Committee); David Stout, *Reno Backs Former Energy Secretary's Denials of Wrongdoing*, N.Y. TIMES, Dec. 3, 1997, at A31 (describing the results of a preliminary investigation into accusations that the former Secretary of Energy agreed to a meeting in exchange for a \$25,000

If some of these hypothesized conditions intuitively seem less reasonable than others, what principle distinguishes them? Should all such conditions be deemed equally illegitimate if not specifically authorized by statute? Tentative answers to such questions must await a fuller description of the other forms of administrative arm-twisting.

B. Government Contracting

The Executive branch has used its procurement powers to regulate indirectly the behavior of firms wishing to contract with the federal government. Pursuant to the Federal Property and Administrative Services Act of 1949,³⁶ the President may prescribe procurement policies designed to promote "economy" and "efficiency" in government contracting.³⁷ On several occasions, Presidents have utilized this procurement power to promote secondary goals seemingly unrelated to the federal government's proprietary interests,³⁸ such as commitments by contractors to promote equal employment opportunities,³⁹ to adhere to voluntary wage and price standards,⁴⁰ and to refuse to hire permanent

contribution to her favorite charity).

36. 40 U.S.C. §§ 471-544 (1994).

37. See *id.* § 471 (declaring congressional intent "to provide for the Government an economical and efficient [procurement] system"); *id.* § 481(a) (requiring that the Administrator of General Services establish procurement policies "advantageous to the Government in terms of economy, efficiency, or service"); *id.* § 486(a) ("The President may prescribe such policies and directives . . . as he shall deem necessary to effectuate the provisions" of this statute.).

38. See *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1332-33 (D.C. Cir. 1996).

39. See, e.g., Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965); see also *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 (1979) ("The origins of the congressional authority for Executive Order 11246 are somewhat obscure and have been roundly debated by commentators and courts."); Michael Brody, *Congress, the President, and Federal Equal Employment Policymaking: A Problem in Separation of Powers*, 60 B.U. L. REV. 239, 269-81 (1980); Arthur S. Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 VA. L. REV. 27, 49-51 (1955). Courts generally have upheld such orders. See, e.g., *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159, 171 (3d Cir. 1971); cf. *United Steelworkers v. Weber*, 443 U.S. 193, 222-23 & n.2 (1979) (Rehnquist, J., dissenting) (criticizing coercion of federal contractors to adopt affirmative action plans).

40. See Exec. Order No. 12,092, 43 Fed. Reg. 51,375 (1978); see also 44 Fed. Reg. 1229 (1979) (implementing guidelines issued by the Office of Federal Procurement Policy). A court has upheld this Order. See *AFL-CIO v. Kahn*, 618 F.2d 784, 796 (D.C. Cir. 1979) (en banc); see also Alan Hyde, *Beyond Collective Bargaining: The Politicization of Labor Relations Under Government Contract*, 1982 WIS. L. REV. 1, 24-27 (discussing *Kahn*).

replacements for striking workers.⁴¹ A court recently invalidated the latter order as preempted by the National Labor Relations Act, but it did not suggest that the President had otherwise exceeded the scope of his procurement powers.⁴²

In other situations, the President has used the procurement power to pursue policies more clearly at odds with congressional directives.⁴³ For example, when the House of Representatives approved appropriations riders meant to forestall an effort by the EPA to expand reporting requirements under the Emergency Planning and Community Right-to-Know Act,⁴⁴ President Clinton issued Executive Order No. 12,969, requiring that government contracts include a condition demanding voluntary compliance with the EPA's expanded reporting obligations.⁴⁵

41. See Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (1995) (finding that "[e]fficient economic performance and productivity are directly related to the existence of cooperative working relationships between employers and employees"); see also 60 Fed. Reg. 27,856 (1995) (implementing guidelines issued by the Department of Labor); Asra Q. Nomani, *Clinton Bans Use of Firms that Replace Strikers; GOP and Business Vow Battle*, WALL ST. J., Mar. 9, 1995, at A5. For a description of the latest (but stalled) proposal designed to benefit organized labor, see Glenn Burkins & Gerald F. Seib, *Alexis Herman Is Pawn in Feud Over Executive Order*, WALL ST. J., Apr. 28, 1997, at A20. By comparison, President Bush issued procurement orders unfavorable to unions. See Exec. Order No. 12,818, 57 Fed. Reg. 48,713 (1992) (barring pre-hire agreements); Exec. Order No. 12,800, 57 Fed. Reg. 12,985 (1992) (requiring that firms post notices explaining that workers are free to decline union membership). President Clinton rescinded both of these orders. See Exec. Order No. 12,836, 58 Fed. Reg. 7045 (1993).

42. See *Chamber of Commerce*, 74 F.3d at 1339; see also Gordon M. Clay, Comment, *Executive Abuse of the Procurement Power: Chamber of Commerce v. Reich*, 84 GEO. L.J. 2573 (1996) (criticizing this Executive Order); Charles Thomas Kimmitt, Note, *Permanent Replacements, Presidential Power, and Politics: Judicial Overreaching in Chamber of Commerce v. Reich*, 106 YALE L.J. 811 (1996) (defending this Order).

43. See, e.g., *United States v. East Tex. Motor Freight Sys.*, 564 F.2d 179, 184-85 (5th Cir. 1979) (holding that an Executive Order requiring affirmative action by government contractors conflicted with congressional policy favoring the protection of seniority plans); LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 113-14 (4th ed. rev. 1997).

44. Pub. L. No. 99-499, tit. III, 100 Stat. 1728 (1986) (codified at 42 U.S.C. §§ 11001-11050 (1994)); see also Pollution Prevention Act of 1990, Pub. L. No. 101-508, tit. VI, 104 Stat. 1388-321 (codified at 42 U.S.C. §§ 13101-13109 (1994)); 59 Fed. Reg. 61,432 (1994) (announcing revisions to EPA's implementing regulations and reporting requirements). For a description of the recent congressional assault on the EPA's enforcement budget, see Zygmunt J.B. Plater, *Environmental Law as a Mirror of the Future: Civic Values Confronting Market Force Dynamics in a Time of Counter-Revolution*, 23 B.C. ENVTL. AFF. L. REV. 733, 753-55 (1996).

45. See Exec. Order No. 12,969, 60 Fed. Reg. 40,989 (1995) (asserting that "[t]he efficiency of the Federal Government is served when it purchases high quality supplies and services that have been produced with a minimum impact on the public health and environment"); see also 60 Fed. Reg. 50,738 (1995) (implementing guidelines issued

Because most large chemical companies presumably wish to conduct business with the federal government, this Order effectively forced compliance with the EPA requirements even though Congress had sought to make those rules temporarily inoperative.⁴⁶

In a few instances, threats to stop dealing with a firm accompany an allegation of some regulatory infraction. For example, "warning letters" issued by the FDA identify the supposed violation, provide the recipient with a limited period of time to take corrective action (coupled with a threat of formal enforcement proceedings), and, in the case of drugs and medical devices, explain that government purchasing entities have been advised to stop dealing with the company in the meantime.⁴⁷ Again, because the federal government represents the single largest purchaser of prescription drugs in this country,⁴⁸ few manufacturers would dare risk losing these contracts. If a company voluntarily corrects the alleged

by the EPA); Bill McAllister, *Clinton Announces Executive Order Challenging Curbs on EPA*, WASH. POST, Aug. 9, 1995, at A6.

46. Courts have rejected suggestions that conditional government contracting creates mandatory and enforceable legal requirements. See, e.g., *AFL-CIO v. Kahn*, 618 F.2d 784, 794 (D.C. Cir. 1979) (en banc) (upholding the Executive Order requiring compliance with voluntary wage and price standards as a condition of contracting). Earlier in its opinion, however, the court noted that "[t]here is every reason to anticipate general compliance throughout the economy." *Id.* at 792 (predicting that "most large companies will comply with the [voluntary] standards"); see also *id.* at 809 (MacKinnon, J., dissenting) ("[A] corporation would prefer to pay a \$10,000 penalty for disobeying wage guidelines than to lose a government contract in excess of \$400 million. . . . [The guidelines] are not suggestions; realistically, they operate as mandatory economic controls."); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 443 (116th ed.) [hereinafter *STATISTICAL ABSTRACT*] (reporting federal consumption and gross investment of \$516.7 billion in 1995 as compared to the total gross domestic product of \$7,245.8 billion).

47. See FDA, REGULATORY PROCEDURES MANUAL 7 (1991) (warning letter format). For an example of such correspondence, see Warning Letter 94-PHI-01 from FDA to Boehringer Laboratories, Inc. (Oct. 2, 1993) ("Until these violations are corrected, Federal agencies will be informed that FDA recommends against the award of contracts for the affected products. . . . You should take prompt action to correct these violations. Failure to promptly correct these violations may result in regulatory action without further notice."). Before 1991, the FDA issued "regulatory letters" which did not include such a threatened procurement freeze. See 56 Fed. Reg. 27,026 (1991) (announcing switch to warning letters "issued for the purposes of achieving voluntary compliance and establishing prior notice"); 43 Fed. Reg. 27,498 (1978) (announcing revised policies governing the use of "regulatory letters" and "notices of adverse findings").

48. In 1994, the federal government accounted for more than \$5 billion of the \$78 billion spent on drugs and other medical nondurables. See *STATISTICAL ABSTRACT*, *supra* note 46, at 112, 114 tbls.156 & 159; see also 136 CONG. REC. S5993 (daily ed. May 10, 1990) (statement of Sen. Pryor) (reporting that Medicaid covers more than 10% of retail sales of prescription drugs).

violations of federal law, it never gets an opportunity to challenge the legal basis for the FDA's objections. Should a company disagree with the Agency's allegations and choose to pursue a judicial challenge rather than accede to its demands, the FDA invariably argues that the controversy is not yet ripe for review,⁴⁹ and so far only a single court has held that a challenge was justiciable on the basis of such an interim procurement freeze.⁵⁰

C. Voluntary Recalls and Adverse Publicity

The Food and Drug Administration generally lacks the statutory authority to order a recall of potentially dangerous products subject to its regulatory jurisdiction.⁵¹ Although Congress has granted the Agency such authority with regard to limited classes of products,⁵² and others

49. See, e.g., *Dietary Supplemental Coalition, Inc. v. Kessler*, 978 F.2d 560, 563 (9th Cir. 1992) (holding that FDA regulatory letter did not constitute final agency action); *Professionals & Patients for Customized Care v. Shalala*, 847 F. Supp. 1359, 1365 (S.D. Tex. 1994) (holding that warning letters do not constitute final agency action but instead "merely establish a dialogue between the FDA and the pharmacist and do not necessarily lead to further sanctions"), *aff'd*, 56 F.3d 592, 599 (5th Cir. 1995); *Estee Lauder, Inc. v. FDA*, 727 F. Supp. 1, 5 (D.D.C. 1989) (holding that challenge to an FDA regulatory letter was not ripe for review).

50. See *Den-Mat Corp. v. United States*, No. MJG-92-444, 1992 U.S. Dist. LEXIS 12233, at *13 (D. Md. Aug. 17, 1992) ("Such action by the FDA would effectively 'seize' all products that normally would be sold to federal agencies."). The court also expressed concern that "the FDA may have targeted Den-Mat . . . for a publicity campaign designed to coerce Den-Mat (and others) into complying with the agency's decision." *Id.* at *14. "[I]t would be inherently unfair to allow the FDA to continue to 'enforce' its determination [through indirect means] without allowing the affected party an opportunity to prove that the FDA's position is wrong." *Id.* at *15 & n.6; see also *Darby v. Cisneros*, 509 U.S. 137 (1993) (holding that an order issued by the Department of Housing and Urban Development, debarring a real estate developer from transacting with any federal agency for 18 months, constituted final action subject to judicial review); *Washington Legal Found. v. Kessler*, 880 F. Supp. 26, 29-30, 34-36 (D.D.C. 1995) (holding that a challenge to the FDA's unofficial policy against drug industry sponsorship of scientific symposia was ripe for review partly based on warning letters alleging the unlawful promotion of off-label uses at such meetings).

51. See, e.g., *National Confectioners Ass'n v. Califano*, 569 F.2d 690, 694-95 (D.C. Cir. 1978); *United States v. Superpharm Corp.*, 530 F. Supp. 408, 410 (E.D.N.Y. 1981); *United States v. C.E.B. Prods., Inc.*, 380 F. Supp. 664, 667-72 (N.D. Ill. 1974). But see *United States v. K-N Enters., Inc.*, 461 F. Supp. 988, 990-91 (N.D. Ill. 1978) (reading statute broadly as authorizing a court-imposed recall of adulterated drugs).

52. See, e.g., Safe Medical Devices Act of 1990, Pub. L. No. 101-629, § 8, 104 Stat. 4520 (codified at 21 U.S.C. § 360h(e) (1994)); Infant Formula Act of 1980, Pub. L. No. 96-359, § 2, 94 Stat. 1191 (codified as amended at 21 U.S.C. § 350a(f) (1994)); 21 C.F.R. pt. 107 (1997) (regulations governing infant formula recalls).

have recommended providing it with broader recall powers,⁵³ the FDA generally has resisted suggestions that the statute be amended to provide it with recall authority.⁵⁴ Instead, the Agency prefers encouraging voluntary recalls, and it has even promulgated detailed regulations setting forth its recall procedures and policies.⁵⁵ Even agencies with explicit recall authority often prefer negotiating settlements with regulated entities in which the companies agree to undertake voluntary recalls.⁵⁶

This strategy has succeeded because firms know that a failure to cooperate with an agency's request risks more serious enforcement measures authorized by statute, such as product seizures, injunctions, and even criminal penalties.⁵⁷ Because these measures require somewhat

53. See, e.g., H.R. REP. NO. 102-1030, at 12-13, 15 (1992); 49 Fed. Reg. 29,937, 29,940-41 (1984) (recommendation by the Administrative Conference of the United States (ACUS)).

54. See Eugene M. Pfeifer, *Enforcement*, in FOOD AND DRUG LAW 72, 101 (Food & Drug Law Inst. 1984) ("It realistically fears that Congress would legislate burdensome, time-consuming procedural requirements Because requests for recalls—backed by the implicit threa[t] of court actions and publicity—are generally complied with, the agency has been unwilling to jeopardize what it regards as an efficient, albeit voluntary, recall system."); cf. Michael Janofsky, *U.S. Proposing Greater Powers on Food Safety*, N.Y. TIMES, Aug. 30, 1997, at A1 (reporting that, in the wake of a recent recall of tainted meat, the Administration has asked Congress for mandatory recall authority).

55. See 43 Fed. Reg. 26,202, 26,218 (1978) (codified at 21 C.F.R. pt. 7(C) (1997)); see also 21 C.F.R. § 7.40(a) ("This [subpart] recognize[s] the voluntary nature of recall by providing guidelines so that responsible firms may effectively discharge their recall responsibilities."). The FDA emphasized, however, that its recall policy is not "based on the agency's forbearance from court action as the 'quid pro quo' for industry's voluntary compliance." 43 Fed. Reg. at 26,205. For one recent example of a voluntary recall, see Gina Kolata, *2 Top Diet Drugs are Recalled Amid Reports of Heart Defects*, N.Y. TIMES, Sept. 16, 1997, at A1.

56. See, e.g., M. Stuart Madden, *Consumer Product Safety Act Section 15 and Substantial Product Hazards*, 30 CATH. U. L. REV. 195, 228-31, 245-47 (1981) (discussing Consumer Product Safety Commission (CPSC) consent decrees); Teresa M. Schwartz & Robert S. Adler, *Product Recalls: A Remedy in Need of Repair*, 34 CASE W. RES. L. REV. 401, 415-20, 438-41 (1984) (discussing National Highway Traffic Safety Administration (NHTSA) and CPSC consent decrees for recalls). The CPSC occasionally does mandate a recall. See Bruce Ingersoll, *CPSC, In Its Biggest Recall Ever, Orders Return of 40 Million Halogen Lamps*, WALL ST. J., Aug. 22, 1997, at A4.

57. See 21 U.S.C. §§ 332-334 (1994); 21 C.F.R. § 7.40(c) (1997) ("Seizure, multiple seizure, or other court action is indicated when a firm refuses to undertake a recall requested by the [FDA]"); 41 Fed. Reg. 26,924, 26,924 (1976) ("While the act does not specifically mention recalls, the statutory sanctions available to FDA have a vital role in a firm's willingness to recall and support the development of recall as a major FDA regulatory tool."); H.R. REP. NO. 92-585, at 18 (1971) (observing that the "FDA has largely ignored and abandoned the statutory sanctions in favor of recalls"); I. Scott Bass, *Enforcement Powers of the Food and Drug Administration*, in FOOD AND DRUG LAW 61, 74 (Richard M. Cooper ed., 1991) ("[T]he recall is one of FDA's most potent

cumbersome judicial proceedings, however, the issuance of adverse publicity may be a more effective means of inducing prompt action.⁵⁸ Companies often prefer a voluntary recall because it allows them to exercise greater control over the nature and extent of public notification regarding any hazards associated with their particular product.

The Food, Drug, and Cosmetic (FD&C) Act expressly authorizes the issuance of adverse publicity by the FDA, though only in limited circumstances.⁵⁹ Even when Congress has delegated such power, however, some controversy surrounds the use of adverse publicity.⁶⁰ In

enforcement tools An implicit or explicit threat of [formal] enforcement action, together with the risk that the agency will initiate adverse publicity, generally brings about any recall desired by the agency—and does so without time-consuming procedures.”); Mary Olson, *Substitution in Regulatory Agencies: FDA Enforcement Alternatives*, 12 J.L. ECON. & ORG. 376, 384-86 (1996) (same); see also Philip C. Olsson & Dennis R. Johnson, *Meat and Poultry Inspection: Wholesomeness, Integrity and Productivity*, in FOOD AND DRUG LAW, *supra*, at 227-28 (“[T]he inspector may shut down the plant until the sanitation or other alleged defect is corrected to the inspector’s satisfaction. . . . The pervasive presence of meat and poultry inspectors, and the extensive powers granted to those inspectors by statute, have compelled meat and poultry establishments to cooperate with their inspectors.”).

58. See Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380, 1408 (1973) (“Since [recalls] cannot be required by law, the FDA ensures compliance by threatening seizure, injunction, and the issuance of publicity. Of these, the threat of publicity is usually the most potent persuader.”); *id.* at 1415 (noting that the FDA apparently “cannot resist the temptation of using [public] warnings to operate an extrastatutory recall program”); Eugene I. Lambert, *Recalls, Regulatory Letters and Publicity—Quasi-Statutory Remedies*, 31 FOOD DRUG COSM. L.J. 360, 364-65 (1976) (same); see also Bruce Ingersoll, *Recalls of Meat Have No Muscle, Critics Contend*, WALL ST. J., Aug. 21, 1997, at A16 (“The Agriculture Department has never had the power to mandate recalls In some instances, it has taken heavy jawboning to get results.”); cf. *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 749 (E.D.N.Y. 1984) (recognizing that a company might agree to settle even meritless products liability litigation to avoid adverse publicity and the expense of trial).

59. See 21 U.S.C. § 375(b) (1994) (“The Secretary may also cause to be disseminated information regarding food, drugs, devices, or cosmetics in situations involving, in the opinion of the Secretary, imminent danger to health or gross deception of the consumer.”); see also Public Health Service Act, 42 U.S.C. § 242o (1994) (authorizing the publication of health information); *Ajay Nutrition Foods, Inc. v. FDA*, 378 F. Supp. 210, 216-19 (D.N.J. 1974) (refusing to enjoin adverse publicity issued by the FDA), *aff’d mem.*, 513 F.2d 625 (3d Cir. 1975); *Hoxsey Cancer Clinic v. Folsom*, 155 F. Supp. 376, 377-78 (D.D.C. 1957) (same). For a discussion of other mechanisms for the disclosure of risk information, see Lars Noah, *The Imperative to Warn: Disentangling the “Right to Know” from the “Need to Know” About Consumer Product Hazards*, 11 YALE J. ON REG. 293, 391-97 (1994).

60. See, e.g., 38 Fed. Reg. 16,839 (1973) (ACUS recommendation) (“[A]dverse agency publicity is undesirable when it is erroneous, misleading or excessive or it serves no authorized agency purpose.”); see also Gellhorn, *supra* note 58, at 1441 (“Adverse agency publicity is a powerful and often unruly nonlegal sanction.”); Richard S. Morey,

particular, targets of an information campaign often have no meaningful opportunity to respond to the charges or seek judicial review.⁶¹ In recognition of the risk of improper use, the FDA once proposed a policy to limit the issuance of such publicity.⁶² The Agency never finalized this proposal, and it continues to rely on explicit or implicit threats of disseminating adverse publicity as a method of encouraging voluntary compliance with its various demands.

Only a few other statutes expressly authorize agency publication of adverse information. For example, the Consumer Product Safety Commission (CPSC) may disseminate product risk information to the public subject to certain procedural constraints,⁶³ and it too has been criticized for inappropriately using this power.⁶⁴ A number of other federal agencies utilize publicity to pursue regulatory ends even without

Publicity as a Regulatory Tool, 30 FOOD DRUG COSM. L.J. 469, 474-77 (1975) (same). Professor Gellhorn explained that agency publicity may serve different functions: to inform the public and/or to sanction a wrongdoer. See Gellhorn, *supra* note 58, at 1383 ("Occasionally publicity which informs or warns also functions to punish law violators, to deter unlawful conduct, or to force a transgressor to negotiate and settle."); *id.* at 1424 n.177 (noting that "the FDA's use of publicity in its recall program is paradigmatic" of this dual use).

61. See H. Thomas Austern, *Sanctions in a Silhouette*, in WALTER GELLHORN & CLARK BYSE, *ADMINISTRATIVE LAW* 671, 674 (4th ed. 1960) ("Never forget that the publicity sanction—that omnibus public condemnation by press release—goes forward without formal evidence, without any opportunity for hearing, without counsel and, of course, without the remotest possibility of court review."); Gellhorn, *supra* note 58, at 1424 ("Publicity is quicker and cheaper; it is not presently subject to judicial review or other effective legal control; and it involves the exercise of pure administrative discretion."); *id.* at 1426 ("Because adverse publicity is usually a deprivation not subject to effective judicial control, it should usually be a sanction of last, not first, resort.").

62. See 42 Fed. Reg. 12,436, 12,440-41 (1977), *withdrawn*, 56 Fed. Reg. 67,446 (1991); see also 45 C.F.R. pt. 17 (1996) (Department of Health and Human Services (HHS) policy governing the use of publicity).

63. See 15 U.S.C. §§ 2054(a)(1), 2055(b) (1994); see also CPSC v. GTE Sylvania, Inc., 447 U.S. 102, 105-15 (1980) (discussing these constraints on CPSC disclosures, though in the context of information released in response to a request under the Freedom of Information Act).

64. See *Consumer Product Safety Commission: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the Senate Comm. on Commerce, Science, and Transp.*, 104th Cong. 124 (1996) (statement of David W. Rohn, Executive Director, National Ass'n Mfrs.) ("Threats of investigations, arm twisting and other informal means are used to extract design changes, retrofit of products and other actions. Manufacturers and importers that are faced with public stigmatization and protracted legal costs may capitulate to demands before any adequate basis for action is established.").

explicit authorization,⁶⁵ including ends that apparently exceed the scope of the substantive authority delegated by Congress.⁶⁶

D. Consent Decrees in Enforcement Proceedings

As is true with most civil lawsuits and criminal prosecutions, the vast majority of all administrative enforcement proceedings result in settlements.⁶⁷ Although sometimes simply reflected in private agreements, these settlements often lead to the entry of judgment by a court in the form of a consent decree, which gives the court continuing jurisdiction over the dispute and the power to enforce the agreement by fashioning appropriate equitable remedies.⁶⁸ In the course of settling enforcement

65. See, e.g., *FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1314 (D.C. Cir. 1968) (upholding the Commission's practice of issuing press releases on the filing of adjudicative complaints); Gellhorn, *supra* note 58, at 1384-419, 1422 (noting that "[m]ost government agencies lack explicit authorization to issue adverse publicity"); Note, *Disparaging Publicity by Federal Agencies*, 67 COLUM. L. REV. 1512, 1518-25 (1967).

66. See, e.g., FINAL REPORT OF THE ATTORNEY GEN.'S COMM. ON ADMIN. PROCEDURES, S. DOC. NO. 77-8, at 135 (1941) (The Federal Alcohol Administration "relied upon threatened adverse publicity as an extra-legal sanction to secure observance of its commands, even when the validity of its dictates was not free from doubt. Such abuse of the power to publicize proceedings must be unqualifiedly condemned."). Professor Gellhorn provided another example of the use of publicity:

Not only has the CLC [Cost of Living Council] used publicity rather than formal sanctions to coerce parties within its acknowledged sphere of competence, but it has also used publicity to extend its control to parties not covered by its enabling statute and regulations. . . . [Moreover,] the effort to control dividends was entirely ultra vires in terms of the President's original "freeze" order.

Gellhorn, *supra* note 58, at 1404-05; see also Hyde, *supra* note 40, at 28 n.89 (summarizing other "jawboning" mechanisms considered by the CLC).

67. See, e.g., Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL F. 327, 330 (explaining that "the vast majority of environmental enforcement actions [are] resolved by negotiated settlement"); Marc I. Steinberg, *SEC and Other Permanent Injunctions—Standards for Their Imposition, Modification, and Dissolution*, 66 CORNELL L. REV. 27, 63 (1980) (estimating that the Securities and Exchange Commission resolves approximately 90% of its enforcement actions by consent decree); see also 44 Fed. Reg. 34,936, 34,937 (1979) (explaining that FERC "could not possibly cope with the flood of business engendered by its jurisdictional statutes if the outcome of a substantial proportion of that business were not the result of voluntary settlements").

68. See, e.g., *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992) (recognizing the contractual nature of a consent decree in institutional reform litigation, but emphasizing that "it is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees"); Larry Kramer, *Consent Decrees and the Rights of Third*

actions, agencies sometimes manage to extract concessions from the companies suspected of violating statutory requirements, and they frequently include regulatory provisions in these administrative consent decrees that they could not impose directly on a regulated entity.⁶⁹

Again, the FDA provides some prime recent examples. In the early 1990s, the Agency negotiated consent decrees with pharmaceutical companies that it had accused of unlawfully promoting certain prescription drug products. In one of these cases, a manufacturer 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,⁷⁰ even though the statute generally prohibits such mandatory preclearance of pharmaceutical advertising.⁷¹ In another case, a company agreed to establish an FDA-approved training program for its pharmaceutical sales representatives,⁷² even though the Agency does not appear to have the

Parties, 87 MICH. L. REV. 321, 324-30 (1988) (elaborating on the nature of consent decrees). See generally Symposium, *Consent Decrees: Practical Problems and Legal Dilemmas*, 1987 U. CHI. LEGAL F. 1.

69. See Breger, *supra* note 4, at 336 ("Companies entering into these settlement agreements often agree to conditions that the government could not otherwise enforce, even if won in court, as they go beyond the scope of statutory enforcement authority."). Professor Breger noted, for instance, that "many settlement agreements negotiated between employers and OSHA contain provisions requiring safety and health audits [sometimes even at facilities in addition to the site of the alleged infraction], even though such audits are not required by law." *Id.* at 336 & n.65; see also *United States v. Olin Corp.*, 927 F. Supp. 1502, 1505-06 (S.D. Ala. 1996) (commenting that the defendant entered into an EPA consent decree as "a pragmatic business judgment . . . despite reservations about its legality and despite the government's rigid dictation of the terms and conditions it would accept" (footnotes and original quotation marks omitted)).

70. See *Syntex Will Run Naprosyn Corrective Ads in 18 Medical Journals and on "Lifetime" TV in Court-Filed Consent Decree to Halt Arthroprotective Claims*, F-D-C REP. ("The Pink Sheet"), Oct. 14, 1991, at 6, 8 [hereinafter *Syntex Ads*] (reporting that "[t]he comprehensive scope and breadth of FDA scrutiny set out in the consent agreement are unprecedented"); see also *Bristol Oncology Promotions Will Be Precleared by FDA for Two Years: Automatic Go-Ahead May Protect Company from Delays in Agency Ad Reviews*, F-D-C REP. ("The Pink Sheet"), June 3, 1991, at 6, 6 (describing a preclearance requirement covering a dozen products in a consent decree negotiated with Bristol-Myers Squibb, and adding that "[t]he agency has extracted similar agreements in recent years").

71. See 21 U.S.C. § 352(n) (1994) (providing that, "except in extraordinary circumstances, no regulation issued under this paragraph shall require prior approval by the Secretary of the content of any advertisement"); see also 21 C.F.R. § 202.1(j) (1997) (implementing regulations that call for FDA preclearance of proposed advertisements only if unexpected fatalities, or other serious side effects, come to light); 61 Fed. Reg. 24,313, 24,314-15 (1996) (disavowing any intent to require routine preclearance of prescription drug advertisements).

72. See *Kabi Pharmacia's Dipentum Consent Decree Requires FDA-Approved Training Program for Sales Reps: July 30 Order is FDA's First "Significant" Detailing*

power to regulate such communications.⁷³ In these and other cases, explicit FDA threats of especially burdensome product seizures or injunctions prompted the drug companies to accept these unprecedented requirements.⁷⁴

Some agencies have formalized the types of voluntary undertakings they may accept in settlement of an enforcement proceeding. In 1995, for instance, the EPA issued its revised "Supplemental Environmental Projects" (SEPs) policy, describing in detail what types of actions a suspected violator may undertake in hope of reducing the amount of civil penalties sought in a settlement.⁷⁵ By definition, projects qualify as SEPs only if they represent commitments that the EPA could not have sought directly,⁷⁶ on the premise that a violator should receive no reduction in penalty simply for complying with existing legal requirements. Thus, a company that has violated an air pollution standard may face a lower fine if it agrees to set aside some of its property for wetlands restoration, but not if it simply agrees to abide by emission requirements

Case, F-D-C REP. ("The Pink Sheet"), Aug. 9, 1993, at 17, 17 (noting that the "FDA's involvement in developing a training program is unprecedented"). Other provisions of this consent decree require corrective advertising, preclearance of all promotional materials for one year, and reimbursement of the FDA's costs for investigation and oversight. *See id.* at 18.

73. *See* Lars Noah, *Death of a Salesman: To What Extent Can the FDA Regulate the Promotional Statements of Pharmaceutical Sales Representatives?*, 47 FOOD & DRUG L.J. 309, 322-26 (1992).

74. *See, e.g., Syntex Ads*, *supra* note 70, at 8 ("To get the Syntex agreement, FDA is understood to have threatened to seize all of the company's stocks of Naprosyn."); *see also FDA's Generic Drug Enforcement Policies Will Be Reviewed*, F-D-C REP. ("The Pink Sheet"), Aug. 31, 1992, at T&G-1 (reporting congressional concerns about the "FDA's recent approach to pressuring firms for corrections of alleged violations. In one case, involving Barr Laboratories, FDA has offered the firm the choice of signing a consent decree and agreeing to correct alleged deficiencies or facing an injunction that would shut down operations").

75. *See* 60 Fed. Reg. 24,856, 24,856 (1995) ("All else being equal, the final settlement penalty will be lower for a violator who agrees to perform an acceptable SEP compared to the violator who does not agree to perform a SEP."). The EPA went on to explain that it "encourages the use of SEPs. While penalties play an important role in environmental protection by deterring violations and creating a level playing field, SEPs can play an additional role in securing significant environmental or public health protection and improvements." *Id.* at 24,856-57.

76. *See id.* at 24,857 (defining SEPs as "environmentally beneficial projects which a defendant/respondent agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform," meaning that "the SEP is not required by any federal, state or local law or regulation"). The EPA explained that "the primary purpose of this Policy is to obtain environmental or public health benefits that may not have occurred 'but for' the settlement." *Id.* at 24,857 n.3; *see also infra* Part IV.D (discussing SEPs policy).

in the future.⁷⁷ SEPs have become popular features in recent EPA settlements.⁷⁸

Consent decrees are not used only in the settlement of formal or threatened enforcement proceedings. In recent years, pursuant to its authority to review certain proposed mergers and acquisitions,⁷⁹ the Federal Trade Commission (FTC) has negotiated several such decrees.⁸⁰ The Commission sometimes imposes unusual restrictions as a condition for accepting a merger, and companies usually accede to these demands rather than risk antitrust litigation brought by the Department of Justice.⁸¹ Although these conditions serve primarily to allay antitrust concerns, nothing prevents the FTC from imposing regulatory restrictions of other sorts.⁸²

77. See 60 Fed. Reg. at 24,859 (specifying environmental restoration and protection as one category of acceptable SEPs); *id.* at 24,860 (identifying projects that would not be acceptable SEPs, including community service efforts "unrelated to environmental protection, e.g., making a contribution to charity, or donating playground equipment").

78. See *Enforcement: Record \$76.7 Million in Criminal Fines Assessed by Agency During Fiscal 1996*, 27 Env't Rep. (BNA) 2174, 2174 (1997) (reporting that "fiscal 1996 enforcement actions resulted in agreements that violators undertake supplemental environmental projects worth \$65.8 million").

79. See Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1383, 1390 (codified as amended at 15 U.S.C. § 18a (1994)); 16 C.F.R. pts. 801-803 (1997) (FTC's implementing regulations). The Department of Justice has long relied on consent decrees to settle antitrust litigation. See *United States v. Microsoft Corp.*, 56 F.3d 1448, 1452 (D.C. Cir. 1995); Michael E. DeBow, *Judicial Regulation of Industry: An Analysis of Antitrust Consent Decrees*, 1987 U. CHI. LEGAL F. 353, 368 ("Consent decrees have long been an important element of the federal government's enforcement of the antitrust laws."); Milton Katz, *The Consent Decree in Antitrust Administration*, 53 HARV. L. REV. 415, 424 (1940) (describing the Department's practice of pursuing a parallel criminal prosecution to "bludgeon" a company into accepting a consent decree).

80. See John R. Wilke & Bryan Gruley, *Merger Monitors: Acquisitions Can Mean Long-Lasting Scrutiny by Antitrust Agencies*, WALL ST. J., Mar. 4, 1997, at A1 ("In the past five years, the number of consent decrees out of the FTC has more than doubled, to 21. The Justice Department's total also has risen sharply, to 20 last year."). "Sometimes the settlements let mergers proceed that in the past might have been unlikely to win approval." *Id.* at A10.

81. See *id.* at A1 (reporting that the agencies are "fashioning intrusive settlements that let big deals go ahead but leave the government with a continuing role in monitoring the business. Companies, eager to get their megadeals approved, are signing on").

82. See *id.* at A10 ("[T]he law gives enforcers great leverage. But it also forces them to make their concerns clear before filing lawsuits to block deals, and that makes it easier for companies to address those concerns in consent decrees. . . . The wheeling and dealing that result have changed the way mergers get approved . . ."); see also *In re Time Warner Inc.*, No. C-3709, 1997 FTC LEXIS 13, at *120 (Feb. 3, 1997) (Starek, dissenting) (objecting to a provision in a consent decree requiring a broadcaster to sell

When used in this manner, consent decrees more closely resemble conditions imposed during licensing than bargains to settle enforcement actions. In effect, like permits or product approvals, the FTC first must authorize market entry. The Federal Reserve Board (FRB) engages in similar scrutiny of mergers and acquisitions involving bank holding companies.⁸³ Recognizing that "[v]arious kinds of conditional order[s] are used by the [FRB] to tailor its regulatory decisions to the specific applicant before it," the Administrative Conference of the United States (ACUS) generally has applauded what it characterized as the Board's "participatory approach to decisionmaking."⁸⁴ In some situations, however, the FRB has imposed conditions on (or extracted voluntary commitments from) applicants that appear to conflict with limits of its statutory authority.⁸⁵

programming at a price set by the FTC, calling this type of rate-setting a task "to which we are ill-suited"); Jonathan Honig, *Negotiating Antitrust Consent Decrees*, N.Y.L.J., June 2, 1995, at 1, 12 (concluding that "the enforcement agencies will be creative in negotiating remedial provisions"); E. Thomas Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 WASH. U. L.Q. 997, 1034-42, 1054 (1986) ("[A]s the [DOJ's] Antitrust Division has evolved from a traditional, litigation-oriented enforcement agency to that of a regulatory agency, it has done so without clear congressional approval or directive.").

83. See Bank Holding Company Act of 1956, Pub. L. No. 84-511, §§ 3, 4, 70 Stat. 133, 134-37 (codified as amended at 12 U.S.C. §§ 1842, 1843 (1994)); 12 C.F.R. pt. 225 (1997) (FRB's implementing regulations); Daniel R. Fischel et al., *The Regulation of Banks and Bank Holding Companies*, 73 VA. L. REV. 301, 336-38 (1987).

84. See 53 Fed. Reg. 26,025, 26,029 (1988) ("[C]onditions and commitments are important regulatory tools used by the [FRB] that, for the most part, add flexibility to and encourage efficiency in the consideration of applications to individual cases, providing a wide range of regulatory choices between unconditional approval and complete denial of an application."); see also JONATHAN R. MACEY & GEOFFREY P. MILLER, *BANKING LAW AND REGULATION* 591-92 (1992) (discussing the FRB's use of conditional approvals); 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, 839 (1989) (noting that "[c]onditions and commitments are the currency of the informal bargaining process by which the Fed reviews applications for expansion and acquisitions"); *id.* at 886-92 (describing the range of conditions and commitments that the FRB may demand before approving an application); *id.* at 893 (suggesting that this bargaining is inevitable and frequently beneficial).

85. See, e.g., *Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys.*, 839 F.2d 47, 68 (2d Cir. 1988) (invalidating market share limitations on securities transactions by subsidiaries of bank holding companies); *First Bancorporation v. Board of Governors of Fed. Reserve Sys.*, 728 F.2d 434, 435, 438 (10th Cir. 1984) (invalidating restrictions imposed on NOW accounts as a condition of approval of an acquisition); Aman, *supra* note 84, at 882 ("[A] commitment may result from an applicant's sense that its application would be denied unless it 'voluntarily' agreed to a condition that it thought was unwise, unnecessary, or even ultra vires."); *id.* at 898 ("The regulatory use of conditions and commitments can significantly expand an agency's power and jurisdictional

E. Sketching a Typology

Because of the recurring patterns of agency behavior evident across these different contexts, it is possible to categorize variations of arm-twisting as a prelude to the normative discussion reserved for Part IV. Cognizant of the inevitable hazards of generalization, Table 1 represents an attempt to differentiate among types and degrees of administrative arm-twisting based on the extent to which Congress has spoken to both the means used and the ends pursued by agency officials. Reasonable minds will differ, of course, over the question of whether Congress has spoken directly and unambiguously on a particular issue.⁸⁶ Moreover, the distinction between means and ends is itself ambiguous. For instance, is a voluntary recall an end procured by means of threats, or is it a means to pursue the broader purpose of safeguarding consumers from dangerous products? One might say that it is both and suggest a separate designation such as an "intermediate" means, though here it will be treated more narrowly as an end in itself.⁸⁷ Although a mandatory recall order would

reach."); *see also* United States v. Gaubert, 499 U.S. 315, 319-20, 327-34 (1991) (describing informal pressures that are legitimately exerted over financial institutions by the Federal Home Loan Bank Board); ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 174-75 (4th ed. 1997) (discussing the significant leverage exercised by bank examiners); Howell E. Jackson, *The Expanding Obligations of Financial Holding Companies*, 107 HARV. L. REV. 507, 532-33 n.82 (1994) (suggesting constraints on the reach of possible conditions); *supra* note 11 (discussing FERC's imposition of conditions on merger approvals).

86. *See, e.g.*, Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 255-61 (1995); Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-43 (1984); *see also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980-93 (1992); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 94-103 (1994).

87. The courts have confronted a similar difficulty in deciding whether to apply *Chevron* even when the statutory ambiguities relate to the scope of the agency's jurisdiction. Some have argued against any deference in these situations because of an agency's vested interest in expanding its jurisdiction. *See, e.g.*, New York Shipping Ass'n v. Federal Maritime Comm'n, 854 F.2d 1338, 1363 & n.9 (D.C. Cir. 1988); *see also* Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2097-101 (1990). Others have taken the position that no clear demarcation exists between jurisdictional and non-jurisdictional questions. *See, e.g.*, Oklahoma Natural Gas Co. v. FERC, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994); Railway Labor Executives' Ass'n v. National Mediation Bd., 29 F.3d 655, 676-77 (D.C. Cir. 1994) (en banc) (Williams, J., dissenting) ("Indeed, any issue may readily be characterized as jurisdictional merely by manipulating the level of generality at which it is framed. . . . Such pliable labels should not control the scope of review."); Quincy M. Crawford, Comment, *Chevron Deference to Agency Interpretations that Delimit the Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957, 968-83 (1994) (arguing in favor of deference).

be a means to achieve a public health and safety end, a voluntary recall undertaken at an agency's urging is triggered by some other administrative mechanism, usually an implicit threat of a sanction. Even with such inevitable difficulties, these oversimplified categories should facilitate further discussion.⁸⁸

ARM-TWISTING TYPOLOGY

<u>ENDS:</u>				
<u>MEANS:</u>		Explicitly authorized	Statutory ambiguity	Explicitly prohibited
Explicitly authorized	\	1	4	7
Statutory ambiguity		2	5	8
Explicitly prohibited		3	6	9

TABLE 1

88. As Professor Alfred Aman explained in his study of bargaining by the FRB, which is perhaps the only previous effort to evaluate what I have denominated as administrative arm-twisting, the "malleability of informal decisionmaking makes it difficult to study, but extremely important to the everyday functioning of an agency." Aman, *supra* note 84, at 839 n.9 ("This ad hoc, flexible manner seems to defy analysis, and one must be careful not to impose an artificial structure on these processes."). Professor Aman added that "there has been little analysis of the use and outer limits of conditions that administrative agencies impose when granting regulatory benefits to applicants or issuing administrative orders for litigants." *Id.* at 838; *see also* Gerd Winter, *Bartering Rationality in Regulation*, 19 L. & SOC'Y REV. 219, 222 (1985) ("When an agency barter with a firm, . . . it may seek returns that it is arguably not authorized to demand. Indeed, the ability to regulate at the border of its authority may be a reason why an agency prefers bartering to efforts at full legal enforcement.").

The previous survey of administrative arm-twisting provides examples that help illustrate most of the "cells" in Table 1. The FDA's issuance of adverse publicity to alert consumers of an imminent health hazard would fall into Cell #1, and this would not amount to arm-twisting as defined herein. Identical conduct by a different agency, which has not been delegated express authority to disseminate adverse publicity, provides an illustration of Cell #2. The FDA's threat to disseminate adverse publicity unless a manufacturer initiates a voluntary product recall might fall into Cell #4, because Congress has neither authorized nor prohibited this use of the publicity power. (One might argue that, insofar as Congress did not explicitly authorize *threats* to use publicity, this example of agency action belongs in Cell #5; in any event, such threats by an agency without express authorization to disseminate adverse publicity certainly would fit here.) The Executive Orders and the SEPs in EPA consent decrees would fall more clearly into Cell #4.

None of the categories discussed to this point seem particularly objectionable, an issue that will be revisited in Part IV. The FDA's threat to use adverse publicity to convince a drug company to submit all proposed advertising for preclearance might provide an example of behavior fitting within Cell #7 (or Cell #8 if one regards threats as not expressly authorized). Threats by agency officials to delay further action on a license application and ignore statutory deadlines until a company voluntarily agrees to accept a prohibited condition (again perhaps FDA preclearance of proposed advertising) would fall into Cell #9. (A more extreme, though purely hypothetical, illustration would involve the use of these same threats to convince an applicant to make a contribution to a political party.)

Agencies also may threaten to delay action on license applications for less objectionable reasons, such as the FDA's demand that Procter & Gamble agree to undertake postmarketing surveillance of the consumption of olestra (Cell #6), or that the company agree to accept without challenge a particular warning label requirement imposed as a condition of approval (Cell #3). If, however, one regards agency threats to delay review of license applications as not explicitly prohibited means, but instead a matter of statutory ambiguity, each of these last three illustrations shifts into the second row, where the merger approval conditions of the FTC, FRB, and FERC also seem to belong. Ultimately, the precise location of these and other examples discussed earlier is less important than some appreciation for the range of administrative arm-twisting.

III. ARM-TWISTING IN OTHER CONTEXTS

Federal regulators are hardly alone in using leverage to extract voluntary commitments or concessions from private parties that they could not impose directly. In fact, arm-twisting occurs with greater frequency in a variety of other contexts, including land use planning by state and local officials, criminal prosecution by state and federal officials, and economic regulation in other countries. This Part summarizes the imposition of exactions in the land use context, criminal plea bargaining, and the Japanese approach to the regulation of industry. Although some of the judicial constraints are introduced here in the course of describing these practices, Part IV will more fully elaborate upon the comparisons with arm-twisting by federal agencies.

A. Land Use Exactions

Local zoning authorities frequently condition their approval of building or subdivision development permits on the donation of property to the government.⁸⁹ In theory, municipalities utilize exactions to force developers to internalize the costs associated with their proposed uses of land. Exactions come in many different forms, including dedications of property for streets and parks within a proposed subdivision, off-site dedications of land for similar uses outside of a proposed subdivision, impact fees to offset increased demands on public services, linkages requiring the provision of facilities such as day care centers, and set-asides of low-income housing.⁹⁰ Some linkages are quite attenuated, such as requirements to support public art.⁹¹ Often these demands, which generally inhabit Cell #5 in the previously discussed typology (statutory ambiguity concerning both means and ends), emerge from

89. See ALAN A. ALTSHULER & JOSÉ A. GÓMEZ-IBÁÑEZ, REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS 36 (1993) (reporting that 90% of communities use some form of exactions). See generally MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 350 (1986) (noting the high degree of discretion characteristically possessed by local officials to adjust land use restrictions).

90. See Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 480-81 (1991); Donald L. Connors & Michael E. High, *The Expanding Circle of Exactions: From Dedication to Linkage*, LAW & CONTEMP. PROBS., Winter 1987, at 69, 70-72.

91. See, e.g., Ehrlich v. City of Culver City, 911 P.2d 429, 450 (Cal.) (rejecting a developer's challenge to a municipal requirement that it donate public art), cert. denied, 117 S. Ct. 299 (1996); Robert Guenther, *Novel Links with Developers Give Arts Institutions a Boost*, WALL ST. J., Apr. 18, 1984, at 22 (reporting that commercial developers agreed to build a new museum hall in exchange for building permits).

bargaining between land use officials and particular developers rather than from a pre-set formula of exactions.⁹²

The practice of demanding exactions presents several significant objections. First, the ad hoc nature of bargaining for exactions raises serious concerns about inequities in the exercise of discretion.⁹³ (In order to prevent unequal treatment among similarly situated developers, local governments could formalize a schedule of land use exactions required for certain types of developments.) Second, the widespread use of exactions and other types of bargained waivers of generally applicable land use restrictions may distort policy choices about appropriate levels of regulation.⁹⁴ Third, exactions may allow officials to skirt the

92. See Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831, 851 (1992) ("[P]re-set standards rarely determine the amount of municipal exactions; instead, exactions are generally the product of dealmaking between municipality and developer."); Paul M. Barrett, *Developers Win Property Ruling in High Court*, WALL ST. J., June 27, 1994, at A2 (reporting that "conditions to building permits are typically hammered out in negotiations between government and owner"); see also Desmond Heap, *The British Experience*, LAW & CONTEMP. PROBS., Winter 1987, at 31, 32-34 (describing the British practice of bargaining for "planning gains," concessions extracted from developers that could not be imposed directly).

93. See Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, LAW & CONTEMP. PROBS., Winter 1987, at 51, 62 ("A project-by-project approach to exaction policy, to which many survey respondents admitted, creates not only uncertainty, with all its financial ramifications, but also the possibility of uneven governmental treatment . . ."); Charles Siemon, *Who Bears the Cost?*, LAW & CONTEMP. PROBS., Winter 1987, at 115, 124-26 (expressing concerns that ad hoc bargaining over exactions, coupled with a lack of effective judicial review, invites abuse); Sterk, *supra* note 92, at 852 ("When deals, not rules, serve as the basis for setting exaction levels, municipal officials will have the opportunity to discriminate among developers."). But cf. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837 (1983) (defending the largely ad hoc process of local land use decisionmaking); Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957 (1987) (same).

94. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 n.5 (1987) ("One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served . . ."); see also Stewart E. Sterk, *Nollan, Henry George, and Exactions*, 88 COLUM. L. REV. 1731, 1744-47 (1988) (suggesting that imposition of a nexus requirement for land use exactions would reduce rent-seeking behavior of this sort); cf. Lynda L. Butler, *The Politics of Takings: Choosing the Appropriate Decisionmaker*, 38 WM. & MARY L. REV. 749, 754-55 (1997) (warning that officials "could simply over-regulate a tract of land until the market value fell to a point at which the landowner would prefer to sell the property and government was one of the few parties interested in buying").

constitutional requirement that the government compensate persons for the taking of their property. The Takings Clause of the Fifth Amendment provides that the government may take private property only for "public use" and only with "just compensation."⁹⁵ Land use exactions may represent efforts to take private property for legitimate public uses but without just compensation.⁹⁶

Twice in the last decade, the United States Supreme Court has held that certain land use exactions constituted unconstitutional takings of property. First, in *Nollan v. California Coastal Commission*,⁹⁷ the Court reviewed a state agency's requirement that residential property owners donate a lateral easement across their beachfront property in order to obtain a permit to build a larger house.⁹⁸ The Court held that in order to avoid the just compensation requirement of the Takings Clause, an "essential nexus" must exist between the exaction and the projected impact of the development.⁹⁹ Otherwise, the government would have to utilize its eminent domain powers and purchase an easement from the landowners,¹⁰⁰ and the approval of a requested development permit

95. U.S. CONST. amend. V; see also Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995 (1997); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995). The Takings Clause of the United States Constitution is made applicable to the states by the Fourteenth Amendment. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978).

96. See, e.g., *Rosen v. Village of Downers Grove*, 167 N.E.2d 230, 235 (Ill. 1960) (finding that economic pressure on developer to accept exaction constituted duress); *Collis v. City of Bloomington*, 246 N.W.2d 19, 26 (Minn. 1976) (characterizing some exactions as "grand theft"); *J.E.D. Assocs. v. Town of Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981) (calling exaction scheme "extortion"); *West Park Ave., Inc. v. Township of Ocean*, 224 A.2d 1, 4-6 (N.J. 1966) (finding that local officials exerted "duress" in imposing exactions); Richard F. Babcock, *Exactions: A Controversial New Source for Municipal Funds*, LAW & CONTEMP. PROBS., Winter 1987, at 1, 1-3 (describing the "municipal leverage" used to secure exactions, many of which "appear to be completely ad hoc and unrelated to the proposed development").

97. 483 U.S. 825 (1987).

98. See *id.* at 828-29. In fact, 43 other landowners in the area already had capitulated to the Commission's requests for such easements. See *id.* at 829.

99. See *id.* at 837 (explaining also that the condition must "serve[] the same governmental purpose as the development ban"). The Court added that the exaction would have to "substantially advance" the same interest that the prohibition on construction sought to achieve. See *id.* at 834, 841. Thus, the nexus requirement did not turn on the closeness of the fit between means and ends, so much as on the relationship between the purpose served by the exaction and the range of permissible reasons for denying the requested building permit altogether.

100. See *id.* at 841-42.

would not constitute just compensation.¹⁰¹ Absent the requisite connection, an exaction would amount to "an out-and-out plan of extortion."¹⁰² In *Nollan*, the Court concluded that the state agency had failed to establish any sort of nexus.¹⁰³

More recently, in *Dolan v. City of Tigard*,¹⁰⁴ the Court reviewed a city's demand that a commercial property owner donate an easement over a strip of her land adjacent to a creek, to serve as a greenway and bicycle path, in order to obtain permits to enlarge a store and pave a parking lot on the property.¹⁰⁵ The city justified the exaction as necessary to offset the projected additional runoff of water within the creek's floodplain and the increased traffic congestion associated with the improvements to the property.¹⁰⁶ After initially conceding that this exaction would satisfy *Nollan*'s "essential nexus" test,¹⁰⁷ the Court added that some linkages might not amount to a sufficiently close linkage for purposes of the Takings Clause.

Instead, the Court demanded a "rough proportionality" between the exaction and the projected impact of the development;¹⁰⁸ otherwise, the government would have to abide by the Constitution's just compensation requirement. In *Dolan*, the Court concluded that the exaction failed the

101. See *id.* at 833 n.2. But cf. Douglas T. Kendall & James E. Ryan, "Paying for the Change: Using Eminent Domain to Secure Exactions and Sidestep *Nollan* and *Dolan*," 81 VA. L. REV. 1801, 1803 (1995) (proposing that, "where the value of a development permit exceeds the value of the land exaction sought by the town, the town should take the land through eminent domain and give the landowner a choice between cash compensation and compensation in the form of a development permit").

102. *Nollan*, 483 U.S. at 837 (footnote and original quotation marks omitted).

103. See *id.* at 838 ("It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house."). The Court suggested that a more limited condition on granting the development permit, linked more closely to the concern over reduced visual access to the ocean, would survive constitutional challenge. See *id.* at 836 (noting that the Commission could, for example, have imposed "a height limitation, a width restriction, or a ban on fences," or required "that the Nollans provide a viewing spot on their property for passersby").

104. 512 U.S. 374 (1994).

105. See *id.* at 380. The strip of land amounted to approximately 10% of the lot. See *id.*

106. See *id.* at 381-82 (noting, for instance, that the greenway could be used by pedestrians and bicyclists).

107. See *id.* at 386-88. The Court contrasted the undoubted nexus in this case with the "gimmickry" relied upon by the California Coastal Commission in *Nollan*. See *id.* at 387.

108. See *id.* at 388-91. "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391 (footnote omitted).

proportionality test.¹⁰⁹ In dissent, Justice Stevens agreed that "the city may not attach arbitrary conditions to a building permit or a variance even when it can rightfully deny the application outright," but he objected to the majority's adoption and application of the "rough proportionality" requirement.¹¹⁰ Notwithstanding the Supreme Court's fairly restrictive holdings in these two cases, however, exactions appear to remain an attractive regulatory device for local land use officials and cash-strapped municipalities.¹¹¹

B. Criminal Plea Bargaining

Plea bargaining also offers some interesting parallels to administrative arm-twisting. Criminal defendants routinely plead guilty, typically in exchange for a reduction in charges or some concession by prosecutors in making sentencing recommendations.¹¹² An accused may agree to plead guilty to a lesser-included offense or a smaller set of offenses charged in an indictment if the prosecutor agrees not to pursue other

109. See *id.* at 392-96. The Court held that the city's findings of a nexus were too conclusory. See *id.* at 393 ("The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control."); *id.* at 395-96 ("[T]he city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."); see also *id.* at 394 ("If petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere.").

110. See *id.* at 397 (Stevens, J., dissenting); *id.* at 405 ("The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan."); see also *id.* at 413 (Souter, J., dissenting) (same). "The correct inquiry should instead concentrate on whether the required nexus is present and venture beyond considerations of a condition's nature or germaneness only if the developer establishes that a concededly germane condition is so grossly disproportionate to the proposed development's adverse effects" *Id.* at 403 (Stevens, J., dissenting).

111. See EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE *DOLAN* ERA (Robert H. Freilich & David W. Bushek eds., 1995); TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* (David L. Callies ed., 1996); David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1286-302 (1997).

112. See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 5-6 (1979) (arguing that, contrary to claims of its longstanding use, plea bargaining only emerged slowly and with misgivings over the course of the last century); Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 564 (1977) ("[T]he locus of the criminal process has shifted largely from trial to plea bargaining.").

charges in the indictment. Indeed, defendants may avoid prosecution altogether by agreeing to participate in a pretrial "diversion" program, such as drug rehabilitation for certain types of offenders.¹¹³

In addition to charge reductions, prosecutors may encourage guilty pleas in other ways. Prosecutors may agree to make certain sentencing recommendations to trial judges, including alternatives to incarceration,¹¹⁴ or they may promise not to charge third parties such as a close relative of the accused.¹¹⁵ Referring back to the previously discussed typology, promises concerning charge reductions or sentencing recommendations would seem to fall into the second row (statutory ambiguity concerning means), but threats to pursue groundless additional charges or incarcerate a relative unless the defendant agrees to plead guilty would seem to belong in the third row (explicitly prohibited means).

113. See, e.g., *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 805 (9th Cir. 1994); *United States v. Foster*, 823 F. Supp. 884, 885 (D. Kan. 1993); *United States v. Snead*, 822 F. Supp. 885, 886-88 (D. Conn. 1993); *Wood v. United States*, 622 A.2d 67, 69-70 (D.C. App. 1993); Mark Curriden, *Drug Courts Gain Popularity*, A.B.A. J., May 1994, at 16. Induction into the military once was another popular form of diversion. See Richard Mills, *The Prosecutor: Charging and "Bargaining"*, 1966 U. ILL. L.F. 511, 516 ("Another practice, which appears to be fairly common among prosecutors, is to 'bargain' young defendants into entering military service in lieu of prosecution . . ."). Plea bargaining and pretrial diversion should be distinguished from post-conviction conditions imposed through probation and parole, though some of the same issues may arise. See, e.g., *State v. Zeta Chi Fraternity*, 696 A.2d 530, 540-42 (N.H. 1997) (upholding condition of probation allowing random warrantless searches of house by probation officers, because it was reasonably related to the rehabilitation and supervision of the defendant, but rejecting condition insofar as it authorized similar searches by police officers), *cert. denied*, 66 U.S.L.W. 3170 (U.S. Dec. 1, 1997) (No. 97-346); NEIL P. COHEN & JAMES J. GOBERT, *THE LAW OF PROBATION AND PAROLE* 181-343 (1983).

114. See, e.g., *People v. Mitchell*, 262 N.E.2d 915, 916 (Ill. 1970) (recommending probation); *State v. Loyd*, 190 N.W.2d 123, 123-24 (Minn. 1971) (recommending work release); *Wilson v. State*, 490 S.W.2d 33, 34 (Mo. 1973) (recommending drug treatment center); *People v. Dreusike*, 348 N.Y.S.2d 258, 259 (App. Div. 1973) (recommending a reformatory rather than a prison sentence).

115. See, e.g., *United States v. Marquez*, 909 F.2d 738, 741-43 (2d Cir. 1990); *Politte v. United States*, 852 F.2d 924, 929-30 (7th Cir. 1988); *Gardner v. State*, 537 P.2d 469, 470-71 (Nev. 1975); cf. *Stein v. New York*, 346 U.S. 156, 167, 186 (1953) (holding that the defendant's confession was voluntary even though exchanged for his father's release from detention and a promise that his brother would not be prosecuted for violating parole). The Supreme Court has suggested some concerns about such tactics. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 n.8 (1978) (noting that "a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person other than the accused . . . might pose a greater danger of inducing a false guilty plea"); see also *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) (holding that the defendant's confession had been coerced where it "was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate'"); *United States v. Wright*, 43 F.3d 491, 497-500 (10th Cir. 1994).

For their part, defendants may offer inducements (or face prosecutorial demands) other than the guilty plea itself. For instance, an accused may promise to cooperate by assisting in an ongoing investigation or testifying at trial against another defendant.¹¹⁶ Defendants may offer to forego their right to pursue any available appeals,¹¹⁷ or they may agree to release law enforcement officials from civil liability for any alleged constitutional violations arising out of their arrest, in exchange for a dismissal of criminal charges against them.¹¹⁸ Criminal defendants sometimes even manage to purchase leniency by making large financial donations to government agencies, including local police departments.¹¹⁹ Again in terms of the typology, a guilty plea to some of the charges would fall into the first column (explicitly authorized ends), promises to cooperate would fit in the second column (statutory ambiguity concerning ends), and promises to forfeit property unrelated to any of the charged offenses might belong in the third column (explicitly prohibited ends).

Although prevalent for more than a century, the United States Supreme Court accepted plea bargaining as legitimate only within the last

116. See, e.g., *Ricketts v. Adamson*, 483 U.S. 1, 9-10 (1987); *United States v. De La Fuente*, 8 F.3d 1333, 1335 (9th Cir. 1993); Yvette A. Beeman, Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800, 800-01 (1987).

117. See, e.g., *United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995); *United States v. Johnson*, 67 F.3d 200, 202-03 (9th Cir. 1995); *People v. Seaberg*, 541 N.E.2d 1022, 1023 (N.Y. 1989). An accused also may have to waive certain evidentiary privileges for statements made during the plea negotiations so that incriminating statements can be introduced at trial. See, e.g., *United States v. Mezzanatto*, 513 U.S. 196, 209-10 (1995) (upholding an agreement waiving the rule that prevents the use of statements made by the accused during plea negotiations to impeach him should he go to trial). See generally William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 825-34 (1989).

118. See, e.g., *Town of Newton v. Rumery*, 480 U.S. 386, 393-94 (1987) (rejecting the claim that release-dismissal agreements are inherently coercive and, therefore, inappropriate, while conceding that such settlements pose greater dangers of abuse than court-approved plea bargains); see also Seth F. Kreimer, *Releases, Redress, and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges*, 136 U. PA. L. REV. 851, 928-35 (1988) (criticizing the use of these agreements); Andrea Hyatt, Note, *Release-Dismissal Agreement Validity—From Per Se Invalidity to Conditional Validity, and Now Turning Back to Per Se Invalidity*, 39 VILL. L. REV. 1135 (1994) (surveying recent decisions).

119. See Joe Pichirallo, *Some Marijuana Smugglers Offer 'Donations' for Leniency*, WASH. POST, Feb. 5, 1980, at A1 ("Court officials in at least two other localities . . . agreed to accept hundreds of thousands of dollars in 'donations' from accused drug smugglers to local governments. In return, the defendants . . . received probation instead of prison."); see also *infra* note 180 (discussing alleged abuses in using civil forfeiture powers).

thirty years.¹²⁰ In one decision upholding a questionable prosecutorial tactic, the Court described "the give-and-take negotiation common in plea bargaining between the prosecution and the defense, which arguably possess relatively equal bargaining power."¹²¹ Although that assessment of the two sides' relative negotiating strength seems somewhat naive,¹²² the Court has fully embraced plea bargaining as an acceptable practice, going so far as to call it "an essential component of the administration of justice."¹²³

Detractors of plea bargaining argue that the system invites prosecutorial overreaching and abuse.¹²⁴ For instance, the hope of leveraging guilty pleas may encourage prosecutors to overcharge initially.¹²⁵

120. See, e.g., *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) ("Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system."); *id.* at 76 ("Only recently has plea bargaining become a visible practice accepted as a legitimate component in the administration of criminal justice."); *Brady v. United States*, 397 U.S. 742, 752-53 (1970) (observing that "at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty," adding that "we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State").

121. *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978) (footnotes and original quotation marks omitted); see also *id.* at 363 (declining to find prosecutorial retaliation "so long as the accused is free to accept or reject the prosecution's offer"); DOUGLAS W. MAYNARD, *INSIDE PLEA BARGAINING: THE LANGUAGE OF NEGOTIATION* (1984).

122. See, e.g., Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1473 (1993) (arguing that "prosecutors hold great bargaining power over defendants and are able to obtain exchanges of pleas at subcompetitive prices"). In some situations criminal defendants enjoy a relatively strong bargaining position, for instance when they have critical information, or in release-dismissal situations, but the majority of defendants have little of value to offer in exchange other than eliminating the necessity for trial.

123. *Santobello v. New York*, 404 U.S. 257, 260 (1971) ("Properly administered, [plea bargaining] is to be encouraged.").

124. See, e.g., Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 652 (1981) ("[P]lea bargaining remains an inherently unfair and irrational process, one that turns major treatment consequences upon a single tactical decision irrelevant to any proper objective of criminal proceedings."); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 17-18 (1978) ("Our law of plea bargaining has . . . repeated the main institutional blunder of the law of torture. Plea bargaining concentrates effective control of criminal procedure in the hands of a single officer.").

125. See *Bordenkircher*, 434 U.S. at 368 n.2 (Blackmun, J., dissenting); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85-105 (1968); see also *Town of Newton v. Rumery*, 480 U.S. 386, 395 (1987) (plurality opinion) (conceding that the availability of release-dismissal agreements tempts prosecutors to bring frivolous charges that they then agree to drop in exchange for the defendant's release of civil claims against the government); *id.* at 400 (O'Connor, J., concurring)

Indeed, critics emphasize one important distinction between plea bargaining and the settlement of private disputes—the government enjoys enormous power over the accused. The threat of a larger criminal sanction after trial strongly discourages defendants from invoking their constitutional rights.¹²⁶ Defense counsel also may have incentives to plea bargain even when it is not in the best interests of their clients.¹²⁷ Moreover, because so much of it occurs behind the scenes, these and other abuses go largely unchecked. As a consequence, the risk of convicting innocent defendants may increase.¹²⁸

Justifications for plea bargaining include improved equity, insofar as rigid sentencing guidelines may fail to take into account a defendant's particular circumstances, and administrative efficiency, insofar as guilty pleas relieve growing caseload pressures on courts, prosecutors, and other law enforcement officials.¹²⁹ These and other supposed advantages find parallels in the justifications favoring settlements in other contexts,¹³⁰ though private dispute resolution has its own share of forceful

(same); *Dixon v. District of Columbia*, 394 F.2d 966, 969 (D.C. Cir. 1968) (same).

126. See, e.g., Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 904-15 (1980); Stephen A. Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 MICH. L. REV. 1265, 1305-07 (1978).

127. See Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1313 (1975) ("Contrary to the assumption of the Supreme Court and other observers that plea negotiation ordinarily occurs in an atmosphere of informed choice, private defense attorneys, public defenders, and appointed attorneys are all subject to bureaucratic pressures and conflicts of interest that seem unavoidable in any regime grounded on the guilty plea.").

128. See, e.g., John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?*, 126 U. PA. L. REV. 88, 95-100, 145 (1978); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1981-87 (1992).

129. See *People v. Selikoff*, 318 N.E.2d 784, 788-89 (N.Y. 1974); Thomas W. Church, Jr., *In Defense of "Bargain Justice"*, 13 L. & SOC. REV. 509 (1979); Steven S. Nemerson, *Coercive Sentencing*, 64 MINN. L. REV. 669, 719-29 (1980) (canvassing justifications).

130. See Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992); H. Richard Uviller, *Pleading Guilty: A Critique of Four Models*, LAW & CONTEMP. PROBS., Winter 1977, at 102, 102-03; cf. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1934 (1992) ("[T]he objections to plea bargaining as an institution are not grounded in the norms of contract law [C]lassical contract theory plainly supports a presumption in favor of enforceability.").

detractors.¹³¹ Whatever one thinks of the practice, explicit or implicit bargaining in the criminal justice system seems largely unavoidable.¹³²

C. Regulation in Japan

Japanese officials have long relied upon forms of arm-twisting as a regulatory technique. "Administrative guidance, the process whereby bureaucratic agencies request certain conduct and exert other forms of statutory or non-statutory pressure to achieve compliance, is the primary method of enforcing regulations and implementing policy" in Japan.¹³³ Agencies may pursue their goals by threatening to utilize wholly unrelated regulatory powers over firms in order to encourage voluntary compli-

131. See, e.g., Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995). For one recent response to some of these criticisms, see Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995).

132. See, e.g., MILTON HEUMANN, *PLEA BARGAINING* 162 (1978); Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265, 265 n.2 (1987) ("Most scholars assume that bargaining is inevitable."). But see Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 935-37 (1983) (arguing that plea bargaining could and should be abolished); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1106-07 (1984) (challenging the dogma that bargaining is inevitable).

133. Ken Duck, Comment, *Now That the Fog Has Lifted: The Impact of Japan's Administrative Procedures Law on the Regulation of Industry and Market Governance*, 19 FORDHAM INT'L L.J. 1686, 1707 (1996); see also MITSUO MATSUSHITA, *INTERNATIONAL TRADE AND COMPETITION LAW IN JAPAN* 62-63 (1993); FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 168 (1987) ("Even in areas where it has specific legal power, MITI rarely exercises it formally. Instead it prefers to use various informal, legally voluntary modes of persuasion, generically known as administrative guidance, to convince individual firms or groups of firms to comply with Ministry policy."); Peter B. Edelman, *Japanese Product Standards as Non-Tariff Trade Barriers: When Regulatory Policy Becomes a Trade Issue*, 24 STAN. J. INT'L L. 389, 436-37 (1988) (summarizing the use of administrative guidance); Steven M. Spaeth, *Industrial Policy, Continuing Surveillance, and Raised Eyebrows: A Comparison of Informality in Administrative Procedure in Japan and the United States*, 20 OHIO N.U. L. REV. 931, 933-40 (1994) (same); Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 935 (1984) ("Japanese administrative agencies turn to administrative guidance as the preferred regulatory technique with notable frequency . . . , attempt[ing] to accomplish through administrative guidance what by most admissions they cannot achieve under the governing legal regime.").

ance.¹³⁴ For instance, a company's refusal to abide by voluntary pricing or output guidelines might result in the denial of export permits (like Cell #5 in the typology). Japanese officials also have used administrative guidance in the land use context.¹³⁵

Although perhaps not as pervasive, arm-twisting by agency officials in the United States parallels this Japanese approach to regulation.¹³⁶ As in the United States, their informal method of regulating firms often evades judicial review,¹³⁷ thereby allowing Japanese agencies to pursue extra-statutory ends.¹³⁸

134. See UPHAM, *supra* note 133, at 171 (describing "forceful arm twisting" and "threat[s] of collateral future action" by MITI to encourage agreement); KAREL VAN WOLFEREN, *THE ENIGMA OF JAPANESE POWER* 344-45 (1989) (explaining that agencies use various forms of leverage over regulated entities, such as threatened denials of applications for permits or licenses, and that threats may involve matters unrelated to the guidance); Young, *supra* note 133, at 938 (noting that "administrative guidance enables agencies to gain additional flexibility by resorting to collateral methods of enforcement to effectuate quite unrelated regulatory objectives").

135. See Young, *supra* note 133, at 928-32.

Although such Outline Guidance was not legally binding, the municipalities did not leave compliance entirely to the developers' good will. Musashino's Outline Guidance, for example, indicated that the city would not provide water or sewage services to uncooperative developers. Moreover, the city would not issue the construction permits required under the Construction Standards Law. Other municipalities outlined additional ways in which they would refuse to aid uncooperative developers.

Id. at 932; see also *id.* at 940-46 (adding that, unlike the more formal legal structure in the United States, the Japanese approach to land use sought primarily to alter bargaining dynamics between developers and residents rather than to serve as a mechanism for securing concessions demanded by municipalities); UPHAM, *supra* note 133, at 174-75.

136. See Young, *supra* note 133, at 925 n.6 (disputing the notion that the practice of administrative guidance is uniquely Japanese, pointing to the history of voluntary wage and price controls in the United States); see also Winter, *supra* note 88, at 240 n.32 (explaining that, in Germany, "[a]greements between private parties and agencies that are not specifically authorized by law are allowed provided they are not forbidden by law, relate to the basic goal the agency is empowered to seek, and involve trade-offs that are, generally speaking, 'proportional'").

137. See Robert W. Dziubla, *The Impotent Sword of Japanese Justice: The Doctrine of Shobunsei as a Barrier to Administrative Litigation*, 18 CORNELL INT'L L.J. 37, 54-56 (1985) (concluding that restrictive justiciability requirements encourage Japanese officials to structure administrative activity in ways that escape judicial review); cf. Young, *supra* note 133, at 953-80, 983 ("The absence of any legal compulsion in administrative guidance also initially deterred Japanese courts from reviewing such action, thereby insulating from judicial scrutiny a significant portion of Japanese regulatory conduct. More recently, however, courts have addressed the proper scope of review, particularly in cases involving municipalities' Outline Guidance" for land use disputes.).

138. See Young, *supra* note 133, at 936 ("Administrative guidance permits agencies to regulate not only beyond the limits of the law but also, on occasion, in direct contravention of the law . . . because any judicial inquiry into the propriety of the

Because the use of administrative guidance frees an agency from the specific moorings of the governing statutory language, it may not only expand the scope of its activity, but also redefine the very nature of its regulatory mandate. Many Japanese bureaucrats appear to view their enabling legislation not merely as establishing substantive areas over which they are to exercise regulatory control, but rather as descriptions of the various groups in society over which they have charge.¹³⁹

For these and other reasons, agency reliance on administrative guidance has attracted substantial criticism,¹⁴⁰ which in turn has prompted some limited reforms. For instance, under the Administrative Procedures Law enacted in 1993, Japanese officials "may no longer threaten to deny licenses, permits, or approvals in order to effect compliance with the agency's administrative goals."¹⁴¹ It is not clear, however, that this limitation has appreciably altered the traditional reliance on administrative guidance and voluntary compliance in Japan, though a similar directive from Congress might succeed in discouraging administrative arm-twisting in the United States.

regulatory objectives will be limited.").

139. *Id.*; see also Duck, *supra* note 133, at 1705-06, 1708 ("The flexibility or extra-legal nature of administrative guidance means that its exercise is not always constrained by any legal limits.").

140. See, e.g., MITSUO MATSUSHITA & THOMAS J. SCHOENBAUM, JAPANESE INTERNATIONAL TRADE AND INVESTMENT LAW 40 (1989) (Although "there is nothing inherently sinister about it," the "flexibility of administrative guidance may mean that its exercise is not circumscribed by any limits . . . [and] may lead to an arbitrary and capricious exercise of *de facto* governmental power and to infringement of individual rights."); Meryll Dean, *Administrative Guidance in Japanese Law: A Threat to the Rule of Law*, in COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 685, 686 (Kenneth L. Port ed., 1996) ("It is a system of achieving indirectly that for which no direct legal power exists."). But see Young, *supra* note 133, at 980-83 (defending the use of administrative guidance as a flexible response to difficult problems, and disputing claims that it escapes judicial scrutiny).

141. Duck, *supra* note 133, at 1733. The new law "stipulates that parties that do not comply with guidance may not be treated unfairly or be pressured by the ministry in this or other unrelated matters also within the ministry's jurisdiction." *Id.* at 1732; see also Frank K. Upham, *Privatized Regulation: Japanese Regulatory Style in Comparative and International Perspective*, 20 FORDHAM INT'L L.J. 396, 504-06 (1996) (discussing the initial experience under the Administrative Procedures Law); *id.* at 466-74 (describing successful judicial challenges by Japanese developers to Outline Guidance).

IV. COPING WITH ADMINISTRATIVE COERCION

As described in Part II, administrative arm-twisting occurs in the course of licensing, government contracting, and enforcement proceedings. One may applaud some of these agency initiatives as refreshingly innovative alternatives to the typically inflexible and occasionally counterproductive regulations and enforcement policies of the federal government.¹⁴² Indeed, some of the approaches represent responses to past complaints by regulated firms about undue rigidity in administrative decisionmaking, and companies no doubt prefer negotiated outcomes (with strings attached) to the denial of a license, the rejection of a contract bid, or the imposition of a formal sanction. This same flexibility, however, carries with it opportunities for abuse.

Although perhaps more apt as a gauge for legislative than administrative behavior, the insights of public choice theory suggest that agency officials act to further their self-interest, whether by aggrandizing their own power or placating important constituencies.¹⁴³ During the last quarter of a century, for instance, the FDA has been notoriously creative in construing its own statutory authority. In the early 1970s, Agency officials expressed the view that their enabling statute represents a broad "constitution" authorizing the FDA to protect the public health by any necessary and proper means, rather than a limited and precise delegation of power from Congress.¹⁴⁴ Some might congratulate the Agency for

142. See, e.g., Aman, *supra* note 84, at 883, 893 (noting the "many advantages" of bargaining as part of the FRB's regulatory process); *id.* at 897 ("It would be an overreaction to these problems [with the bargaining process] to discourage the flexibility and fine-tuning capabilities that conditions and commitments make possible."); Seidenfeld, *supra* note 5, at 513 ("Such conditions allow[ed] FERC to tailor transmission access and market-based rates to take into account the magnitude and distribution of transition costs in particular markets. In addition, by attaching mandates . . . as conditions on approvals desired by utilities, FERC has mollified the electric industry's opposition to deregulation.").

143. See Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 51 (1982) ("Budget maximizing, jurisdictional expansion, and output maximizing in their various manifestations may increase private payoffs to agency personnel."); Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 248 (1984); cf. Edward L. Rubin, *Public Choice and Legal Scholarship*, 46 J. LEGAL EDUC. 490, 496 (1996) (summarizing limitations of public choice theory in predicting the behavior of unelected officials).

144. See Peter Barton Hutt, *Philosophy of Regulation Under the Federal Food, Drug and Cosmetic Act*, 28 FOOD DRUG COSM. L.J. 177, 178 (1973) ("[T]he Act must be regarded as a constitution. . . . The mission of the [FDA] is to implement [its fundamental] objectives through the most effective and efficient controls that can be devised."); see also *United States v. Dotterweich*, 320 U.S. 277, 280 (1943) (suggesting that the FD&C Act be treated as "a working instrument of government and not merely

its adaptability to changing circumstances, but others have credibly accused it of overreaching and arbitrariness.¹⁴⁵ As elaborated in this Part, administrative tendencies toward expansion of agency jurisdiction and power should be condemned and curtailed, though effectuating such elusive goals may prove to be quite difficult.

When private parties settle disputes, they bargain in the "shadow" of the law, with the prospect of judicial review serving to constrain the range of potential outcomes.¹⁴⁶ When administrative agencies bargain with regulated entities, it is less clear that they operate in the shadow of the law, in particular the constraints on the power delegated by Congress. Before discussing possible reforms, this Part considers the unconstitutional conditions doctrine as it has been employed in both the land use and plea bargaining contexts, and it then evaluates the experience with administrative consent decrees. Thereafter, this Part recommends both substantive and procedural checks on agency opportunities for arm-twisting to counteract some of the inevitable problems associated with such an unsupervised practice.

as a collection of English words"); David A. Kessler & Wayne L. Pines, *The Federal Regulation of Prescription Drug Advertising and Promotion*, 264 JAMA 2409, 2411 (1990) ("Until further judicial decisions or congressional action clarifies the FDA's specific authority in the area of [drug product] promotion, the FDA will continue to assert broad jurisdiction.").

145. See, e.g., 62 Cases of *Jam v. United States*, 340 U.S. 593, 600 (1951) ("In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."); *United States v. Parkinson*, 240 F.2d 918, 921 (9th Cir. 1956) ("The record of the past few decades is replete with examples of the tendency of executive agencies to expand their field of operations. A passion and a zeal to crusade affects their operations."); H. Thomas Austern, *Philosophy of Regulation: A Reply to Mr. Hutt*, 28 FOOD DRUG COSM. L.J. 189, 191 (1973) (criticizing the suggestion that "a well-motivated administrative agency can legally do what it alone deems desirable unless Congress has in advance specifically prohibited it"); Lars Noah & Barbara A. Noah, *Nicotine Withdrawal: Assessing the FDA's Effort to Regulate Tobacco Products*, 48 ALA. L. REV. 1, 37 (1996) ("[T]he FDA should not be free to ignore the outer boundaries of its delegated authority in pursuit of a well-meaning crusade against a public health problem.").

146. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979) ("Individuals in a wide variety of contexts bargain in the shadow of the law."). As one example, the authors mentioned that "[m]ost administrative proceedings result in consent agreements rather than trials." *Id.* For subsequent commentary on this general notion, see Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); Edward L. Rubin, *The Nonjudicial Life of Contract: Beyond the Shadow of the Law*, 90 NW. U. L. REV. 107 (1995).

A. Using the Unconstitutional Conditions Doctrine

Land use exactions and plea bargaining represent variants of the unconstitutional conditions problem, which may provide some useful lessons for possible limitations on agency arm-twisting. In particular, judicially imposed restrictions on both of these widespread practices offer valuable guidance for how courts and legislators might appropriately supervise or restrain administrative arm-twisting at the federal level.

In *Dolan*, the Supreme Court evaluated the city's land use exaction against the backdrop of "the well-settled doctrine" of unconstitutional conditions, which it summarized as follows: "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the [condition] sought has little or no relationship to the property."¹⁴⁷ The doctrine represents a reaction to the now generally discredited distinction between rights and privileges,¹⁴⁸ and the often associated premise that the government's greater power not to bestow a privilege at all includes the lesser power to provide any such privilege conditionally.¹⁴⁹ The unconstitutional conditions doctrine originated in challenges to state restrictions on charters granted to foreign corporations.¹⁵⁰ More

147. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). In fact, *Dolan* represented the first time that a Takings challenge had been scrutinized explicitly by reference to this rule against unconstitutional conditions. See *id.* at 407-09 (Stevens, J., dissenting); Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 861, 864 n.28 (1995); see also Jonathan M. Block, Note, *Limiting the Use of Heightened Scrutiny to Land-Use Exactions*, 71 N.Y.U. L. REV. 1021, 1044-53 (1996) (arguing that *Dolan*'s nexus requirement only applies to physical takings imposed by agency officials as conditions on permit approvals in an adjudicatory setting, not to regulatory takings claims or challenges to generally applicable zoning restrictions enacted by elected officials).

148. See William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1442 (1968); cf. Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 69 (1982) ("[T]he doctrine has shown an uncanny ability to reconstitute itself in spite of the best efforts of scholars and jurists to bury it. In the last decade it has reemerged in the procedural due process area . . .").

149. See Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 519 (1995) (concluding that, although the greater-includes-the-lesser argument makes sense, heightened judicial scrutiny is appropriate in those cases where a lesser power is separated from the greater power along a constitutionally protected dimension); John H. Garvey, *The Powers and the Duties of Government*, 26 SAN DIEGO L. REV. 209, 215-19 (1989) (discussing the limitations of this argument); Michael Herz, *Justice Byron White and the Argument That the Greater Includes the Lesser*, 1994 BYU L. REV. 227, 238-49 (same).

150. See, e.g., *Terral v. Burke Constr. Co.*, 257 U.S. 529, 532-33 (1922) (overruling earlier decisions allowing states to revoke licenses of foreign corporations for

contemporary applications have included challenges to state denials of unemployment benefits to individuals who decline to work on their sabbath,¹⁵¹ state prohibitions on office-holding by ministers,¹⁵² and federal restrictions on editorializing as a condition for receiving public broadcasting subsidies.¹⁵³

Because of its wildly inconsistent application by the Supreme Court, the unconstitutional conditions doctrine has attracted a great deal of scholarly attention in recent years.¹⁵⁴ At its base, the doctrine attempts to identify situations where the government has impermissibly coerced a beneficiary to relinquish a constitutional right. Narrowly conceived, "coercion" exists only if a person is put to a choice involving an unlawful option,¹⁵⁵ but coercion arguably also exists where a choice leaves the

failing to honor conditions waiving the right to remove lawsuits to federal court); *Doyle v. Continental Ins. Co.*, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) ("Though a State may have the power . . . of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so."). As the Supreme Court once noted:

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.

Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593 (1926).

151. See, e.g., *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 146 (1987); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); see also *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958) (holding that the denial of a state tax exemption to persons advocating the overthrow of government represented an unconstitutional condition).

152. See *McDaniel v. Paty*, 435 U.S. 618, 626-29 (1978) (plurality opinion).

153. See *FCC v. League of Women Voters*, 468 U.S. 364, 399-401 (1984).

154. See, e.g., Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 10-11 (1988) (complaining that the doctrine "roams about constitutional law like Banquo's ghost, invoked in some cases, but not in others"); Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 995-96 (1995); Louis Michael Seidman, *Reflections on Context and the Constitution*, 73 MINN. L. REV. 73, 75 (1988). For earlier treatments of the issue, see John D. French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234 (1961); Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935).

155. See ALAN WERTHEIMER, COERCION 202-21 (1987); Daniel Lyons, *Welcome Threats and Coercive Offers*, 50 PHILOSOPHY 425, 436 (1975); Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices*, 67 VA. L. REV. 79, 83 (1981) (responding to "the mistaken assimilation of all hard decisions made under pressure of grim alternatives to cases of duress or coercion"); cf. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 589-90 (1937) (Cardozo, J.) ("[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties.").

individual worse off than they were previously.¹⁵⁶ In the typical unconstitutional conditions challenge, however, the government has offered to make a person better off than they were previously and does not force them to accept a benefit conditioned on the waiver of rights. Instead, the doctrine recognizes that, even without coercion, individuals often face seriously constrained choices and that the government's offer may encourage persons to waive their rights without valid consent. "Exploitation" may be more apt a term than coercion.¹⁵⁷

A number of competing formulations have been suggested by scholars,¹⁵⁸ including one that attempts to distinguish "threats" from "offers" by reference to some baseline,¹⁵⁹ or one that identifies those situations where the government appears to be exercising monopoly

156. See Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD 440, 447 (Sidney Morgenbesser et al. eds., 1969) (arguing that coercion exists when threatened action would make one worse off than they "would have been in the normal or natural or expected course of events"); see also J.P. Day, *Threats, Offers, Law, Opinion and Liberty*, 14 AM. PHIL. Q. 257, 259 (1977); Peter Westen, 'Freedom' and 'Coercion'—*Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 558-93; David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121, 124-38 (1981); cf. James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 701-04 (1984) (explaining that blackmail is treated as coercion even though the threatened act—disclosure of damaging but truthful information about the victim—is not considered unlawful).

157. See, e.g., JOEL FEINBERG, HARM TO SELF 242-49 (1986) (explaining that exploitation exists where one party takes advantage of another's weakness or dependency); ALAN WERTHEIMER, EXPLOITATION 123-57 (1996) (discussing unconstitutional conditions as a form of exploitation); cf. JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 72, 79-83 (1993) (differentiating, in the context of police interrogations, between coercion, defined as "volitional impairment," and exploitation, defined as "cognitive impairment" or taking unfair advantage of a person's cognitive deficiencies).

158. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (canvassing several competing theories based on notions of coercion, corruption, and commodification, and offering instead a "systemic" theory calling for strict scrutiny of rights-pressure conditions on government benefits because they skew the distribution of power between and among the government and governed). "[U]nconstitutional conditions doctrine responds to a constant fear that government will tend to use the strategic manipulation of gratuitous benefits to aggrandize public power." *Id.* at 1493.

159. See Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1352 (1984) ("[T]he distinction between liberty-expanding offers and liberty-reducing threats turns on the establishment of an acceptable baseline against which to measure a person's position after imposition of an allocation."). Professor Kreimer proposed that history, equality, and prediction serve as relevant baselines. See *id.* at 1359-74; see also Kenneth W. Simons, *Offers, Threats, and Unconstitutional Conditions*, 26 SAN DIEGO L. REV. 289, 311-17 & n.78 (1989) (rejecting history and equality in favor of a modified predictive baseline).

power.¹⁶⁰ The United States Supreme Court has not explicitly embraced any of these approaches.¹⁶¹ Instead, as in *Dolan*, it often resorts to a nexus requirement, inquiring whether the condition imposed by the government is "germane" to the benefit conferred on the recipient.¹⁶²

1. LESSONS FROM LAND USE PLANNING

Although arm-twisting by federal administrative agencies sometimes resembles exactions, the Takings Clause imposes no serious constraints on regulatory activities at this level.¹⁶³ Nonetheless, the nexus or germaneness requirement developed by the Court to limit land use exactions may provide a basis for limiting the range of permissible arm-twisting in other contexts. Indeed, in response to claims that municipal exactions exceeded statutory delegations of the state's police power or violated due process, state courts developed variants of the nexus requirement long before the Supreme Court applied it to challenges under the Takings Clause.¹⁶⁴

160. See Epstein, *supra* note 154, at 102 (concluding that "the traditional norms prohibiting coercion and duress are insufficient to police the legal monopoly that government exercises over certain critical domains").

161. See Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1195 (1990) (noting that all recent commentators concede that "the Court has yet to arrive, explicitly or implicitly, at a clear limiting principle for deciding challenges to conditions on government benefits"); Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 SAN DIEGO L. REV. 337, 338 (1989) ("Whether a condition is permissible is a function of the particular constitutional provision at issue; on that score, anything so general as an unconstitutional conditions doctrine is likely to be quite unhelpful.").

162. See, e.g., *United States v. National Treasury Employees Union*, 513 U.S. 454, 471-77 (1995); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); see also Sullivan, *supra* note 158, at 1457, 1473-76 (criticizing the Court's "recurrent focus" on germaneness); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1597 (1960) (suggesting that conditioned waivers should "satisfy the test of suitability to the achievement of objectives which justify the exercise of governmental regulatory power").

163. See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984) (holding that Congress could condition EPA pesticide registration on the applicant's forfeiture of property rights in trade secret information without providing compensation because a valuable government benefit was exchanged). To the extent that a federal statute created some reasonable investment-backed expectation of confidential treatment for this data, however, an agency's unauthorized disclosure of an applicant's trade secrets could amount to a taking of property requiring just compensation. See *id.* at 1010-14; see also *Thomas v. Union Carbide Agric. Prods. Corp.*, 473 U.S. 568 (1985) (upholding the compensation system established by Congress for the private use of pesticide registration data).

164. See *Dolan*, 512 U.S. at 389-91 (surveying state court decisions); John J. Delaney et al., *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, LAW & CONTEMP. PROBS., Winter 1987, at

Administrative arm-twisting typically involves efforts to secure waivers of statutory rather than constitutional rights.¹⁶⁵ Even so, the unconstitutional conditions doctrine may offer clues for differentiating among legitimate and illegitimate waivers secured by regulatory agencies.¹⁶⁶ Just as the unconstitutional conditions doctrine may help courts to identify impermissible legislative efforts to evade the limits of the Constitution by indirection, a nexus test would allow courts to discern illegitimate administrative efforts to evade the limits of an enabling statute through arm-twisting.

A predictive baseline, by asking what an agency would have done if unable to impose a questionable condition, provides one method for determining whether an appropriate nexus exists.¹⁶⁷ For instance,

139, 146-56 (same); Note, *Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992, 995, 1010-11 (1989) (same); see also *West Montgomery County Citizens Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n*, 522 A.2d 1328, 1329 (Md. 1987) ("A county enjoys no inherent power to zone or rezone, and may exercise zoning power only to the extent and in the manner directed by the State Legislature."); *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442, 446-47 (Wis. 1965) (upholding municipality's authority to impose land dedication requirements). But cf. *United States v. Alaska*, 503 U.S. 569, 589 n.12 (1992) (distinguishing *Nollan* as inapplicable to a state's challenge to the statutory authority of the Army Corps of Engineers demand that the state disclaim sovereignty over certain submerged lands as a condition for granting a permit required for the construction of port facilities).

165. In another context, the Supreme Court has emphasized that ultra vires claims cannot be recharacterized as constitutional challenges asserting a violation of the separation of powers. See *Dalton v. Specter*, 511 U.S. 462, 472 (1994) (noting that "we have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority"). In the event agency action poses separation of powers concerns, a party could not successfully waive such an objection. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850-51 (1986) ("To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty . . .").

166. See *Aman*, *supra* note 84, at 885 ("An ultra vires condition imposed by an agency is the regulatory counterpart to an unconstitutional condition imposed by Congress."). In some cases, agency licensing conditions or other restrictions may infringe on constitutional rights. See, e.g., *Lars Noah & Barbara A. Noah, Liberating Commercial Speech: Product Labeling Controls and the First Amendment*, 47 FLA. L. REV. 63, 105-11 (1995).

167. See *Kreimer*, *supra* note 159, at 1372 ("This [prediction] baseline has the happy property of forcing the government to pay fair measure for the forfeiture of rights. It cannot purchase rights by granting benefits that the victim would receive anyhow."); *Simons*, *supra* note 159, at 310-11 (arguing that, "once the government legitimately sets a baseline for benefits and burdens, the individual has a qualified kind of entitlement to that baseline—in the special sense that government ordinarily needs as strong a reason for lowering the individual from the baseline as it needs when it directly punishes or regulates"); *id.* at 320-21 (analogizing this baseline concept to the nexus requirement).

would the FDA have approved olestra even without the postmarketing surveillance and summary revocation concessions made by the applicant? Or would it seek an injunction every time that a company failed to undertake a requested voluntary recall? Would the Executive branch have purchased supplies from companies that hire permanent replacements for striking employees in the absence of a restrictive procurement order? Although often indeterminate, answers to such counterfactual questions may be easier to find than in the unconstitutional conditions context because legislation often specifies the predictive baseline. Similarly, the recognition that an agency exercises monopoly power over the issuance of licenses and permits should alert courts to the particular risks of abuse in those contexts.¹⁶⁸

2. LESSONS FROM PLEA BARGAINING

The unconstitutional conditions doctrine operates somewhat differently in the criminal context.¹⁶⁹ In exchange for the waiver of rights to trial, the defendant benefits from a reduced sentence, compared to the likely sentence if convicted after trial, and in most cases the conditioned waiver is reasonably related to the benefit received.¹⁷⁰

168. See RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 196 (1993) ("The state's power to license various kinds of business activities creates another domain of monopoly power of great importance and equally subject to abuse."); *id.* at 312 (concluding that "a government that has any level of monopoly power cannot be trusted to impose whatever conditions it wants"); Aman, *supra* note 84, at 882-83 ("The Fed's legal monopoly on the regulatory benefits that applicants seek . . . can significantly diminish the relative bargaining strength of the applicant . . . Of course, the nature of regulation properly militates against equality of bargaining positions between the regulated and the regulator. No one expects them to be equal."); *id.* at 886 (arguing in favor of a stricter test of voluntariness because licensing applicants typically are at the mercy of the agency); Craig R. Habicht, Note, *Dolan v. City of Tigard: Taking a Closer Look at Regulatory Takings*, 45 CATH. U. L. REV. 221, 270-73 (1995) (describing the Court's nexus test as a constraint on a municipality's exercise of monopoly power over the issuance of building permits).

169. See McCoy & Mirra, *supra* note 126, at 904-15 (applying the unconstitutional conditions doctrine to plea bargaining); Peter Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741, 745-52 (1981) (discussing application of unconstitutional conditions doctrine to the forfeiture of rights by criminal defendants); cf. Kreimer, *supra* note 118, at 896-97 n.172 (applying unconstitutional conditions analysis to release-dismissal agreements).

170. See *United States v. Goodwin*, 457 U.S. 368, 379 (1982) (noting that "charges brought in an original indictment may be abandoned by the prosecutor in the course of plea negotiation—in often what is clearly a 'benefit' to the defendant"); *McGautha v. California*, 402 U.S. 183, 213 (1971) ("Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose."); *Fambo v.*

Nonetheless, because of the high stakes involved and concerns about inequalities in relative bargaining power, courts scrutinize plea agreements to ensure that constitutional rights were not waived unknowingly or involuntarily.¹⁷¹ The use of leverage by prosecutors does not by itself invalidate plea bargains,¹⁷² but courts have intervened in situations smacking of prosecutorial vindictiveness against defendants who choose to exercise their constitutional rights.¹⁷³

A couple of other important constraints on plea bargaining also may resonate in the agency arm-twisting context. First, certain prosecutorial inducements to bargain are deemed illegitimate. The Supreme Court has suggested that a guilty plea would be invalid if "induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)."¹⁷⁴ Such bargains would fall into

Smith, 433 F. Supp. 590, 598-600 (W.D.N.Y.) (describing the benefits to the defendant and the prosecutor), *aff'd*, 565 F.2d 233 (2d Cir. 1977); *see also supra* Part III.B (discussing criminal plea bargaining).

171. *See, e.g.*, *Godinez v. Moran*, 509 U.S. 389, 400-02 & n.12 (1993) (holding that defendant must be competent); *Henderson v. Morgan*, 426 U.S. 637, 644-46 (1976) (holding that guilty plea was not voluntary because defendant lacked adequate notice of the elements of the lesser offense); *North Carolina v. Alford*, 400 U.S. 25, 31, 37-39 (1970) (upholding guilty plea even though it was accompanied by protestations of innocence); *Brady v. United States*, 397 U.S. 742, 748 (1970). *See generally* *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."); Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478 (1981); Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977).

172. *See, e.g.*, *United States v. Mezzanatto*, 513 U.S. 196, 209-10 (1995) ("The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government may encourage a guilty plea by offering substantial benefits in return for the plea." (footnote and original quotation marks omitted)); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("[A]cceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process.").

173. *See, e.g.*, *Blackledge v. Perry*, 417 U.S. 21, 27-29 (1974) (holding that an escalation of charges against a defendant exercising his right to appeal violated due process). *But cf. Bordenkircher*, 434 U.S. at 364-65 (holding that prosecutor could effectuate his threat to pursue additional charges against a defendant who failed to plead guilty to the original charge); Barbara A. Schwartz, *The Limits of Prosecutorial Vindictiveness*, 69 IOWA L. REV. 127, 164-78 (1983) (discussing *Bordenkircher*).

174. *Brady v. United States*, 397 U.S. 742, 755 (1970) (footnote and original quotation marks omitted).

Cell #3 of the previously discussed typology (explicitly prohibited means). In addition,

A prosecutor's bargaining tactics may come under attack because of commitments exacted from the defendant in addition to the guilty plea. Illustrative is a plea bargain which included a promise by defendant to leave the state for ten years, a commitment held unenforceable because contrary to public policy; or one which included a promise by defendant not to testify in favor of a codefendant, unenforceable because a violation of the codefendant's right to compulsory process.¹⁷⁵

Such bargains would fall into Cell #7 of the typology (explicitly prohibited ends). Interestingly, however, defendants may agree to plead guilty to a charge of something other than a lesser included offense (perhaps Cell #4), as where a defendant charged with manslaughter pleads guilty to the logically impossible crime of "attempted" manslaughter.¹⁷⁶

Even so, flexibility about charging to a lesser offense or recommending a lenient sentence apparently does not authorize the prosecutor to charge defendants with a completely unrelated offense or recommend an unauthorized sentence. Thus, a defendant facing a prison term of three to five years could not agree to a sentence of banishment¹⁷⁷ or a \$100,000 forfeiture of assets.¹⁷⁸ Such deals rarely happen, of course,

175. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 910 (2d ed. 1992) (adding that "[c]ourts are not in agreement concerning a prosecutor-induced commitment by the defendant not to take an appeal").

176. See *id.* at 939 ("[T]he plea might be to a hypothetical crime which produces the range of sentencing possibilities the parties are agreeable to . . . [A]n appellate court which is called upon to overturn the plea is not likely to do so, reasoning that the anomalous situation was sought by the defendant as part of a bargain struck for his benefit."); *People v. Burgan*, 183 N.W.2d 413, 414 (Mich. Ct. App. 1970); *People v. Foster*, 225 N.E.2d 200, 201 (N.Y. 1967) ("The question on this appeal is whether this definition which includes an 'intent to commit a crime' renders the plea taken by defendant inoperative, illogical or repugnant and, therefore, invalid. We hold that it does not when a defendant knowingly accepts a plea to attempted manslaughter . . .").

177. See *Chae v. People*, 780 P.2d 481, 484-85 (Colo. 1989) (vacating guilty plea requiring defendant to submit to deportation proceedings); *Rojas v. State*, 450 A.2d 490, 493-94 (Md. Ct. Spec. App. 1982) (same). See generally Christopher Vaeth, Annotation, *Guilty Plea as Affected by Fact That Sentence Contemplated by Plea Bargain Is Subsequently Determined to Be Illegal or Unauthorized*, 87 A.L.R.4th 384, 389-96 (1991).

178. Cf. *Libretti v. United States*, 116 S. Ct. 356, 365 (1995) (upholding stipulated asset forfeiture embodied in a plea agreement, but cautioning that it did "not mean to suggest that a district court must simply accept a defendant's agreement to forfeit property, particularly when that agreement is not accompanied by a stipulation of facts supporting forfeiture"); *id.* at 370 (Stevens, J., dissenting) (worrying that "a wealthy

because trial judges ultimately remain responsible for sentencing decisions even though they typically defer to prosecutorial recommendations.¹⁷⁹ Where prosecutors agree to drop charges altogether, however, as happens in release-dismissal agreements, courts may not have any occasion to review the terms of the bargain.¹⁸⁰ Thus, in addition to encouraging closer judicial scrutiny, some commentators have called for managerial guidelines to control the range of prosecutorial discretion in the plea bargaining context.¹⁸¹

Administrative arm-twisting differs in important respects, of course, from plea bargaining. Regulated entities generally are more sophisticated and better represented than most criminal defendants, and the unknowing waiver of rights seems unlikely. In addition, the stakes are less serious and, consequently, fewer constitutional rights attach to agency proceedings in the first place.¹⁸² Finally, the instrumental justifications for

defendant might bargain for a light sentence by voluntarily 'forfeiting' property to which the government had no statutory entitlement"); *Town of Newton v. Rumery*, 480 U.S. 386, 401 (O'Connor, J., concurring) ("No court would knowingly permit a prosecutor to agree to accept a defendant's plea to a lesser charge in exchange for the defendant's cash payment to the police officers who arrested him.").

179. See, e.g., FED. R. CRIM. P. 11(e); *McCarthy v. United States*, 394 U.S. 459, 471-72 (1969) ("[P]rejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea."); see also *United States v. Hyde*, 117 S. Ct. 1630, 1633-34 (1997) (discussing the application of Rule 11).

180. See *supra* note 118 and accompanying text (discussing release-dismissal agreements); see also Nkechi Taifa, *Civil Forfeiture vs. Civil Liberties*, 39 N.Y.L. SCH. L. REV. 95, 100-01 (1994) (arguing that "widespread misuse" of forfeiture powers by the police amounts to "legalized extortion"); *id.* at 107 ("The police are making millions of dollars in forfeited assets and, in some cases, losing interest in ever actually pursuing convictions."). Courts generally do not review pretrial diversion agreements either, though statutes or rules establishing these programs may call for some judicial involvement. See, e.g., *Cleveland v. State*, 417 So. 2d 653, 654 (Fla. 1982); *State v. Leonardis*, 375 A.2d 607, 610-19 (N.J. 1977).

181. See NATIONAL INST. OF JUSTICE, *PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES* 44-48 (1985); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Power*, 1983 U. ILL. L. REV. 37, 96-97; James Vorenberg, *Decent Restraint of Prosecutorial Discretion*, 94 HARV. L. REV. 1521, 1560-72 (1981); Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 449-62 (1971). Limited guidelines exist for federal prosecutors. See 7 DEPARTMENT OF JUSTICE MANUAL § 9-16.300 (1987).

182. See, e.g., *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36-37 (1990) (holding that a state need not provide a prepayment opportunity to challenge an excise tax); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (using a balancing test to define the scope of a beneficiary's predeprivation right to an administrative hearing); Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044 (1984).

widespread criminal plea bargaining seem weaker in the administrative context, whether in the course of licensing or enforcement.

Conversely, the risk of involuntary waivers increases. Arm-twisting succeeds, and evades judicial or other scrutiny, in part because companies in pervasively regulated industries believe that they cannot afford to resist agency demands.¹⁸³ For instance, some critics have accused the FDA of retaliating against firms that fail to cooperate.¹⁸⁴ Whether or not such charges are accurate, the perception leads companies to accede to the Agency's demands even though they may lack any basis in law or fact.¹⁸⁵ As one federal court recently observed:

183. See Anthony, *supra* note 7, at 36 (Economic "considerations will often lead permit applicants to accept whatever restrictions the agency imposes without attempting a judicial challenge. . . . The applicant needs the permit, and therefore will comply with the nonlegislatively stated conditions."). Professor Anthony characterized this situation as "government by intimidation." *Id.* at 33; see also Aman, *supra* note 84, at 851 ("The relative degree of independence with which the Board exercises many of its regulatory responsibilities often exacerbates the conflicts that can arise in particular regulatory contexts when the Fed imposes conditions or informally extracts so-called 'voluntary commitments.'"); *id.* at 872 ("A party eager to close a deal may not feel it has much negotiating room. In such cases, the Board has superior, indeed coercive, bargaining power."); *id.* at 898 ("In certain contexts, the applicant's strong incentives to avoid litigation and to avoid the denial of its requested regulatory benefits give the agency substantial, informal, and largely unreviewable discretionary powers.").

184. See, e.g., *Southeastern Minerals, Inc. v. Harris*, 622 F.2d 758, 761, 767 (5th Cir. 1980) (criticizing the FDA's "bureaucratic hubris that confuses abuse of power with reason," adding that "the FDA's abuse of its statutory rights of entry and inspection so as to harass and threaten [the parties] can in no way be condoned"); *Allegations of FDA Abuses of Authority: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 104th Cong. 2 (1995) [hereinafter *Hearings*] (statement of Hon. Joe Barton) (suggesting that "these stories are not rare exceptions," adding that "the FDA never forgets who its enemies are"); *id.* at 9 (statement of Hon. Thomas J. Bliley, Jr.) (suggesting that "the threat of retaliation is deeply embedded in the culture of this Agency"). But see *id.* at 6 (statement of Hon. Henry A. Waxman) (warning that we should "not base our policy decisions on anecdotes and hyperbole"); *id.* at 83 (statement of Hon. John D. Dingell) (noting that, "upon a fuller review of the five cases selected by the Majority, claims of FDA retaliation were decidedly premature"). Similar charges have been leveled against the Internal Revenue Service. See, e.g., SHELLEY L. DAVIS, *UNBRIDLED POWER: INSIDE THE SECRET CULTURE OF THE IRS* 87-99, 104-09 (1997); John M. Broder, *Director of I.R.S. Issues an Apology for Agent Abuses*, N.Y. TIMES, Sept. 26, 1997, at A1.

185. See, e.g., *Hearings*, *supra* note 184, at 70 (testimony of Ronald C. Jankelson, Myo-Tronics, Inc.) (describing pressures to enter into a consent decree); Elizabeth C. Price, *Teaching the Elephant to Dance: Privatizing the FDA Review Process*, 51 FOOD & DRUG L.J. 651, 653 (1996) ("The natural response to such alleged abusive tactics would be to bring suit against the agency, but such a response might not be in the best interests of the affected company."); Peter Brimelow & Leslie Spencer, *Food and Drugs and Politics*, *FOREES*, Nov. 22, 1993, at 115 (citing the results of a survey finding that

[An] agency could effectively regulate industry without ever exposing itself to judicial review. A powerful agency such as FDA could achieve this result through the simple expedient of (1) never formally declaring the policy to be "final" and (2) threatening (but never actually initiating) enforcement procedures against companies which failed to comply with the agency's de facto policy.¹⁸⁶

Thus, although arm-twisting by agencies is not akin to plea bargaining by prosecutors, there are similar grounds for fearing abuse.

Calls for better managerial controls over prosecutorial negotiations and closer judicial scrutiny of the resulting bargains deserve serious consideration in the administrative arena. In fact, when agencies negotiate consent decrees to settle enforcement proceedings, the terms of these bargains are scrutinized by courts and interested parties, though, as explained in the next section, perhaps not always to the extent necessary.

84% of respondents failed to press potentially legitimate complaints against the FDA for fear of retaliation). Professor Young has explained that Japanese drug manufacturers feared that the relevant agencies would be appreciably less inclined to approve their new drugs if they were unwilling to withdraw drugs the government deemed hazardous. In actuality, not much evidence exists that bureaucrats in Japan operate so vindictively . . . [but] the perception of reality, especially as it determines behavior, [may be] more significant than the reality itself.

Young, *supra* note 133, at 938 n.64.

186. *Washington Legal Found. v. Kessler*, 880 F. Supp. 26, 34 (D.D.C. 1995).

[T]he reality of the situation, as alleged by plaintiff, is that few if any companies are willing to directly challenge the FDA in this manner. In the first instance, the company must expose itself to the FDA's power to seize an entire product line In addition, FDA wields enormous power over drug and medical device manufacturers through its power to grant or deny new product applications. It is evident that manufacturers are most reluctant to arouse the ire of such a powerful agency.

Id. at 36 (adding that "[t]he fact that this suit is being brought by doctors . . . rather than the manufacturers with whose conduct the FDA policy primarily interferes lends further credence to plaintiff's contention"); *see also* Burnele V. Powell, *Administratively Declaring Order: Some Practical Applications of the Administrative Procedure Act's Declaratory Order Process*, 64 N.C. L. REV. 277, 298-99 (1986) ("Congress' intent that agencies operate within properly delegated spheres of authority is undermined when improper agency action is allowed to go unchallenged . . . [because] then agencies can operate under a de facto extension of their delegated authority.").

B. Supervising Agency Consent Decrees

Administrative consent decrees used as an enforcement mechanism have received scant critical attention. In contrast, the use of "discretion-limiting" consent decrees to settle lawsuits brought *against* the government has attracted considerable commentary.¹⁸⁷ In either case, agency consent decrees require judicial approval, distinguishing them from other potential avenues for arm-twisting. One longstanding question about such decrees concerns the tension between using a contractual and a judicial order model for understanding these settlement devices.¹⁸⁸ The choice between these or perhaps some other paradigm will affect the rigor of judicial scrutiny of a proposed consent decree.

Although the United States Supreme Court has addressed disputes over the interpretation of ambiguous language in consent decrees,¹⁸⁹ as well as efforts to modify existing consent decrees,¹⁹⁰ it has provided

187. See *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1136 (D.C. Cir. 1983) (Wilkey, J., dissenting) (warning of the "evil of government by consent decree," including "its potential to freeze the regulatory processes of representative democracy"); Timothy Stoltzfus Jost, *The Attorney General's Policy on Consent Decrees and Settlement Agreements*, 39 ADMIN. L. REV. 101 (1987); Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295; Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203, 204 (1987) (noting that one of the "obvious dangers" of consent decrees against the government is that the practice "allows one administration to commit its successors to policies they might not otherwise have chosen"); Peter M. Shane, *Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241; cf. *Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 341-42 (7th Cir. 1987) ("A consent decree is not a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them.").

188. See, e.g., *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975) ("Consent decrees and orders have attributes both of contracts and of judicial decrees . . ."); Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291, 309-44 (1988) (rejecting contractual, judicial, and hybrid paradigms in favor of a functional approach to judicial scrutiny of consent decrees).

189. See *ITT Continental Baking*, 420 U.S. at 235-37 (holding that consent decrees should be interpreted as ordinary contracts); *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) ("[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it."); see also Phillip G. Oldham, Comment, *Regulatory Consent Decrees: An Argument for Deference to Agency Interpretations*, 62 U. CHI. L. REV. 393, 413-22 (1995) (contending that the judicial deference given agencies in interpreting ambiguous statutory provisions should also apply to language in consent decrees).

190. See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 393 (1992) (announcing flexible standards for requests to modify consent decrees in institutional reform litigation); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576-77 &

little guidance about the appropriate role of the courts in initially approving proposed decrees.¹⁹¹ As a result, the lower courts have vacillated between a relatively passive role, rubber-stamping essentially any bargained exchange between the parties to the litigation,¹⁹² and an active role, carefully scrutinizing the terms of a decree.¹⁹³

Federal courts generally review a proposed consent decree to ensure that it is "fair, adequate, and reasonable; that the proposed decree will not violate the Constitution, a statute, or other authority; [and] that it is consistent with the objectives of Congress."¹⁹⁴ As the Supreme Court explained in an employment discrimination case, a "court is not barred

n.9 (1984) (rejecting district court's modification of a Title VII decree); *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932) ("We reject the argument . . . that a decree entered upon consent is to be treated as a contract and not as a [modifiable] judicial act."); Timothy Stoltzfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101 (1986).

191. See Mengler, *supra* note 188, at 306 ("The Supreme Court has refrained from explicitly deciding the appropriate court role in approving proposed consent decrees.").

192. See *id.* at 309 n.139 ("Because no court explicitly admits to rubber-stamping, the evidence is necessarily anecdotal. Even so, the practice appears widespread."); see also *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990) (In reviewing administrative consent decrees, courts must "refrain from second-guessing the Executive Branch."); cf. Kramer, *supra* note 68, at 333 n.53 ("The common wisdom used to be that judges enter consent decrees with little or no inquiry into the substance of the dispute. . . . Statements to this effect are still found in the secondary literature, but rubber-stamping is in fact much less common.").

193. See, e.g., *FTC v. Standard Fin. Management Corp.*, 830 F.2d 404, 408 (1st Cir. 1987) ("When a public agency requests that a judicial stamp of approval be placed on a negotiated consent decree, the court . . . , rather than blindly following the agency's lead, must make its own inquiry into the issue of reasonableness before entering judgment."); *Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 338-42 (7th Cir. 1987); *United States v. City of Miami*, 664 F.2d 435, 440-41 (5th Cir. 1981) (en banc) ("The court . . . must not merely sign on the line provided by the parties. Even though the decree is predicated on consent of the parties, the judge must not give it perfunctory approval.").

194. *Durrett v. Housing Auth.* 896 F.2d 600, 604 (1st Cir. 1990); see also *System Fed'n No. 91 v. Wright*, 364 U.S. 642, 651 (1961) (A court's "authority to adopt a consent decree comes only from the statute which the decree is intended to enforce. Frequently of course the terms arrived at by the parties are accepted without change by the adopting court."); *Consumer Fed'n of Am. v. CPSC*, 990 F.2d 1298, 1305 n.14 (D.C. Cir. 1993) ("The Consent Decree scheme, though implemented by court-approved private agreement, incorporates several of the remedial tools available to the Commission under the CPSA, including a product ban (on three-wheel ATVs), encouragement of voluntary performance standards, warning label requirements, and a public education campaign."); *United States v. City of Alexandria*, 614 F.2d 1358, 1362 (5th Cir. 1980) ("[A] consent decree proposed by a private defendant and government agency in an employment discrimination case carries with it a presumption of validity that is overcome only if the decree contains provisions which are unreasonable, illegal, unconstitutional, or against public policy.").

from entering a consent decree merely because it might lack the authority under [the governing statute] to do so after trial."¹⁹⁵ Even so, "there is no inherent executive authority to settle cases on terms that have no connection with the agency's statutory warrant."¹⁹⁶

Although judges must engage in some review of a proposed consent decree, parties to the decree generally cannot challenge its legality in court.¹⁹⁷ In cases of arm-twisting, public interest groups will not intervene to object to extrastatutory demands imposed on a company, and others in the industry may well prefer to let their competitor suffer the consequences of a burdensome consent decree.¹⁹⁸ Thus, unlike settle-

195. Local No. 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501, 526 (1986) ("This is not to say that the parties may agree to take action that conflicts with or violates the statute upon which the complaint was based."); see also Conservation Law Found. v. Franklin, 989 F.2d 54, 59 (1st Cir. 1993) (noting that "parties enjoy wide latitude in terms of what they may agree to by consent decree and have sanctioned by a court"); Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1125 (D.C. Cir. 1983) ("The fact that certain provisions in the Decree track the language of the Act more closely than others is irrelevant, so long as all are consistent with it."); Breger, *supra* note 4, at 338 ("Traditional doctrines of prosecutorial discretion have given a wide range of discretionary authority to regulators to 'plea bargain' or settle cases . . . [including] arrangements that would produce 'enforcement' results beyond that which could be required by law.").

196. Breger, *supra* note 4, at 338; see also United States v. Olin Corp., 927 F. Supp. 1502, 1505, 1533 (S.D. Ala. 1996) (refusing to approve Superfund consent decree because the EPA could not have constitutionally applied the statute to the defendant's hazardous waste site); cf. Frank H. Easterbrook, *Justice and Contract in Consent Judgment*, 1987 U. CHI. LEGAL F. 19, 39 ("[T]here is no good reason to allow consent decrees to make binding promises that exceed the authority the parties would have in the absence of the litigation.").

197. See, e.g., NLRB v. Ochoa Fertilizer Corp., 368 U.S. 318, 322-23 (1961) (noting that a company honored its agreement not to contest the terms of a consent decree, and holding that a court could not modify the terms of that decree when the Board filed a petition for its enforcement); Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1578 (11th Cir. 1994) ("Parties to a consent decree are estopped by their status as signatories from challenging the decree's validity under law existing when they accepted the decree."); see also Aulenback, Inc. v. Federal Highway Admin., 103 F.3d 156, 159, 162 & n.5 (D.C. Cir. 1997) (noting that consent agreement included an express waiver of rights to challenge its terms); Mengler, *supra* note 188, at 343 n.308 (recognizing that "the parties to the proposed decree will not be inclined to point out [any] illegality," but suggesting that intervenors may help bring such concerns to the court's attention).

198. Cf. Lars Noah, *Sham Petitioning as a Threat to the Integrity of the Regulatory Process*, 74 N.C. L. REV. 1, 8 n.21 (1995) ("Companies sometimes inform agency officials of alleged regulatory infractions by existing or potential competitors."). Courts have held that a competitor's bona fide reports to law enforcement officials are immune from antitrust attack. See King v. Idaho Funeral Serv. Ass'n, 862 F.2d 744, 745-46 (9th Cir. 1988); Ottensmeyer v. Chesapeake & Potomac Tel. Co., 756 F.2d 986, 993-94 (4th Cir. 1985); Forro Precision, Inc. v. International Bus. Mchs. Corp., 673 F.2d 1045, 1059-61 (9th Cir. 1982).

ments of private suits against the government, which frequently attract input from a variety of interested parties, courts may review heavy-handed settlements of government suits against private parties without the benefit of this critical outside perspective because the only party with an incentive to object has promised to remain silent. If courts began reviewing proposed consent decrees more vigorously, however, the government might prefer reaching out-of-court settlements with regulated entities, which would avoid judicial review altogether.¹⁹⁹ Driving settlements further underground in this fashion would magnify the very problems that heightened judicial scrutiny of proposed consent decrees seeks to minimize.²⁰⁰

Consent decrees undoubtedly serve useful functions,²⁰¹ and Congress has encouraged federal agencies to utilize alternative dispute resolution (ADR) techniques more generally to promote settlements.²⁰²

199. See *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 133 (1987) (noting that, although a settlement represents final agency action, the application of the APA's judicial review provisions to the terms of an agency settlement would be "absurd"); *Schering Corp. v. Heckler*, 779 F.2d 683, 685-87 (D.C. Cir. 1985) (rejecting as unreviewable a pharmaceutical company's challenge to a private settlement between the FDA and a competitor); see also *Heckler v. Chaney*, 470 U.S. 821, 831-38 (1985) (according a presumption of unreviewability to agency nonenforcement decisions); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990).

200. As Professor Mengler has explained:

[P]rivate settlement of a government suit is clearly inferior to settlement by consent decree. Private settlement can deprive the relevant business or social community of guidance through exposure to government enforcement policy. Private settlement also deprives the electorate of an accountability mechanism. Less than complete disclosure through public court filings allows the executive to shield its enforcement activity from the critical scrutiny of the public.

Mengler, *supra* note 188, at 326.

201. See Easterbrook, *supra* note 196, at 25 (arguing that consent decrees provide more efficient and better tailored regulatory solutions); Mengler, *supra* note 188, at 317 (adding that consent decrees serve a signaling and deterrent function not typical of confidential out-of-court settlements).

202. See Administrative Dispute Resolution Act of 1990, 5 U.S.C. §§ 571-584 (1994); see also 5 U.S.C. § 554(c) (1994) (provision of the APA requiring that agencies give parties to adjudication an opportunity to make "offers of settlement"); *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) (describing congressional policy favoring settlements of Title VII litigation); Jeffrey S. Lubbers, *Better Regulations: The National Performance Review's Regulatory Reform Recommendations*, 43 DUKE L.J. 1165, 1174 (1994); *A Colloquium on Improving Dispute Resolution: Options for the Federal Government*, 1 ADMIN. L.J. 399 (1987). Using alternative dispute resolution (ADR) techniques, however, weakens the agency's leverage in settlement negotiations insofar as the locus of control over the outcome shifts to a neutral third party. Cf. Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315, 319-20 (1989).

Occasionally it has demanded that all settlements of certain agency enforcement actions result in consent decrees.²⁰³ In some cases it has also specified procedures for the review of proposed decrees. Under the Tunney Act,²⁰⁴ for instance, the Department of Justice (DOJ) must publish in the *Federal Register* a notice of a proposed antitrust consent decree and invite public comment.²⁰⁵ After the DOJ responds to all of the comments that it has received,²⁰⁶ a district court may enter the proposed decree only if the judge determines that it would serve "the public interest."²⁰⁷ Thus, a mechanism exists for combatting agency tendencies to overreach in the antitrust enforcement area, though the DOJ's creative impulses may instead find expression in FTC merger approval decrees which are not governed by the Act.

203. See, e.g., 42 U.S.C. § 9622(d)(1)(A) (1994) ("Whenever the [EPA] enters into an agreement . . . with any potentially responsible party with respect to remedial action under [Superfund,] . . . the agreement shall be entered . . . as a consent decree."); see also *United States v. Charter Int'l Oil Co.*, 83 F.3d 510 (1st Cir. 1996); Jerome M. Organ, *Superfund and the Settlement Decision: Reflections on the Relationship Between Equity and Efficiency*, 62 GEO. WASH. L. REV. 1043, 1056-60 (1994); William F. Balcke, Note, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 VA. L. REV. 123 (1988). The statute also sets out factors for determining whether a settlement would be appropriate. See 42 U.S.C. § 9622(f)(4).

204. Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(b) (1994); see also Eric J. Branfman, *Antitrust Consent Decrees—A Review and Evaluation of the First Seven Years Under the Antitrust Procedures and Penalties Act*, 27 ANTITRUST BULL. 303, 354 (1982) (concluding that the Tunney Act has had a minor but positive impact).

205. See 15 U.S.C. § 16(b); see also *United States v. Airline Tariff Pub. Co.*, 836 F. Supp. 9, 10-11 (D.D.C. 1993) (explaining that the Tunney Act sought to eliminate secrecy in the negotiation of antitrust consent decrees). Similar settlement procedures exist under Superfund. See 42 U.S.C. § 9622(i). In addition, the DOJ has announced a policy of entering into consent decrees to enjoin discharges of pollutants only if non-parties have an opportunity to comment on the terms of a proposed decree. See 28 C.F.R. § 50.7 (1997); see also 51 Fed. Reg. 23,706, 23,708-09 (1986) (announcing and justifying the EPA's policy of relying on consent agreements, with assurances of public participation, to impose testing requirements under the Toxic Substances Control Act).

206. See 15 U.S.C. § 16(d).

207. See *id.* § 16(e); *Maryland v. United States*, 460 U.S. 1001 (1983) (affirming summarily the district court's entry of a consent decree to settle the DOJ's antitrust suit against AT&T); *United States v. Microsoft Corp.*, 56 F.3d 1448, 1457-62 (D.C. Cir. 1995) (reversing the district court's refusal to enter a proposed consent decree); *United States v. Western Elec. Co.*, 993 F.2d 1572, 1576-77 (D.C. Cir. 1993) (affirming modification of AT&T consent decree, emphasizing that the district court appropriately deferred to the DOJ's judgment); James Rob Savin, Comment, *Tunney Act '96: Two Decades of Judicial Misapplication*, 46 EMORY L.J. 363 (1997); Note, *The Scope of Judicial Review of Consent Decrees Under the Antitrust Procedures and Penalties Act of 1974*, 82 MICH. L. REV. 153 (1983).

Other agencies should adhere to similar procedures for all of their administrative consent decrees.²⁰⁸ Although unduly proceduralizing the settlement process may encourage agencies to shift to even less formal alternatives,²⁰⁹ Congress could craft an amendment to the APA modeled on the Tunney Act that would attempt to minimize this danger. In addition, even if proposed decrees do not first go through notice and comment procedures, courts must ensure that the terms of such agreements comport with the limits of an agency's statutory authority. Judges should not blithely accept whatever deal that the government has decided to impose on a company suspected of violating the law.

C. Addressing the Ultra Vires Objection

The principle of legislative supremacy attempts to ensure that only Congress may enact or amend a statute.²¹⁰ In effect, enabling acts represent charters for administrative agencies, and actions taken beyond the range of that statutory authority are ultra vires and unlawful.²¹¹ Under a once dominant conception of administrative law, agencies have

208. See Michael J. Zimmer & Charles A. Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 1976 DUKE L.J. 163, 177-224 (arguing that all agencies should abide by principles and procedures similar to those established by the Tunney Act).

209. See *supra* note 200; cf. Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1464 (1992) (suggesting that the "proceduralization [of rulemaking] may be perversely encouraging governmental lawlessness; as agencies struggle to meet public and political expectations about their responsibilities with constrained resources, heightened procedural responsibilities *here* encourage the struggle to escape *there*").

210. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 317-18 (1989) (discussing the subordinate role of judges vis-a-vis the legislature); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 402 (1989).

211. See, e.g., 5 U.S.C. § 706(2)(C) (1994) (instructing reviewing courts to "hold unlawful and set aside agency action" found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"); *Board of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373 (1986) (invalidating the FRB's effort to exercise jurisdiction over certain nonbank acquisitions); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *Transohio Sav. Bank v. Director, Office Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992); RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 111-12 (2d ed. 1992) ("When Congress grants power to an agency to act in a particular area, it couples that grant of power with statutory limits on the circumstances in which the agency is empowered to act and the type of action the agency is permitted to take."); MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION* 55 (1988) ("Administrative agencies may do lawfully only what congressional statutes authorize them to do.").

only as much power as Congress chooses to delegate and may utilize only those procedures set forth in their enabling statutes, with courts serving as a backstop to ensure that agencies abide by these substantive and procedural constraints.²¹² Although other paradigms now compete with this rule-of-law ideal, none has fully replaced it.²¹³ Moreover, from any of these different theoretical perspectives, administrative arm-twisting potentially arrogates undelegated power.

Although Congress typically delegates fairly sweeping substantive responsibilities to agencies, enabling statutes often limit the allowable range of regulatory methods available to pursue these broad purposes.²¹⁴

212. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1671-76 (1975) (elaborating on the "traditional model" of administrative law).

213. See *id.* at 1805-13; Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 512 (1985) (arguing that the courts recently turned away from an interest representation model in favor of "an expanded notion of fidelity, one that requires not only that the agencies not exceed their congressionally authorized powers, but also that they use those powers as Congress intended"); Linda R. Hirschman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U. L. REV. 646, 666-68, 703 (1988) (arguing in favor of continued judicial review to ensure agency conformity to statute); Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385, 397-404, 441-42 (describing the rule-of-law ideal, which "permeates administrative law," as well as its limitations, and concluding that it remains "robust" even while it competes with alternative paradigms); Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 569-70 (1992) ("All approaches to administrative law which have prevailed from time to time in this country embody the core components of the traditional model."); *id.* at 626-27 (arguing in favor of a return to the traditional model); cf. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1325 (1986) ("The courts have not developed a consistent approach to controlling agency discretion. . . . Lacking an intelligible theoretical framework, the Supreme Court has oscillated between activism and restraint in reviewing agency decisions."). For a general discussion of the rule-of-law ideal, see JOHN RAWLS, *A THEORY OF JUSTICE* 235-43 (1971); Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997).

214. See Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 821-45 (explaining that Congress has become more precise in its recent delegations, especially in the environmental area); Timothy A. Wilkins & Terrell E. Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*, 63 GEO. WASH. L. REV. 479, 518 (1995) (arguing "that the popular notion of unconfined delegation is a myth and that Congress virtually always prescribes policy structures in sufficient detail so that agency choice of regulatory method is narrowed significantly"); *id.* at 523 ("Congress almost always speaks at length to at least the primary questions of policy design and structure, thus sharply limiting agency choice of regulatory method and generally precluding the possibility of *Chevron* deference on those questions.").

Nor will courts necessarily defer to expansive agency interpretations of their powers. For instance, agencies cannot impose sanctions on regulated entities unless specifically authorized by statute to do so.²¹⁵

Consider again the product approval examples discussed at the outset. Congress has authorized the FDA to impose certain conditions on food additive and new drug approvals (e.g., warning requirements); it has not explicitly authorized other requirements (e.g., recalls or postmarketing surveillance); and it implicitly or explicitly forbade the imposition of still other requirements (e.g., preclearance of drug advertising). The latter category should be off limits, leaving parties at most to bargain over commitments about which Congress expressed no intent one way or another, though even that intermediate category could raise *ultra vires* concerns.

Perhaps the power to license implies a power to impose conditions on approval,²¹⁶ but, to ameliorate the risk that regulators may impose *ultra vires* demands, one might insist that Congress explicitly authorize agencies to deviate from statutory directives.²¹⁷ Congress has, for instance, invited the FDA to impose such other conditions on product approvals as it may deem necessary in certain limited circumstances.²¹⁸ Beyond such situations, however, courts should hold agencies to the limits of their enabling statutes.²¹⁹ Such a reform might resemble the recent

215. See 5 U.S.C. § 558(b) (1994) ("A sanction may not be imposed . . . except within jurisdiction delegated to the agency and as authorized by law."); *SEC v. Sloan*, 436 U.S. 103, 111-12 (1978) (holding that statute did not authorize a series of summary suspension orders); *Gold Kist, Inc. v. USDA*, 741 F.2d 344, 348 (11th Cir. 1984) ("[T]he statute must plainly establish a penal sanction in order for the agency to have authority to impose a penalty . . ."); *Savage v. Commodity Futures Trading Comm'n*, 548 F.2d 192, 196-97 (7th Cir. 1977).

216. See, e.g., *PAULINE B. HELLER, FEDERAL BANK HOLDING COMPANY LAW* § 7.08, at 7-63 to -64 & n.10 (1997) ("Authority to approve or deny reasonably implies authority to impose conditions."); cf. *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 134 (1985) (upholding EPA variances of standards for toxic pollutants even though not explicitly authorized by statute); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (ordering the FCC to consider waiver requests by license applicants).

217. Cf. *Aman*, *supra* note 32, at 317-22 (cautioning against the excessive use of exceptions to promote the public interest); *id.* at 330 ("[E]xplicit statutory authorization for such exceptions should be encouraged."). In the context of waivers and exceptions, a number of statutes provide agencies with explicit authority. See, e.g., 29 U.S.C. § 655(d) (1994) (authorizing OSHA to issue an order granting a request to vary an otherwise applicable occupational safety or health standard).

218. See, e.g., 21 U.S.C. § 348(c)(1)(A) (1994) (food additive approvals); *id.* § 360j(e)(1)(B) (restricted medical devices).

219. See, e.g., *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700, 724-33 (1994) (Thomas, J., dissenting) (objecting to the majority's interpretation of the permitting provision in the Clean Water Act, allowing the state agency to condition certification of hydroelectric power plants on minimum streamflow rates or conditions

Japanese legislation designed to curtail the use of administrative guidance in that country.²²⁰

ARM-TWISTING TYPOLOGY

<u>ENDS:</u>				
<u>MEANS:</u>	Explicitly authorized	Explicitly authorized	Statutory ambiguity	Explicitly prohibited
	Explicitly authorized	1	4	7
	Statutory ambiguity	2	5	8
	Explicitly prohibited	3	6	9
		↑ Germaneness		
		<div> <div>□</div> = Completely unobjectionable <div>▤</div> = Presumptively legitimate </div> <div> <div>▦</div> = Somewhat problematic <div>▥</div> = Presumptively illegitimate </div>		

TABLE 2

other than those explicitly specified in the provision); *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 187 (3d Cir. 1983) (criticizing the EPA for "using its power to regulate grants under the Clean Water Act to accomplish matters not included in that statute"); *Delta Air Lines, Inc. v. United States*, 490 F. Supp. 907, 913, 918 (N.D. Ga. 1980) (holding "the imposition of the functional limitations [on medical certificates for pilots] to be improper, since the [FAA] has not delegated to the Federal Air Surgeon the authority to impose such limitations"); *see also* Winter, *supra* note 88, at 240 ("Courts have been somewhat more aggressive in limiting administrative barter when agencies have conditioned the grant of permits on behavior the agency is not authorized by law to seek.").

220. *See supra* note 141 and accompanying text.

More seriously than potentially expanding the means available for pursuing authorized regulatory ends, arm-twisting provides a mechanism for pursuing ends not contemplated by the legislature when it delegated authority to an agency. One of the objections to the widespread use of administrative guidance in Japan was the resort by officials to threats of action or inaction unrelated to their particular request.²²¹ At the very least, agencies should use arm-twisting only to pursue ends reasonably related to the purposes expressed in their enabling statutes. Table 2 revisits the typology sketched out earlier and suggests tentative boundaries for presumptively legitimate and illegitimate agency demands. A germaneness test splits the middle column lengthwise, in order to differentiate between implicitly authorized and implicitly prohibited purposes. Thus, consistent with the germaneness limitation, the FDA presumably understands that it cannot condition product approvals on voluntary price controls or charitable contributions, even though Congress has not expressly prohibited such demands.

Before the Supreme Court's expansion of the Commerce Clause, Congress sometimes utilized its spending power to regulate the private sector by imposing conditions on government contractors.²²² If a company objected to these conditions, then it could decline the invitation to bid on the government contract. Although Congress no longer needs to resort to conditional spending as an indirect means of regulating the economy, sometimes it still imposes conditions on recipients of federal monies—whether contractors, welfare beneficiaries, or state and local governments—to pursue goals that it could not accomplish by direct regulation, either due to residual limitations on the commerce power,²²³

221. See UPHAM, *supra* note 133, at 174-75 (suggesting that reviewing courts in the United States would be more suspicious of unrelated collateral threats by agencies than would the courts in Japan).

222. See, e.g., *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127-30 (1940) (upholding statute requiring that government contractors pay employees the prevailing minimum wage); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1130-31 (1987); see also Kingman Brewster, *Does the Constitution Care About Coercive Federal Funding?*, 34 CASE W. RES. L. REV. 1, 3 (1983) (objecting to "the free-wheeling way in which the threatened forfeiture of federal money was frequently used to coerce compliance with objectives unrelated to the purpose for which the grant was given"); *id.* at 15 ("[T]he potential for covert regulation is far more pervasive than is the incidence of direct regulation.").

223. See *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (striking down a federal statute prohibiting the possession of guns in the vicinity of schools as beyond the power of Congress to regulate interstate commerce); Symposium, *The New Federalism After United States v. Lopez*, 46 CASE W. RES. L. REV. 635 (1996).

or more typically because of constraints imposed on the exercise of that power by the Bill of Rights.²²⁴

Of more immediate interest, the Executive branch has utilized its powers in comparable ways. Because the Court has not interpreted the inherent powers of the Executive as expansively as the legislature's commerce powers,²²⁵ the question turns on the scope of power delegated by Congress.²²⁶ For instance, courts generally have not questioned the President's use of the procurement power to pursue secondary goals,²²⁷ requiring at most some reasonable "nexus" between the restriction

224. See Rosenthal, *supra* note 222, at 1131; see also *South Dakota v. Dole*, 483 U.S. 203, 206-12 (1987) (holding that Congress may indirectly regulate the drinking age by conditioning state highway funding even if it could not directly impose a mandatory minimum age); *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947) ("While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have the power to fix the terms upon which its money allotments to states shall be disbursed."); *supra* Part IV.A (discussing the unconstitutional conditions doctrine).

225. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 682 (1981) (upholding Executive Orders establishing Iranian claims tribunal to secure the release of American hostages); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952) (plurality opinion) (invalidating the President's attempted seizure of domestic steel mills during the Korean War); *id.* at 655 (Jackson, J., concurring).

226. See Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 8-13, 29-41 (1982); Albert J. Rosenthal, *Conditional Federal Spending as a Regulatory Device*, 26 SAN DIEGO L. REV. 277, 286-87 (1989) ("The Executive Branch's adoption of conditions seems to have become more frequent in the individual rights area. Such conditions have repeatedly been imposed without any express congressional command, and sometimes even when implied authority is dubious."); Rosenthal, *supra* note 222, at 1131 & n.123 ("The principal constitutional questions would appear to concern only matters of separation of powers—whether such action by the executive branch was expressly or implicitly authorized by Congress or fell within some area of inherent executive authority.").

227. See *supra* Part II.B; see also *AFL-CIO v. Kahn*, 618 F.2d 784, 796 n.65 (D.C. Cir. 1979) (en banc) (conceding that Presidents have "deployed the procurement power in pursuit of ends that might not strictly be defined as economy or efficiency"); *cf. id.* at 800 (MacKinnon, J., dissenting) ("While the Order deals with federal government procurement, its aims are unrelated to any pressing procurement need."); *id.* at 817 (Robb, J., dissenting) ("The purpose of the Act is to create efficient machinery for the procurement and management of government property; it is not even remotely concerned with the use of procurement authority to accomplish social and economic objectives."); *Consumers Union v. Kissinger*, 506 F.2d 136, 143 (D.C. Cir. 1974) (rejecting challenges to voluntary restraint agreements on steel imports, noting that nothing "differentiates what the Executive has done here from what all Presidents, and to a lesser extent all high executive officers, do when they admonish an industry with the express or implicit warning that action . . . will be taken if a desired course is not followed voluntarily"); *id.* at 145 (Danaher, J., concurring) (approving of such "jawboning").

imposed on contractors and the government's proprietary interests.²²⁸ This limitation parallels the requirement that any conditions imposed by Congress on grants offered to states be germane to a federal interest related to the spending program,²²⁹ as well as the previously discussed nexus test applied to land use exactions. A similar constraint should apply to administrative arm-twisting (represented by the vertical line splitting the middle column in Table 2) so that federal agencies cannot use their leverage to pursue goals wholly unrelated to their directives from Congress.

D. Reforming Administrative Procedure

In exercising their delegated authority to formulate policy, agencies generally enjoy unrestricted freedom to choose between rulemaking and adjudication.²³⁰ Although opportunities for administrative arm-twisting

228. See *Kahn*, 618 F.2d at 792-93; *Chamber of Commerce v. Reich*, 897 F. Supp. 570, 580-81 (D.D.C. 1995) (dicta), *rev'd on other grounds*, 74 F.3d 1322, 1332, 1337 (D.C. Cir. 1996) ("That is not to say that the President, in implementing the Procurement Act, may not draw upon any secondary policy views that deal with government contractors' employment practices—policy views that are directed beyond the immediate quality and price of goods and services purchased."). Dissenting in *Kahn*, Judge MacKinnon argued that the majority's broad reading of the Procurement Act posed delegation problems. See *Kahn*, 618 F.2d at 813 ("Because the majority imposes only the most distant requirement of a nexus on presidential behavior, the President's discretion is virtually unfettered."); see also *Hampton v. Mow Sun Wong*, 426 U.S. 88, 114-16 (1976) (narrowly construing delegation of authority to Civil Service Commission to specify qualifications for federal employment so as to prohibit the imposition of constitutionally suspect requirements promoting purposes unrelated to job performance).

229. See *South Dakota v. Dole*, 483 U.S. 203, 208-09 n.3 (1987) (declining to "define the outer bounds of the 'germaneness' or 'relatedness' limitation on the imposition of conditions under the spending power"); *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion); see also *New York v. United States*, 505 U.S. 144, 172 (1992) ("The conditions imposed are reasonably related to the purpose of the expenditure . . . ; both the conditions and the payments embody Congress' efforts to address the pressing problem of radioactive waste disposal."); Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1962-78, 1988-89 (1995) (proposing, in order to prevent an end-run around limits on the Commerce power, "a new test under which the courts would presume invalid that subset of conditional offers of federal funds to the states which, if accepted, would regulate them in ways that Congress could not directly mandate," in essence, a stricter germaneness test that could only be satisfied if the funds just sought to reimburse rather than coerce a state to accept a condition); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 54-62 (1994) (criticizing the Court's germaneness requirement).

230. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (holding that "the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion"); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he

arise most frequently in informal adjudicatory settings, about which the APA offers little guidance,²³¹ the examples set forth above demonstrate that the behavior also may manifest itself during rulemaking and formal adjudicatory proceedings.

Undue reliance on individualized bargaining undermines consistency and invites the standardless (and largely unaccountable) exercise of agency discretion.²³² "By resorting to ad hoc methods of coercion, agencies circumvent the visibility of legislative approval of sanctions and may even frustrate the legislature's intent to limit their power to coerce."²³³ The

choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."); cf. Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 413-18 (1995) (arguing that the NLRB's policymaking through adjudication, sometimes accompanied by disingenuous fact-finding, insulates agency decisions from effective judicial review).

231. See 5 U.S.C. § 555 (1994) (addressing "ancillary matters" which may arise in any proceeding); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990) (explaining that "the minimal requirements" applicable to informal adjudication appear in § 555); *Roelofs v. Secretary of Air Force*, 628 F.2d 594, 601 (D.C. Cir. 1980) ("The requirement of § 555(e) is modest. Indeed, it probably does not add to, and may even diminish, the burden put on an agency by the APA's provision for judicial review."); ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 256-75 (1993); Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 744 (1976). In addition to possible requirements derived from the Due Process Clause, an enabling statute, or an agency's own practice, see *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 542-48 (1978), the Supreme Court once held that the presumption in favor of judicial review imposed on agencies a burden of explanation even for largely informal decisionmaking, see *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-17 (1971).

232. See Aman, *supra* note 84, at 896 (expressing concern that reliance by the FRB on unpublished voluntary commitments makes it "more likely that the Board's power will remain relatively unchecked and run the risk of being overextended"); Breger, *supra* note 4, at 335-36 ("[I]ndividually negotiated agreements are intrinsically suspect in the American 'rule of law' environment exemplified by the APA."); *id.* at 339 ("The fear of empowering bureaucrats with untrammelled flexibility reflects a traditional concern that the administrative state, if unchecked, would act arbitrarily and capriciously."); Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 420-21 (1996) (fearing that the increased exercise of informal agency discretion will sacrifice values of openness, consistency, and rationality); Rossi, *supra* note 32, at 289 (noting that "exceptions and waivers, like other adjudicatory mechanisms, have lower visibility and greater freedom from outside controls"); Keith Werhan, *Delegalizing Administrative Law*, 1996 U. ILL. L. REV. 423, 460-66 (arguing that recent efforts to reform agency decisionmaking threaten to undermine the commitment to the rule-of-law ideal by reducing both procedural formality and the rigor of judicial review).

233. Gellhorn, *supra* note 58, at 1421 (discussing the use of adverse publicity); see also *id.* at 1424 (adding that "agencies frequently use adverse publicity to supplement their formal and informal sanctions," but concluding that "the 'need' for additional

opportunity to challenge agency action in court provides a critical deterrent to arbitrary action.²³⁴ In the licensing context in particular, the possibility of challenging conditions imposed on approvals would help constrain agency overreaching.²³⁵ In theory, regulated entities could seek judicial review of conditions formally imposed by an agency, while voluntary concessions not memorialized in a permit, order, or consent decree generally would escape review altogether.²³⁶ Courts generally will not entertain challenges to agency delays in licensing,²³⁷ and, even

administrative enforcement power should not be resolved by an agency's arrogating such power to itself without congressional approval").

234. See *Touby v. United States*, 500 U.S. 160, 170 (1991) (Marshall, J., concurring) ("[J]udicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds."); LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320 (1965) ("The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."); cf. CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990) (criticizing existing approaches to judicial review).

235. See *Aman*, *supra* note 84, at 896 ("One way to equalize bargaining power between staff and applicant is to encourage judicial review of 'voluntary commitments.' This would at least provide some protection against the use of arguably ultra vires commitments."). One commentator has suggested the increased utilization of the APA's declaratory order procedure, see 5 U.S.C. § 554(e) (1994), as one possible solution to improper agency demands, see Burnele V. Powell, *Regular Appellate Review, Direct Judicial Review, and the Role of Review of the Declaratory Order: Three Roads to Judicial Review*, 40 ADMIN. L. REV. 451, 487 n.158, 502-03 (1988); Powell, *supra* note 186, at 282-83.

236. As ACUS observed:

Such commitments often are the result of a decision by the applicant to expedite processing of a particular application by committing to resolve questions that might otherwise result in denial of the application. These commitments usually do not appear in the [FRB's] order and . . . are not subject to judicial review at the instance of the applicant.

53 Fed. Reg. 26,028, 26,029 (1988); see also *Aman*, *supra* note 84, at 881-82, 894 ("Because applicants have, in effect, waived their legal rights by voluntarily agreeing to conditions, the agreement is impossible to challenge in court.").

237. See, e.g., *In re Barr Lab., Inc.*, 930 F.2d 72, 73-76 (D.C. Cir. 1991) (denying petition for writ of mandamus to compel the FDA to expedite its processing of numerous pending applications for approval of generic drugs); *Abbott Lab. v. Harris*, Food Drug Cosm. L. Rep. (CCH) ¶ 38,046 (N.D. Ill. June 12, 1980) (declining to compel final FDA action on food additive petition for cyclamate); see also *FTC v. Standard Oil Co.*, 449 U.S. 232, 242-43 (1980) (elaborating on finality requirement); cf. 5 U.S.C. § 706(1) (1994) (authorizing judicial review of any agency action "unreasonably delayed"); *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 79-81 (D.C. Cir. 1984) (establishing deferential test for reviewing claims of unreasonable agency delay).

if agencies ultimately decide to deny a permit application, courts typically will defer to their judgments.²³⁸

At least demanding that agencies first promulgate rules setting forth conditions applied during licensing would allow for some limited judicial scrutiny.²³⁹ In this respect, the FDA's accelerated new drug approval rules and elaborate recall procedures seem preferable to ad hoc concessions extracted in other contexts. Even if one did not require compliance with notice and comment rulemaking procedures, perhaps to avoid a counterproductive increase in the imposition of unannounced conditions,²⁴⁰ Congress should at least demand publication of agency policy.²⁴¹ In this sense, the EPA's SEPs guidelines seem far preferable

238. See, e.g., *Warner-Lambert Co. v. Heckler*, 787 F.2d 147, 154 (3d Cir. 1986) (concluding that "it is the [FDA] Commissioner who must determine, after giving full consideration to all of the evidence that has been submitted, including expert opinions, if the studies meet the regulatory criteria"); *Edison Pharm. Co. v. FDA*, 600 F.2d 831, 840-41 (D.C. Cir. 1979) (upholding FDA denial of NDA); *Unimed, Inc. v. Richardson*, 458 F.2d 787, 789 (D.C. Cir. 1972) (same); see also *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983) (deferring to agency's scientific judgments); *Schering Corp. v. FDA*, 51 F.3d 390, 399 (3d Cir. 1995) (explaining that "judgments as to what is required to ascertain the safety and efficacy of drugs fall squarely within the ambit of the FDA's expertise and merit deference from us"); *Merrill*, *supra* note 26, at 1864 ("Nor are FDA's decisions—to grant, withhold, or delay approval—commonly challenged in court. . . . The FDA product approval system is, in short, remarkably free from conventional legal constraint."). But cf. *Serono Lab., Inc. v. Shalala*, 974 F. Supp. 29 (D.D.C. 1997) (preliminarily enjoining the sale of a generic drug approved by the FDA).

239. See *Aman*, *supra* note 84, at 898 ("Some conditions and commitments are not appropriate for the bargaining context in which they arise. They involve issues that are best resolved in more detailed rulemaking or adjudicatory procedures."); cf. Anthony, *supra* note 7, at 39 (recommending that agencies "use notice and comment rulemaking to announce an interpretation that asserts jurisdiction into new areas over which its authority is not obvious"); Mark Seidenfeld, *Playing Games with the Timing of Judicial Review: An Evaluation of Proposals to Restrict Pre-enforcement Review of Agency Rules*, 58 OHIO ST. L.J. 85, 98 (1997) (arguing that a prohibition on pre-enforcement judicial review of regulations would induce firms to comply rather than risk penalties, which in turn would reduce the likelihood of any post-enforcement review and consequently reduce incentives for agencies to exercise care when initially promulgating rules).

240. See Anthony, *supra* note 7, at 37-38 ("Where the agency heads are under no compulsion to announce standards in advance, a judicial rule requiring them to set definitive standards legislatively may discourage them from declaring standards at all, even informally.").

241. See 53 Fed. Reg. 26,028, 26,029 (1988) (ACUS recommendation that the FRB "should, from time to time, summarize the thrust of [voluntary] commitments [by bank holding companies] and publish and disseminate these summaries"); see also *Aman*, *supra* note 84, at 885 ("It is advisable for the Fed to examine periodically the conditions in its orders, summarize their policy, and then make this summary available to the public. If a new policy has emerged, an agency rulemaking proceeding might be in order."); Rossi, *supra* note 32, at 296-97 (suggesting that agencies promulgate waiver standards as

to the FDA's largely secretive approach to possible items for negotiation in consent decrees.

The EPA's policy includes guidelines designed to ensure that settlements containing supplemental environmental projects conform to legal requirements,²⁴² though the Agency did not elaborate on the precise nature of these legal constraints.²⁴³ Above all else, some "nexus" must exist between the settlement project and the underlying violation.²⁴⁴ Thus, community service "unrelated to environmental protection," such as "making a contribution to charity, or donating playground equipment," would not qualify as acceptable.²⁴⁵ Nonetheless, the Agency's explanation of this nexus requirement suggests requiring only a weak connection.²⁴⁶ For instance, the EPA lists as acceptable an environmental restoration project "which goes beyond repairing the damage caused by the violation to enhance the condition of the ecosystem or immediate geographical area adversely affected."²⁴⁷

rules, or at least publish them as guidelines, in order to promote transparency and accountability); cf. *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329-34 (D.C. Cir. 1995) (holding that the imposition of an administrative fine for the violation of an ambiguous regulation violated due process for lack of adequate notice).

242. See 60 Fed. Reg. 24,856, 24,858 (1995) ("The legal evaluation of whether a proposed SEP is within EPA's authority and consistent with all statutory and Constitutional requirements may be a complex task.").

243. See Leslie J. Kaschak, Note, *Supplemental Environmental Projects: Evolution of a Policy*, 2 ENVTL. L. 465, 471-73 (1996) (describing congressional concerns about the legality of the EPA's prior SEP policy).

244. See 60 Fed. Reg. at 24,858 ("All projects must have adequate nexus. Nexus is the relationship between the violation and the proposed project. This relationship exists only if the project remediates or reduces the probable overall environmental or public health impacts or risks to which the violation at issue contributes"); see also 53 Fed. Reg. 26,028, 26,029 (1988) (ACUS recommendation that any "[c]onditions established by the [FRB] regarding applications and voluntary commitments offered by applicants [under the Bank Holding Company Act] should be unambiguous and reasonably related to an articulated policy of the Federal Reserve Board.").

245. See 60 Fed. Reg. at 24,860.

246. As the EPA explained:

SEPs are likely to have an adequate nexus if the primary impact of the project is at the site where the alleged violation occurred or at a different site in the same ecosystem or within the immediate geographic area [i.e., within a 50 mile radius]. Such SEPs may have sufficient nexus even if the SEP addresses a different pollutant in a different medium.

Id. at 24,858 (footnotes omitted).

247. See *id.* at 24,859 (providing examples of such projects, including "[r]eductions in discharges of pollutants which are not the subject of the violation to an affected air basin or watershed; restoration of a wetland along the same avian flyway in which the facility is located; or . . . projects which provide for the protection of endangered species").

The policy also requires that SEPs "advance at least one of the declared objectives of the environmental statutes that are the basis of the enforcement action" and "cannot be inconsistent with any provision of the underlying statutes."²⁴⁸ Finally, a project may not serve as a supplement to existing EPA activities, presumably to discourage Agency officials from seeking SEPs simply to fund or substitute for EPA programs.²⁴⁹ Although these restrictions may still exceed the scope of Congress' delegation of authority to the EPA, the effort to formalize some limitations on permissible settlement demands may deserve more widespread adoption to guard against the risk of overreaching evident in the ad hoc bargaining by agencies such as the FDA.

Published guidelines invite scrutiny by interested parties and decisionmakers. If nothing else, such managerial controls would help prevent agency staff from exercising discretion without effective supervision by high-level officials.²⁵⁰ A publication requirement, even without the threat of judicial review, presumably would promote discipline by agency officials in announcing possible demands and limiting the range for bargaining.²⁵¹ One would not, for instance, expect the EPA's guidelines to invite companies to undertake blatantly nongermane SEPs in an effort to mitigate penalties. Policing adherence to such published guidelines would, of course, still be difficult, especially if the targets of arm-twisting continue to remain silent, but agency commitments to self-restraint may be the most that reforms can hope to accomplish.²⁵²

248. *Id.* at 24,858.

249. *See id.* ("A project may not be something that EPA itself is required by its statutes to do. And a project may not provide EPA with additional resources to perform an activity for which Congress has specifically appropriated funds."). The Agency added that a SEP should not amount to "an expansion of an existing EPA program. For example, if EPA has developed a brochure to help a segment of the regulated community comply with environmental requirements, a SEP may not directly, or indirectly, provide additional resources to revise, copy or distribute the brochure." *Id.*; *see also* Breger, *supra* note 4, at 337 ("To do otherwise would violate anti-augmentation principles which limit federal agencies to the money appropriated by Congress for their work." (footnotes omitted)).

250. *See Aman, supra* note 84, at 894-97 (expressing the concern that "[t]he bargaining process may give an inordinate amount of policymaking power to the staff involved," and suggesting that the FRB's Board of Governors more closely supervise negotiated agreements).

251. *See DAVIS, supra* note 2, at 97-116, 226 (recommending maximum openness to structure the use of discretionary power as a check on the potential for arbitrariness); Shapiro, *supra* note 2, at 1516-17 ("Such deliberately structured bargaining in which the quid pro quo and the reserve price are matters of public record could provide adequate restraints on discretion without judicial review.").

252. *See Aman, supra* note 84, at 897-98 ("An appropriate balance between the flexibility of a bargaining process and the potential abuse of a legal monopoly may best

Because of the ever present fear of retaliation, regulated entities usually will not take the initiative to petition Congress or the courts for relief. Thus, it becomes incumbent upon legislators and regulatory officials to endeavor to guard against the most objectionable forms of administrative arm-twisting identified herein, along the lines illustrated in Table 2.

V. CONCLUSION

Administrative arm-twisting hardly represents a new phenomenon, but it has received very little critical attention to date. Arm-twisting also is not a unitary, easily identified practice. Instead, federal officials have exerted their leverage across numerous regulatory programs and through a variety of mechanisms, including licensing, contracting, and enforcement monitoring. State and local officials also engage in forms of arm-twisting, in the context of land use planning and criminal plea bargaining, as have regulatory officials in Japan and elsewhere.

The one feature common to all of these examples is the use of negotiation and indirection by government officials eager to stretch the outer boundaries of their delegated powers. Even when agencies pursue laudable goals, such a practice poses serious concerns about sacrificing fairness and accountability. This Article has suggested a range of potential constraints on administrative arm-twisting to minimize the risks associated with this exercise of largely unchecked discretion, including heightened judicial supervision to ensure that Congress has explicitly authorized (or at least not prohibited) both the means used and the ends pursued by the agency, as well as greater openness by regulatory officials in describing what they regard as permissible subjects for negotiation. In addition, Congress must try to watch for and, where necessary, respond to administrative arm-twisting in order to prevent agencies from inappropriately aggrandizing their power. Although these are partial solutions at best, some effort must be made to push administrative bargaining out of complete darkness and, if not into the sunshine, at least into the shadow of the law.

be achieved by equalizing the bargaining power between staff and applicants and by counseling regulatory restraint on the part of the Board"); Thomas, *supra* note 7, at 156 (concluding that we "must accept that an agency's own good faith efforts to fulfill its statutory mission, . . . and its attempts to regularize the discretion of its own enforcement personnel, as well as the continuing influence of the politically accountable branches on agency policy, are the best hope for rationalizing agency discretion").

