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Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits

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TEXT:

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I. Introduction

No program of environmental regulation is better than its enforcement system. n1

Many commentators have come to believe that the adversarial interest group politics of pollution regulation create massive transaction costs and that those costs should encourage agencies and interest groups to adopt cooperative approaches to problem solving. n2 With the advent of the Bush Administration, the notion that [*83] environmental regulation should aim for cooperation rather than contention has gained new prominence. n3

Good evidence, particularly from the states, shows that environmental regulatory agencies have been practicing a kind of "cooperative enforcement" all along. Some systematic empirical research and a larger body of anecdotal evidence suggest that these agencies lean toward negotiation and compromise in enforcement and that such emphasis is increasing. Most regulatory agencies prefer to work informally with violators: bargaining with them or helping them reach voluntary compliance rather than punishing their noncompliance in formal administrative or judicial actions to deter future violations.

As the critics of adversarial administrative politics note, cooperative enforcement may reduce administrative and compliance costs and lead to better environmental quality outcomes in the long run. It is nevertheless risky, as, at some point, cooperation can become collusion, and goals can be lost in salving the abrasions of the regulatory process. Although many firms - particularly small firms - that try in good faith to comply with regulatory commands deserve the assistance of regulatory agencies, the risk remains that agencies will be too nice, letting bad actors get away with prolonged and significant violations of the law. While agencies should cooperate with firms that make good faith efforts to comply but sporadically fail to do so, agencies must identify strategic, profit-maximizing firms and impose stiff penalties to deter their noncompliance.

Contemporary environmental regulation was born in an atmosphere of grave distrust of cooperation between regulators and regulated firms. Based in part on the urging of critics who saw regulatory agencies' tendency to be seduced or "captured" by regulated interests, Congress in the early 1970s imposed on the new environmental agencies strict controls designed to reduce administrative discretion and expand public participation. Those innovations, continued in subsequent reauthorizations of

the statutes, have combined with the natural, fractious pluralism of environmental politics to discourage capture of environmental agencies.

[*84] Nevertheless, risks of capture linger, particularly in the enforcement of environmental standards and where state agencies implement the federal programs. Cooperative enforcement makes the risks especially acute; by putting regulator and regulatee in close and frequent cooperation, it provides many of the prerequisites for collusion. This risk of capture means that agencies may not use the optimal blend of cooperation and deterrence in enforcement.

The risks of capture emphasize the importance of the statutory anti-capture measures, which afford opportunities for participation by countervailing, pro-regulatory interests in regulatory decision making. Part of this "representation revolution" n4 was the citizen suit, in which citizens, independent of the regulatory agency, sue alleged violators of environmental statutes and regulations. Citizen suit provisions are included in all of the major pollution control statutes n5 and have successfully encouraged vigorous citizen enforcement of environmental laws.

Each citizen suit is an opportunity for oversight - policing - of the regulatory enforcement process. It provides access for pro-regulatory constituents to regulatory enforcement, where capture is most likely. The countervailing force of citizen plaintiffs can disrupt the cozy environment of cooperative enforcement, pushing it away from capture, by providing surrogate enforcement or encouraging more stringent agency enforcement.

But this countervailing power is not wholly positive. Officious citizen enforcers are likely to push too hard for penalties or intrusive compliance orders. They might thereby undermine the agency's best efforts to foster compliance through legitimate cooperation because the informal bargains struck by regulators and regulatees cannot protect the latter from citizen litigation. In this sense, citizen enforcement may discourage firms and agencies from investing in productive cooperation.

The pros and cons of citizen enforcement call for a delicate [*85] balancing by the courts. Nevertheless, courts at present appear reluctant to entertain such suits, either because they view citizen plaintiffs as presumptively intermeddlers, or because they are unwilling to scrutinize the quasi-political judgments inherent in agency enforcement. To be sure, cooperative enforcement forces courts to face a complex ongoing relationship between regulator and regulatee fraught with weighty policy questions and considerable social-psychological tension. A court in such cases will find deference to the agency far easier than its scrutiny.

In authorizing citizen suits, however, Congress has invited the courts to resolve the conflict. And as surely as cooperative enforcement makes the court's role as mediator more difficult, it makes it more important. While cooperative enforcement has expanded, so too has the risk of capture, but courts have unfortunately retreated from scrutiny of agency enforcement when reviewing citizen suits. The potential of capture to grow in the soil of broad administrative discretion demands that courts go beyond rubber-stamping agency enforcement, or lack thereof, when faced with a citizen suit. To effectuate Congress' desire to avoid capture, courts must draw nuanced distinctions between useful citizen suits that ameliorate failures of agency enforcement and those that disrupt productive cooperation. Courts should allow strong citizen enforcement where the risks of failure in the administrative process are most severe and rein it in where it merely interferes with salutary agency efforts to assist good-citizen firms in complying with the law.

Part II of this article finds cooperative enforcement to be the norm and evaluates the normative arguments for and against it. Part II concludes with an operational definition of an "optimal" enforcement strategy, which includes considerable cooperation but also demands punitive enforcement to deal with recalcitrant violators. Part III describes the pathological form of cooperation: capture. That Part summarizes the scholarly theories of agency capture and finds that Congress was cognizant of them and attempted to build solutions into the federal environmental statutes. These efforts, along with inherent characteristics of environmental regulation, may often discourage capture of environmental agencies, but risks remain, particularly where enforcement, as opposed to policymaking, is concerned. The lesson of Part III is that encouraging agencies to cooperate with regulated firms may

be a recipe for disaster absent effective oversight: one cannot expect agencies alone to adopt the right balance of cooperation and contention.

[*86] Part IV discusses the importance of citizen enforcement in resolving the tension between productive cooperation and its pathological form. That Part finds that citizen participation in enforcement is necessary and desirable to police the cooperative relationships of regulators and regulatees. Part IV nevertheless suggests that citizen enforcement can overcompensate and discourage or undermine effective cooperation. Finally, Part V looks to the courts to avoid that eventuality, to balance agency cooperation and vigorous citizen enforcement. That Part argues that any presumptive treatment of citizen suits - whether skeptical or encouraging - is inappropriate in light of the risks of capture and benefits of cooperation. Accordingly, Part V provides criteria that might help courts draw finer distinctions between useful and counterproductive citizen actions.

II. Cooperation and Enforcement

The scholarly literature on environmental policy is littered with paeans to non-adversarial dispute resolution and collaborative policy making. Many commentators have found the prevailing "command and control" style of environmental regulation to be heavy-handed and inefficient, imposing high transaction costs yet often failing to advance environmental quality goals. n6 Current efforts to move toward less adversarial policy making include negotiated rulemaking, or "reg-neg"; n7 market-based pollution control regimes; n8 and streamlined, multimedia or whole-facility permitting. n9 These initiatives hope to avoid the litigation and general foot-dragging by regulated entities and pro-regulatory interest groups alienated by the policy-making process and thereby reach equivalent or improved environmental outcomes with lower transaction costs.

Collaboration is also increasingly hailed as the optimal strategy for regulatory enforcement, although it has been an important tool in the enforcement toolbox all along. In a 1998 report, the General [*87] Accounting Office ("GAO") identified a growing movement, especially at the state level, "to develop alternative approaches that supplement - and sometimes replace - ... traditional enforcement activities with more cooperative approaches designed to achieve compliance by regulated facilities." n10 Environmental agencies very often avoid adversarial enforcement tools - imposition of administrative penalties and prosecution of civil actions - in favor of negotiation and technical assistance. n11 This strategy draws some support from the normative literature on enforcement: cooperation, within limits, can provide improved compliance, reduced transaction costs, enhanced fairness to regulated firms, and increased popular support for the environmental regulatory endeavor. Part II.A introduces the enforcement tools used by regulatory agencies and canvasses available empirical data to identify the tools environmental agencies use most often. Part II.B addresses the normative dimension of that choice.

A. The Enforcement Toolbox

Regulatory agencies use a broad array of enforcement tools, from the plainly punitive to the barely intrusive. n12 Informal enforcement actions may involve regulators making phone calls to violators, holding compliance conferences with firms, or writing informal "warning letters" or somewhat more formal "notices of violation" ("NOVs"). These actions notify the firm about the violation and the agency's cognizance of it, and encourage the firm to achieve compliance voluntarily. They may also, implicitly or explicitly, warn the firm of the more formal enforcement actions that can follow if the firm fails to remedy the violation.

Those more formal steps include administrative actions, civil judicial actions, and criminal judicial actions. Administrative actions are formal proceedings before an administrative law judge, potentially resulting in an order, by judgment or consent, that requires [*88] payment of penalties and/or implementation of particular compliance actions. Alternatively, or in addition, the enforcement agency may refer the case to a prosecutorial authority - the Department of Justice ("DOJ") at the federal level or an attorney general or district attorney at the state level - which may or may not opt to bring a civil or criminal action in state or federal court seeking penalty or compliance orders enforce-

able with the court's contempt power, or criminal sanctions against the violating firm or its officers. n13

Over the long run, an agency's choice among these tools comprises a "regulatory style." n14 Scholars have identified two basic styles of regulatory enforcement that I will term generically "adversarial" and "cooperative." n15

The adversarial style represents what most people likely think of when they imagine law enforcement. It is "accusatory and adversarial, leading to routine reliance on formal legal processes," rather than informal and accommodationist. n16 The adversarial approach takes as its primary goal establishment of a credible punitive response to produce specific and general deterrence, systematically imposing penalties that eliminate, at a minimum, whatever economic benefit the firm derived from noncompliance and thus making noncompliance more expensive than compliance. The EPA enforcement policy, for instance, calls for penalties equal to the economic benefit the violator enjoyed multiplied by a "gravity" component based on the severity and blameworthiness of the violation. n17 The agency may also issue formal administrative orders that dictate particular steps toward compliance, such as installation of [*89] specified effluent-treatment technology, or seek a judicial decree awarding injunctive relief. These orders allow direct judicial intervention in the enforcement process, in the form of injunctive orders (and enforcement of those orders through the court's contempt power) or orders enforcing an existing administrative order.

The cooperative style, on the other hand, emphasizes negotiated enforcement: an iterative process in which regulators and regulated entities "communicate and bargain" to achieve compliance. n18 The agency's prosecutorial discretion allows it to bargain by "offering" any of a number of "commodities." n19 Most valuable is the agency's forbearance; it can withhold an expensive sanction that it could legitimately pursue. The agency can also offer information, working as a kind of consultant to the firm to help it comply. In exchange, the violator can offer commitments to comply by a particular date, specific process or pollution control technology changes, or commitments to achieve over-compliance with other regulatory commands. Because compliance is an ongoing process, the bargaining may take place over time, shifting with circumstances and the firm's responses. Unlike that of formal, adversarial enforcement, the deterrent effect of bargaining is small. In place of punishment, the agency offers lenience, withholding penalties if the firm makes assurances of compliance and shows steps toward it. The firm may be deterred from remaining noncompliance by the risk that the agency will eventually impose penalties, but that deterrent effect must be minimal where the agency consistently follows a cooperative strategy. n20

Because few, if any, agencies adopt purely one strategy or the other, these "styles" are ideal types at the ends of a continuum. Where, then, do most environmental agencies fall on that continuum? Professor Joel Mintz has characterized EPA as falling toward the adversarial end of the spectrum, finding that "both the EPA's written enforcement policies and its actual practices have consistently [*90] emphasized the initiation of formal enforcement actions against violators of federal environmental standards." n21 He refers to a panoply of guidance documents promulgated by EPA that set out the agency's policy for enforcement of the programs in its bailiwick. n22 For instance, EPA's Policy on Civil Penalties states that "successful deterrence is important because it provides the best protection for the environment," and accordingly "for cases that go to court, the Agency will request the statutory maximum penalty in the filed complaint." n23

Nevertheless, EPA practice, on the ground, may be less adversarial. Based on an empirical study of enforcement actions taken by EPA's Office of Water, Professors Susan Hunter and Richard Waterman have argued that EPA adopts a cooperative, "negotiated compliance" approach. n24 They found that not only did informal compliance-directed measures account for 70 percent of all Office of Water enforcement actions, but "many of these actions were conducted at the very lowest levels [of formality] - one might characterize them as the most informal of the informal actions." n25 They found that few of the Office's enforcement actions went beyond a phone call or an informal notice letter. Moreover, in a study of the same program office, GAO found that the formal actions that EPA does take are limited to certain categories of violation. "Because most formal enforcement actions have been taken

for significant violations of monthly average limits, comparatively few penalties have been assessed for significant violations of other limits." n26

[*91] The ambiguity about EPA's "style" also appears in equivocal language in recent statements by EPA officials and in official EPA documents. According to the then Assistant Administrator in charge of the Office of Enforcement and Compliance Assurance ("OECA"), EPA "will not run an 'either/or' enforcement program. Only a combination of ... tough enforcement actions ... and innovative programs to promote compliance will be effective" n27 At the same hearing, EPA's then-Inspector General testified that enforcement "should include assisting the regulated community to comply with environmental laws and regulations and must include consistent employment of fines and penalties when voluntary compliance cannot be achieved." n28 OECA's FY98 Accomplishments Report is similarly equivocal:

Over the past five years, EPA has developed new tools such as compliance assistance ... and compliance incentives These new tools join a strong program of compliance monitoring (through inspections and investigations) and civil and criminal enforcement actions, to form a national program which applies the appropriate tool or combination of tools to address environmental problems and patterns of noncompliance. n29

However, the states, rather than EPA, perform most environmental enforcement as a function of their "primacy" under the federal statutes. n30 A sizable majority of states have obtained primacy for most of the major federal environmental programs n31 and, accordingly, perform most environmental regulatory enforcement. n32 [*92] For instance, in terms of administrative actions under the water, air, and hazardous waste programs, n33 the states initiated an average of nearly three times as many actions annually as did EPA from fiscal years 1987 to 1996. n34 For the same years and programs, states made an annual average of slightly more than three times as many civil judicial referrals as did EPA. n35

The states have apparently long relied on cooperative enforcement, more so than EPA. n36 Many assessments of state enforcement have found that state agencies emphasize negotiation and collaboration over imposition of punitive sanctions. n37 Furthermore, these [*93] studies show that even where a state agency does take punitive steps, they may come only after years of continued noncompliance. n38 By some estimates, more than 90 percent of state enforcement actions are concluded prior to issuance of administrative penalties or a judicial referral. n39 In these cases, a notice of violation ("NOV") and perhaps some form of compliance conference between violator and agency are thought to be adequate. Unfortunately, comprehensive statistics describing the distribution of state regulatory enforcement actions by type of action are elusive, especially for informal enforcement actions. EPA has only recently begun collecting data on informal enforcement actions, and those data are limited to the most formal of the informal: NOVs. These statistics support the conclusion reached by earlier commentators that states pursue increasingly fewer actions as one moves up the scale of formality, so that NOVs greatly outstrip administrative orders, which in turn outstrip judicial referrals. Tables 1 and 2 show the relationship between the aggregate numbers of enforcement actions taken in a given year in the Clean Air Act ("CAA") and Resource Conservation and Recovery Act ("RCRA") programs, based on data provided by EPA. n40

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Table 1. Total Number of NOVs, Civil Actions, and Administrative Orders Under RCRA, 1984-1998.

(N) = number of states reporting at least one action.

[tdg0,m'0000',ql [tcgp1,m'0000 (00)',qc [tcgp1,m'Administrative'+1,qc [tcgp1,m'000 (00)',qc] [tu3;4] Year

NOVs Administrative Orders Civil Actions [tu3;4] 1984 1333 (30) 123 (25) 18 (10) 1985 2231 (36) 289 (35) 48 (12) 1986 2381 (31) 345 (31) 81 (13) 1987 3528 (44) 474 (43) 95 (20) 1988 4427 (47) 496 (42) 120 (27) 1989 7394 (49) 1298 (48) 279 (33) 1990 7886 (50) 1527 (48) 292 (34) 1991 9118 (48) 1657 (46) 336 (30) 1992 7881 (48) 1420 (43) 423 (34) 1993 8162 (48) 1677 (46) 347 (28) 1994 8154 (48) 1671 (44) 315 (30) 1995 7449 (47) 1275 (47) 271 (23) 1996 6977 (48) 1004 (44) 187 (26) 1997 5870 (46) 984 (44) 222 (23) 1998 5896 (48) 1093 (45) 157 (27) [tu3;4]

Table 2. Total Number of NOVs, Civil Actions, and Administrative Orders Under the Clean Air Act, 1984-1998. (N)= number of states reporting at least one action.

[tdg0,m'0000',ql [tcgp1,m'0000 (00)',qc [tcgp1,m'Administrative'+1,qc [tcgp1,m'000 (00)',qc] [tu3;4] Year NOVs Administrative Orders Civil Actions [tu3;4] 1984 369 (16) 62 (19) 5 (4) 1985 310 (18) 148 (20) 70 (4) 1986 396 (24) 281 (27) 96 (7) 1987 534 (26) 223 (25) 93 (7) 1988 555 (25) 451 (29) 44 (5) 1989 1112 (38) 844 (40) 75 (7) 1990 1156 (35) 913 (37) 29 (10) 1991 1364 (35) 1026 (40) 13 (5) 1992 1329 (39) 925 (41) 14 (8) 1993 1650 (42) 1159 (47) 19 (13) 1994 1872 (45) 1359 (44) 36 (12) 1995 1969 (43) 1456 (44) 38 (10) 1996 2342 (44) 1408 (49) 84 (11) 1997 3044 (46) 1522 (48) 71 (7) 1998 3357 (45) 1410 (48) 119 (8) [tu3;4]

These data probably greatly underestimate the informality of state enforcement. First and most important, these figures are entirely silent about the frequency of the most informal actions, like telephone calls and warning letters, which Professors Hunter and Waterman found to predominate in EPA's Office of Water enforcement actions. Second, EPA believes that the NOV data substantially underestimate the actual frequency of NOVs, because the Agency has not historically required states to maintain and report their totals. n41 Given that latitude, one might expect states to underestimate or underreport the number of NOVs relative to more formal [*94]

[SEE TABLES IN ORIGINAL] [*95] actions, because EPA considers the states' raw number of enforcement actions as an indicator of enforcement success. n42 To the extent this is true, the balance of actions shown in the tables would fail to demonstrate the true disproportion of NOVs to other actions.

Although one can draw only limited conclusions from these data, one might reasonably infer that state enforcement is far from the adversarial ideal type. Not every violation draws a penalty or administrative or judicial compliance order, and indeed it appears that the vast majority of reported enforcement actions stop after an NOV. We have no idea how many enforcement actions occur where no NOV is ever issued. If existing studies are accurate, this unseen "dark matter" of enforcement likely dwarfs the actions for which data are available.

More anecdotal evidence shows states embracing cooperative enforcement. According to a 1998 GAO report, states have adopted many novel, non-adversarial enforcement programs, including compliance assistance programs, audit privileges, and penalty amnesty. n43 Compliance assistance programs involve the agency's performing compliance consulting services for regulated firms and providing "plain English" explanations of complex regulatory requirements. n44 Audit privileges and penalty amnesty programs encourage voluntary discovery, disclosure, and abatement of violations by either granting an evidentiary privilege to voluntary audit reports or withholding penalties for voluntarily disclosed violations. n45 These programs all seek to encourage voluntary compliance without penalizing noncompliance.

Even if EPA would prefer that states take a more adversarial approach to enforcement, realistically, the Agency cannot do much about it. Although EPA could consider a state's failure to follow EPA enforcement policy in deciding to revoke a state's primacy, that threat is basically empty because EPA lacks the resources [*96] necessary to rescind primacy from even a few states. n46 More likely, at most, EPA could supplement state enforcement with its own actions in the state, n47 or "overfile" - bringing an action against a violator against whom the state has already commenced an insufficient

enforcement action - but even overfiling is rare. n48 In practice, little restrains a state from pursuing, or not pursuing, enforcement in whatever form it chooses.

B. Normative Concerns of Regulatory Style

Commentators debate what regulatory style advances regulatory goals most fully and cost-effectively. Perhaps unsurprisingly, the optimal enforcement strategy appears to involve a combination of adversarial and cooperative approaches, in which the enforcer chooses between sticks and carrots based on the regulatee's compliance history and response to prior enforcement efforts.

1. The debate.

Advocates of adversarial enforcement emphasize the importance of general and specific deterrence: adversarial enforcement discourages targeted defendants and regulated entities at large from violating the law. They argue that only substantial, predictable, and public sanctions for noncompliance can achieve adequate compliance in the long run by making violation uneconomic: proper penalties make the expected cost of noncompliance higher than its expected economic benefit. The expected cost is equal to the probability that a penalty actually will be imposed multiplied by the dollar value of the penalty. n49 The economic benefit from noncompliance is the avoided cost of attaining [*97] and maintaining compliance, including the capital and operating costs of pollution control equipment, the opportunity cost of reduced or less efficient production, and the transaction costs of compliance, such as ascertaining regulatory requirements or applying for a permit. n50

Deterrence advocates reject cooperative enforcement as insufficiently punitive and insufficiently certain. n51 Cooperative enforcement often eschews penalties altogether, and where penalties are imposed, they may be small. As a result, violators face minimal material incentives to avoid noncompliance. Instead, the deterrent effect of cooperative enforcement is limited to the transaction costs of bargaining with the agency plus the expected costs of incremental compliance, which include the cost of reaching compliance over months or years and the amount of any minimal penalties imposed along the way (multiplied by their low risk), all discounted to present value. A firm may often be able to reduce the cost of incremental compliance by absorbing the cost of minor penalties along the way, allowing the firm to remain noncompliant for years.

A few values unrelated to deterrence also support adversarial, punitive enforcement. First, punishment may shore up the moral authority of the regulatory rule and the enforcement agency. n52 For instance, formal, publicly visible enforcement actions validate the compliance decisions of voluntary compliers who might see failure to enforce vigorously against noncompliant firms as unfair. n53 Failure to sanction violators publicly may delegitimize the rule violated and actually encourage noncompliance by others who would otherwise [*98] comply voluntarily. Second, penalties and formal administrative or judicial orders also simply express public disapprobation of polluting activity. n54 Where enforcement is negotiated "under the table," the ethical message that polluting is "wrong" is not delivered. n55 Finally, by forcing violators to disgorge the ill-gotten gains of noncompliance, penalties also prevent unjust enrichment. Regardless of the incentives created for future compliance, we might view profits derived from lawbreaking as "tainted" and demanding forfeiture.

Advocates of cooperative enforcement reject the unstated premise of deterrence theory that all regulated firms are "amoral calculators" n56 that will consciously choose to violate where economically reasonable. Professors Robert Kagan and John Scholz argue that the "amoral calculator" model of firm behavior is inaccurate in many cases and that two other "types" of regulated firm are also common: the "political citizen" and the "incompetent." n57 The citizen-firm will voluntarily comply with the subset of legal rules that the firm's decision makers view as legitimate, but will shirk compliance with rules that are considered "unreasonable." The incompetent firm, on the other hand, may be noncompliant due to ignorance of the rule, incapacity to comply (technical or fiscal), or failure of intraorganizational process. n58

Advocates of cooperative enforcement also advance a broader critique of adversarial enforcement, based on the ongoing relationship of regulator and regulatee inherent in much regulatory en-

forcement. Because pollution discharges will continue at one level or another as long as the polluting firm is in operation, the firm will necessarily interact repeatedly with the regulatory agency. In this kind of ongoing relationship, regulators must carefully assess the impact of their enforcement strategy on the agency's long-term [*99] relationship with regulated firms. n59 Cooperative enforcement, advocates argue, is necessary to reduce (and thus avoid the costs of) the friction otherwise inherent in the regulatory process.

In this regard, cooperative enforcement may provide at least four distinct benefits in comparison to an adversarial approach. First, cooperative enforcement may lower an agency's administrative costs in each individual enforcement action, reducing transaction costs in the short run. n60 In formal enforcement actions, agencies devote enormous resources to provide notice, develop evidence, and prosecute the enforcement action and judicial appeals. The agency can avoid these costs if it can secure voluntary compliance through informal action. The savings may be especially significant where small sources are involved: the administrative cost of adversarial enforcement may outweigh the benefits of compliance in such cases. n61

Nevertheless, given the variation among "types" of violator discussed above, informal or negotiated enforcement might induce compliance from some firms but not others. Amoral calculators could feign compliance or withhold compliance, knowing that the costs of formal action make any threat of action merely a bluff. A general strategy of cooperation can actually undermine compliance by such firms.

Second, cooperative enforcement may also enable agencies to mitigate the perceived irrationality and unfairness of generally applicable regulations.

Regulatory policy making frequently results in "overinclusiveness" - rules that are too general, stringent, and costly, if fully enforced ... because the agency bureaucracy resists the costs of information and analysis necessary to design rules that reflect unique economic conditions. Adjustment to this problem then takes place in the course of enforcement where the agency relies upon the discretion of officials in individual cases. n62

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Faced with uniform rules, regulated firms may experience what Professors Bardach and Kagan call "site-level unreasonableness," in which the generic legal rule applies to factual settings that fail to advance the goal of the rule or do so with apparently unbalanced costs and benefits. n63 Cooperative enforcement may mitigate this perceived unfairness and irrationality by encouraging regulators to exercise their broad discretion equitably. The regulator can withhold sanctions where the policy of the legal rule is not advanced by its application to a particular regulated firm.

Making regulatory rules more fair and reasonable in the eyes of regulated firms through more flexible enforcement of broad rules supplies both deontological and utilitarian benefits. As a matter of nonconsequentialist ethics, an enforcer's withholding sanctions where the policy behind a rule is not advanced by strict enforcement makes the legal rule more "just." n64 From this perspective, rigidly punitive enforcement may be undesirable, even if it results in net social benefits such as reduced pollution, if it imposes unfair burdens on individuals.

Avoiding irrationality and unfairness also carries significant utilitarian benefits by boosting the Agency's credibility and legitimacy. n65 Unfairness may inspire recalcitrance in regulated firms that would otherwise comply voluntarily: "Industry believes that the coercive, irrational, and suboptimal nature of rules justifies high levels of resistance via noncompliance, obfuscation, and delay in their dealings with regulators, and litigation challenging the factual and analytical justifications for agency regulations." n66 This resistance will raise the agency's transaction costs in the long run, as firms try to hide noncompliance or fight future enforcement efforts [*101] because of past unfairness. Cooperative enforcement may reduce these long-run transaction costs by legitimating the rule and agency in the eyes of some firms. n67 Further, by reducing perceived unfairness, cooperative enforcement

may dissuade regulated firms from making political attacks on the statutory regime or the agency's authority and budgets and may shore up general public support for the agency's regulatory mandate.

Yet seen from a different perspective, bargained enforcement may reduce legitimacy.

Disgust, disappointment, and distrust would arise in [bargaining over enforcement] because the agency appears gutless. Its effort to avoid enunciating a rule may be rationalized as flexibility, but to most intelligent people directly involved in such a problem it can end in reduced respect - for the agency and for government. n68

The regulated entity involved in bargaining views the state not as a moral authority, but rather as simply another interest group, undermining the firm's respect for the agency's authority. n69 Flexible enforcement may also look to third parties as if the agency has become beholden to private interests, undermining the agency's legitimacy in the eyes of those third parties. n70 Third parties see only the agency's refusal to sanction violations, as they are not privy to the facts of a firm's individual position or to the details of the enforcement bargain.

Third, the greater flexibility afforded by cooperative enforcement may help remove barriers to investment in environmentally beneficial new technologies. For instance, consider a manufacturing firm that falls within the terms of a rule - say, an end-of-pipe, pollution control technology specification standard n71 - but which, [*102] because of the peculiarities of the firm's production process, would produce none of the pollution that the rule seeks to avoid. Application of the rule to this firm may make the process uneconomic, discouraging investment in an environmentally sound production process. Sanctioning noncompliance only where doing so in fact advances the rule's purpose might solve this problem but the flexibility that makes such enforcement attractive also makes it unreliable. The mere possibility that an enforcement officer down the line may withhold sanctions is unlikely to provide sufficient confidence to stimulate capital investment.

Finally, cooperative enforcement may allow "trades" in which an agency accepts undercompliance with a legal mandate in one area in exchange for a regulatee's commitment to overcompliance in another. n72 In exchange for permission to reduce the level of compliance required in a regulatory area where marginal pollution control costs are high (call the area x), the regulated firm can offer to reduce pollution in an area in which the firm is already in compliance but where further pollution avoidance can be readily achieved (area y). In theory, the firm will make the trade where the marginal control costs associated with x are higher than those associated with y, and the agency will agree to the trade if the marginal pollution control benefits in area x are lower than in area y.

In practice, however, allowing regulators such broad discretion places great faith in their ability to recognize and represent public interests. The enforcer must determine that the benefits to the public from a reduction in area y are as great or greater than those accruing from a reduction in area x. We may have reason to question whether an enforcement official can adequately carry out the necessary informal cost-benefit analysis, or at least whether her analysis is better than that underlying the regulation as written. While an enforcer may be better placed than a rulemaker to understand the compliance costs of particular firms, n73 that officer will likely have less information about the public costs of pollution: she will not have available the broad public input and time for reflection [*103] available in notice and comment rulemaking. n74 To ask agencies to make such decisions on a case-by-case basis during enforcement may assume considerable capacity that the agency lacks and may leave the agency at the mercy of an industry's superior knowledge of its own processes. n75

2. Synthesis.

The basic lesson of the debate between advocates of cooperative and adversarial enforcement is that neither strategy is completely satisfactory. Although adversarial enforcement is essential to ensure that strategic profit-maximizing firms internalize external costs, the process of deterrence may in some settings raise administrative costs and create simple injustice. To strike the proper balance, an

agency's enforcement tactics should depend heavily on the particular violator involved and the agency's past interactions with it: "course of dealing" and "course of performance" of the agency and violator's interactions. n76 Agencies should cooperate with cooperators and punish evaders.

Many commentators have made the deceptively simple argument that regulators should treat different firms differently and like firms alike. The argument derives, in part, from firms' differing marginal-pollution-control-cost functions. Differences in control-cost functions may color the response of regulated firms to particular enforcement tools. n77 That response may also vary with the less tangible, sociological variables of firm culture and the attitudes of management. In fact, not all firms with identical control-cost functions will respond to a legal rule in the same way. Some firms will always or nearly always comply with a legal rule regardless of cost, others will comply only where doing so is cost-effective, some will not comply simply out of ignorance or incapacity, and yet others will comply so long as managers consider the rule "reasonable." n78 [*104] Accordingly, a uniform legal rule with uniform enforcement will not produce uniform results, and some flexible or "state-dependent" enforcement is justifiable. n79

The agency's enforcement approach should depend on where the agency and firm are in the enforcement process. Professor Scholz recommends this approach on the theory that regulatory enforcement involves the regulator and regulatee in an ongoing series of prisoner's dilemma games. Because the regulatory "game" is played repeatedly, the agency's optimal enforcement strategy is "tit-for-tat," in which the regulator chooses its action based on the regulatee's behavior in the prior round. If the regulatee has cooperated, the agency should cooperate, but if the regulatee "defects," the agency should punish until the regulatee again adopts a cooperative posture. n80

If a new violation is discovered, the agency should review the firm and agency's course of dealing, to determine whether the firm is in general an "incompetent," a "political citizen," or an "amoral calculator." The agency's choice of enforcement tools - cooperative or adversarial - should be based on the firm's history of reasonable cooperation with the agency, good faith, and patterns of compliance. The agency should forgive violations (and withhold penalties) if the regulatee has cooperated with the agency, such that the violation appears to have occurred notwithstanding the firm's best efforts. Where there are indicia of strategic behavior or knowing or negligent violation, however, the agency should apply punitive sanctions to each violation until the regulatee adopts a compliant strategy evidenced by continual compliance with agency orders. In other words, the agency must be willing to shift a firm from the category of "incompetent" or "political citizen" to "amoral calculator" until the firm shows a durable willingness to cooperate. When the firm returns to the fold, it may be treated again as something other than an amoral calculator. n81

[*105] After an individual enforcement interaction - informal negotiations or formal proceedings - has begun, the agency should be cognizant of the course of performance in that particular encounter. If the firm is dragging its feet in implementing a compliance bargain or administrative order, the agency should respond by imposing sanctions and escalating the formality of the enforcement action. Again, the severity of sanctions and the speed of their imposition should vary according to overall courses of performance and dealing.

To be sure, this approach is not perfect. Its greatest weakness is the substantial information it demands from agencies and firms. With adversarial enforcement, enforcers might reduce information costs by reducing monitoring while dramatically increasing penalties to raise the expected cost of noncompliance. n82 Flexible enforcement, on the other hand, requires the agency to ascertain whether a penalty is justified based on more than the mere fact of a violation. Accordingly, agencies employing flexible enforcement must devote considerable resources to monitoring to learn of the regulatee's compliance status, efforts, and history, in circumstances of asymmetric information. n83 To the extent that a flexible approach provides transaction-cost savings in individual enforcement actions and in the long run, those monitoring costs might be shouldered without substantial new resources. n84 But in any event, agencies should impose strict monitoring and reporting terms in any negotiated compliance agreement and should remorselessly penalize all but entirely accidental violations of any such terms or statutory monitoring and reporting requirements. n85

The regulatee may also lack adequate information about the regulator's behavior. Because a firm will have little incentive to adopt a compliant strategy if it cannot be confident that the agency will also cooperate, the agency must broadcast its enforcement [*106] strategy. n86 Dissemination of the agency's enforcement policy is also important to secure the legitimacy gains promised by cooperative enforcement: the agency must develop a reputation for cooperative enforcement to prove that it will not punish firms' good deeds and that good-faith compliers will not be competitively penalized by repeated violators' getting off scot-free. n87

Consequently, agencies should formalize their enforcement strategy in an enforcement policy and communicate that policy to firms. n88 Although this raises the specter of inflexibility, the costs of that inflexibility must be weighed against the benefits of increased certainty that such a policy would provide. Given that this model strategy involves treating firms differently that are in many respects similarly situated, an enforcement policy may be necessary to describe to a firm why it and its competitors will be treated in particular ways.

Finally, this model of enforcement concededly does not in every case effectuate the "moral" or "expressive" function of regulation. Penalties will not be applied in every case to register societal moral outrage. Nevertheless, the tit-for-tat strategy calls for severe penalties where the violation is intentional or negligent. An agency should also impose penalties where the firm's polluting behavior causes significant effects on human health or environmental quality. Where those compelling circumstances are absent, however, the tit-for-tat strategy remains appropriate.

III. Pathological Cooperation: Capture

"The other side of the coin of discretion in regulatory law is the question of whether (and how) discretionary decision making becomes systematically distorted, biased in the favor of some interests over others due to structured imbalances in power and influence." n89

Despite its benefits, cooperation between regulator and regulatee [*107] can go too far and derail the public goals of the regulatory regime, and the agency is "captured" by the firms it regulates. A term coined in the 1950s by students of bureaucratic behavior, n90 capture is typically used to describe a regulatory agency's collusion with the firms it is ostensibly regulating, to the detriment of the public interest. Capture is not a binary condition - it is a matter of degree. Generally, an agency may be considered "captured" when it has moved too far toward accommodating industry interests and away from the policies enshrined in its guiding statutes or freestanding policy norms, such as efficiency. n91 Given the discussion of optimal enforcement strategy above, for present purposes, I will define capture as an agency's failing to enforce vigorously when it should and thus missing the proper balance between cooperative and adversarial enforcement.

Part III complicates the picture of optimal enforcement painted in Part II, suggesting that environmental regulation is susceptible to capture in the form of lax enforcement. Part III.A summarizes the factors that encourage capture. Part III.B then asks to what extent environmental regulation specifically might be subject to capture. The section concludes that, while the evidence of capture in environmental agencies is mixed, the risks of capture are most acute in the area of enforcement.

A. The Theory of Regulatory Capture

Capture theory first appeared in the 1950s in studies of independent regulatory commissions, which suggested that public-spirited regulatory legislation eventually becomes derailed by its targets during implementation. n92 The idea was later adopted by [*108] economists studying the political process, who, by training if not by nature, were skeptical of "public interest" theories of regulation. n93 Since Professor Bernstein's early work, the theory has proven a fruitful area of research for scholars of regulation. n94

In its most mechanistic form, capture theory insists that regulators are purposefully instrumental of the interests of regulated communities to the end of lining their own pockets. A more subtle view sees regulators as subject to myriad pressures and incentives that push regulatory choices in the direction desired by regulated industry. This latter view describes capture as a manifestation of understandable human responses to normally adversarial relationships.

Several aspects of the regulator's environment color her response to regulated entities and to interest groups generally. They affect the regulator's material well-being by affecting chances of promotion, access to resources needed to accomplish job requirements, [*109] and subsequent private-sector job prospects. They also work on the regulator's beliefs and ideas, encouraging her to adopt policies favorable to industry simply because her views of a situation and the proper policy response are similar to those of regulated firms.

By all accounts, the first prerequisite for capture is broad discretion given to an agency by its governing statutes. n95 Discretion allows agencies to cave-in to regulated interests, as they are not constrained by enforceable legal authority. Broad discretion also deprives agencies of the law as a shield: the regulator cannot claim to be bound by law to policies opposed by regulated entities.

Once an agency has the discretion to make regulatory decisions, several factors encourage the agency to make decisions favored by regulated interests. A primary factor is the array of active interest groups: "[Problems with capture] are more likely if fewer groups contend for influence. Bureaucracies that interact with a larger number of groups are less likely to be beholden to any single one and can play them off against one another." n96 If an agency need not accommodate competing interest groups, it is more likely to adopt the views of the single, loud voice it hears. In some regulatory fields, countervailing interest groups such as environmentalists or consumer advocates will make claims on regulators. If such interests are not active, however, the regulator will hear only the voice of the regulated community, whom the resulting regulation is therefore likely to favor.

An additional factor is the agency's scarcity of resources, which encourages regulators to turn to the regulated community itself for assistance. n97 Consider, for example, the plight of a regulator charged with adoption of workplace safety regulations. The informational resources needed to adopt a regulation that will survive judicial review require, at a minimum, understanding of the production processes involved, epidemiological or accident data, and knowledge of the costs, mechanics, and effectiveness of competing preventative measures. Given that the regulator lacks those resources to some degree, she is likely to call on knowledgeable interest [*110] groups for assistance. n98 She is likely to be particularly concerned about the views of the regulated community, which has better access to relevant information.

Resource scarcity also forces agencies to seek cooperation to legitimate their authority and streamline interactions with the regulated community. If the regulated community challenges every action taken by the agency, the agency's mission may be substantially hindered. And if a regulated entity views the regulator's authority as illegitimate, it is more likely to try to shirk compliance with imposed regulations (and cover up that noncompliance), which increases demand for already scarce agency resources.

The regulated community may also gain influence over regulatory agencies indirectly through their influence on elected officials. n99 In practice, an executive or legislator may be a more effective conduit for influencing an agency than is direct lobbying of the agency. n100 For instance, a governor may seek to implement policies favorable to the regulated community through her control of appointments, budget requests, and direct policy tools such as executive orders. If that governor shares the interests of regulated entities, an agency might find itself pushed into a captive position.

One of the most cynical capture arguments describes a "revolving door" for the personnel of agencies and private enterprise. One half of this theory, call it the "revolving door - out," contends that agency personnel angle for jobs in regulated industry by making decisions favorable to possible future employers. n101 On the other hand, disloyalty is unattractive to employers, as a regulator who would

sell-out the agency might do the same to the hiring firm when a better job opportunity comes along. n102

[*111] Regulators and regulatees may also simply share norms and ideologies that color the regulator's view of the desirable and possible. These shared views may be a function of a "revolving door - in" phenomenon, in which a regulator previously employed by industry views the world through the lens of that industry or seeks to make decisions that her former colleagues would approve of. n103 Common views may also derive from shared professional norms and education, n104 common cultural or class position, n105 or simply frequent, close association. n106 Given sufficient discretion, a regulator who thinks like those she regulates is more likely to support their favored regulatory policies or to resolve close questions in favor of her ideological kin. n107

Finally, regulators might often feel an understandable social-psychological need to avoid interpersonal conflict. n108 Regulators might try to eliminate some of the contention of the job by compromising with industry, adopting its preferred positions more than she might in less contentious circumstances. This desire to avoid conflict may be reinforced by the regulator's sense of insecurity at imposing rules on parties better informed about the regulated conduct.

B. Environmental Regulation Is Not Immune From Capture

The original capture theorists were not concerned with "social regulation," such as environmental regulation, and some have argued capture is less likely in environmental regulation. n109 These [*112] commentators cite Congress's awareness of capture theory and efforts to "immunize" environmental regulation against capture as well as inherent peculiarities of environmental regulation that make it less susceptible to capture than is traditional economic regulation. On the other hand, some scholars of environmental regulation have concluded that one of the field's defining characteristics is "slippage," a disconnect between administrative practice and the goals of the statutes, n110 and others have argued that environmental regulation is not specially immune from capture, n111 particularly at the state level. n112 Whatever the truth is about capture in environmental regulation generally, in environmental enforcement the risks appear to be acute.

1. Capture of environmental regulation generally.

"The prevailing view is that [the] body of research [on capture] had a major influence on the design of American bureaucracy. Congress learned its lesson." n113 In the 1960s and 1970s, policy entrepreneurs such as Ralph Nader mobilized the rising tide of critical studies of bureaucracy to persuade Congress to adopt statutory [*113] checks that would force implementing agencies to stay true to legislated goals. n114 In enacting and reauthorizing the federal environmental statutes and other social-regulatory legislation, Congress did just that. n115 It is not clear, however, that its efforts were completely successful.

a. Discretion. One of the primary mechanisms that Congress adopted to forestall capture was the imposition of detailed mandates on regulatory agencies. n116 In many ways, the environmental statutes differ markedly from the open-ended standards of traditional economic regulation, which exhort the agency, for instance, to regulate in the "public interest" n117 or to root out "unfair" competitive practices. n118 For example, Congress prescribed dates by which EPA or states were to have taken particular actions; n119 it adopted severe "hammer" provisions to take effect automatically if EPA failed to act by the stated date; n120 it set out lists of regulatory targets, such as regulated industries or chemicals, on which EPA must act; n121 and it occasionally adopted rigid standards that would [*114] not allow agencies to balance competing values in issuing regulations. n122

The 1984 Hazardous and Solid Waste Amendments ("HSWA") to RCRA are illustrative. In enacting HSWA, Congress was acting on the perception that the Reagan EPA had abused its discretion in implementing RCRA by refusing to take actions that had been mandated by RCRA years earlier. HSWA accordingly included a so-called "land ban," which prohibited the disposal of specified liquid hazardous wastes in landfills if EPA failed, within 32 months of the statute's enactment, to identify safe storage methods consistent with statutory criteria. n123 Ironically, this provision made regulatory

advocates of regulated firms, which hoped to forestall the land ban by encouraging EPA to adopt more palatable rules within the 32-month deadline.

Nevertheless, for every provision specifying a deadline or a list of regulated chemicals, one finds other broad delegations of policy-making authority. For instance, the CAA directs EPA to adopt National Ambient Air Quality Standards ("NAAQSs") subject only to the broad injunction that they be "requisite to protect the public health." n124 Similarly, the Supreme Court chose *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, n125 a CAA case, to define the federal courts' obligation to defer to agency constructions of their guiding statutes where Congress has implicitly delegated policy-making authority to the agency. The Court based its decision on Congress's inclusion of a gap in the CAA - a gap that the Court believed demanded application of policy-making judgment to fill. [*115] In some respects, such gaps are inevitable in environmental regulation: its complexity makes impossible precise congressional specification of regulatory requirements in more than a few areas.

Moreover, agency discretion remains particularly great at the state level. In any principal-agent relationship, the principal ordinarily bears the costs of monitoring and sanctioning the agent's behavior to ensure compliance with its mandate. In the cooperative-federalist structure of environmental regulation, these costs are exacerbated by a second-order principal-agent relationship - between EPA and state agencies - added to the typical legislative-principal/administrative-agent relationship. In theory, EPA monitors each state's performance to square implementation of the delegated program with the federal program. This additional agency relationship actually allows state agencies a broader margin of discretion, potentially allowing the state to move farther from the will of Congress. n126 Where EPA is involved, Congress can readily summon responsible officials to oversight hearings and can sanction agency "misbehavior" by cutting appropriations, rescinding statutory authority, or pressuring the President to remove particular officials. The costs of monitoring the Agency's compliance with congressional will and the costs of enforcing that will are comparatively low. On the other hand, with the states, Congress lacks the ready sanction of appropriations, and the difficulty of discovering the agent's shirking is exacerbated by the diversity of agencies, programs, and local circumstances involved. Furthermore, unlike EPA, each state has at least three zealous advocates in Congress to stymie oversight of agencies within their states.

Congress delegates to EPA most of its oversight of state implementation and has given EPA several tools with which to enforce state compliance with federal mandates. The Agency can bring enforcement actions on its own or overfile if it feels a state enforcement action was too lenient; n127 it can review certain state actions and reject them if inconsistent with statutory criteria; n128 and, most [*116] severe, it can rescind the state's primacy and take over implementation of the statute. In practice, however, EPA's oversight is less than probing. Few state actions reviewed by EPA are rejected, revocation of primacy is basically an empty threat because EPA lacks the resources to administer additional state programs on its own, and overfiling is exceedingly rare. n129

With every additional step from the principal to its final agent, the noise and transmission loss in the system becomes more pronounced, and the agent can move farther from the principal's design. Consequently, state agencies may be better able than EPA to undermine environmental protection goals by developing cozy ties with regulatees far from the prying eyes of federal legislators.

Discretion is further expanded at the state level where pollutants are transported across state lines. Undaunted by political boundaries, pollution produced in one state will often impose external costs on other states, a basic premise of federal control of environmental policy. n130 Insofar as the social costs of pollution are borne in other states, the polluting state has leeway to relax regulation of domestic firms. State officials could therefore choose a lower level of pollution control than if all the pollution costs were borne entirely by their own constituents. n131 Legislative actors, who would be insulated from the electoral reprisals of out-of-state pollution victims and yet able to benefit from industry support and claim credit for economic growth, would feel the incentive most forcefully. Nevertheless, agency personnel might also relax regulatory controls where pollution is largely transboundary, because the public and locally active environmental groups would offer little protest while doing so would earn the support of regulated firms.

[*117]

b. Countervailing interest group participation. After broad discretion, perhaps the second most important condition precedent for capture is an imbalance in the participation of competing interest groups in the agency's domain. Congress targeted this condition by providing incentives and processes to mobilize public participation in the development and implementation of policy. n132 These public participation provisions afforded new entree for regulatory advocates previously excluded from the administrative process and, in a sense, delegated oversight functions to those groups. n133

Many environmental statutes require publication of plans, permits, and other information available for public scrutiny n134 and specify that public hearings be held on particular regulatory decisions. The Surface Mining Control and Reclamation Act ("SMCRA"), for instance, requires that surface mining permit applicants advertise and hold public conferences on the record if a member of the public has submitted written objections about the proposed permit. n135 The statutes also typically require that, to obtain primacy, state programs must include public participation measures. n136 The Title V permit program created by the 1990 CAA Amendments requires that states implementing the program provide "public notice, including offering an opportunity for public comment and a hearing" on permitting decisions. n137

In fact, these new participation requirements benefit pro-regulatory interest groups in particular because agencies have always had strong incentives to listen to regulated firms, created by the due process guarantee that an affected firm can sue to challenge a [*118] regulatory requirement that imposes new costs on it. n138 Agencies might forestall such suits by taking regulated firms' interests into account ab initio. Expansion of public participation thus enfranchises parties who traditionally could claim no constitutional right to process and thus had no natural leverage in the process. Under basic principles of administrative law, moreover, the agency cannot ignore those comments but rather must respond and rationally justify its failure to adopt relevant suggestions when taking a final action. n139

The statutes also gave agencies new incentives to listen to pro-regulatory groups by giving those groups a right to direct judicial review of new rules though due process would provide no such right. n140 The Toxic Substances Control Act ("TSCA"), for instance, states that "any person may file a petition for judicial review" of EPA rules adopted under the statute. n141 The CAA's Title V permit program also demands that states with primacy guarantee "an opportunity for judicial review in State court of the final permit action by ... any person who participated in the public comment process." n142 In combination with the simultaneous expansion of standing doctrine, n143 these provisions gave pro-regulatory interest groups further bargaining power in their interaction with agencies. No longer faced with only a single constituency that could bring expensive and lengthy legal challenges, agencies now have to balance the claims of countervailing groups with the power to block agency decisions. n144

In addition to administrative remedies, Congress widely employed citizen suits. n145 The citizen suit "provides an open door for [*119] those who have legitimate interests in the courts, and encourages more meaningful participation in the administrative processes." n146 The provisions typically allow suits in federal court by private citizen plaintiffs 1) to enforce the law independently of any agency against alleged violators of regulatory requirements, and 2) to force the agency to perform nondiscretionary duties. n147 On the one hand, regulatory beneficiaries are given the power to enforce the statute directly, and on the other, they can goad the agency into performance of its statutory duties. To be sure, the citizen suit provisions fail to allow directly for citizen oversight of state agencies, n148 the main players in environmental enforcement. Nonetheless, suits against EPA may affect state agency behavior by forcing EPA to fulfill a nondiscretionary duty to review state agency action, n149 and as discussed below in Part IV, suits against firms directly may affect a state agency's behavior substantially.

Even putting aside the statutes' public participation and litigation [*120] measures, environmental regulation naturally encourages the development and participation of countervailing interests. Unlike the independent regulatory commissions that drew the original capture theorists' criticisms,

environmental agencies regulate an immensely broad array of industries. For instance, while the ICC regulated only surface transportation industries, railroads and truckers, EPA regulates hundreds of industries. The diversity of the regulated community makes the agency unlikely to become attached to a particular industry or firm because agency personnel are constantly exposed to new players and new demands. n150 The structure of EPA compounds this effect: EPA is divided into media-specific units, such as the Office of Water and the Office of Air and Radiation, rather than industry-specific units, which should discourage close interaction with discrete segments of the regulated community. n151 A regulator in the Office of Air and Radiation, for example, may work on air emissions issues with many firms in several industries in multiple states.

This diversity can prevent agency personnel from developing close ties - and thus shared norms and ideologies - with firms and means that the agency will feel countervailing pressures from within the regulated community itself. A rule preferred by one industry might be reviled by another, to the point that firms may attempt to use regulation affirmatively as an anti-competitive tool. n152 The regulator thus will be compelled to accommodate competing industries rather than sit comfortably in the pocket of any particular industry.

Traditional regulatory programs also lacked groups actively supporting the commissions' regulatory mission. While support existed for the programs' enactment, it tended to decline precipitously with time, leaving the commissions faced with only the regulated community and a consequent "decay" of their regulatory mission. n153 Environmental agencies, on the other hand, continue [*121] to face many active interest groups advocating sustained or expanded regulation. n154 To some extent, mobilized pro-regulatory groups can counterbalance the influence of industry and force the agency to accommodate, or at least respond to, their views. The pro-regulatory interests trying to influence EPA can break up the monopoly of information and interaction that a regulated industry might otherwise hold, and they can defuse the threat that aggrieved firms will be able to sabotage the agency in the legislative process.

In part because of the public participation innovations of the environmental statutes and in part because of societal transformations of the 1960s and 1970s, environmentalists are now a well-mobilized and politically savvy interest community that supports the regulatory mission of the environmental agencies. n155 They have used the administrative and judicial processes to great effect in challenging adverse agency action and supporting sympathetic agency decisions. n156 Accordingly, the vigilant oversight of environmental groups should somewhat insulate agencies such as EPA from captive influences.

On the other hand, participation by pro-regulatory groups may be quite weak at the state level, where much of the real work of environmental regulation gets done. James Madison's classic theory, in Federalist Ten, of the correlation between the size of a polity and the diversity of interests that can be expected to flourish within it suggests that fewer interest groups are likely to be active at the state level. n157 Madison contended, as have capture theorists, that such diversity reduces the risk that government could be enthralled by any single interest.

The smaller the society, the fewer probably will be the distinct [*122] parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; ... [and] the more easily will they concert and execute their plans of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens ... n158

The reduced diversity of interests one would expect to find at the state level applies as readily to environmental interests as any other. While the national stage may accommodate groups focusing on every imaginable environmental issue, not all of those groups are likely to be active at the state level and certainly not in every state.

Rational choice theories of interest mobilization n159 also suggest that the array of active interest groups will be less diverse at the state level because the impact per dollar spent on influencing policy will be greater at the federal level than at the state level. Federal rules apply to every state, giving the advocate an enormous economy of scale. For pro-regulatory groups such as environmentalists, focusing on national policy is more likely to maximize the effectiveness of existing scarce resources and to attract new resources than is attention to an issue that affects only a single state. In any event, such groups certainly cannot participate effectively in all 50 states and are accordingly likely to be less-well represented in at least some state policy circles. n160 Regulated firms, on the other hand, retain incentives to be active at the state and local level because most operate in a limited number of state or local jurisdictions.

Available empirical research also shows a narrower spectrum of interests active in state policy-making processes. n161 Environmentalists are better represented at the state level now than ever before, n162 but their participation is still weak compared to industry groups and individual firms. n163 Moreover, studies showing increased [*123] state involvement of environmental groups appear to focus on participation in the legislative arena. Because of the higher costs of participation in the administrative arena, n164 cash-strapped environmental groups may target only state legislatures and thus might influence state agencies only indirectly.

Simply put, the narrower and less-balanced array of interests active at state and local levels means greater risk that state and local environmental agencies will be captured. While pro-regulatory groups are active at the federal level, their vigilance and advocacy at the state level may be inadequate to discourage capture of state agencies by regulated industry.

c. Agency ideology. Beyond EPA's external environment, the Agency's institutional ideology may also protect it from capture. In his study of the Occupational Safety and Health Administration ("OSHA"), Professor Steven Kelman found that the agency's actions were best explained by the "protection values of agency officials, derived from the ideology of the safety and health professional and the organizational mission of OSHA." n165 Regulators developed those views from their common training as industrial hygienists, which encouraged them to maintain a strong regulatory presence in the workplace and insulated them from the influence of active interest groups. n166 EPA's circumstances are similar. The Agency was established to serve a particular position, environmental protection, n167 and its personnel appear to share an ideological commitment to that goal. n168

d. Complexity. On the other hand, the resources required of environmental regulators are substantial and may push them into the arms of industry. Environmental regulation is resource-intensive, requiring expansive and detailed technical knowledge about [*124] production processes, pollution-control or remediation technologies, the characteristics of chemical compounds, epidemiology, economics, and natural processes. One of the best repositories of technical knowledge on many of these subjects is likely to be regulated firms themselves, and agencies will seek out their assistance. n169 Their expertise also means that firms can adroitly challenge agency action in court, arguing that the agency failed to consider fully all relevant information, and agencies will surely try to forestall such suits by working closely with regulated firms. Although the diversity of regulated industries with which the agency must work may discourage the formation of a cohesive "industry" position that the agency must address, it also makes the agency's job more complex and thereby exacerbates the need to rely on regulated firms.

e. Executive control. Environmental regulation, like any other regulatory field, is subject to control by presidents and governors, who may pressure environmental agencies to take positions favored by regulated industry. For example, early in President Reagan's first term, Reagan appointees at EPA systematically tried to reorient the agency in a direction preferred by their previous industry employers. n170 The transformation of enforcement under President Reagan's first EPA Administrator, Anne Gorsuch Burford, is illustrative.

Voluntary compliance negotiations became the dominant method of dealing with pollution violations. EPA officials were told to pursue 'every opportunity for settlement,' and referrals of cases for prosecu-

tion were regarded as 'black marks' against the officials recommending penal action. Amid multiple reorganizations of the agency, the separate enforcement offices were abolished and their personnel reassigned to the program offices or the General Counsel's Office. n171

The Reagan Office of Management and Budget (OMB) also gutted EPA budget requests before their submission to Congress, severely constraining the agency's already overtaxed resources. n172 [*125] Finally, the Reagan White House issued executive orders concentrating power over all regulatory decision making within OMB, allowing the Office to effectively veto regulations that did not pass muster under its cost-benefit criteria. n173 "The effects of [Exec. Order 12,291] - and its aggressive, arguably extralegal implementation by the Reagan executive team - was to delay, dilute, and in some cases indefinitely bury regulations, particularly those social regulations on industry that addressed questions of public health and safety." n174

Although the foregoing discussion hardly points uniformly toward the susceptibility of environmental agencies to capture, it suggests that such regulation is not immune from capture. As the following sections argue, the risks of capture are most acute where state agencies implement federal environmental programs and where enforcement of environmental requirements is concerned.

f. Race to the bottom. In states' competition with each other to attract and retain industry as a source of jobs and tax revenue, states will engage in a "race to the bottom," diluting environmental rules out of fear that industries would leave the state for more accommodating regulatory regimes or ignore the state when first locating. n175 This broader variant of the capture thesis suggests that state governments have strong incentives - fiscal and electoral - to adopt policies favorable to industry. n176 Although regulatory climate in fact is probably not a primary criterion in siting decisions, n177 regulators' perception that firms consider such variables is sufficient to deter strict regulation. Moreover, given that states plainly do compete in other ways on a grand scale, such as with massive tax breaks, trying to attract investment by scaling back regulatory severity is [*126] different only as a foregone cost rather than an added benefit. n178 On the other hand, political pressures, particularly in states that value environmental quality highly, will discourage political actors from "selling out" environmental quality in the state. As a result, state actors may try to satisfy industry and a concerned public by reducing regulatory stringency to the point beyond which they would suffer reprisals from the public. That is undoubtedly a tough line to draw.

Nonetheless, wherever that line is drawn, the pressure on states to retain industry could translate to state agency solicitude for regulated firms, as agency personnel seek to protect appropriations and statutory authority from legislative incursions at the behest of powerful industries threatening exit. n179 Pro-regulatory groups cannot make similar threats, further exacerbating the imbalance of interest influence at the state level.

2. Enforcement.

The foregoing suggest that the risks of capture of environmental regulation in general are mixed. Yet environmental enforcement appears uniquely susceptible to influence by regulated entities. n180 An agency's choices about monitoring, whether or not to bring an enforcement action, and the type of enforcement action to bring, lacks the regularity and transparency of rulemaking. Much more so than policy development, enforcement activity is insulated from the close scrutiny of pro-regulatory interests, of Congress, and of the general public. It also calls for closer interaction between regulators and individual firms. This confluence of obscurity [*127] and familiarity allows agencies and regulated firms to move closer together.

a. Discretion. However detailed, the federal environmental statutes do not meaningfully constrain an agency's choice of the firms against which it will enforce the law or the choice of tools with which it does so. n181 For example, although the CAA specifies regulated hazardous air pollutants ("HAPs"), n182 it does not tell the Agency when and how to enforce the HAP regulations. The only limits on agency enforcement are informal: interest group pressures and oversight by Congress and, in

the case of state agencies, EPA. n183 Enforcement, or more precisely nonenforcement, is the paradigm case of discretion.

Enforcement without discretion would create injustice, as justifiable and minuscule violations would be treated on par with intentional and recurrent violations. Discretion is accordingly essential to the cooperative approach to enforcement discussed in Part II. Sadly, however, nearly all theories of regulatory capture also take broad discretion as their starting point. Discretion allows agencies to serve the interests of client groups because opponents lack enforceable standards of behavior to force the agency in the opposite direction.

b. Opacity. Enforcement is a low-visibility activity, at least as compared with rulemaking. n184 This opacity prevents third parties from effectively monitoring enforcement and allows agencies to favor industry without fear of reprisal. Several factors contribute to enforcement's opacity. First, rulemaking and other generally applicable policy decisions are subject to procedural requirements designed to bring policy decisions into the "sunshine" of public scrutiny. n185 Enforcement, in both the decision to bring or withhold [*128] an enforcement action and the subsequent choice of enforcement tools, typically lacks the procedural rules that open policy making to public view. Public disclosure is minimal and hearings are rare. Essentially, enforcement is treated as a matter between regulator and violator.

Although some of the most formal enforcement actions must be accompanied by public notice, n186 enforcement is particularly obscure where the agency uses informal, cooperative enforcement tools. By definition, such actions produce no paper trail; no formal notice of violation is issued and no hearings need be held, and agencies obviously do not involve the public in enforcement negotiations. n187 Accordingly, the terms of an enforcement bargain may be known to none but the regulator and the firm. Agencies generally do not even aggregate data about the number of actions taken, let alone report details about each action. n188 Little or no information is available to the public before, during, and even after informal enforcement bargains are struck.

Enforcement is most inscrutable, however, when an agency brings no enforcement action at all. Those decisions are invisible outside the agency, because no one else may know that violations have occurred and that the enforcement agency has decided to take no action. And yet non-enforcement decisions are precisely those that pro-regulatory observers of the agency would be most concerned about.

Finally, enforcement is opaque because of the costs of its oversight relative to the costs of overseeing policy-making activities. Rulemaking is centralized: the agency considers and issues a single rule applicable to a wide range of firms and circumstances. Interest groups and political principals can identify the action and learn of its terms without expending enormous resources. Enforcement actions, [*129] on the other hand, are numerous and decentralized. Political principals and pro-regulatory groups thus lack the economies of scale available in oversight of policy making. n189

The inability of political principals and pro-regulatory interest groups to monitor and sanction agencies' enforcement activities or inactivity is particularly distressing given the wide discretion accorded enforcement officers. This lack of oversight enables agencies to develop close accommodative relationships with regulated firms that they would avoid if their actions were well scrutinized. n190

c. Asymmetric participation. Beyond opacity, enforcement's allocation of benefits and costs creates strong incentives for participation by regulated firms and weak incentives for pro-regulatory groups. The resulting asymmetric participation in enforcement proceedings is likely even where enforcement is not opaque, and accordingly, compounds the risk of captured enforcement.

Regulated entities have an obvious interest in participating in the enforcement process. They face fines, costly compliance orders, or even criminal sanctions if the agency takes formal enforcement action. Unlike advocacy in lawmaking or rulemaking arenas, a violator's opposition to an enforcement action does not supply a public good at its private expense, which typically discourages collective action. n191 Rather, the benefits of the agency's leniency are enjoyed only by the individual firm. Moreover, the potential costs of nonparticipation - sanction or forced compliance - are often high rela-

tive to the transaction costs of participation. Finally, unlike rent-seeking behavior in policy-making arenas, potential enforcement triggers firms' "threat orientation": they are more likely to respond to a threat of a newly imposed cost than to the possibility of a new benefit. n192 In sum, collective action problems do not [*130] discourage firms from lobbying agencies to avoid enforcement.

Pro-regulatory groups' incentives are markedly different. Advocates of diffuse interests such as environmental protection face acute public-goods problems in the enforcement setting. Although the rational-choice/public-goods theory of collective action fails to predict the development of a sizable environmental lobby, n193 it correctly predicts that environmental groups will be poorly funded. n194 Pro-regulatory groups' tight budget constraints encourage them to pick their battles to have the most significant and long-lasting influence. n195 Enforcement can be cost-ineffective for pro-regulatory groups because of the minor policy gains per dollar of effort n196 and because contributor dollars are more likely to follow high-profile, large-scale actions than small, obscure, and piecemeal battles in administrative fora. A fortiori, enforcement is likely to have particularly low salience for the general public, the source of political power and contributions for many environmental groups.

These contrasting incentives are likely to manifest themselves as dramatically different levels of participation of pro-regulatory and industry interest groups. "Large groups seeking agency decisions that would yield diffuse, remote, dispersed, and nonexclusive benefits are handicapped relative to small groups seeking decisions that would avoid (or fighting decisions that would impose) concentrated costs." n197 As that imbalance of participation increases, so does the risk of capture. Without a pro-regulatory constituency, enforcement [*131] agencies can become entangled with vigorously active firms.

d. Close proximity of regulator and regulatee. Finally, enforcement requires regulators to operate in close proximity to regulated firms, closer than to pro-regulatory constituents, and closer than in rulemaking. Monitoring, for instance, often places agency personnel in direct contact with individual firms because inspection requires regulators to visit firms on their own "turf." Cooperative enforcement tools only exacerbate the problem. Negotiated compliance requires ongoing discussions between regulator and regulatee about the terms of compliance and the firm's progress toward compliance. Informal enforcement measures like compliance conferences and phone conversations bring regulators and firms closer together than do formal measures, and they do so in a non-adversarial environment, as compared to an administrative proceeding or civil suit. Compliance assistance programs also require agency personnel to spend substantial time with individual firms and demand in-depth knowledge of the firm's processes to develop compliance measures based on the firm's peculiar circumstances. Each close interaction with regulated firms allows regulators to align their goals and views with those of regulated firms and encourages non-adversarial coping strategies to mitigate conflict, which is itself most severe in the enforcement context.

. . . [to be continued]

FOOTNOTES:

n1. Peter S. Menell & Richard B. Stewart, *Environmental Law and Policy* 531 (1994).

n2. See, e.g., General Accounting Office, Report No. GAO/RCED-98-113, *Environmental Protection: EPA's and States' Efforts to Focus State Enforcement Programs on Results* (1998) [hereinafter GAO, *Enforcement Programs*]; Edward P. Weber, *Pluralism by the Rules: Conflict and Cooperation in Environmental Regulation* (1998) (describing the problem as one of transaction costs); Charles C. Caldart & Nicholas A. Ashford, *Negotiation as a Means of Developing and Implementing Environmental and Occupational Health and Safety Policy*, 23 *Harv. Envtl. L. Rev.* 141 (1999); Jody Freeman, *Collaborative Governance and the Administrative State*, 45 *UCLA L. Rev.* 1 (1997). But cf. Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 *S. Cal. L. Rev.* 1181 (1998) (critiquing arguments for non-adversarial enforcement); Mark Seidenfeld, *Empowering*

Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation, 41 *Wm. & Mary L. Rev.* 411 (2000) (critiquing collaboration in environmental policy generally).

n3. See Eric Pianin & Michael Grunwald, *Bush Plan Shifts Power Over Polluters to States; EPA's Enforcement Activities Would Be Scaled Back*, *Wash. Post*, Apr. 10, 2001, at A03; Cindy Skrzycki, *New Brand of Oversight; Bush's Regulatory Record in Texas Offers Clues to the Approach He'll Bring to Washington*, *Wash. Post*, Jan. 21, 2001, at H1; Jim Yardley, *Governor Bush and the Environment; Bush Approach to Pollution: Preference for Self-Policing*, *N.Y. Times*, Nov. 9, 1999, at A1.

n4. William T. Gormley, *The Representation Revolution: Reforming State Regulation Through Public Representation*, 18 *Admin. & Soc'y.* 179 (1986).

n5. See Toxic Substances Control Act (TSCA) 20, 15 U.S.C. 2619 (1998); Surface Mining Control and Reclamation Act (SMCRA) 520, 30 U.S.C. 1270 (1986); Clean Water Act (CWA) 505, 33 U.S.C. 1365 (1986 & Supp. 1999); Safe Drinking Water Act (SDWA) 1449, 42 U.S.C. 300j-8 (1991 & Supp. 1999); Resource Conservation and Recovery Act (RCRA) 7002, 42 U.S.C. 6972 (1995); Clean Air Act (CAA) 304, 42 U.S.C. 7604 (1995); Comprehensive Environmental Response Compensation and Liability Act (CERCLA) 310, 42 U.S.C. 9659 (1995); Emergency Planning and Community Right-to-Know Act (EPCRA) 326, 42 U.S.C. 11046(a)(1) (1996).

n6. See sources cited *supra* note 2. Professor Edward Weber particularly emphasizes transaction costs. See Weber, *supra* note 2, at 73-76.

n7. See Negotiated Rulemaking Act, 5 U.S.C. 561-570 (1996) (providing statutory authority for reg-neg); see also Caldart & Ashford, *supra* note 2, at 143-79 (discussing a variety of examples of reg-neg use by EPA and OSHA); Freeman, *supra* note 2, at 33-55 (discussing EPA's experience with reg-neg).

n8. See, e.g., 42 U.S.C. 7651f (1996) (sulfur dioxide emissions trading program of the Clean Air Act Amendments of 1990).

n9. EPA's Project XL ("eXcellence and Leadership") is the most notable example. See Caldart & Ashford, *supra* note 2, at 182-86; Freeman, *supra* note 2 at 55-66.

n10. GAO, *Enforcement Programs*, *supra* note 2, at 14.

n11. See Ross Macfarlane & Lori Terry, *Citizen Suits: Impacts on Permitting and Agency Enforcement*, *Nat. Resources & Env't* (Spring 1997), at 20 ("Most agencies are moving away from command and control and enforcement to an emphasis on non-adversarial efforts to improve overall compliance in the regulated community ...").

n12. See Clifford S. Russell et al., *Enforcing Pollution Control Laws* 24-27 (1986) (discussing the variety of enforcement tools); Susan Hunter & Richard Waterman, *Determining an Agency's Regulatory Style: How Does the EPA Water Office Enforce the Law?*, 45 *W. Pol. Q.* 403, 408 (1992) (finding that EPA's Office of Water "utilized over sixty different enforcement techniques," from administrative penalty orders to simple phone calls to violators).

n13. Prosecutors are not bound to prosecute cases referred by regulatory agencies and may be predisposed to reject them. See Colin S. Diver, *A Theory of Regulatory Enforcement*, 28 *Pub. Pol'y* 257, 287-88 (1980).

n14. See generally Hunter & Waterman, *supra* note 12.

n15. See Keith Hawkins, *Environment and Enforcement: Regulation and the Social Definition of Pollution* 3 (1984) ("compliance" and "sanctioning"); Joel A. Mintz, *Enforcement at the EPA: High Stakes and Hard Choices* 4 (1995) ("compliance" and "deterrence"); Neal Shover et al., *Enforcement or Negotiation: Constructing a Regulatory Bureaucracy* 11 (1986) ("negotiated compliance" and "enforced compliance"); Keith Hawkins & John M. Thomas,

The Enforcement Process in Regulatory Bureaucracies, in *Enforcing Regulation* 3, 13 (Keith Hawkins & John M. Thomas eds., 1984) ("compliance" and "deterrence"); Hunter & Waterman, *supra* note 12, at 403-04 ("negotiated compliance" and "enforced compliance"); John T. Scholz, Cooperation, Deterrence, and the Ecology of Regulatory Enforcement, 18 *L. & Soc'y Rev.* 179, 179-80 (1984) ("goal oriented" and "rule oriented").

n16. Hawkins & Thomas, *supra* note 15, at 13-15.

n17. See *Env'tl. Prot. Agency, Policy on Civil Penalties* (Feb. 16, 1984), available in 17 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 35,083 (1987) [hereinafter EPA, *Policy on Civil Penalties*]. The factors comprising the gravity component include the "degree of willfulness and/or negligence[, h]istory of noncompliance[, a]bility to pay[, d]egree of cooperation/noncooperation[, and o]ther unique factors specific to the violator or the case." *Id.* at 35,084.

n18. Hunter & Waterman, *supra* note 12, at 404; see also Hawkins, *supra* note 15, at 122-26.

n19. See Eugene Bardach & Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* 131-50 (1982); Hawkins, *supra* note 15, at 122-23.

n20. The transaction costs associated with bargaining may be significant in some cases and thus have some deterrent effect, and regulators might use those costs as leverage in negotiating compliance, essentially pestering a violator into compliance. See Bardach & Kagan, *supra* note 19, at 163-64.

n21. Mintz, *supra* note 15, at 102; see also David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 *Md. L. Rev.* 1552, 1567-68 (1995) (finding that "EPA has implemented the [Clean Water Act as] a sanctioning-oriented Act"). For a comprehensive portrayal of EPA enforcement policy and practice, see David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 *Harv. Env'tl. L. Rev.* 1 (2000).

n22. See, e.g., EPA, *Policy on Civil Penalties*, *supra* note 17; *Env'tl Prot. Agency, A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* (Feb. 16, 1984), available in 17 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 35,074 (1987) [hereinafter EPA, *Statute-Specific Framework*].

n23. EPA, *Policy on Civil Penalties*, *supra* note 17, at 35,083 (emphasis added); *id.* at 35,084.

n24. See Hunter & Waterman, *supra* note 12, at 403. They note, however, the difficulty of analyzing EPA as a single agency because of the prominent enforcement role played by its regional offices. See *id.* at 407.

n25. See *id.* at 412.

n26. See General Accounting Office, *Report No. GAO/RCED-96-23, Water Pollution: Many Violations Have Not Received Appropriate Enforcement Attention* 11-12 (1996) [hereinafter GAO, *Water Pollution*].

n27. Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, Environmental Protection Agency, *Prepared Statement Before the Senate Environment and Public Works Subcommittee* (June 10, 1997).

n28. Nikki L. Tinsley, Acting Inspector General, Environmental Protection Agency, *Prepared Testimony Before the Senate Environment and Public Works Committee* (June 10, 1997).

n29. Office of Enforcement and Compliance Assurance, Environmental Protection Agency, *Enforcement and Compliance Assurance FY98 Accomplishments Report*, at 7-8

(June, 1999), available at <http://es.epa.gov/oeca/fy98accomp.pdf> [hereinafter OECA, FY98 Accomplishments Report].

n30. To receive primacy, a state must adopt a program that meets requirements set out in the statute and EPA regulations. See, e.g., 33 U.S.C. 1342(b) (1986 & Supp. 1999) (Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) program); 42 U.S.C. 6926(b) (1995) (RCRA Subtitle C).

n31. According to the Environmental Council of the States (ECOS), a group of state environmental agency officials, "more than 75 percent of the total number of the major delegable environmental programs have been delegated to or assumed by the States." Environmental Council of the States, States Administer Most Environmental Programs, at <http://www.sso.org/ecos/news.htm> (last modified Feb. 1, 1999).

n32. The states' total share of enforcement may be as high as 90 percent. See Mark Coleman, Executive Director, Oklahoma Department of Environmental Quality, Prepared Testimony Before the Senate Committee on Environment and Public Works (June 10, 1997).

n33. These are the Clean Water Act (CWA) and Safe Drinking Water Act (SDWA), Clean Air Act (CAA), and Resource Conservation and Recovery Act (RCRA) programs, respectively, and which represent "66% of all [environmental] enforcement actions taken in the United States." GAO, Enforcement Programs, *supra* note 2, at 19 n.7.

n34. Compare Office of Enforcement and Compliance Assurance, Environmental Protection Agency, FY1996 Enforcement and Compliance Assurance Accomplishments Report app. at A-3 tbl.A-3 (1997), available at <http://es.epa.gov/oeca/96accomp/96accomp.pdf> [hereinafter OECA, FY1996 Accomplishments] (federal enforcement) with *id.*, app. at A-6 tbl.A-6 (state enforcement).

n35. Compare *id.*, app. at A-5 tbl.A-5 (federal enforcement) with *id.*, app. at A-6 tbl.A-6 (state enforcement).

n36. See Water Pollution Prevention and Control Act of 1991: Hearing on S. 1081 Before the Subcommittee on Environmental Protection of the Senate Committee on Environment and Public Works, 102d Cong. 687 (1991) (statement of John Martin, Inspector General, U.S. EPA) [hereinafter "Hearing on S. 1081"] ("In reviewing enforcement actions taken by the delegated States, we found a pronounced preference for informal action such as telephone calls and notices of violation."), quoted in Hodas, *supra* note 21, at 1606; Cheryl E. Wasserman, Federal Enforcement: Theory and Practice, in *Innovation in Environmental Policy: Economic and Legal Aspects of Recent Developments in Environmental Enforcement and Liability* 21, 42 (T.H. Tietenberg, ed. 1992) (noting that "many states would prefer to forgo penalties or to agree to a lesser penalty than would EPA"); see also GAO, Enforcement Programs, *supra* note 2, at 42 (noting EPA's concern with state cooperative enforcement efforts); Rechtschaffen, *supra* note 2, at 1189. But cf. Paul B. Downing, Bargaining in Pollution Control, 11 *Pol'y Stud. J.* 577, 581 (1983) (finding that federal and state agencies are "remarkably alike," in that "they all attempt to maintain a cooperative relationship with each source").

n37. See General Accounting Office, Report No. GAO/RCED-95-64, EPA and the States: Environmental Challenges Require a Better Working Relationship 38 (1995) [hereinafter GAO, Better Working Relationship] (finding that some states "de-emphasize penalties in favor of negotiating with violators to obtain compliance"); Russell et al., *supra* note 12, at 37-41; Denise Scheberle, Federalism and Environmental Policy: Trust and the Politics of Implementation 148 (1997) (finding that only 21 percent of state surface mining officials agreed that "strong enforcement depends on citing violations"); Downing, *supra* note 36, at 579; Paul B. Downing & James N. Kimball, Enforcing Pollution Control Laws in the U.S., 11 *Pol'y Stud. J.* 55, 59-60 (1982) (finding, *inter alia*, that "it appears difficult to suggest that fines play any significant role in enforcement" in the studied region in Virginia); see also Hearing on S. 1081, *supra* note 36 ("Informal actions are not inappropriate, but when the same facility remains in

violation of its permit year after year, stronger enforcement actions are indicated. In many of the cases we reviewed, the States continued to use informal means to bring violators back into compliance with little success."), quoted in Hodas, *supra* note 21, at 1606.

n38. See Russell et al., *supra* note 12, at 37-38; Hodas, *supra* note 21, at 1615; Derek A. Yeo & Roy A. Hoagland, *United States v. Smithfield: A Paradigmatic Example of Lax Enforcement of the Clean Water Act by the Commonwealth of Virginia*, 23 *Wm. & Mary Env'tl. L. & Pol'y Rev.* 513 (1999).

n39. Telephone Interview with Mark Coleman, Executive Director, Oklahoma Department of Environmental Quality (Mar. 29, 1999). In 1999, Mr. Coleman was also chairman of the Compliance Committee of ECOS. See also Downing, *supra* note 36, at 580.

n40. The data were prepared in conjunction with Freedom of Information Act request number HQ-RIN-01912-99 and were drawn by EPA personnel from the Agency's Integrated Data for Enforcement Analysis (IDEA) database. All data are on file with author.

n41. Telephone Interview with Joe Acton, Office of Enforcement and Compliance Assurance, EPA (Apr. 16, 1999).

n42. See GAO, *Enforcement Programs*, *supra* note 2, at 17, 21; Mintz, *supra* note 15, at 119-25; Scheberle, *supra* note 37, at 24-25.

n43. The 1998 GAO report studied the activities of ten states in detail and interviewed officials from EPA and nongovernmental organizations involved in environmental enforcement. See GAO, *Enforcement Programs*, *supra* note 2, at 19-20.

n44. See GAO, *Enforcement Programs*, *supra* note 2, at 22-24; see also *id.*, app. at 66-67 (describing several states' compliance assistance programs).

n45. See *id.* at 24-28; see also *id.*, app. at 68-69 (describing several states' amnesty programs); *id.*, app. at 70 (identifying 21 states recognizing an audit privilege).

n46. See GAO, *Better Working Relationship*, *supra* note 37, at 20-21; Hodas, *supra* note 21, at 1582; cf. Barry Boyer & Erroll Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 *Buff. L. Rev.* 833, 908 (1985) ("The practical need to keep the states functioning as effective enforcement partners can force EPA to tolerate some [state agency] departures from federal enforcement policy.").

n47. Under most of the statutes, EPA retains authority to bring its own enforcement actions in states with primacy. See, e.g., 33 U.S.C. 1342(i) (CWA); 42 U.S.C. 7413(a)(3) (1995) (CAA); 42 U.S.C. 6928(a)(1) (RCRA).

n48. For example, EPA overfiled only 30 times from FY1992 to FY1994. See Herman, *supra* note 27.

n49. See Diver, *supra* note 13, at 262-63; see also generally Mark A. Cohen, *Monitoring and Enforcement of Environmental Policy* (Aug. 1998), available at <http://www.vanderbilt.edu/VCEMS/papers/enforcement.pdf> (annotated bibliography on the economic theory of environmental regulatory enforcement).

n50. Because a \$ 1 million penalty with a 0.1 percent chance of occurrence is equivalent to a \$ 10,000 penalty with a ten percent chance of occurrence, an agency, in theory, might set an arbitrarily high penalty to increase the effective cost of noncompliance and make monitoring less necessary. See Cohen, *supra* note 49, at 18 (citing Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 *J. Pol. Econ.* 169 (1968)). In reality, though, the agency is prevented from doing so by statutory penalty maxima. See, e.g., 33 U.S.C. 1319(d) (1986 & Supp. 1999) (CWA; allowing penalties of up to \$ 25,000 per violation); 42 U.S.C. 6928(a), (g) (1995) (RCRA; same).

n51. See, e.g., Rechtschaffen, *supra* note 2, at 1225-30.

n52. See *infra* notes 68-70 and accompanying text.

n53. See Chester Bowles *Promises to Keep: My Years in Public Life 1941-1969*, at 25 (1971) (noting that "75 percent [of regulated firms] will comply as long as they think the 5 percent [attempting to evade] will be caught and punished"), quoted in Bardach & Kagan, *supra* note 19, at 65-66; see also Diver, *supra* note 13, at 297; Hodas, *supra* note 21, at 1607 (discussing a poll in which corporate environmental managers complained of the frustration of seeing repeated violators go unpunished) (citing *Government Has Too Many Rules, Too Little Enforcement, Not Enough Prevention, Environmental Managers Report in BNA Survey*, 22 *Env't Rep. (BNA)* 2386, 2386 (1992)).

n54. See Rechtschaffen, *supra* note 2, at 1220-22.

n55. See generally Steven Kelman, *What Price Incentives? Economists and the Environment* (1981).

n56. Robert A. Kagan & John T. Scholz, *The "Criminology of the Corporation" and Regulatory Enforcement Strategies*, in *Enforcing Regulation*, *supra* note 15, at 67, 69-74.

n57. See *id.* at 67-68; cf. Wasserman, *supra* note 36, at 24-25 (identifying three similar types); Hawkins, *supra* note 15, at 110-13 (describing typology used informally by British regulators). But see Mintz, *supra* note 15, at 105 (arguing that most firms are amoral calculators).

n58. See Kagan & Scholz, *supra* note 56, at 80-84; see also GAO, *Enforcement Programs*, *supra* note 2, at 22 (noting that noncompliance, especially among small firms, may be due to incapacity).

n59. See Hawkins, *supra* note 15, at 6; Albert J. Reiss, *Selecting Strategies of Social Control over Organizational Life*, in *Enforcing Regulation*, *supra* note 15, at 23, 26-29.

n60. See Hawkins & Thomas, *supra* note 15, at 11-12, 15; Diver, *supra* note 13, at 288; Downing, *supra* note 36, at 582, 584.

n61. See GAO, *Enforcement Programs*, *supra* note 2, at 22. Even cooperative enforcement tactics may not offer net cost savings insofar as they demand time-and resource-intensive negotiation or compliance consultation.

n62. Hawkins & Thomas, *supra* note 15, at 12; see also Cento G. Veljanovski, *The Economics of Regulatory Enforcement*, in *Enforcing Regulation*, *supra* note 15, at 171, 174; Diver, *supra* note 13, at 279; cf. William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 *J. Legal Stud.* 1, 38 (1975) (discussing the phenomenon in the legislative context).

n63. Bardach & Kagan, *supra* note 19, at 25.

n64. Compare the traditional understanding of justice as equity. See Aristotle, *Nicomachean Ethics* bk. E, at 1137a35-1138a (Hippocrates G. Apostle, trans., *The Peripatetic Press*, 1984). Aristotelian justice includes both evenhanded application of general rules and the "bending" of uniform rules to fit only those cases that the rulemaker had intended to address. See *id.* at 1137b12-1127b23.

n65. "Absolute regulatory commands unswervingly applied may impose such severe costs on some regulated firms as to undermine the agency's credibility, public acceptance, or political support." Diver, *supra* note 13, at 279; see also Cass R. Sunstein, *Administrative Substance*, 1991 *Duke L.J.* 607, 630 (arguing that strict regulation produces backlash from regulated firms that undermines adoption or implementation of regulation). The agency may be unable to afford that loss of legitimacy. See Hawkins, *supra* note 15, at 12-13 ("[The agency's] authority is not secured on a perceived moral and political consensus about the ills they seek to

control. ... The lack of a moral mandate threatens the regulatory agency's legitimacy as an enforcement authority." (emphasis removed)).

n66. Weber, *supra* note 2, at 87.

n67. See Bardach & Kagan, *supra* note 19, at 104-16; Mintz, *supra* note 15, at 14-15; Robert A. Kagan, On Regulatory Inspectorates and Police, in *Enforcing Regulation*, *supra* note 15, at 37, 55; Kagan & Scholz, *supra* note 56, at 75; see also Rechtschaffen, *supra* note 2, at 1204 (evaluating the argument).

n68. Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States* 109 (2d ed. 1979).

n69. Cf. Diver, *supra* note 13, at 297 (arguing that sanctions are necessary to preserve the agency's legitimacy).

n70. See Hawkins & Thomas, *supra* note 15, at 9, 15-16.

n71. True technology specification standards are very rare in environmental policy. Most technology-based standards are "performance standards": they require only that firms achieve emissions levels consistent with use of a particular technology. The route that a firm takes to that level of emissions is up to the firm. See Zygmunt J.B. Plater et al., *Env'tl Law and Policy: Nature, Law, and Society* 511-12 (1998); David M. Driesen, *Is Emissions Trading an Economic Incentive Program?: Replacing the Command and Control/Economic Incentive Dichotomy*, 55 *Wash. & Lee L. Rev.* 289, 296-98 (1998). Critics who see "regulatory unreasonableness" as an ever-looming threat typically focus on these rare specification standards. See, e.g., Bardach & Kagan, *supra* note 19, at 70.

n72. See, e.g., Kagan & Scholz, *supra* note 56, at 73; David A. Dana, *The New "Contractarian" Paradigm in Environmental Regulation*, 2000 *U. Ill. L. Rev.* 35, 36; Scholz, *supra* note 15, at 183.

n73. See Veljanovski, *supra* note 62, at 175.

n74. See *infra* Part III.B.2.b (comparing enforcement and rulemaking and the participation of interests).

n75. See Kagan & Scholz, *supra* note 56, at 79-80.

n76. Concepts used in commercial law, "course of dealing" refers to the history of all interactions between the contracting parties and "course of performance" refers to the history of those parties' interactions under a particular contract. See U.C.C. 1-205, 2-208. In the enforcement context, they might be considered to be, respectively, the history of the agency and violator's interactions over the long run and their interactions with respect to any individual enforcement action.

n77. See W. Kip Viscusi & Richard J. Zeckhauser, *Optimal Standards With Incomplete Enforcement*, 27 *Pub. Pol'y* 437, 438 (1979).

n78. See Hawkins, *supra* note 15, at 110-18 (describing enforcement officers' categorization of firms); Kagan & Scholz, *supra* note 56, at 67-68 (dividing firms into categories of "amoral calculators," "political citizens," and "incompetents" based on their responses to rules).

n79. See Cohen, *supra* note 49; Viscusi & Zeckhauser, *supra* note 77.

n80. See generally John T. Scholz, *Cooperative Regulatory Enforcement and the Politics of Administrative Effectiveness*, 85 *Am. Pol. Sci. Rev.* 115 (1991); Scholz, *supra* note 15; see also Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* 19-53 (1992) (approving of Prof. Scholz's scheme); Russell et al., *supra* note 12, at 184 (applying a very similar game-theoretic framework).

n81. The agency should move firms among these categories based on their behavior, but some "repeat offender" firms may need to be moved into a permanent position of adversarial treatment to deter other recalcitrants. See Russell et al., *supra* note 12, at 119.

n82. See *supra* note 50.

n83. Cf. Jonathan Bendor, *In Good Times and Bad: Reciprocity in an Uncertain World*, 31 *Am. J. Pol. Sci.* 531 (1987) (noting the weaknesses of the "tit-for-tat" strategy in information-poor circumstances).

n84. Cf. Scholz, *supra* note 15, at 184 (noting that cooperative enforcement allows agencies to shift resources to problem firms).

n85. Several federal environmental programs require regulated firms to report their own emissions. See, e.g., 42 U.S.C. 7661c(c) (1995) (CAA); 33 U.S.C. 1318(a)(4)(A) (1986 & Supp. 1999) (CWA).

n86. Cf. Rechtschaffen, *supra* note 2, at 1225-26 (discussing certainty of agency response as a precondition for effective deterrence).

n87. See Weber, *supra* note 2, at 20 (finding that one of the elements critical to effective collaboration in rulemaking is the agency's reputation for cooperative behavior); cf. Bardach & Kagan, *supra* note 19, at 111 (finding that an agency reputation for adversarial enforcement may encourage resistance from regulated firms).

n88. See Boyer & Meidinger, *supra* note 46, at 897 (arguing for codification of enforcement policy). But cf. Diver, *supra* note 13, *passim* (noting the difficulty of implementing a formal enforcement policy).

n89. Peter Cleary Yeager, *The Limits of Law: The Public Regulation of Private Pollution* 187 (1991).

n90. Professor Marver Bernstein appears to have been the first to use the term capture. See Marver H. Bernstein, *Regulating Business by Independent Commission* 90 (1955).

n91. This is a tricky judgment to make, of course, especially given that one premise of capture is that the agency possesses a large measure of discretion in choosing the means and ends of regulation.

Judging the validity of [accusations of capture] can become quite complex and uncertain[,] because an allegation of industry influence usually rests on an (often unstated) assumption about what the agency would have done in the absence of industry influence - an assumption that tends to derive from what the critic thinks should have been done.

Paul J. Quirk, *Industry Influence in Federal Regulatory Agencies* 4 (1981).

n92. See, e.g., *id.*; Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 *Yale L.J.* 467 (1952). Most capture theory involves influence of regulated firms on regulatory agencies. In a twist on this view, some commentators have argued that the administrative state has increasingly come to incorporate interested parties within its decision-making apparatus. See, e.g., Lowi, *supra* note 68; Grant McConnell, *Private Power and American Democracy* (Vintage Books 1970) (1966); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667 (1975). Another strain finds that regulatory legislation is not only implemented to serve regulated interests, but may be designed to serve such interests *ab initio*. See, e.g., Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916* (1963); George J. Stigler, *The Theory of Economic Regulation*, 2 *Bell J. Econ. & Mgt. Sci.* 3 (1971).

n93. See, e.g., Sam Peltzman, *Toward a More General Theory of Regulation*, 19 *J.L. & Econ.* 211 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 *Bell J. Econ. & Mgmt. Sci.* 335 (1974); Stigler, *supra* note 92.

n94. See, e.g., John E. Chubb, *Interest Groups and the Bureaucracy* (1983); Lowi, *supra* note 68; McConnell, *supra* note 92; Barry M. Mitnick, *The Political Economy of Regulation: Creating, Designing, and Removing Regulatory Forms* (1980); Quirk, *supra* note 91; Michael Reagan, *Regulation: The Politics of Policy* (1987); Lawrence S. Rothenberg, *Regulation, Organizations, and Politics: Motor Freight Policy at the Interstate Commerce Commission* (1994); Philip Selznick, *TVA and the Grass Roots: A Study in the Sociology of Formal Organization* (Harper Torchbooks 1966) (1949); James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (1989); Roger G. Noll, *Government Regulatory Behavior: A Multidisciplinary Survey and Synthesis, in Regulatory Policy and the Social Sciences 9* (Roger G. Noll, ed. 1985); William R. Freudenburg & Robert Gramling, *Bureaucratic Slip-page and Failures of Agency Vigilance: The Case of the Environmental Studies Program*, 41 *Soc. Probs.* 214 (1994); William Gormley, *A Test of the "Revolving Door" Hypothesis at the FCC*, 23 *Am. J. Pol. Sci.* 665 (1979); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 *J.L. Econ. & Org.* 167 (1990); Peltzman, *supra* note 93; Posner, *supra* note 93; Paul J. Quirk, *Food and Drug Administration, in The Politics of Regulation 191* (James Q. Wilson, ed. 1980); Paul Sabatier, *Social Movements and Regulatory Agencies: Toward a More Adequate - and Less Pessimistic - Theory of "Clientele Capture," 6 Pol'y Sci.* 301 (1975); James Q. Wilson, *The Politics of Regulation, in Social Responsibility and the Business Predicament 135* (James W. McKie, ed. 1974). This is by no means a complete list.

n95. See Bernstein, *supra* note 90, at 154; Lowi, *supra* note 68, at 105-07; McConnell, *supra* note 92, at 50.

n96. Richard C. Elling, *Bureaucracy: Maligned Yet Essential, in Politics in the American States 286, 311* (Virginia Gray & Herbert Jacob, eds., 6th ed. 1996); see also Sabatier, *supra* note 94, at 318; Wilson, *supra* note 94, at 168.

n97. See, e.g., Mitnick, *supra* note 94, at 209-10; Quirk, *supra* note 91, at 16-17; Stewart, *supra* note 92, at 1686, 1713-14.

n98. Indeed, that is precisely what the Occupational Safety and Health Administration (OSHA) did in this circumstance. See Lowi, *supra* note 68, at 118-19 (discussing OSHA's "national consensus standard").

n99. Although capture theory has sometimes ignored political control of the bureaucracy, some scholars have increasingly found such mechanisms of control to be very important to predicting agency behavior. See, e.g., B. Dan Wood & Richard W. Waterman, *Bureaucratic Dynamics: The Role of Bureaucracy in a Democracy* (1994); see also Jeffrey L. Brudney & F. Ted Hebert, *State Agencies and Their Environments: Examining the Influence of Important External Actors*, 49 *J. Pol.* 186, 192 (1987).

n100. Cf. Quirk, *supra* note 91, at 96-142 (discussing the hypothesis that agencies court industry groups to protect the agency's budget or statutory authority from attacks by those groups in the legislative process, but rejecting it in the context of budgetary policy).

n101. See, e.g., Bernstein, *supra* note 90, at 185 ("The possibility of well-paid positions with private firms may influence government officials who deal with these firms."); Quirk, *supra* note 91, at 143 (calling it a "delayed bribe"); Wilson, *supra* note 94, at 86-87.

n102. See Wilson, *supra* note 94, at 86-87; Noll, *supra* note 94, at 39. Professional norms may also discourage such conduct. See, e.g., Suzanne Weaver, *Decision to Prosecute: Organization and Public Policy in the Antitrust Division* (1977) (discussing the Department of Justice's Antitrust Division).

n103. See generally Bernstein, *supra* note 90, at 184-85; Gormley, *supra* note 94. The evidence of this is weak, however. See *id.*

n104. See Weaver, *supra* note 102, at 160-65; Diver, *supra* note 13, at 279.

n105. See G. William Domhoff, *The Powers That Be: Processes of Ruling Class Domination in America* (1978).

n106. See Bernstein, *supra* note 90, at 157-58; Quirk, *supra* note 94, at 212.

n107. Cf. Steven Kelman, Occupational Safety and Health Administration, in *The Politics of Regulation*, *supra* note 94, at 236, 251-52 (finding that OSHA regulators sought strict workplace safety rules because of a shared professional tutelage in industrial hygiene and accompanying norms that favored strong regulation).

n108. See, e.g., McConnell, *supra* note 92, at 163; Quirk, *supra* note 91, at 19-20; Noll, *supra* note 94, at 28.

n109. See, e.g., Reagan, *supra* note 94, at 98-99; Evan J. Ringquist, *Environmental Protection at the State Level: Politics and Progress in Controlling Pollution* 102 n.2 (1993) (collecting arguments); Walter A. Rosenbaum, *The Bureaucracy and Environmental Policy*, in *Environmental Politics & Policy: Theories and Evidence* 206, 222 (James P. Lester ed., 2d ed. 1995) (citing David Vogel, *National Styles of Regulation: Environmental Policy in Great Britain and the U.S.* (1986)); John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *Ecol. L.Q.* 233, 309 (1990); Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, *Law & Contemp. Probs.*, Autumn 1991, at 311, 364.

n110. See Boyer & Meidinger, *supra* note 46, at 888-89; see also generally Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 *Harv. Envtl. L. Rev.* 297 (1999); Freudenburg & Gramling, *supra* note 94.

n111. See, e.g., John Cronin & Robert F. Kennedy, *The Riverkeepers* 179 (1997); Ringquist, *supra* note 109, at 87; Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 *N.Y.U. L. Rev.* 1495, 1548 (1999) (concluding that "the complexity and opacity of many environmental issues and the public's difficulty in perceiving its own interest make the risk of special interest manipulation much more severe in the environmental realm than in other fields of regulation or government activity"); Bradford C. Mank, *Superfund Contractors and Agency Capture*, 2 *N.Y.U. Envtl. L.J.* 34 (1993); Sabatier, *supra* note 94, at 308; cf. Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 *U. Pa. L. Rev.* 1027, 1064-69 (1990) (describing capture problems in risk management).

n112. Bruce A. Williams, *Economic Regulation and Environmental Protection*, in *Politics in the American States*, *supra* note 96, at 506 ("State governments, many scholars argue, are beholden to industrial interest groups in a way that makes adequate land-use, consumer, or environmental regulations impossible."); see also, e.g., J. Clarence Davies & Barbara S. Davies, *The Politics of Pollution Control* 101 (2d ed. 1975) ("The influence of polluting industries tends to be greater at the state and local level than at the national level."); William R. Lowry, *The Dimensions of Federalism: State Governments and Pollution Control Policies* 16 (1992); Ringquist, *supra* note 109, at 89. But the problem is likely not as serious as it once was. See Elling, *supra* note 96, at 311.

n113. Terry M. Moe, *The Politics of Bureaucratic Structure*, in *Can the Government Govern?* 267, 287 (John E. Chubb & Paul E. Peterson, eds. 1989).

n114. See Alfred Marcus, *Environmental Protection Agency*, in *The Politics of Regulation*, *supra* note 94, at 270-71. In discussing the CWA's enactment, Professor Yeager finds that

[The House and Senate] were concerned to finally establish law that would not be subverted by the regulated. They were responding generally to the critiques of the "capture" theory of

regulation, and to the often scathing indictments of federal pollution control law published by Ralph Nader's Center for the Study of Responsive Law ...

Yeager, *supra* note 89, at 149.

n115. See, e.g., Bardach & Kagan, *supra* note 19, at 44-57; Reagan, *supra* note 94, at 95; Shover et al., *supra* note 15, at 49-51; Wilson, *supra* note 94, at 85-86 ("Acting on this view [of the risk of capture], new programs were embedded in structures and surrounded by procedures intended to prevent capture, and old procedures where possible were modified to achieve the same end."); Kagan & Scholz, *supra* note 56, at 70; Marcus, *supra* note 114, at 267; Rosenbaum, *supra* note 109, at 208-09; Lazarus, *supra* note 109, at 317; Scholz, *supra* note 80, at 122.

n116. See, e.g., Bardach & Kagan, *supra* note 19, at 46-49; Reagan, *supra* note 94, at 95-97; Shover et al., *supra* note 15, at 49; Marcus, *supra* note 114, at 267-68; Thomas W. Merrill, Capture Theory and the Courts: 1967-1983, 72 Chi.-Kent L. Rev. 1039, 1052 (1997); Rosenbaum, *supra* note 109, at 208-09.

n117. 47 U.S.C. 309 (1996) (Federal Communications Act).

n118. 15 U.S.C. 45 (1996) (Federal Trade Commission Act).

n119. See, e.g., 33 U.S.C. 1313, 1314, 1317 (1986 & Supp. 1999) (CWA); 42 U.S.C. 300g-1, 300g-6 (1991 & Supp. 1999) (SDWA); 42 U.S.C. 11001, 11002 (1996) (EPCRA).

n120. See, e.g., 42 U.S.C. 6924(d)(1) (1995) (RCRA; "land ban" of liquid hazardous wastes); 42 U.S.C. 7412 (1995) (CAA; technology-based standards for hazardous air pollutant emissions).

n121. See, e.g., 33 U.S.C. 1316(b)(1)(A) (CWA; establishing base list of source categories); 42 U.S.C. 6924(d)(2) (RCRA; establishing the list of hazardous wastes covered by the land ban); 42 U.S.C. 7412(b)(1) (CAA; establishing initial list of hazardous air pollutants).

n122. See, e.g., 21 U.S.C. 348(c)(3)(A) (1994) (Delaney Clause of the Food, Drug, and Cosmetic Act; imposing absolute ban on carcinogenic substances in processed foods), amended by Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1489 (1996); 42 U.S.C. 7409 (CAA; health-based National Ambient Air Quality Standards); see also Bardach & Kagan, *supra* note 19, at 47-48. But cf. 33 U.S.C. 1314 (CWA; best technology that can be economically achieved).

n123. See 42 U.S.C. 6924(d). On HSWA as a response to EPA foot-dragging, see, e.g., Andrew Szasz, *Ecopopulism: Toxic Waste and the Movement for Environmental Justice* 130-32 (1994); Plater et al., *supra* note 71, at 788-89; Rosenbaum, *supra* note 109, at 222.

n124. 42 U.S.C. 7409 (2001). In fact, the D.C. Circuit thought this delegation so broad that it invalidated several of EPA's NAAQs under the otherwise moribund nondelegation doctrine. See *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999), *rev'd sub nom Whitman v. Am. Trucking Ass'ns*, 121 S. Ct. 903 (2001).

n125. 467 U.S. 837 (1984).

n126. See David Hedge et al., *The Principal-Agent Model and Regulatory Federalism*, 44 West. Pol. Q. 1055, 1076 (1991); cf. George C. Edwards, *Implementing Public Policy* 151 (1980) (finding that policies requiring decentralized implementation are more likely to diverge from intended results because of "transmission error"). Of course, the states' leeway might also cut the other way and allow them to move too far toward environmentalists to the detriment of regulated firms. The balance of the factors discussed in this section, however, suggest that state agencies are far more likely to use additional discretion to move closer to, rather than farther from, regulated firms.

n127. See Hodas, *supra* note 21, at 1581-99.

n128. See, e.g., 33 U.S.C. 1313(d) (1986 & Supp. 1999) (CWA; requiring submission to and approval by EPA of "Total Maximum Daily Loads" for certain waterbodies throughout the state); 42 U.S.C. 7410(a) (1995) (CAA; requiring submission to and approval of EPA of state implementation plans).

n129. See sources cited *supra* notes 46-48; see also Hodas, *supra* note 21, at 1587-90 (describing infrequency of EPA enforcement under the CWA in states with primacy).

n130. See Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 Mich. L. Rev. 570, 601-602 (1996); Rena E. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?*, 81 Minn. L. Rev. 97, 166n.249 (1996). Perhaps the best-known example is the transport to northeastern states of sulfur dioxide produced by coal-burning utilities in the Midwest. See Lowry, *supra* note 112, at 44-45; Barry G. Rabe, *Power to the States: The Promise and Pitfalls of Decentralization*, in *Environmental Policy in the 1990s* 31, 43-46 (Norman J. Vig & Michael E. Kraft, eds., 3d ed. 1997).

n131. Professor Lowry has found tangential evidence of this phenomenon, finding a statistically significant relationship between powerful industry groups' presence in a state and the state's attempt to externalize pollution costs. See Lowry, *supra* note 112, at 47.

n132. See Bardach & Kagan, *supra* note 19, at 44-45, 54-55 (discussing public participation as a response to the fear of capture).

n133. See Rothenberg, *supra* note 94, at 17-18 (noting that Congress can use its control over administrative procedure to empower particular constituencies); Jeffrey S. Banks & Barry R. Weingast, *The Political Control of Bureaucracies Under Asymmetric Information*, 36 Am. J. Pol. Sci. 509, 512 (1992) (arguing that legislatures have incentives to delegate oversight to sympathetic constituencies).

n134. See, e.g., 30 U.S.C. 1257(e) (1986 & Supp. 1999) (SMCRA; requiring public availability of reclamation permit applications); 42 U.S.C. 6927(b) (1995) (RCRA; providing for public availability of facility inspection records); 42 U.S.C. 7408(d) (1995) (CAA; requiring publication of air quality criteria).

n135. See 30 U.S.C. 1263(b) (1986 & Supp. 1999). Note that the SMCRA provision specifically encourages participation by pro-regulatory interests.

n136. See, e.g., 33 U.S.C. 1342(b)(3) (1986 & Supp. 1999) (CWA; NPDES permit program); 42 U.S.C. 6926(f) (1995) (RCRA; TSD facility permitting program); 42 U.S.C. 7661a(b)(6) (CAA; Title V permit program).

n137. See 42 U.S.C. 7661a(b)(6).

n138. See Stewart, *supra* note 92, at 1670 (discussing the historic standing of regulated firms to challenge restrictions placed upon them and the traditional absence of such standing for regulatory advocates).

n139. See, e.g., *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977).

n140. See, e.g., 15 U.S.C. 2618 (1998) (TSCA); 30 U.S.C. 1264(f), 1276 (1986) (SMCRA); 42 U.S.C. 7607(b) (1995) (CAA).

n141. 15 U.S.C. 2618(a)(1)(A).

n142. 42 U.S.C. 7661a(b)(6).

n143. See generally Stewart, *supra* note 92.

n144. See Chubb, *supra* note 94, at 55-56, 121-24.

n145. See statutes cited supra note 5. On citizen suits as a response to capture, see Robert F. Blomquist, Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values, 22 Ga. L. Rev. 337, 403 & n.195 (1988) (collecting sources); Boyer & Meidinger, supra note 46, at 843; Hodas, supra note 21, at 1624; Cass R. Sunstein, What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163, 192-93 (1992).

As inhabitants of a more genteel era of congressional protocol, members of Congress in the early 1970s would not publicly condemn government officials for acting in the interests of those they were supposed to regulate. Accordingly, the legislative history only hints at citizen suits' being responses to the problem of capture. See S. Rep. No. 91-1196, at 36-37 (1970) (CAA; "Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings."); id. at 3 ("The proposed legislation emphasizes the need to accelerate enforcement action. To assure that Federal and State agencies aggressively pursue their responsibilities and to supplement their capacities, the bill provides a right of citizen action to seek enforcement of the provisions of the act."); 91 Cong. Sen. Debates 33,101, 33,102 (1970) (written statement of Sen. Scott) ("The citizens suits authorized in the legislation will guarantee that public officials are making good on our national commitment to provide meaningful environmental protection."); 91 Cong. Sen. Debates 33,102, 33,102 (1970) (remarks of Sen. Muskie) ("The concept of compelling bureaucratic agencies to carry out their duties is integral to democratic society. ... The concept in the bill is that administrative failure should not frustrate public policy and that citizens should have the right to seek enforcement where administrative agencies fall."); 91 Cong. Sen. Debates 33,104, 33,104 (1970) (remarks of Sen. Hart) ("[Citizen suits] will provide powerful supplementary enforcement ... and an effective and desirable prod to officials to do their duty.").

n146. H.R. Rep. No. 92-911, at 134 (1972). On citizen suits as public participation, see Adam Babich, Citizen Suits: The Teeth in Public Participation, 25 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,141 (1995); Boyer & Meidinger, supra note 46, at 843-44; Hodas, supra note 21, at 1577; Lazarus, supra note 109, at 334; Rosenbaum, supra note 109, at 209, 211.

n147. See, e.g., 33 U.S.C. 1365 (1986 & Supp. 1999) (CWA); 42 U.S.C. 6972 (1995) (RCRA); 42 U.S.C. 7604 (1995) (CAA).

n148. Of course, the Eleventh Amendment would likely prohibit the federal statutes from creating a private cause of action in federal courts against state agencies. See *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 120 S. Ct. 1858 (2000).

n149. See, e.g., 33 U.S.C. 1313(d)(2) (CWA; requiring review and approval or rejection of state water quality planning submissions).

n150. See Chubb, supra note 94, at 256; Quirk, supra note 94, at 86; Dwyer, supra note 109, at 310; Lazarus, supra note 109, at 365.

n151. Cf. Noll, supra note 94, at 55-57 (suggesting that a division of labor into interest-specific units encourages the development of close relations with affected interest groups).

n152. See David Vogel, The "New" Social Regulation in Comparative and Historical Perspective, in *Regulation in Perspective: Historical Essays* 155, 174 (Thomas K. McCraw ed., 1981) ("Specific regulatory policies affected individual companies differently, particularly in the area of environmental protection, and, on several occasions, particular segments of business employed the conflict over social regulatory policies either to maintain or strengthen their competitive positions.").

n153. See Bernstein, supra note 90, at 86-95.

n154. Dwyer, *supra* note 109, at 309 ("Because of 'competing economic and ideological passions,' the policy issues in social regulation are almost always controversial and involve numerous interest groups representing all points of view."); see also Chubb, *supra* note 94, at 256 (describing environmentalists and industry in a "bipolar conflict"); Lazarus, *supra* note 109, at 365; cf. Scheberle, *supra* note 37, at 128 (identifying an "implementation squeeze" of environmental agencies caught between pro-and anti-regulatory forces); Hawkins, *supra* note 15, at 9 (same). Professor William Gormley contends that environmental agencies are still "young" in Prof. Bernstein's process of institutional decay and consequently pro-regulatory forces remain active. See Gormley, *supra* note 4, at 193.

n155. See Wilson, *supra* note 94, at 83-84 (suggesting that environmentalists' rise can be attributed in part to technological changes affecting political advocacy, such as direct mail, and the rise of charitable foundations).

n156. See Christopher J. Bosso, *Seizing Back the Day: The Challenge of Environmental Activism in the 1990s*, in *Environmental Policy in the 1990s*, *supra* note 130, at 53.

n157. The Federalist No. 10 (Madison); see also The Federalist No. 51 (Madison).

n158. The Federalist No. 10 (Madison).

n159. The seminal work on the subject is Mancur Olson, *The Logic of Collective Action* (photo. reprint 1971) (1965).

n160. See Lowry, *supra* note 112, at 17; McConnell, *supra* note 92, at 109-10; Dana, *supra* note 72, at 53; Esty, *supra* note 130, at 604-05 (discussing the view that "environmental advocates who try to rally the public in support of relatively diffuse and obscure benefits experience difficulty in achieving a critical threshold of political activity and influence at local or state levels, and are more often able to aggregate sufficient resources to be effective at the national level" (footnote omitted)).

n161. See Ringquist, *supra* note 109, at 89, 156.

n162. See Clive S. Thomas & Ronald J. Hrebenar, *Interest Groups in the States*, in *Politics in the American States*, *supra* note 96, at 148, 155.

n163. Professors Thomas and Hrebenar ranked environmentalists, by intensity of participation, fifteenth out of nineteen types of groups found to be "continually active" in "more than 45 states." *Id.* at 127 tbl.4-1. The top five groups were, in order of intensity of participation: individual businesses, local government units, state departments, business and trade associations, and utility companies. See *id.* The results of the authors' rankings of interest groups' "power" are similar. See *id.* at 149 tbl.4-4; cf. Bosso, *supra* note 155, at 66 (noting complaints that the major environmental groups ignore local issues).

n164. See Chubb, *supra* note 94, at 39-41.

n165. See Kelman, *supra* note 107, at 250.

n166. See *id.* at 255; cf. Weaver, *supra* note 102, at 165 (discussing the function of professional norms of vigorous prosecution in explaining the aggressiveness of antitrust regulators).

n167. See Marcus, *supra* note 114, at 294-95.

n168. See Lazarus, *supra* note 109, at 366.

n169. Professor John Chubb's study of the federal Energy Regulatory Agency found that even a well-mobilized environmental constituency failed to prevent agency personnel from relying almost exclusively on regulated firms for information and advice. See Chubb, *supra* note 94, at 158-59.

n170. See Weber, *supra* note 2, at 34-35; Wood & Waterman, *supra* note 99, at 69; Yeager, *supra* note 89, at 228-29.

n171. Boyer & Meidinger, *supra* note 46, at 876 (footnotes omitted).

n172. See Wood & Waterman, *supra* note 99, at 69.

n173. See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 2, 1981) ("Federal Regulation"); Exec. Order No. 12,498, 50 Fed. Reg. 1036 (Jan. 8, 1985) ("Regulatory Planning Process").

n174. Yeager, *supra* note 89, at 227-28 (footnote omitted).

n175. See Lowry, *supra* note 112, at 12; Hodas, *supra* note 21, at 1574-75, 1615-17 (discussing the effect on enforcement). The seminal article on the "race" was Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 *Yale L.J.* 1196 (1977). It has come under attack by some in recent years, however. See, e.g., Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 *N.Y.U. L. Rev.* 1210 (1992). On the current state of the debate, see generally Esty, *supra* note 130.

n176. See, e.g., Charles E. Lindblom, *Politics and Markets* (1977); Freudenburg & Gramling, *supra* note 94, at 216 (collecting theories).

n177. See Lowry, *supra* note 112, at 13 (citing, *inter alia*, Howard A. Stafford et al., *The Effects of Environmental Regulations on Industrial Location* (1983)).

n178. See *id.* at 14.

n179. See *id.* at 12. Consider an anecdotal example. After Smithfield Foods, Inc. threatened relocation, the State of Virginia entered a consent decree that allowed continued violations for five years, notwithstanding that Smithfield had been in longstanding, substantial non-compliance with CWA effluent limitations. The federal DOJ, however, obtained a criminal conviction against one responsible employee and "overfiled" Virginia in the case, obtaining a judgment of \$ 12.6 million in civil penalties against the firm. On the Smithfield litigation generally, see Yeo & Hoagland, *supra* note 38.

n180. Although commentators have not addressed the relationship between environmental enforcement and capture specifically, a number have noted a variety of "failures" of enforcement. See GAO, Report No. GAO/RCED-91-166, *Environmental Enforcement: Penalties May Not Recover Economic Benefits Gained by Violators* (1991); GAO, *Water Pollution*, *supra* note 26; John H. Cushman, *E.P.A. and States Found to be Lax on Pollution Law*, *N.Y. Times*, June 7, 1998, at A1; Victor B. Flatt, *A Dirty River Runs Through It (The Failure of Enforcement in the Clean Water Act)*, 25 *B.C. Env'tl. Aff. L. Rev.* 1 (1997); Hodas, *supra* note 21; Robert Worth, *Asleep on the Beat: Why Aren't Our Environmental Laws Being Enforced?*, *Wash. Monthly*, November 1, 1999, at 36.

n181. See Bardach & Kagan, *supra* note 19, at 37-38. This is true of regulatory enforcement generally. See *Heckler v. Chaney*, 470 U.S. 821, 830-31 (1985) ("An agency's decision not to prosecute or enforce [is] generally committed to an agency's absolute discretion."); Diver, *supra* note 13, at 287 (noting traditionally broad discretion in choosing a sanction for a regulatory violation).

n182. See 42 U.S.C. 7412(b) (2001).

n183. Enforcement resists effective oversight, however. See *infra* Parts III.B.2.b, III.B.2.c.

n184. See Diver, *supra* note 13, at 259-60; Freudenburg & Gramling, *supra* note 94, at 221; Hodas, *supra* note 22, at 1614 ("For all practical purposes, administrative enforcement ac-

tivity is not subject to public scrutiny; thus there is no independent public check on state and federal enforcement practices." (footnote omitted)).

n185. See, e.g., Administrative Procedure Act, 5 U.S.C. 553 (1996) (imposing notice and public comment requirements on informal rulemaking); Federal Advisory Committee Act, 5 U.S.C. App. II 1-15 (1994) (requiring public notice of, and access to, meetings of advisory committees).

n186. See 33 U.S.C. 1319(g)(4)(A) (1986 & Supp. 1999) (CWA; requiring notice and comment "before issuing an [administrative] order assessing a civil penalty"); 42 U.S.C. 7413(g) (1995) (CAA; requiring notice and comment on judicial settlements). EPA also requires that states with primacy provide avenues of public participation. See, e.g., 40 C.F.R. 123.27(d) (1998) (describing public participation requirements for primacy under the CWA).

n187. See Dana, *supra* note 72, at 53; Hodas, *supra* note 21, at 1638.

n188. See Hawkins, *supra* note 15, at 5 (noting that compliance-focused enforcement occurs "in private, intimate negotiations"); *id.* at 8; cf. *supra* Section II.A (noting the paucity of data on informal enforcement).

n189. Cf. Hodas, *supra* note 21, at 1579-80, 1617 (identifying the high cost of EPA oversight of state enforcement).

n190. See Freudenburg & Gramling, *supra* note 94, at 221-22 (finding that agencies take strong pro-regulatory positions in highly scrutinized fora such as rulemaking, but then undermine those positions in the rules' enforcement).

n191. On the public-goods problem in collective action generally, see Olson, *supra* note 159. Professor Olson theorized that interest groups should coalesce and participate much less readily than expected by pluralist theory. Because most goods to be obtained from the political process are nonexclusive public goods, fewer resources would be devoted to secure those goods than would be justified by their benefits. See also Chubb, *supra* note 94, at 29-33.

n192. Interests are more likely to be mobilized to avoid new costs than to secure new benefits. See Wilson, *supra* note 94, at 139.

n193. See, e.g., Anthony Downs, *Up and Down with Ecology: The Issue Attention Cycle*, 28 *Pub. Int.* 38 (1972) (predicting that the then-nascent environmental movement would prove ephemeral).

n194. See Chubb, *supra* note 94, at 111.

n195. Nonprofit groups cannot, of course, simply flock to capital markets to fund their advocacy activities. Accordingly, they are bound by budget constraints that for-profit firms might avoid.

n196. Enforcement at first appears to have few ramifications for generally applicable policy. On the other hand, if firms consider the expected costs of noncompliance, the level of enforcement is a policy choice in that it affects anticipated levels of compliance. See Jeannette L. Austin, Comment, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 *Nw. U. L. Rev.* 220, 259-60 (1987); Viscusi & Zeckhauser, *supra* note 77. Nevertheless, pro-regulatory groups might reasonably consider these efforts to be transaction-cost-ineffective.

n197. Gillette & Krier, *supra* note 111, at 1068-69; see also Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 *Mich. L. Rev.* 471, 495-96 (1970) (arguing that potentially high particularized benefits of natural resource "giveaways" encourages participation by special interest groups, but the public costs of those giveaways are diffuse and unlikely to spawn countervailing participation); Wilson, *supra* note 94, at 76-77.